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IOWA'S LAW PROHIBITING DISABILITY DISCRIMINATION IN EMPLOYMENT: AN OVERVIEW

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I. Introduction

Handicapped individuals confront innumerable obstacles to full and equal participation in our society. Some of these barriers stem from the physical or mental impairments themselves. These individual limitations may be alleviated or overcome by therapy or training. Far more crippling are the subjective barriers erected by others which consciously or unconsciously limit the horizons of the handicapped.

Our society extols youthful vitality, physical beauty, mobility, and athletic grace. These values influence most facets of our culture. Not surprisingly, they also permeate our employment relationships. They fuel a well-entrenched, and oftentimes well-intentioned, resistance to hiring handicapped individuals. Such amorphous attitudinal barriers to employing the disabled exact a terrible human toll.[1]

Conventional wisdom once posited that it was futile to legislate against the prejudices of the majority. Fortunately for women and our racial, ethnic,

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1. It is estimated that there are 22 million physically disabled persons in the United States, yet only 800,000 are employed. In addition, estimates put the number of persons suffering from mental retardation at 5.5 million. The economic cost of unemployment of these persons is obvious. The human cost, in terms of suffering or wasted lives, is distressing.

Holland v. Boeing Co., 90 Wash. 2d 384, 388 n.1, 583 P.2d 621, 623 n.1 (1978) (citing Note, *Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 Geo. L. Rev. 1501 (1973); *Equal Employment and the Disabled: A Proposal*, 10 Colum. J.L. & Soc. Probs. 457 (1974)).

and religious minorities, this passive philosophy gave way to the great surge of civil rights legislation enacted in the mid-1960's. The Civil Rights Act of 1964,[2] the Voting Rights Act of 1965,[3] and the Fair Housing Act of 1968[4] challenged these overt forms of social intolerance.

The Iowa Civil Rights Act of 1965[5] was also a product of the civil rights turbulence of the sixties. In its original form, the Act proscribed discrimination in employment and public accommodations[6] but it did not bring the disabled under its aegis. In 1972 the legislature amended the Act to prohibit employment discrimination against the physically and mentally disabled.[7]

Many Iowans were affected by the extension of equal employment opportunities to handicapped individuals. According to provisional estimates of the 1980 Census, 135,545 Iowans between the ages of sixteen and sixty-four are handicapped.[8] Approximately 73,000 of those individuals were not in the labor force;[9] another 57,000 considered themselves unemployable.[10]

The Iowa Civil Rights Act affects virtually every employer in Iowa by forcing compliance with its nondiscriminatory mandate. The only employers not affected are those who regularly employ fewer than four employees.[11]

The Iowa Civil Rights Act is enforced by the Iowa Civil Rights Commission. In 1981 a total of 943 civil rights complaints were filed with the Commission.[12] Eighty-seven percent of those complaints alleged some form of employment discrimination.[13] Physical disability complaints alone constituted fourteen percent of the total number of complaints filed, outnumbered only by complaints alleging sex (30%) and race (25%) discrimination.[14]

These statistics suggest that disability discrimination in employment is already a fertile source of litigation. As the public's awareness increases, so will the number of disability complaints.

Disability discrimination law in Iowa is in its infancy. The substantive principles are still in the formative stage. Many budding issues remain unresolved. No one can predict how many more questions will surface in the

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2. 42 U.S.C. §§ 2000e-2000e-17 (1976 and Supp. IV 1980) [hereinafter cited as Title VII].
3. 42 U.S.C. §§ 1971-1974e (1976 and Supp. IV 1980).
4. 42 U.S.C. §§ 3601-3619 (1976 and Supp. IV 1980).
5. Iowa Civil Rights Act of 1965, ch. 121, 1965 Iowa Acts 195 (codified at IOWA CODE § 601A (1981)).
6. *Id.*
7. Act of March 22, 1972, ch. 1031, §§ 1-7, 1972 Iowa Acts 129 (codified at IOWA CODE §§ 601A.2(11), .5-.7, .11, .14 (1981)).
8. UNITED STATES DEPARTMENT OF COMMERCE, 1980 CENSUS OF POPULATION AND HOUSING, PROVISIONAL ESTIMATES OF SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS 15 (Supplementary Report).
9. *Id.*
10. *Id.*
11. IOWA CODE § 601A.6(5)(a) (1981).
12. IOWA CIVIL RIGHTS COMM'N., 1981 ANNUAL REPORT 4.
13. *Id.*
14. *Id.* at 5.

future. Disabled complainants, employers, and their counsel are to be excused if they are bewildered by the current state of Iowa's disability discrimination law.

This article hopes to pierce, to some extent, the informational veil which shrouds Iowa's disability discrimination law. First, the procedural mechanisms by which the law is enforced will be examined in detail. Second, the difficulties in separating those disabilities protected by the Act from those that are not protected will be discussed. Next, the article will address the substantive protections to which a protected disabled individual is due. Of paramount importance in this regard is the employer's duty to reasonably accommodate the individual's disability. Finally, the article will discuss some of the appropriate theories for litigating disability discrimination cases. It will be suggested that the traditional theories of employment discrimination—the disparate impact and disparate treatment models—must be modified if they are to be applied to disability discrimination. The thesis is that the existence of unlawful discrimination can only be determined on a case-by-case basis utilizing principles unique to this species of employment discrimination law.

Occasionally the Federal Rehabilitation Act of 1973[15], which has had some impact on the development of Iowa's disability law, will be referred to. But the two statutes are quite different. Unfortunately, a detailed analysis of the Rehabilitation Act is beyond the scope of this article.[16] The Rehabilitation Act governs federal employment,[17] programs and activities receiving federal financial assistance,[18] and contractors or subcontractors performing under federal contracts exceeding $2,500.[19] Iowa employers and disabled individuals should be mindful that their rights and duties may also be governed, in some instances, by the Rehabilitation Act.

Ultimately, the esoteric intricacies of disability discrimination law must not obscure the human dimensions of the problem. The Iowa Civil Rights Act requires employers to open their doors to qualified disabled individuals. While confusion may reign over the appropriate means, the end is clear. Attitudinal barriers which frustrate the employment of qualified disabled applicants must fall.

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15. 29 U.S.C. §§ 701-796 (1976 and Supp. IV 1980).

16. For more detailed discussions of the Rehabilitation Act see Bernstein, *Overview of Section 503: Affirmative Action in Employment for the Handicapped*, 9 COLO. LAW. 505 (1980); Cook, *Nondiscrimination in Employment Under the Rehabilitation Act of 1973*, 27 AM. U.L. REV. 31 (1977); Finn, *Implied Rights of Action Under the Rehabilitation Act of 1973*, 68 GEO. L.J. 1229 (1980); Jacobs, *Employment Discrimination and the Handicapped: Some New Teeth for a Paper Tiger—the Rehabilitation Act of 1973*, 23 HOW. L.J. 481 (1980); Comment, *Discrimination on the Basis of Handicap: The Status of Section 504 of the Rehabilitation Act of 1973*, 65 IOWA L. REV. 446 (1980).

17. 29 U.S.C. § 791 (1976) (also known as Section 501).

18. 29 U.S.C. § 794 (1976 and Supp. IV 1980) (also known as section 504).

19. 29 U.S.C. § 793 (1976 and Supp. IV 1980) (also known as section 503).

II. Overview of Procedures for Litigating Disability Discrimination Actions

Understanding the procedural framework in which disability discrimination actions[20] are litigated is as essential as knowing the substantive law. The action is commenced by filing a complaint with the Iowa Civil Rights Commission.[21] Thereafter, the action may be pursued in one of two forums. The complainant either may let the Commission process the complaint to its resolution or, if certain conditions are met, the action may be removed from the agency altogether and pursued directly in district court. The pros and cons of each forum will be discussed briefly.[22] While these procedures and considerations apply to all kinds of employment discrimination complaints, some special considerations apply to disability complaints.

A. *The Administrative Process*

1. *Filing the Complaint*

All actions under the Iowa Civil Rights Act, whether ultimately prosecuted in an administrative or a judicial forum, commence when the complainant files a complaint with the Iowa Civil Rights Commission.[23] Such complaints may also be filed by the Commission itself, an individual Commissioner, or the Iowa Attorney General.[24]

To be timely, the complaint must be filed within one hundred eighty days of the alleged discriminatory act.[25] This limitation period is deemed to be mandatory rather than merely directory.[26] Thus, failure to timely file a

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20. Throughout this article the term "disability discrimination" will refer to disability discrimination in employment. It should be noted, however, that the Iowa Civil Rights Act also proscribes disability discrimination in public accommodations, Iowa Code §§ 601A.2(10), .7 (1981); housing, Iowa Code § 601A.8 (1981); and—with respect to the physically but not mentally disabled—credit transactions. Iowa Code § 601A.10 (1981). If the legal principles applicable to disability discrimination in employment are in their infancy, the principles applicable to these other areas remain embryonic. In the future, some of the employment-based principles may prove adaptable to some other bases. Will public accommodations, landlords, and creditors be obliged to provide some form of reasonable accommodation to otherwise qualified disabled individuals? These and other questions unfortunately are not settled at this point.

21. Iowa Code § 601A.15(1) (1981).

22. *See infra* text accompanying notes 424-51. For a more comprehensive analysis, see Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 Iowa L. Rev. 720 *passim* (1980).

23. Iowa Code § 601A.15(1) (1981).

24. *Id.*

25. Iowa Code § 601A.15(12) (1981).

26. *See* Iowa Civil Rights Comm'n v. Massey-Ferguson, Inc., 207 N.W.2d 5, 7-8 (Iowa 1973). The best explanation of the mandatory-directory dichotomy is found in *Taylor v. Dep't of Transp.*, 260 N.W. 2d 521, 522-23 (Iowa 1977).

> Mandatory and directory statutes each impose duties. The difference between them lies in the consequence for failure to perform the duty. Whether the statute is

complaint obviates any further administrative or judicial proceedings thereon, even in the absence of prejudice to the opposing party.[27] Therefore, the Commission generally dismisses as beyond its jurisdiction complaints which, on their face, are not timely filed.[28]

The one hundred eighty day limitation period ordinarily begins to run with the occurrence of an alleged discriminatory act.[29] This computation is fairly straightforward when the discriminatory act is readily apparent to the complainant: for instance, a termination or failure to hire. Other discriminatory practices are not so easily pinpointed. A discriminatory promotion policy or wage scale will rarely be immediately apparent to the victims. Therefore, the limitation period for filing a complaint is computed with reference to the time that the complainant receives actual notice of the discriminatory act or, in the exercise of due diligence, should have known of the discriminatory practice.[30]

Some discriminatory practices are of a continuing nature: for instance, a policy of paying females a lower wage than males for equivalent work or a policy of not accommodating disabled employees. The Commission would accept a complaint alleging a continuing violation so long as it were filed within one hundred eighty days of the cessation of the conduct.[31] Thus, the complainant need not file a complaint within the first one hundred eighty days of discovering the continuing discriminatory policy. The nuances of the continuing violation theory are subtle and beyond the ambit of this article.[32] Nevertheless, it must be noted that a continuing violation does *not* encompass continuing ill effects stemming from a temporally discrete discriminatory act.[33]

When filing the complaint, the complainant must "set forth the particu-

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mandatory or directory depends upon legislative intent. When statutes do not resolve the issue expressly, statutory construction is necessary. If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplish the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.

27. Taylor v. Dep't of Transp., 260 N.W.2d at 522.

28. 240 IOWA ADMIN. CODE § 1.1(6)(e) (1981).

29. IOWA CODE § 601A.15(12) (1981).

30. *See, e.g.*, Tucker v. United Parcel Serv., 657 F.2d 724, 726 (5th Cir. 1981); Oaxaca v. Roscoe, 641 F.2d 386, 388 (5th Cir. 1981); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975).

31. 240 IOWA ADMIN. CODE § 1.3(3)(b) (1980).

32. *See* Jackson and Matheson, *Continuing Violation Theory and the Concept of Jurisdiction in Title VII Suits*, 67 GEO. L.J. 811 (1979); Note, *The Continuing Violation Theory of Title VII after United Air Lines, Inc. v. Evans*, 31 HASTINGS L.J. 929 (1980); Note, *Continuing Violations of Title VII: A Suggested Approach*, 63 MINN. L. REV. 119 (1978).

33. *See* Delaware State College v. Ricks, 449 U.S. 250, 258 (1980).

lars" of the alleged discrimination.[34] The Commission must serve the complaint upon the respondent within twenty days of filing by certified mail.[35]

2. *Jurisdictional Review of Complaints*

The legislature amended the Iowa Civil Rights Act in 1978 by, *inter alia*, adding the following provision: "It is the legislative intent of this chapter that every complaint be at least preliminarily screened during the first one hundred twenty days"[36] The Commission staff discharges this duty by reviewing every complaint within the prescribed time period to determine whether it falls within the Commission's jurisdiction. Three possibilities exist. A complaint on its face may (1) clearly fall within the Act's scope; (2) clearly fall outside the Act's scope; or (3) be jurisdictionally ambiguous. Complaints falling in the first category proceed to the investigative phase.[37] Complaints falling in the second category are dismissed.[38] Complaints falling in the third category should be investigated to determine whether jurisdiction exists.

For those complaints which are dismissed in the second or third category, the agency process ceases. The aggrieved complainant may, however, challenge the dismissal by filing an appeal in district court.[39] There is no specific statutory deadline for such an appeal; it may be filed at any time as long as the petitioner remains aggrieved by the dismissal.[40] The district court may affirm the Commission's dismissal unless it is: "(a) In violation of . . . statutory provisions; (b) In excess of the statutory authority of the agency; (c) In violation of an agency rule; (d) Made upon unlawful procedure; (e) Affected by other error of law; [and] (g) Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."[41] The challenger bears the burden of persuading the court that the agency action was improper.[42]

Disabilities themselves can be classified in various ways for purposes of determining the Commission's jurisdiction.[43] Those disability complaints which allege trivial or temporary impairments risk being dismissed at the

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34. IOWA CODE § 601A.15(1) (1981).

35. IOWA CODE § 601A.15(3)(a) (1981).

36. Iowa Civil Rights Act of 1978, ch. 1179, § 1, 1978 Iowa Acts 851 (codified at IOWA CODE § 601A.16(6) (1981)).

37. *See infra* text accompanying notes 45-69.

38. 240 IOWA ADMIN. CODE § 1.1(6)(e) (1981).

39. IOWA CODE § 17A.19 (1981).

40. IOWA CODE § 17A.19(3) (1981). *See also* Oliver v. Teleprompter Corp., 299 N.W.2d 683 (Iowa 1980).

41. IOWA CODE § 17A.19(8) (1981).

42. The official actions of an agency are clothed with a rebuttable presumption of regularity. *See* Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 390 (Iowa 1980). The onus of rebutting this presumption rests with the challenger. *Id.*

43. *See infra* text accompanying notes 452-60.

jurisdictional review stage.[44]

3. *Investigation of Complaints*

Once a complaint emerges from the jurisdictional review stage, the Commission must "make a prompt investigation."[45] At this juncture, the case file contains the documentation supplied by the complainant when the complaint was filed, as well as the notes of conversations between the complainant and the Commission employee who assisted the drafting of the complaint.

Formal investigation usually begins with the mailing of an "information request" to the affected employer. The information request typically seeks a thorough explanation of the challenged employment decision, a description of the employer's chain of command and general business, the names of employees whose job performance or category is comparable to the complainant's, the names of the individuals who made the challenged employment decision, relevant employment and personnel records, and other relevant information. Consequently, the Commission requires employers to preserve all records relevant to the investigation.[46]

Generally, employers voluntarily proffer the relevant personnel and employment records to the Commission's investigator. If the employer is not cooperative, the Commission "has authority to subpoena books, papers, records and any other real evidence necessary for the agency to determine whether it should institute a contested case proceeding . . . ."[47]

The investigative subpoena is enforced by the court, not the agency.[48] Ordinarily, the court will enforce the investigative subpoena if the agency is empowered to conduct the investigation, the documents requested are rea-

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44. *See infra* text accompanying notes 452-60, 522-65.
45. IOWA CODE § 601A.15(3)(a) (1981).
46. *See* 240 IOWA ADMIN. CODE § 1.3(5) (1980):

> a. Employment records. When a complaint or notice of investigation has been served on an employer . . . under the Iowa Act against discrimination, the respondent shall preserve all [personnel] records relevant to the investigation until such complaint or investigation is finally adjudicated. The term "relevant to the investigation" shall include, but not be limited to, personnel [and] employment . . . records relating to the complainant and to all other employees [or] applicants . . . holding or seeking positions similar to that held or sought by the complainant, and application forms or test papers completed by any unsuccessful applicant and by all other applicants or candidates for the same position . . . as that for which the complainant applied and was not accepted, and any records which are relevant to the scope of the investigation as defined in the notice or complaint.
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> b. Other records. Any other books, papers, documents, or records of any form which are relevant to the scope of any investigation as defined in the notice or complaint shall be preserved during the pendency of any proceedings unless the commission specifically orders otherwise.

47. IOWA CODE § 17A.13(1) (1981).
48. *Id.*

sonably relevant to the subject of the investigation, and the request is not unduly burdensome.[49] Courts are usually reluctant to restrict the scope of an agency's investigation:

> Administrative agencies are normally invested with broad investigative powers to enable them to effectively carry out their legislative mandates. Agencies with authority to conduct investigations for the purpose of ascertaining probable cause for the institution of a contested case have powers comparable to those of a grand jury . . . . Courts have been cautious to interfere with agency subpoena powers except to preserve due process rights.[50]

The agency investigator determines the relevant scope of the investigation, subject, of course, to judicial review.[51]

Investigations vary in their degree of difficulty, depending on such factors as the nature of the claimed discrimination, the size of the employer, complexity and availability of employment records, number and accessibility of witnesses, and promptness in commencing the investigation. Investigations of disability complaints are particularly arduous. The investigator must have detailed knowledge of the complainant's impairment, the essential and non-essential duties of the particular job, the limitations which the impairment imposes on the complainant's potential or actual job performance, and the complainant's previous training or experience in that particular job. The investigator often must consider whether the employer could have accommodated the complainant's disability, thereby enabling the complainant to competently perform the essential job duties despite the impairment.[52] If so, the investigator must then determine whether such a potential accommodation would have been reasonable or, conversely, would have constituted an undue hardship on the employer's operation.[53] Later, when these concepts are more fully explained, the awesome demands facing the Commission's investigators will be more clearly understood.

All employment discrimination complaints raise sensitive issues of per-

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49. *See* United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) (cited with approval in Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981)).

50. Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495 (Iowa 1981).

51. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 4:15 (2d ed. 1978):

> An agency with power to investigate may make an investigation that is as broad as it reasonably finds to be appropriate, but a demand for information must be relevant to the investigation and may not be broader than is reasonably necessary. The breadth of an investigation is for the investigators to determine. The breadth of a subpoena or of a search made in records may be excessive, but the test is relevance to the specific purpose, and the purpose is determined by the investigators.

Id. at 271.

52. *See* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982); 240 IOWA ADMIN. CODE § 6.2(6) (1980).

53. 240 IOWA ADMIN. CODE § 6.2(6) (1980).

sonal privacy, but none more than disability complaints. The investigator must gather information concerning the complainant's disability and must often determine whether the employer has accommodated other employees' disabilities. The investigator may therefore inquire as to the health of the complainant's co-workers or other applicants for employment. Although the information gathered during the investigation must generally remain confidential,[54] employers are sometimes reluctant to disclose medical records of their employees or applicants to the investigator.

This tension between the competing values of personal privacy and thorough Commission investigations was underscored in *Iowa Civil Rights Commission v. City of Des Moines*.[55] A disabled black complainant alleged that the City of Des Moines treated a white handicapped employee more favorably. In order to investigate this charge, the Commission investigator subpoenaed a substantial number of employees' medical records. The City resisted the subpoena. It contended that the employees' medical records were protected from disclosure to the Commission investigator by the Public Records Act.[56] In enforcing the subpoena, the district court sought to balance the investigator's need to inspect the relevant medical records against the employees' interest in preserving the privacy of their records.[57] The court therefore ordered the City's medical staff to screen all the subpoenaed medical records and isolate those which revealed some injury.[58] Once those records were identified, the City and the Commission were ordered to notify the affected individuals that their medical records were being requested by the Commission's investigator.[59] Those individuals were then to be given an opportunity in court to show cause why their medical records should not be inspected.[60]

The City and the Commission both appealed from the district court's order.[61] The Supreme Court rejected the City's argument that the confidentiality provisions of the Public Records Act[62] shielded the employees' medical records from the agency's investigator:

> While disclosure of records accorded confidential treatment under the [Public Records Act] may have a substantial adverse impact upon individuals, to hold that [the Act limits] the administrative subpoena would contravene the public interest in redressing civil rights violations and frustrate the Commission's statutory investigative powers . . . . [W]e perceive no intent on the part of the legislature to place the medical and

54. IOWA CODE § 601A.15(4) (1981).
55. 313 N.W.2d 491 (1981).
56. *Id.* at 492-94; IOWA CODE Chapter 68A (1981).
57. 313 N.W.2d at 496-97.
58. *Id.* at 493.
59. *Id.*
60. *Id.* at 495-96.
61. *Id.* at 494.
62. IOWA CODE § 68A.7 (1981).

> personnel records of public employees in a more favorable position than those of private employees vis-a-vis the Commission . . . .[63]

The Commission contended that the lower court erred by limiting the investigator's access to the medical records specified in the subpoena.[64] The Supreme Court first noted that the lower court had the authority to fashion a protective order restricting the agency's investigation,[65] and the terms of the trial court's protective order were found to be within the court's sound discretion.[66]

Once the agency's investigators have obtained the information relevant to assessing the claimed discriminatory act, they must "review all of the evidence"[67] and make a recommendation of probable cause or no probable cause to the Commission's internal hearing officer.[68] In so doing, the investigator acts as a neutral fact-finder rather than as an advocate for the complainant.

The investigator may also make other recommendations for the disposition of the complaint. For instance, the investigation may reveal that the complaint is beyond the Commission's jurisdiction. The investigator may recommend that the complaint be "administratively closed" because the complainant cannot be located or the employer has become defunct.[69] In any event, the investigator's findings and rationale for the recommended disposition of the complaint are contained in a "case summary" which is mailed to the complainant and respondent.[70]

4. *The Probable Cause Decision*

"The principal purpose for requiring an investigation is to determine whether there is probable cause that an unfair or discriminatory employment practice has occurred."[71] The investigator makes a recommendation one way or the other to the internal hearing officer. The internal hearing officer "review[s] the case file and issue[s] an independent determination of probable cause or no probable cause, or other appropriate action."[72] The internal hearing officer may discuss the case with the investigator.[73] If the

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63. 313 N.W.2d at 495.
64. *Id.* at 494.
65. *Id.* at 496.
66. *Id.* at 496-97.
67. 240 IOWA ADMIN. CODE § 1.5(1)(a) (1982).
68. IOWA CODE § 601A.15(3)(a) (1981).
69. *See* 240 IOWA ADMIN. CODE § 1.1(6)(f) (1981).
70. 240 IOWA ADMIN. CODE § 1.5(1)(c) (1982).
71. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 169.
72. 240 IOWA ADMIN. CODE § 1.5(1)(a) (1982).
73. The internal hearing officer is exempt from the prohibition against *ex parte* communications under IOWA CODE § 17A.17 (1981). *See* IOWA CODE § 601A.15(3)(b) (1981). However, the Commission's rules preclude the internal hearing officer who has made a "cause" finding from presiding at a contested case hearing involving the same controversy. 240 IOWA ADMIN.

hearing officer's decision differs from the investigator's recommendation, the reasons for disagreement must "be stated in writing and placed in the case file."[74]

If the hearing officer credits the complaint with probable cause, it proceeds to the next administrative stage—conciliation.[75] Buf if the hearing officer finds no probable cause, no jurisdiction, or orders the complaint administratively closed for some other reason, he or she then issues "a final order dismissing the complaint" which is promptly served upon the parties.[76]

A complainant who wishes to contest a dismissal may request that the agency reopen the complaint.[77] This request must be in writing, showing good cause for reopening the complaint, and filed within twenty days of the issuance of the final order.[78] The Commission may also reopen a complaint *sua sponte* "whenever justice so requires."[79]

Alternatively, the aggrieved complainant may file a petition for judicial review of the Commission's dismissal of the complaint.[80] The petition may be filed either in Polk County or in the petitioner's county of residence.[81] Unlike petitions for judicial review of the Commission's "contested case" decisions, which generally must be filed no later than thirty days after the issuance of the decision,[82] a petitioner challenging a no probable cause or other pre-contested case dismissal may file the petition at any time while the petitioner remains aggrieved.[83] The Legislature may place some time limit on these appeals in the future.[84]

Neither due process nor Chapter 601A requires that complainants be afforded an opportunity for an evidentiary hearing prior to a probable cause finding.[85] The Commission investigator acts as an impartial fact-finder; the internal hearing officer's cause determination is likewise impartial and non-adversarial in nature. In *Estabrook v. Iowa Civil Rights Commission*[86] the court observed that the Commission's level of funding and staffing compelled the conclusion that the legislature did not intend that the agency ultimately prosecute every complaint at an evidentiary hearing.[87] A complaint

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CODE § 1.5(1)(d) (1982).

74. 240 IOWA ADMIN. CODE § 1.5(1)(b) (1982).

75. *See* IOWA CODE § 601A.15(3)(c) (1981).

76. *See* IOWA CODE §§ 601A.15(3)(a), .15(3)(c) (1981); 240 IOWA ADMIN. CODE §§ 1.1(6)(e), 1.1(6)(f) (1981).

77. 240 IOWA ADMIN. CODE § 1.17 (1981).

78. *Id.*

79. *Id.*

80. IOWA CODE § 17A.19 (1981).

81. IOWA CODE § 17A.19(2) (1981).

82. IOWA CODE § 17A.19(3) (1981).

83. *Id. See also* Oliver v. Teleprompter Corp., 299 N.W.2d 683 (Iowa 1980).

84. This was suggested in *Oliver v. Teleprompter Corp.*, 299 N.W.2d at 687.

85. *See* Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d 306 (Iowa 1979).

86. *Id.*

87. *Id.* at 310-11.

would be credited with probable cause only if the investigation led the hearing officer "to reasonably conclude [that] prohibited discrimination has occurred."[88] But probable cause need not be credited to "every complaint which merely generated a minimal prima facie case."[89] Instead, "the legislative intent was to permit the commission to be selective in the cases singled out to process through the agency, so as to better impact unfair or discriminatory practices with highly visible and meritorious cases."[90] A court which reviews a no probable cause decision should therefore affirm the Commission's decision unless the agency abuses its prosecutorial discretion, ignores the facts revealed by the investigation, utilizes an improper legal standard in evaluating those facts, or commits some other error.[91]

In *Estabrook* the court rejected the petitioner's claim that procedural due process necessitated an evidentiary hearing before the Commission could dismiss his age discrimination complaint.[92] The court assumed, *arguendo*, that the petitioner's state age discrimination complaint constituted a property interest protected by the due process clause.[93] The court held that the Commission's no probable cause decision did not deprive him of this property interest: the petitioner could continue to pursue a remedy under the Federal Age Discrimination in Employment Act[94] or even bring an action in civil court for compensatory damages.[95]

Petitioners might challenge *Estabrook's* due process analysis in light of the United States Supreme Court's recent decision in *Logan v. Zimmerman Brush Co.*[96] In *Logan*, the Illinois Fair Employment Commission, through no fault of the complainant, failed to convene a fact-finding conference within the legislatively-prescribed time period. The state high court deemed that this was a mandatory duty on the part of the agency.[97] Thus, the agency's failure to timely convene the fact-finding conference divested it of jurisdiction to hear the merits of the complainant's case.[98]

The Supreme Court found that the complainant's "cause of action [was] a species of property protected by the Fourteenth Amendment's Due Process Clause."[99] Unlike the situation in *Estabrook*, the state agency's proce-

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88. *Id.* at 310.
89. *Id.*
90. *Id.* at 311.
91. *See generally* IOWA CODE § 17A.19(8) (1981).
92. Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 311.
93. *Id.* at 309-10.
94. 29 U.S.C. §§ 621-34 (1976 and Supp. IV 1980). *See* Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 310.
95. Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 310 (citing Iowa Civil Rights Comm'n v. Massey-Ferguson, Inc., 207 N.W.2d at 10; Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 768 (Iowa 1971)).
96. 102 S. Ct. 1148 (1982).
97. *Id.* at 1152-53.
98. *Id.* at 1153.
99. *Id.* at 1154-55.

dural error in *Logan* blocked the only avenue for litigating the complainant's cause of action.[100] Moreover, the dismissal of the cause of action was entirely unrelated to the merits of the complaint.[101] This is readily distinguishable from the Iowa Civil Rights Commission's procedure for dismissing complaints not credited with probable cause.[102] Finally, the *Logan* complainant—again unlike the situation in *Estabrook*—was not even afforded the opportunity for judicial review of the state agency's procedural error.[103]

The Supreme Court concluded that the Illinois scheme violated due process:

> Obviously, nothing we have said entitles every civil litigant to a hearing on the merits of every case. The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, . . . or, in an appropriate case, filing fees [citations omitted]. And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule [citations omitted]. What the Fourteenth Amendment does require, however, "is an *opportunity* . . . granted at a meaningful time and in a meaningful manner, [citations omitted] for [a] hearing appropriate to the nature of the case" [citations omitted] . . . .[104]

The apparent breadth of this ruling should be tempered by the astonishing deprivation visited upon the complainant in *Logan*. By comparison, the petitioner in *Estabrook* was protected by a battery of administrative and judicial safeguards which allowed the merits of his complaint to reach the administrative decisionmakers and the reviewing court. The "no probable cause" procedure under Iowa Code Chapter 601A—with its attendant judicial review safeguards—would appear to provide "reasonable procedural requirements for triggering the right to an adjudication"[105] which do not run afoul of the due process clause as interpreted in *Logan v. Zimmerman Brush Co.*[106]

5. *Conciliation*

"A probable cause determination is a prerequisite to the initiation of efforts to eliminate the unfair or discriminatory practice."[107] The first vehicle for these efforts is the informal conciliation procedure.[108] The Commis-

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100. *Id.* at 1157.
101. *Id.* at 1156-57.
102. *See supra* text accompanying notes 67-91.
103. 102 S. Ct. at 1157.
104. *Id.* at 1158-59.
105. *Id.* at 1158.
106. 102 S. Ct. 1148 (1982).
107. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 169.
108. IOWA CODE § 601A.15(3)(c) (1981). Of course, the parties may informally resolve the complaint themselves prior to the formal conciliation process.

sion conciliators shed the mantle of impartiality and act as advocates for both the complainant and the broad social interest in eliminating the conduct which precipitated the probable cause finding.[109]

Conciliation must be attempted for at least thirty days after "the initial conciliation meeting."[110] The meaning of "meeting" has not been construed by the courts, but the Iowa Attorney General's office has informally advised the Commission that an initial telephonic communication will suffice.

Once the thirty day conciliation period expires without an acceptable agreement, the Commission's director may order the bypassing of further conciliation efforts in favor of prosecution at an evidentiary hearing.[111] Such a bypass is permissible if the employer refuses to stop the challenged practice or fails to offer an acceptable remedy to the complainant.[112]

a. *Satisfactory Adjustment.* Who determines whether an employer's conciliation offer is acceptable? The Commission staff may ultimately make this determination: "Whenever the offer of adjustment by the respondent is acceptable to the investigating official [i.e., staff conciliator], but not to the complainant, the commission may close the case as satisfactorily adjusted."[113]

This Commission rule has never been challenged in its application. It seems to fall within the Commission's authority to "establish rules to . . . expedite" the enforcement of civil rights.[114] The Commission's primary duty is "to correct a broad pattern of behavior rather than affording a procedure to settle a specific dispute."[115] A complainant may refuse to accede to an employer's offer to discontinue a broad pattern of discrimination merely because the complainant views the concomitant monetary offer as insufficient. The Commission may have a greater interest in eliminating the challenged employment practice than in maximizing the complainant's monetary settlement. In addition, an element that should be considered is that the recalcitrant complainant might not prevail on the merits if the case proceeded to a hearing. In that event, the complainant not only would come away empty-handed but the Commission would lose its opportunity to eliminate the challenged employment practice. In this way the satisfactory adjustment rule prevents the Commission's primary prophylactic purpose from being held hostage by a complainant who is unwilling to settle the complaint.

The satisfactory adjustment rule also promotes administrative economy. Evidentiary hearings are expensive. The Commission should not be com-

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109. IOWA CODE §§ 601A.15(3)(c), .15(3)(d) (1981); Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 308.

110. IOWA CODE § 601A.15(3)(d) (1981).

111. IOWA CODE §§ 601A.15(3)(d), .15(5) (1981).

112. IOWA CODE § 601A.15(3)(d); 240 IOWA ADMIN. CODE § 1.1(6)(c) (1981).

113. 240 IOWA ADMIN. CODE § 1.1(6)(c) (1981).

114. IOWA CODE § 601A.15(11) (1981).

115. *See* Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 308; Iron Workers Local No. 67 v. Hart, 191 N.W.2d at 770.

pelled to expend its scarce prosecutorial resources merely because a complainant prefers a public hearing rather than a reasonable pre-trial settlement.

Understandably, the frustrated complainant may dispute the Commission's unilateral "satisfactory adjustment" closure. The complainant may do so by obtaining judicial review of this final agency action.[116] The mechanics are the same as if the complainant were appealing a no probable cause dismissal.[117] Since the action has not yet reached the contested case phase,[118] the complainant enjoys the open-ended time period for filing an appeal.[119] Finally, with one significant potential qualification, the scope of judicial review of a "satisfactory adjustment" closure should be the same as that of a no probable cause dismissal.[120] The difference lies in the Commission's probable cause decision in the complainant's favor. This places the complainant's property interest (i.e., the cause of action embodied by the complaint) on a higher plane than that enjoyed by the complainant in *Estabrook v. Iowa Civil Rights Commission*.[121] One could argue that procedural due process requires some kind of hearing before the Commission closes the complaint as "satisfactorily adjusted" after a probable cause finding.[122] This argument derives support from *Logan v. Zimmerman Brush Co.*[123]

b. *Administrative Closure.* Occasionally a complaint which is credited with probable cause must be closed prior to hearing. To accomplish this purpose, the Commission has adopted the following rule:

> *Designated staff of the commission may rule that a case be administratively closed* where no useful purpose would be served by further action by the commission, such as when the complainant has not been located after diligent efforts, issuance of a right to sue letter, or *where, after a probable cause decision has been made it is determined that the record does not justify proceeding to public hearing . . . .*[124]

This procedure was utilized to close *Stilwell v. Woodward State Hospital and School*.[125] In *Stilwell*, an autistic complainant alleged that she was

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116. IOWA CODE § 17A.19 (1981).

117. *See supra* text accompanying notes 80-83.

118. *See* IOWA CODE §§ 17A.2(2), .12(1) (1981). *See also infra* text accompanying notes 134-39.

119. *See supra* note 83.

120. *See supra* text accompanying notes 85-91.

121. 283 N.W.2d 306 (Iowa 1979).

122. *See* 240 IOWA ADMIN. CODE § 1.1(6)(c) (1981). Judicial review of a satisfactory adjustment closure would be virtually impossible unless the agency explained why the employer's offer was "acceptable to the investigating official" and why the complainant's rejection of the offer was deemed unreasonable. Of course, this explanation would not necessitate a full-blown evidentiary hearing.

123. 102 S. Ct. 1148 (1982).

124. 240 IOWA ADMIN. CODE § 1.5(1)(e) (1982) (emphasis added).

125. No. 2-79-5716, slip op. (Iowa Civil Rights Comm'n, May 26, 1982) (to be published in

not receiving adequate treatment and education at a state mental institution.[126] The Commission's internal hearing officer had credited the complaint with probable cause; conciliation had been unsuccessfully attempted.[127] Thereafter, the Commission's director and the Iowa Attorney General's office concluded that the Commission lacked the expertise to review the adequacy or inadequacy of the complainant's treatment, for the investigation had revealed substantial differences of opinion in the medical community concerning the appropriate treatment of autistic persons.[128]

The Commission's director filed a motion to administratively close the complaint with the hearing officer assigned to preside at the contested case hearing. The director, the complainant (represented by private counsel), and Woodward Hospital filed briefs and orally argued the motion.[129] The hearing officer ruled that the director had discretion to administratively close a complaint after it reached the contested case phase but prior to the evidentiary hearing.[130] Given the investigative record, the director's decision to close the *Stilwell* complaint was not deemed to be an abuse of discretion.[131]

Complainants aggrieved by an administrative closure may obtain judicial review of the Commission's action.[132] To the extent that an administrative closure is accompanied by an opportunity for a hearing, as in *Stilwell*, the Commission should be able to withstand a procedural due process challenge premised on *Logan v. Zimmerman Brush Co.*[133]

6. *The Evidentiary Hearing*

After conciliation fails, the complaint is placed on the docket for an evidentiary hearing.[134] An assistant Iowa attorney general is assigned to present the evidence in support of the complainant;[135] the complainant may also retain private counsel.[136] The agency appoints a hearing officer to preside at the evidentiary hearing.[137] The hearing is conducted in accordance with the procedures for contested case hearings specified in the Iowa Administrative Procedure Act.[138]

a. *Discovery and Procedural Motions.* The complaint is deemed to be a

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5 Iowa Civil Rights Comm'n Reports ___).

126. *Id.* at 2.
127. *Id.*
128. *Id.* at 8.
129. *Id.* at 1-2.
130. *Id.* at 9-10.
131. *Id.* at 9.
132. Iowa Code § 17A.19 (1981).
133. 102 S. Ct. 1148 (1982). *See supra* text accompanying notes 96-106.
134. Iowa Code § 601A.15(5) (1981).
135. Iowa Code § 601A.15(6) (1981).
136. Iowa Code § 17A.12(4) (1981).
137. Iowa Code §§ 17A.11, 601A.15(5) (1981).
138. Iowa Code §§ 17A.12-.17, 601A.15(7) (1981).

"contested case" after the notice of hearing is delivered to the parties.[139] This triggers the parties' rights to utilize "[d]iscovery procedures applicable to civil actions."[140] Witnesses may be deposed, motions may be made to compel a mental or physical examination, interrogatories and requests for admissions may be utilized.[141] Respondents may obtain a copy of the Commission's case file[142]—an invaluable aid in pre-trial preparation which no prudent respondent should ignore.

If discovery disputes arise, they must be submitted to the hearing officer for resolution; non-agency parties cannot enlist the courts to settle contested case discovery issues.[143] The Commission's rules of practice provide for motions requesting discovery rulings or relief.[144] The hearing officer may grant oral arguments on such motions.[145] In addition, motions for continuance may be granted under various circumstances.[146]

b. *Witnesses at the Hearing.* The Commission is authorized to subpoena witnesses for the hearing.[147] It must also issue subpoenas on behalf of the respondent when so requested.[148] Administrative subpoenas are not subject to statutory distance limitations.[149]

Witnesses at the hearing are subject to cross-examination.[150] If they have previously made statements to the agency concerning the subject-matter of their testimony, the respondent may request the agency to disclose those statements for use during cross-examination.[151] Testimony may be submitted in written form if the declarant is not in attendance at the hearing.[152]

If a party intends to offer expert testimony at the hearing, a notice of expert testimony must be filed with the hearing officer and served on the opposing party within ten days prior to the hearing.[153] The notice must identify the expert and the subject-matter of the expert's testimony.[154] The notice should be provided even if the expert's testimony will be introduced

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139. Iowa Code § 17A.12(1) (1981).
140. Iowa Code § 17A.13(1) (1981).
141. Iowa Code § 17A.13(1) (1981) and 240 Iowa Admin. Code § 1.6 (1978) incorporates Iowa R. Civ. P. 121-134.
142. 240 Iowa Admin. Code § 1.16 (1981).
143. *See* Christensen v. Iowa Civil Rights Comm'n, 292 N.W.2d 429 (Iowa 1980).
144. 240 Iowa Admin. Code § 1.8 (1981). *See* Christensen v. Iowa Civil Rights Comm'n, 292 N.W.2d at 431.
145. 240 Iowa Admin. Code § 1.8(7)-(8) (1981).
146. 240 Iowa Admin. Code § 1.9(5)(a) (1981).
147. Iowa Code §§ 17A.13(1) & 601A.5(5) (1981).
148. *Id.*
149. Iowa Code § 17A.13(1) (1981).
150. Iowa Code § 17A.14(3) (1981).
151. Iowa Code § 17A.13(2) (1981).
152. Iowa Code § 17A.14(3) (1981).
153. 240 Iowa Admin. Code § 1.9(14) (1981).
154. *Id.*

in the form of documentary exhibits.[155] Since most disability discrimination hearings involve submission of medical documents and testimony, counsel should be alert to this procedural requirement.

c. *Rules of Evidence.* The stringent common law rules of evidence are inapplicable to agency hearings. Evidence is excluded only if it is "[i]rrelevant, immaterial, . . . unduly repetitious" or privileged.[156] An additional rule of exclusion is unique to Iowa Civil Rights Commission hearings: The complainant is barred from introducing any evidence "concerning offers or counter-offers of adjustment during" conciliation.[157] If the complainant offers such evidence, the hearing officer is directed to exclude it.[158] This exclusionary rule is waived if the respondent offers evidence of conciliation proposals.[159] But, in general, if there is any doubt about whether particular evidence is admissible, the hearing officer usually receives the evidence subject to any objections.[160]

Although these rules of evidence are liberal, an agency cannot predicate its findings of fact on evidence entirely devoid of probative value: "A finding shall be based upon the kind of evidence on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial . . . ."[161] Moreover, findings of fact must be based "solely on the evidence in the record and on matters officially noticed in the record."[162] The agency may utilize its "experience, technical competence, and specialized knowledge" in evaluating such evidence.[163]

7. *Proposed and Final Decisions*

a. *Proposed Decision.* The hearing officer who presides at the reception of the evidence renders a "proposed decision."[164] The hearing officer's proposed decision must contain "findings of fact and conclusions of law, separately stated."[165] "Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of underlying facts supporting the findings."[166] If the hearing officer finds that unlawful discrimination has occurred, the proposed decision will include a recommended

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155. *See* Harkin v. Foods, Inc., 4 Iowa Civil Rights Comm'n Case Reports 65, 69 (1980).
156. IOWA CODE § 17A.14(1) (1981).
157. 240 IOWA ADMIN. CODE § 1.9(11) (1981).
158. *Id.*
159. *Id.*
160. 240 IOWA ADMIN. CODE § 1.9(5) (1981).
161. IOWA CODE § 17A.14(1) (1981).
162. IOWA CODE § 17A.12(8) (1981).
163. IOWA CODE § 17A.14(5) (1981).
164. IOWA CODE § 17A.15(2) (1981).
165. IOWA CODE § 17A.16(1) (1981).
166. *Id.*

remedy.[167]

In evaluating the evidence, the hearing officer may consider the demeanor of witnesses.[168] If the hearing officer who presided at the hearing becomes unavailable, a second hearing officer who becomes familiar with the record may draft the proposed decision "unless demeanor . . . is a substantial factor."[169] In that event, "the portion of the hearing involving demeanor shall be heard again or the case shall be dismissed."[170]

The hearing officer assigned to render a proposed decision must "not communicate, directly or indirectly in connection with any issue of fact or law in that contested case, with any person or party, except upon notice and opportunity for all parties to participate . . . ."[171] However, the hearing officer "may communicate with members of the agency"[172] and may also enlist "the aid and advice of persons other than those with a personal interest in, or those engaged in prosecuting or advocating in, either the case under consideration or a pending factually related case involving the same parties."[173]

The proposed decision becomes part of the record in the contested case.[174] The members of the Commission, by rule, must review the hearing officer's proposed decision within one hundred twenty days.[175] If they fail to do so, the proposed decision becomes, by operation of law, the Commission's final decision.[176]

b. *Final Decision.* The parties to the contested case are notified of the time and place at which the Commission will review the proposed decision.[177] Parties may file exceptions, with briefs, challenging the proposed decision.[178] These must be filed with the Commission no later than fifteen days prior to the Commission meeting at which the proposed decision will be reviewed.[179]

The parties may request an opportunity to present oral arguments to the Commission members.[180] Ordinarily, if the Commission grants oral arguments it re-schedules its review of the proposed decision for the next

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167. *See infra* text accompanying notes 191-258.

168. *See, e.g.*, IOWA CODE § 17A.15(2) (1981).

169. *Id.*

170. *Id.*

171. IOWA CODE § 17A.17(1) (1981).

172. *Id.* "Members of the agency" are defined as the seven Iowa Civil Rights Commissioners appointed by the Governor and confirmed by the Senate. *See* IOWA CODE §§ 17A.2(10) & 601A.3 (1981).

173. IOWA CODE § 17A.17(1) (1981).

174. IOWA CODE § 17A.12(6)(f) (1981).

175. 240 IOWA ADMIN. CODE § 1.15(3) (1980). Such a rule is required by Iowa Code section 17A.15(3) (1981).

176. 240 IOWA ADMIN. CODE § 1.15(4) (1981); IOWA CODE § 17A.15(3) (1981).

177. 240 IOWA ADMIN. CODE § 1.15(2) (1980).

178. IOWA CODE § 17A.15(3) (1981); 240 IOWA ADMIN. CODE § 1.15(2).

179. 240 IOWA ADMIN. CODE § 1.15(2) (1980).

180. IOWA CODE § 17A.15(3) (1981).

monthly meeting.[181]

The Commission reviews the proposed decision in conjunction with the transcript of the hearing, the documentary exhibits, the parties' exceptions to the hearing officer's proposal, and supporting briefs.[1] The Commissioners may not consider evidence not introduced at the hearing.[183] A party could, however, conceivably request that the Commission remand the case to the hearing officer for the introduction of additional evidence upon a showing of good cause for failing to present it at the hearing.[184]

The Commission is not bound by the proposed decision in formulating its final decision: "On . . . review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule . . . ."[185] Thus, the Commission may accept the hearing officer's proposed decision as its final decision, modify the proposed decision, or reject it altogether.[186]

The Commission "issues" its final decision when it mails the decision by certified mail to the parties.[187] Any party may request a rehearing by filing an application within twenty days after the agency's issuance of its final decision.[188] The application must contain "specific grounds" for a rehearing.[189] It is deemed denied unless the Commission "grants the application within twenty days after its filing."[190]

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181. The seven Commissioners of the Iowa Civil Rights Commission generally schedule one public meeting every month. These meetings are held throughout the state and are sometimes combined with public forums where interested citizens can express their concerns directly to the Commissioners.

182. 240 IOWA ADMIN. CODE § 1.15(1) (1980).

183. *See, e.g.*, IOWA CODE § 17A.12(8) (1981).

184. The Commission may remand the contested case to the hearing officer pursuant to 240 Iowa Admin. Code section 1.15(3) (1980). While the Commission's rules do not expressly contemplate a remand for the taking of additional evidence, such a procedure would be analogous to Iowa Code section 17A.19(7) (1981), which permits a reviewing court to remand a controversy to the agency for the presentation of additional evidence under certain limited cirumstances.

185. IOWA CODE § 17A.15(3) (1981).

186. *Id.*; 240 IOWA ADMIN. CODE § 1.15(3) (1980).

187. *See* IOWA CODE § 601A.17(1) (1981); 240 IOWA ADMIN. CODE § 1.1(5) (1981). The concept of "issuance" is important because it commences the time period for filing (1) a petition for judicial review in a contested case, IOWA CODE § 17A.19(3) (1981); (2) an application for rehearing in a contested case, IOWA CODE § 17A.16(2) (1981); and (3) an appeal following the granting or denial of an application for rehearing. IOWA CODE § 17A.19(3) (1981).

188. IOWA CODE § 17A.16(2) (1981).

189. *Id.*

190. *Id.* This could be a trap for the unwary when a party files an application for rehearing more than twenty days before the Commission's next regularly scheduled meeting. Such an application would be "deemed denied" by operation of law prior to the Commission's meeting. *See* Ford Motor Co. v. Iowa Dep't of Transp. Regulations Bd., 282 N.W.2d 701, 702 (Iowa 1979). Such a party's period for obtaining judicial review would commence on the date that the application was deemed denied, regardless of any later action taken by the agency on the application. *Id.* at 703. Another interesting possibility exists. Suppose an agency votes to "consider"

8. *Remedies for Unlawful Discriminatory Acts*

The Commission is empowered to fashion a remedy for the victims of unlawful employment discrimination:

> If upon taking into consideration all of the evidence at a hearing, the commission determines that the [employer] has engaged in a discriminatory or unfair practice, the commission . . . shall issue an order requiring the [employer] to cease and desist from the discriminatory or unfair practice and to take the necessary remedial action as in the judgment of the commission will carry out the purposes of this chapter . . . .
>
> For the purposes of this subsection
>
> a. . . ."remedial action" includes but is not limited to the following:
>
> (1) Hiring, reinstatement or upgrading of employees with or without pay. Interim earned income and unemployment compensation shall operate to reduce the pay otherwise allowable . . . .
>
> (5) Extension to all individuals of the full and equal enjoyment of the advantages, facilities, privileges, and services of the [employer] denied to the complainant because of the discriminatory or unfair practice.
>
> (6) Reporting as to manner of compliance.
>
> (7) Posting notices in conspicuous places in the [employer's] place of business in form prescribed by the commission and inclusion of notices in advertising material.
>
> (8) Payment to the complainant of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees.[191]

Employers having a state or local license, or performing under a state or local government contract or subcontract, may be subject to additional sanctions. If the discriminatory act was authorized or tolerated by an officer, executive agent, or board of directors, "the commission shall so certify to the licensing agency."[192] If the Commission's decision is not reversed on judicial review, "the licensing agency may initiate licensee disciplinary procedures."[193] Likewise, the Commission must certify the occurrence of a discriminatory act to the governmental contracting authority.[194] The latter may "take appropriate action to terminate a contract or portion thereof."[195]

The legislature has armed "the Commission with considerable discre-

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the application for rehearing within twenty days of its filing but does not grant or deny it until after twenty days have elapsed. Is this application "deemed denied" on the twentieth day or is this automatic denial suspended by the agency's express decision to consider the matter at a later date?

191. IOWA CODE § 601A.15(8) (1981).

192. IOWA CODE § 601A.15(8)(b)(1) (1981).

193. *Id.*

194. IOWA CODE § 601A.15(8)(b)(2) (1981).

195. IOWA CODE § 601A.15(8)(b)(3) (1981). The contracting authority may take other action as well. *Id.*

tion in fashioning an appropriate remedy" for violations of the Iowa Civil Rights Act.[196] The ultimate purpose in carving a remedy is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[197]

a. *Back Pay.* The Act authorizes but does not require the Commission to award back pay to victims of unlawful discrimination.[198] However, the potential back pay sanction is crucial to the Act's overriding objective to eviscerate unlawful employment discrimination: "It is the reasonably certain prospect of a back pay award that 'provide[s] the spur or catalyst which causes employers . . . to self-examine . . . their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' "[199]

In *Albemarle Paper Co. v. Moody*,[200] the trial court declined to award back pay to a successful class of plaintiffs because the employer's breach of Title VII had not been in bad faith.[201] The Supreme Court noted that a showing of bad faith was not a prerequisite for granting back pay. On the contrary, "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[202]

Complainants who are victimized by unlawful discrimination must nonetheless take reasonable precautions to mitigate their economic losses.[203] However, they are presumed to have discharged this duty unless the employer persuades the Commission to the contrary.[204]

Determining the appropriate back pay award is a three-step process.

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196. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 171.

197. *Id.*

198. *See* IOWA CODE § 601A.15(8)(a)(1) (1981).

199. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-418 (1975) (quoting United States v. N. L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

200. 422 U.S. 405 (1975).

201. *Id.* at 410.

202. *Id.* at 421.

203. This is a common theme in Title VII employment discrimination cases. *See, e.g.*, Sprogis v. United Air Lines, Inc., 517 F.2d 387, 392-93 (7th Cir. 1975). The Commission has repeatedly embraced this principle. *See, e.g.*, Fouts v. Ford Marketing Corp., 4 Iowa Civil Rights Comm'n Case Reports 46, 57 (1980); Schmitt v. City of Cresco Police Dep't, 4 Iowa Civil Rights Comm'n Case Reports 137, 142 (1980).

204. *See* Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981) ("Everyone is presumed to have discharged his or her duty, whether legal or moral, until the contrary is made to appear."). *See also* United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 937 (10th Cir. 1979); Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1975); Schmitt v. City of Cresco Police Dep't, 4 Iowa Civil Rights Comm'n Case Reports at 142; Farnum v. Hoerner Waldorf Co., 3 Iowa Civil Rights Comm'n Case Reports 9, 16-17 (1978).

First, the applicable back pay period must be ascertained.[205] Second, the amount of earnings which the complainant would have received in the absence of the discriminatory act must be calculated for the duration of the back pay period.[206] Finally, the amount of earned income and unemployment compensation benefits actually received by the complainant during the back pay period must be deducted from the complainant's hypothetical earnings.[207]

b. *The Back Pay Period.* The commencement of the back pay period is usually fairly clear: it begins with the discriminatory act.[208] But the terminal point is often not susceptible to easy identification. If the complainant has unsuccessfully attempted to mitigate his or her economic loss through the hearing date, then the back pay period ordinarily ends then.[209] When the complainant obtains more remunerative employment than that offered by the respondent, the back pay period usually terminates.[210] Alternatively, the back pay period generally terminates if the complainant rejects the employer's offer of reinstatement.[211] Merely sporadic efforts by a complainant to mitigate his loss may shorten the back pay period. In a failure-to-hire case, the back pay period might end when the complainant ceased to be qualified for the position or was no longer interested in reinstatement. This discussion by no means exhausts all the possibilities; it merely illustrates the difficulty in predicting the duration of the back pay period.

The back pay period may be tolled for various reasons. For instance, complainants sometimes voluntarily withdraw from the labor market in order to relax or to pursue other interests. The employer should not be liable for a complainant's voluntary hiatus from the labor market. The employer may toll—or even end—the back pay period by an overall reduction of its workforce or by closing its facility. If the employer can establish that the complainant would have been laid off or terminated on a specific date even absent the discriminatory act, the back pay period will be tolled accordingly.[212] The rationale for tolling the back pay period is to avoid placing complainants in a *better* position than they would have enjoyed but for the

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205. *See, e.g.*, Harkin v. Foods, Inc., 4 Iowa Civil Rights Comm'n Case Reports at 77-78, *aff'd*, Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).

206. *Id.*

207. IOWA CODE § 601A.15(8)(a)(1) (1981) ("Interim earned income and unemployment compensation shall operate to reduce the pay otherwise allowable."). *See also* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 172.

208. *See infra* note 213.

209. *Id.*

210. *See* Di Salvo v. Chamber of Commerce, 568 F.2d 593, 597 (8th Cir. 1978).

211. *See* Ford Motor Co. v. Equal Employment Opportunity Comm'n, 645 F.2d 183 (4th Cir. 1981), *rev'd and remanded*, 102 S. Ct. 3057, 3069 (1982).

212. *See, e.g.*, Slack v. Havens, 522 F.2d 1091, 1095 (5th Cir. 1975) (back pay period terminated when employer transferred its assets upon liquidation).

discriminatory act.[213]

If the evidence concerning the tolling or termination of the back pay period is conflicting, courts in Title VII cases resolve any doubts in favor of the complainant.[214] The Commission will probably follow this line of authority.

c. *Computing the Complainant's Hypothetical Earnings.* Once the appropriate back pay period has been delineated, the next step is to compute the gross earnings which the complainant would have received in the absence of the unlawful discrimination. These earnings should include the base wage, estimated overtime, and the value of the fringe benefit package (e.g. group insurance, pension contributions, bonus pay, profit sharing plan, etc.).[215] These hypothesized gross earnings should reflect any raises or cost-of-living adjustments to which the complainant would have reasonably been entitled.[216]

This information can be elicited from the employer through the use of pre-hearing discovery procedures; often, the parties save time and effort by stipulating to these figures. In a termination case, the complainant's gross earnings can simply be extrapolated for the duration of the back pay period. In a failure-to-hire case, the computation might reasonably be based on the actual earnings of an individual hired in lieu of the complainant. Similarly, in a failure-to-promote case, the complainant's hypothetical earnings might track the actual earnings of the preferred employee.[217]

d. *Deductions From Complainant's Hypothetical Earnings.* The appropriate back pay award represents the difference between the complainant's hypothetical earnings and the complainant's actual gross earnings during the back pay period.[218] Unemployment compensation benefits must be deducted from the back pay award.[219] Chapter 601A does not expressly provide for the deduction of other kinds of entitlements such as social security benefits, worker's compensation payments, and AFDC benefits.[220] Without

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213. Back pay is an equitable remedy for an injured complainant. It is like restitution, so it would be inconsistent to provide a complainant with a larger back pay award than the complainant would have earned had he not been discriminated against.

214. *See* Hairston v. McLean Trucking Co., 520 F.2d 226, 233 (4th Cir. 1975); United States v. United States Steel Co., 520 F.2d 1043, 1050 (5th Cir. 1975), *cert. denied*, 429 U.S. 817 (1976); Mead v. United States Fidelity & Guaranty Co., 442 F. Supp. 114, 134 (D. Minn. 1977).

215. *See, e.g.*, Mead v. United States Fidelity & Guaranty Co., 442 F. Supp. at 134. Oftentimes the value of the fringe benefit package can be calculated as a percentage of gross earnings.

216. *See* B. Schlei & P. Grossman, Employment Discrimination Law at 1250 (1976) & at 336 (Supp. 1979).

217. *See* Blasco v. Polk County Comm'n of Veteran Affairs, No. 07-77-4571, slip op. at 15 (Iowa Civil Rights Comm'n Sept. 17, 1981) (to be published in 5 Iowa Civil Rights Comm'n Case Reports _), *aff'd*, Nos. AA-159, 160 (Iowa Dist. Ct., Polk County Sept. 17, 1982).

218. Iowa Code § 601A.15(8)(a)(1) (1981).

219. *Id.*

220. Iowa Code § 601A.15(8)(a)(1) (1981).

express statutory authority to the contrary, the Commission staff has been informally advised by the Iowa Attorney General's office not to deduct these collateral entitlements from the complainant's back pay award during conciliation negotiations.

The Commission does not deduct other income which the complainant would have earned regardless of the discriminatory act. In *Foods, Inc. v. Iowa Civil Rights Commission*,[221] the Commission declined to deduct, from the complainant's back pay award, income from her farming operation which would have been earned in the absence of the discriminatory act.[222] This determination was affirmed on appeal as a proper exercise of the Commission's discretion.[223]

e. *Interest on Back Pay.* The Commission customarily awards ten percent interest, compounded annually, on back pay awards.[224] The interest begins to accrue at the time that the complaint is filed.[225]

f. *Front Pay.* In appropriate cases, the Commission may order employers to pay "front pay" to the complainant during the hiatus between the Commission's final decision and an offer of reinstatement to the complainant.[226] "Front pay" is the amount which the complainant would have earned but for the discriminatory act and which accrues *after* the evidentiary hearing and the Commission's final decision. Typically, the employer's front pay liability begins thirty days after the Commission's final decision is issued and terminates when the complainant is reinstated or rejects the employer's offer of reinstatement.[227] Front pay thus accrues during the pendency of an appeal of the Commission's final decision.

The Commission's remedial authority to award front pay was challenged in *Foods, Inc. v. Iowa Civil Rights Commission.*[228] The Commission's remedy was governed by the following provision:

> If, upon taking into consideration all the evidence at a hearing, the commission shall find that a respondent has engaged in . . . any discriminatory or unfair practice . . ., the commission shall . . . issue and cause to be served upon such respondent an order requiring such respondent to

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221. 318 N.W.2d 162 (Iowa 1982).

222. *Id.* at 171.

223. *Id.*

224. *See* IOWA CODE § 535.3 (1981); Alm v. Douglas & Lomason Co., No. 3-77-4319, slip op. at 10 (Iowa Civil Rights Comm'n Aug. 7, 1981) (to be published in 5 Iowa Civil Rights Comm'n Reports _) *aff'd*, No. AA 128, slip op. 8-9 (Iowa Dist. Ct., Polk County 1982).

225. *See* IOWA CODE § 535.3 (1981) ("The interest shall accrue from the date of the commencement of the action."); Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 731-732 (filing a complaint commences the administrative proceeding). *See also* Janda v. Iowa Ind. Hydraulics, Inc., 326 N.W.2d 339 (Iowa 1982).

226. *See* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 171.

227. Harkin v. Foods, Inc., 4 Iowa Civil Rights Comm'n Case Reports at 78, *aff'd*, Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 171.

228. 318 N.W.2d 162 (Iowa 1982).

> cease and desist from such discriminatory or unfair practice and to take such affirmative action, *including, but not limited to*, . . . reinstatement, or upgrading of employees, with or without back pay, . . . *as in the judgment of the commission shall effectuate the purpose of this chapter.*[229]

After acknowledging that this statutory provision "invests the Commission with considerable discretion in fashioning an appropriate remedy," the court concluded by stating that:

> The ultimate purpose in awarding damages as compensation for injury is to place the injured party in the position he or she would have been in had there been no injury. [Citations omitted] [The complainant] would not have incurred a loss of wages . . . but for her wrongful discharge . . . . She therefore should not bear the economic consequences of her discharge. The hearing officer's provision for loss of earnings helps place [the complainant] in the position she would have been in had she not been wrongfully discharged, and it promotes the remedial purpose of the Civil Rights Act . . . .[230]

An award of front pay is subject to many of the same limitations of a back pay award: a complainant's actual earnings from employment and unemployment compensation benefits received during the front pay period should be deducted from the award.[231] Likewise, if a complainant fails to mitigate the economic loss during all or some portion of the front pay period, the employer's front pay liability should be correspondingly reduced.[232]

g. *Damages for Mental Anguish.* The Commission is authorized to award "actual damages" to a prevailing complainant.[233] The Commission has consistently held that "actual damages" subsumes an award of damages for mental anguish suffered as a proximate cause of an intentional discriminatory act.[234]

"Actual damages" are distinguished from punitive or exemplary damages.[235] "Actual damages" clearly include compensation for emotional distress caused by a willful or intentional act.[236] Iowa courts have allowed awards of damages for mental anguish—even in the absence of a physical injury or trauma—since the decision in *Amos v. Prom, Inc.*[237] Furthermore,

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229. *Id.* at 171. *See also* IOWA CODE § 601A.14(12) (1977) (current version at IOWA CODE § 601A.15(8)(a) (1981)).

230. 318 N.W.2d at 171.

231. *See* IOWA CODE § 601A.15(8)(a)(1) (1981).

232. *See supra* text accompanying note 203.

233. IOWA CODE § 601A.15(8)(a)(8) (1981).

234. *See* Miller v. City of Iowa City, 4 Iowa Civil Rights Comm'n 85, 99 (1980) (the "Linda Eaton case"); Wilder v. Wetherbee, 4 Iowa Civil Rights Comm'n 162, 168 (1980).

235. *See* Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981); Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973).

236. *See* Amos v. Prom, Inc., 115 F. Supp. 127, 132 (N.D. Iowa 1953).

237. 115 F. Supp. 127 (N.D. Iowa 1953). In this case a black plaintiff alleged that she was intentionally and maliciously excluded from a public accommodation because of her race. *Id.* at

the Commission has adopted *Amos* as a guideline for fashioning relief to victims of unlawful discrimination.[238]

The propriety of awarding damages for mental anguish will of course depend on the cirumstances of the case. Measuring the appropriate amount of compensation for mental anguish will depend on such factors as the extent of the harm, its duration, the wantonness of the employer's conduct, and the quantum and quality of evidence establishing the harm.[239] It is worth noting, however, that the Commission has not yet awarded more than $2,000 in damages for mental anguish.[240]

h. *Reinstatement and Retroactive Seniority.* The Commission is expressly empowered to order the employer to reinstate a victim of unlawful employment discrimination.[241] This is an equitable remedy which the Commission may grant or deny depending on the circumstances of the case. Often the denial or loss of a job is even more devastating psychologically than economically. Given contemporary levels of unemployment, the prospect of reinstatement may be more important than a large back pay award. And given the attachment which some individuals feel for their jobs, reinstatement is often an integral element of the Act's "make whole" purpose.[242] Reinstatement is particularly important to disabled complainants who are often at a comparative disadvantage in an increasingly competitive labor market. In practice, the Commission generally orders reinstatement when the complainant evinces such a desire.[243]

Chapter 601A does not expressly address whether reinstatement is to be accompanied by retroactive seniority. As previously noted, the Commission has broad discretion in formulating a remedy to "make whole" the victim of unlawful discrimination.[244] In *Franks v. Bowman Transportation Co.*[245] the

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130-31. Brought under the federal court's diversity jurisdiction, a sum exceeding $3,000 was the necessary jursidictional amount in controversy. *Id.* at 130. The plaintiff prayed for an award of $3,000 for mental anguish and an award of $7,000 in exemplary damages. *Id.* The defendant moved to dismiss the action for failure to meet the jurisdictional amount in controversy. *Id.* The court reviewed Iowa's common law of damages and noted that damages for mental anguish were classified as compensatory rather than exemplary damages. *Id.* at 132. The court denied the defendant's motion to dismiss, holding that it was not impossible for the plaintiff to recover exemplary damages upon a showing of an intentional, willful tort which caused mental anguish. *Id.* at 137. *Amos v. Prom, Inc.* has often been cited by Iowa courts. *See* Muchmore Equipment, Inc. v. Grover, 315 N.W.2d 92, 100 (Iowa 1982); Syester v. Banta, 257 Iowa 613, 628-29, 133 N.W.2d 666, 676 (1965).

238. 240 IOWA ADMIN. CODE § 1.15(5) (1981).

239. *See supra* note 234.

240. *See* Miller v. City of Iowa City, 4 Iowa Civil Rights Comm'n Case Reports at 99.

241. IOWA CODE § 601A.15(8)(a)(1) (1981).

242. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763-70 (1976); Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 171.

243. *See, e.g.,* Harkin v. Foods, Inc., 4 Iowa Civil Rights Comm'n Case Reports at 68, 78, *aff'd,* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).

244. *See supra* text accompanying notes 191-97.

245. 424 U.S. 747 (1976).

United States Supreme Court recognized that retroactive seniority was an essential ingredient of the equitable remedy for victims of racial discrimination in hiring.[246] The Court rejected the employer's argument that such relief should be denied because it would conflict with the seniority expectations of its other employees: " 'If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination will be unhappy about it, there will be little hope of correcting the wrongs to which the Act is directed.' "[247]

The Iowa Civil Rights Act surely accords the Commission discretion to order reinstatement with retroactive seniority. In fact, the value of reinstatement could be negated without the additional safeguard of retroactive seniority. For instance, a recently reinstated complainant without seniority could be laid off along with new hirees because of an employer's reduction-in-force. But if the complainant's seniority had extended back to the time of the discriminatory act—for example, the failure to hire or the termination—the complainant's job would have been secure. It would appear that the "make whole" purpose of the Act virtually compels the linkage of reinstatement with retroactive seniority.

i. *Reasonable Attorney Fees.* The 1978 amendment to Chapter 601A authorized the Commission to award the successful complainant "reasonable attorney fees."[248] Because few complainants retain private counsel, the Commission has not yet acquired much experience in awarding attorney fees. In one case, however, the Commission's award of attorney fees greatly exceeded the complainant's actual damages.[249] The factors to be considered in calculating the appropriate attorney fee will be discussed later in greater detail.[250]

j. *Court Costs.* The Commission is authorized by the 1978 amendment to Chapter 601A to award "court costs" to the successful complainant.[251] This could include witness fees, sheriffs' service fees, deposition expenses, and other relevant costs incurred. The Commission does not impose any filing fees.

k. *Class Action Damages.* Does the Commission have statutory authority to compensate non-party members of a class who are injured by a discriminatory policy or practice? In *Quaker Oats Co. v. Cedar Rapids Human Rights Commission*,[252] a local civil rights agency ordered the employer to pay disability benefits to a class of non-party females who took a maternity

246. *Id.* at 763-770.

247. *Id.* at 775 (quoting United States v. Bethlehem Steel Corp., 446 F.2d 652, 663 (2d Cir. 1971)).

248. Act of June 29, 1978, ch. 1179, § 16, 1978 Iowa Acts 851, 857 (codified at IOWA CODE § 601A.15(8)(a)(8) (1981)).

249. *See* Miller v. City of Iowa City, 4 Iowa Civil Rights Comm'n Case Reports at 99-101 (the complainant was awarded $2,000 for mental anguish and $26,442 in attorney fees).

250. *See infra* text accompanying notes 395-98.

251. *See supra* note 248.

252. 268 N.W.2d 862 (Iowa 1978).

leave but were unlawfully denied disability benefits. The court held that the city's ordinance—which was modeled after Chapter 601A—did not authorize the agency to award class relief.[253] Moreover, the court in dicta suggested that Chapter 601A does not empower the Iowa Civil Rights Commission to award damages to a class.[254]

The statutory provision governing the Commission's remedial authority was amended after the court's decision in *Quaker Oats*.[255] Section 601A.15(8)(a)(8) authorizes: "Payment *to the complainant* of damages for an injury caused by the discriminatory or unfair practice which damages shall include but are not limited to actual damages, court costs and reasonable attorney fees."[256] Since this provision expressly refers to "the complainant," by negative implication it would seem to preclude awards of damages to non-complainants even though they may be part of a class injured by a discriminatory policy. But a contrary argument can also be made. Section 601A.15(8)(a)(1) authorizes the Commission to hire, reinstate, or upgrade "*employees* with or without pay . . . ."[257] By referring to employees—not complainants—this provision suggests that the Commission *can* award class relief. Certainly the latter argument would be more consistent with a remedial statute which is intended "to correct a broad pattern of behavior rather than affording a procedure to settle a specific dispute."[258] In any event, the Commission can require the employer to cease and desist from a discriminatory policy or practice, thereby obviating future injuries to the class.

9. *Enforcement of Conciliation Agreements and Commission Orders*

a. *Conciliation Agreements.* A conciliation agreement is essentially a contract between the complainant and the respondent to settle the action before an evidentiary hearing takes place. The Commission is also an interested party in such settlements. Having found probable cause to believe that discrimination occurred, one of the Commission's primary interests lies in convincing the employer to voluntarily discontinue the conduct which precipitated the "cause" finding.

As part of the conciliation agreement, the Commission may require the employer "to consent to the entry in an appropriate district court of a consent decree embodying the terms of the conciliation agreement."[259] This facilitates enforcement of the agreement: "Violation of such a consent decree

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253. *Id.* at 867-68.

254. *Id.*

255. Act of June 29, 1978, ch. 1179, § 16, 1978 Iowa Acts 851, 856-57 (codified at IOWA CODE § 601A.15(8)(a)(1)-(8) (1981)).

256. IOWA CODE § 601A.15(8)(a)(8) (1981) (emphasis added).

257. *Id.*

258. *See* Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 308; Iron Workers Local No. 67 v. Hart, 191 N.W.2d at 770.

259. IOWA CODE § 601A.15(9) (1981).

may be punished as contempt by the court in which it is filed, upon a showing by the commission of the violation at any time within six months of its occurrence."[260] A finding of contempt may result in a fine or imprisonment or both.[261]

The Commission is authorized to investigate, "[a]t any time in its discretion, . . . whether the terms of the agreement are being complied with by the respondent."[262] If the respondent is not in compliance, "the commission shall take appropriate action to assure compliance."[263]

b. *Commission Orders.* If, after an evidentiary hearing, the Commission determines that unlawful discrimination has occurred, it must issue an order requiring the employer to "cease and desist" from the illegal conduct.[264] The order will also contain the appropriate remedial provisions.[265] On the other hand, if the Commission determines that the employer did not violate Chapter 601A, it must issue an order dismissing the complaint.[266]

The Commission itself cannot enforce its remedial orders. If the employer does not voluntarily comply with the terms of an order, the Commission must bring an enforcement proceeding in district court.[267] The Commission files the petition for enforcement in the district court in the county where the unlawful conduct occurred or where the employer resides or transacts business.[268] The Commission then transfers the administrative record to the appropriate court.[269]

If the Commission brings an enforcement action before the employer's statutory time period for obtaining judicial review elapses,[270] the proceeding is akin to judicial review of the agency's decision in a contested case.[271] The situation is very different if the Commission waits until the employer has lost its statutory right to obtain judicial review.[272] The Commission may then "obtain an order of the court for the enforcement of [the Commission's] order upon showing that respondent is subject to the jurisdiction of the commission and resides or transacts business within the county in which

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260. *Id.*

261. IOWA CODE § 665.4(2) (1981).

262. IOWA CODE § 601A.15(9) (1981).

263. *Id.*

264. IOWA CODE § 601A.15(8) (1981).

265. *Id. See also supra* text accompanying notes 191-258.

266. Iowa Code § 601A.15(10) (1981).

267. *See* IOWA CODE § 601A.17 (1981).

268. IOWA CODE § 601A.17(2) (1981). The petition may also be filed in the county where the respondent is "required in the order to cease or desist from a discriminatory or unfair practice or to take other affirmative action . . . ." *Id.*

269. IOWA CODE § 601A.17(3) (1981).

270. The employer may file a petition for judicial review of the Commission's order within thirty days of its issuance. *See infra* text accompanying notes 275-80.

271. *See* IOWA CODE § 601A.17(6) (1981). *See also* text accompanying notes 300-33.

272. *See supra* note 270.

the petition for enforcement is brought."[273] Compared to a judicial review proceeding, the court's inquiry in an enforcement action, brought after the respondent's right to appeal lapses, is extremely narrow.[274] Therefore, the Commission ordinarily commences an enforcement proceeding after the respondent has lost its opportunity to appeal the Commission's order.

10. *Judicial Review of Commission Contested Case Decisions*

a. *Mechanics of Obtaining Judicial Review.* The Iowa Administrative Procedure Act is the exclusive mechanism for obtaining judicial review of agency action.[275] A person who is aggrieved by a final decision in a contested case may file a petition for judicial review in the appropriate district court.[276] The petition must be filed within thirty days after the issuance[277] of the agency's final decision.[278] Alternatively, if the petitioner first files an application for rehearing with the agency,[279] the petition for judicial review must be filed in court within thirty days after the application is denied or deemed denied.[280]

The petitioner must mail or serve copies of the petition for judicial review on all parties named in the petition and all parties of record in the contested case below.[281] This must be done within ten days after the petition is filed.[282] It is no longer necessary to mail file stamped copies of the

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273. Iowa Code § 601A.17(10) (1981).

274. *Compare* IOWA CODE § 601A.17(10) (1981) (enforcement action) *with* IOWA CODE § 17A.19(8) (1981) (judicial review of contested case).

275. Salsbury Laboratories v. Iowa Dep't of Envtl. Quality, 276 N.W.2d 830, 833-35 (Iowa 1979); IOWA CODE § 17A.19 (1981).

276. Such a petition may be filed in Polk County district court "or in the district court for the county in which the petitioner resides or has its principal place of business." IOWA CODE § 17A.19(2) (1981).

277. *See* IOWA CODE §§ 17A.19(3) & 601A.17(1) (1981). The Commission issues its final decision on the date in which it mails copies of its order, by certified mail, to the parties of record in the contested case.

278. IOWA CODE § 17A.19(3) (1981).

279. IOWA CODE § 17A.16(2) (1981).

280. IOWA CODE §§ 17A.16(2) & .19(3) (1981). An application for rehearing is deemed denied if the agency does not grant the application "within twenty days of its filing." IOWA CODE § 17A.16(2) (1981). *See also supra* text accompanying notes 177-80.

281. Under Iowa Code § 17A.19(2) (1979), mailing a file stamped copy of the petition for judicial review to all proper parties was necessary to vest the court with subject-matter jurisdiction over the appeal. Personal service, in the absence of mailing, was not sufficient. *See* Neumeister v. City Dev. Bd., 291 N.W.2d 11, 13-14 (Iowa 1980). After *Neumeister* the legislature amended section 17A.19(2) to permit parties to commence an action for judicial review either by mailing or by personal service of copies of the petition for judicial review. *See* Act of June 13, 1981, ch. 24, § 1, 1981 Iowa Acts 128-29 (to be codified at IOWA CODE § 17A.19(2)). *See also infra* text accompanying note 281.

282. Act of June 13, 1981, ch. 24, § 1, 1981 Iowa Acts 128-29 (to be codified at IOWA CODE § 17A.19(2)).

petition to the agency and the other parties.[283] Moreover, the petitioner may now mail or serve the petition on the parties' attorneys of record.[284] If the petitioner mails the petition, then he or she must also file an affidavit showing proof of mailing.[285]

The petition for judicial review must name the agency as a respondent.[286] At a minimum, the petition must "contain a concise statement of: (a) The nature of the agency action which is the subject of the petition; (b) The particular agency action appealed from; (c) The facts on which venue is based; (d) The grounds on which relief is sought; (e) The relief sought."[287]

The agency and other named respondents must serve an answer, motion, or special appearance within twenty days after the mailing of the petition to the respondents.[288] The Iowa Rules of Civil Procedure apply to judicial review of agency contested case decisions "[e]xcept to the extent that they are inconsistent with" the provisions of the Iowa Administrative Procedure Act.[289] The parties to the judicial review proceeding, or the court on its own motion, may request a schedule for the future conduct of the proceeding.[290]

The Commission must transmit the entire record of the contested case to the reviewing court within thirty days after the filing of the petition.[291] Judicial review is based upon the entire record made before the agency.[292] However, a party may apply to the court for leave to present additional evidence before the agency. Such an application must be made before the date set for the hearing on the appeal. The court will not grant the application unless (1) "the additional evidence is material" and (2) "there were good reasons for" the failure to present the evidence in the prior contested case proceeding.[293] If the application is granted, the court must remand the action to the agency for the presentation of the additional evidence.[294]

The mere act of filing a petition for judicial review does not stay the Commission's order: the petitioner must apply to the Commission or the reviewing court for a stay.[295] In *Public Employment Relations Board v.*

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283. *See supra* note 281.

284. *See* Act of June 13, 1981, ch. 24, § 1, 1981 Iowa Acts 128-29 (to be codified at IOWA CODE § 17A.19(2)).

285. *Id.*

286. IOWA CODE § 17A.19(4) (1981).

287. *Id.*

288. IOWA R. CIV. P. 332.

289. IOWA R. CIV. P. 331.

290. IOWA R. CIV. P. 333(b).

291. IOWA CODE § 17A.19(6) (1981).

292. *See* Farmers Elevator Co., Kingsley v. Manning, 286 N.W.2d 174, 176 (Iowa 1979); IOWA CODE § 17A.19(7) (1981).

293. IOWA CODE § 17A. 19(7) (1981).

294. *Id.*

295. IOWA CODE § 17A.19(5) (1981).

Stohr,[296] the court discussed the criteria to be considered in granting or dissolving a stay order. The four-part test adopted by the federal courts was noted: First, " '[h]as the petitioner made a strong showing that' " he will prevail on the merits; second, will the petitioner suffer irreparable injury if the stay is denied; third, would a stay order substantially harm other interested parties; and fourth " '[w]here lies the public interest?' "[297] The court in *Stohr* approved the use of these four factors but cautioned that they were not necessarily determinative under the Iowa Administrative Procedure Act.[298] Iowa courts may consider additional factors as well.[299] Furthermore, it appears that the four factors enumerated above need not be accorded equal weight; instead, "the effect and importance of each guideline relative to another depends upon the circumstances of each case."[300]

b. *Scope of Judicial Review.* The district court functions in an appellate capacity when it reviews an agency's final decision in a contested case.[301] Judicial review of a contested case decision is not de novo but at law;[302] it is governed by the criteria set forth in section 17A.19(8):

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant any other appropriate relief from the agency action, equitable or legal and including declaratory relief, if substantial rights of the petitioner have been prejudiced because the agency action is:
>
> a. In violation of constitutional or statutory provisions;
>
> b. In excess of the statutory authority of the agency;
>
> c. In violation of an agency rule;
>
> d. Made upon unlawful procedure;
>
> e. Affected by other error of law;
>
> f. In a contested case, unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole; or
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> g. Unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion.[303]

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296. 279 N.W.2d 286 (Iowa 1979).

297. *Id.* at 291 (quoting Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958)).

298. Public Employment Relations Bd. v. Stohr, 279 N.W.2d at 291. The court emphasized that Iowa's stay provision, IOWA CODE § 17A.19(5) (1981), is different from the federal provision. 5 U.S.C. § 705 (1976). The latter authorizes a stay "to the extent necessary to prevent irreparable injury." *Id.* In contrast, the Iowa provision does not expressly require a showing of irreparable injury.

299. Public Employment Relations Bd. v. Stohr, 279 N.W.2d at 291.

300. Northwestern Bell Tel. Co. v. Iowa State Commerce Comm'n, No. 65641 Equity, slip op. at 6 (Iowa Dist. Ct., Scott County, Apr. 14, 1982), *reprinted* in A. BONFIELD, IOWA STATE ADMINISTRATIVE LAW at 52 (Supp. 1982).

301. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 165.

302. Cook v. Iowa Dep't of Job Service, 299 N.W.2d 698, 701 (Iowa 1980). *Cf.* Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 730-32 (de novo review by court proper in proceedings in process prior to effective date of Iowa Administrative Procedure Act).

303. IOWA CODE § 17A.19(8) (1981).

The language referring to prejudice to a petitioner's substantial rights is analogous to the "harmless error" rule.[304] It indicates that the court should not interfere with an agency's action "unless the complaining party has in fact been harmed."[305]

The official actions of the Commission are clothed with a rebuttable presumption of impartiality and regularity.[306] The challenger carries the burden of rebutting this presumption.[307]

i. *Scope of judicial review of facts.* The Commission's findings of fact are subject to judicial review in accordance with the "substantial evidence" test.[308] This test has been described as follows:

> Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion [citation omitted]. While the substantiality of evidence must take into account whatever in the record fairly detracts from its weight, [citation omitted] the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being unsupported by substantial evidence[309] [citations omitted].

This is a very deferential standard for judicial review. Reviewing courts have been instructed that:

> The [agency], not the court, weighs the evidence. The court should broadly and liberally apply those findings in order to uphold rather than defeat the [agency's] decision [citation omitted]. The question on judicial review is not whether the evidence might support a different finding but whether the evidence supports the findings the [agency] actually made. Hence the findings of the [agency] are binding on appeal unless a contrary result is demanded as a matter of law[310] [citation omitted].

In essence, then, an agency's findings of fact should be upheld unless the weight of the contrary evidence is so overwhelming that no reasonable person could have found what the agency found.

In *Iowa State Fairgrounds Security v. Iowa Civil Rights Commission,*[311] the Commission reversed the hearing officer's proposed decision.[312] The Commission apparently "believed the evidence of discrimination had

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304. City of Des Moines v. Public Employment Relations Bd., 275 N.W.2d 753, 759 (Iowa 1979).

305. *Id.*

306. Anstey v. Iowa State Commerce Comm'n, 292 N.W.2d 380, 390 (Iowa 1980); City of Janesville v. McCartney, 326 N.W.2d 785, 787 (Iowa 1982).

307. *Id.*

308. IOWA CODE § 17A.19(8)(f) (1981).

309. Briggs v. Board of Directors, 282 N.W.2d 740, 743 (Iowa 1979).

310. Ward v. Iowa Dep't of Transp., 304 N.W.2d 236, 237-38 (Iowa 1981).

311. 322 N.W.2d 293 (Iowa 1982).

312. *Id.* at 294.

greater probative force than the hearing officer gave it."[313] In applying the substantial evidence test on judicial review, the district court "accorded the hearing officer's decision 'particular attention' because of the Commission's failure to explain why it disagreed with him.' "[314] The Supreme Court rejected this analysis:

> Nothing in the [Iowa Administrative Procedure Act] supports giving the hearing officer's proposed decision elevated status when, as in the present case, the officer and the agency disagree. The statute gives the agency an unfettered right to find the facts in the first instance. It makes the hearing officer an adjunct of the agency rather than an independent decisionmaker.
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> . . . .
>
> Even when credibility is involved, the agency, not the hearing officer, is charged with the authoritative responsibility to decide what the evidence means under the governing statute.[315]

The hearing officer's proposed decision is part of the record for determining whether an agency finding of fact is supported by substantial evidence.[316] While "[t]he hearing officer's decision is not evidence, . . . his findings may affect its weight when credibility issues are involved."[317] The "court reviews the final agency decision, not the hearing officer's proposal."[318] So in applying the substantial evidence test it is erroneous to grant a contrary proposed decision "enhanced weight" to the derogation of the agency's findings. "The hearing officer's decision is simply one factor to be considered. . . ."[319]

2. *Scope of judicial review of questions of law.* Questions of fact involve the "who, what, why, when, and how" of the contested case. In contrast, questions of law revolve around the legal meaning of statutory terms, the appropriate standards for evaluating the evidence, and so forth. The deferential scope of judicial review which is appropriate for the agency's fact findings is not necessarily appropriate for the agency's legal conclusions.

Courts are the ultimate arbiters of questions involving statutory construction. They "may give deference to, but are not bound by, the agency's [statutory] interpretation."[320] When the agency's interpretation of a statute has been consistently maintained over a considerable period, or when it appears that the legislature has acquiesced in the agency's long-standing inter-

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313. *Id.*
314. *Id.*
315. *Id.* at 294-95.
316. *Id.* at 294.
317. *Id.* at 295.
318. *Id.*
319. *Id.* (citing with approval Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474, 496-97 (1951)).
320. American Home Prod. Corp. v. Iowa State Bd. of Tax Review, 302 N.W.2d 140, 142 (Iowa 1981).

pretation, then judicial deference might be more appropriate.[321] Nevertheless, even then the court is free to substitute its legal interpretation for that of the agency.[322]

3. *Scope of judicial review of mixed questions of law and fact.* Frequently, courts must review agency determinations which are neither pure questions of fact nor pure questions of law. Agencies invariably apply legal concepts to undisputed or established facts;[323] these determinations raise mixed questions of law and fact. Some examples would include the Commission's determination that a particular disability was or was not covered by the Iowa Civil Rights Act;[324] that a proposed accommodation of a complainant's disability was reasonable;[325] or that a proposed accommodation would impose an undue hardship on the employer's operation.[326]

In Iowa, the courts tend to review these questions in accordance with the deferential substantial evidence test.[327] Courts thereby preserve an agency's "reasonable range of informed discretion" in applying legal concepts to established facts.[328] This deferential "test assures respect [for] the expertise of the administrative tribunal and helps promote uniform application of the law."[329]

In *Foods, Inc. v. Iowa Civil Rights Commission,*[330] the court reviewed the Commission's determination that the employer did not reasonably accommodate the complainant's physical disability, but could have done so without incurring any undue hardship.[331] Without any elaborate discussion of the appropriate scope of judicial review, the court simply held that the Commission's determination was "supported by substantial evidence."[332]

This deferential scope of judicial review for the Commission's "reasonable accommodation and undue hardship" determinations is grounded in logic and experience. The Commission has processed disability discrimination complaints since the 1972 amendment to Chapter 601A.[333] The Commission has specifically applied the reasonable accommodation and undue

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321. Churchill Truck Lines v. Transportation Regulation Bd., 274 N.W.2d 295, 297-98 (Iowa 1979).

322. *Id.* at 298.

323. *See generally* 4 K. Davis, Administrative Law Treatise 30.00 (1st ed. 1958 & Supp. 1980).

324. *See infra* text accompanying notes 452-568.

325. *See* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.

326. 240 Iowa Admin. Code § 6.2(6) (1980).

327. *See* City of Davenport v. Public Employment Relations Bd., 264 N.W.2d 307, 311-13 (Iowa 1978); *Cf.* Armstrong's Inc. v. Iowa Dep't of Rev., 320 N.W.2d 623 (Iowa 1982).

328. City of Davenport v. Public Employment Relations Bd., 264 N.W.2d at 312-13; *see also* Peoples Memorial Hosp. v. Civil Rights Comm'n 322 N.W.2d 87, 92 (Iowa 1982).

329. City of Davenport v. Public Employment Relations Bd., 264 N.W.2d at 312.

330. 318 N.W.2d 162 (Iowa 1982).

331. *Id.* at 166-67.

332. *Id.* at 167.

333. *See supra* note 7.

hardship concepts since January 1975, when it first enacted rules governing disability discrimination in employment.[334] Since then, the Commission has processed hundreds of disability complaints. It has acquired a wealth of administrative expertise in this area. It would be difficult to find a court which had more experience than the Commission in applying the reasonable accommodation concept to particular disability cases. Furthermore, it is desirable that this legal concept be applied uniformly to the particular facts of the numerous disability complaints. Such uniformity is advanced if the Commission's determination is reviewed pursuant to the substantial evidence test. If the determination is subject to the more stringent scope of review applicable to pure questions of law, then the court might, by reviewing *de novo*, apply the legal concept to a particular disability case in a manner inconsistent with the agency's normal practice.

c. *Appeal of District Court Decisions to the Iowa Supreme Court.* A party who is aggrieved by the district court's final decision in a judicial review proceeding may obtain further review by appealing to the Iowa Supreme Court.[335] The appeal may be taken regardless of the amount in controversy.[336]

The court's duty under the Iowa Administrative Procedure Act is to correct any errors of law made by the district court when it reviewed the agency's decision.[337] The court does so by applying anew the criteria of section 17A.19(8) to the agency's decision in the contested case.[338]

B. *The Right to Sue Option*

Prior to the 1978 amendment to the Iowa Civil Rights Act,[339] complainants did not have a choice of forums in which to pursue their complaints under the Act: the Commission process was the only available tribunal. Now, eligible complainants can obtain a right-to-sue letter[340] from the Commission which allows them to file their action directly in district court. In so

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334. *See infra* text accompanying notes 492-94.

335. IOWA CODE § 17A.20 (1981).

336. *Id. Contra* IOWA R. APP. P. 3. It should be noted that these principles also apply to appeals of Commission actions other than a contested case decision.

337. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 164-65.

338. Hoffman v. Iowa Dep't of Transp., 257 N.W.2d 22, 25 (Iowa 1977).

339. Act of June 29, 1978, ch. 1179, § 1, 1978 Iowa Acts 851 (codified at IOWA CODE § 601A.16 (1981)).

340. The phrase "right to sue" . . . is synonymous with the technically correct but cumbersome term "administrative release." The "right to sue" phrase is preferred because it is more descriptive and familiar due to its use in [T]itle VII of the United States Civil Rights Act of 1964, under which complainants are entitled to obtain a right to sue letter 120 days after filing a complaint with the EEOC pursuant to 42 U.S.C. section 2000e-5(f)(1) (1976).

Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 IOWA L. REV. 720, 722 n.24 (1980).

doing they can bypass the agency process. This article will concern itself with some of the mechanics of that process—the rationale, the ramifications, and the legislative history of the Iowa right-to-sue provision have already been thoroughly explored elsewhere.[341]

1. *Obtaining the Right-to-Sue Letter*

The right-to-sue option is triggered in the same manner as the Commission process: the complainant must first file a timely complaint with the Iowa Civil Rights Commission.[342] An untimely-filed complaint is void.[343]

The complainant's prerogative to obtain a right-to-sue letter cannot be exercised until the complaint has been on file with the Commission for at least one hundred twenty days.[344] This subjects all complainants to the Commission's jurisdictional review process.[345] After the one hundred twenty day period elapses the complainant may request a right-to-sue letter from the Commission.[346] The Commission must grant the complainant's request unless (1) the internal hearing officer has rendered a no probable cause decision, (2) a conciliation agreement has been executed, or (3) a notice of contested case hearing has been served upon the respondent.[347] It should be noted that the right-to-sue provision does not address the effect of other final agency actions. For instance, this provision does not address the implications of an administrative closure,[348] a satisfactory adjustment agreement,[349] or a dismissal for lack of jurisdiction.[350] Probably the key factor is the timing of these final agency actions. If they precede a probable cause or no probable cause finding, these agency actions, for purposes of the right-to-sue option, would appear to be functionally akin to a no probable cause finding. The Commission has exhausted its efforts with respect to such complaints. Thus, the agency should probably decline to issue right-to-sue letters in such cases. If the final agency actions are taken *after* a probable cause finding, however, the complainant may argue that the legislature did not intend to foreclose the right-to-sue option. For a satisfactory adjustment agreement, the important criterion should be whether the complainant consents thereto.[351] If so, the agreement is akin to an executed conciliation

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341. *See id.*
342. IOWA CODE § 601A.16(1) (1981).
343. IOWA CODE § 601A.15(12) (1981).
344. IOWA CODE § 601A.16(1)(b) (1981).
345. *See supra* text accompanying notes 36-38.
346. IOWA CODE § 601A.16(2) (1981); 240 IOWA ADMIN. CODE § 1.5(4) (1978).
347. IOWA CODE § 601A.16(2) (1981).
348. 240 IOWA ADMIN. CODE § 1.5(1)(e) (1982).
349. 240 IOWA ADMIN. CODE §§ 1.1(6)(c) (1981) & 1.5(1)(e) (1982). *See also supra* text accompanying notes 113-23.
350. 240 IOWA ADMIN. CODE § 1.1(6)(f) (1981). *See also supra* text accompanying notes 36-44.
351. 240 IOWA ADMIN. CODE § 1.1(6)(c) (1981) ("The term 'satisfactorily adjusted' shall

agreement. If the complainant does not consent to the agreement, however, he or she may argue that the right-to-sue option should remain open.

In summary, at least six conditions precedent must be satisfied in order to obtain a right-to-sue letter. They are: (1) the complaint must have been timely filed; (2) it must have been on file with the Commission for no less than one hundred twenty days, during which period there has not been (3) a no probable cause finding, (4) an executed conciliation agreement, or (5) a notice of contested case hearing, and (6) the complainant must request that the Commission issue a right-to-sue letter. In practice, there is also a seventh limitation: a complainant who obtains a right-to-sue letter is barred from filing an action in district court more than one year after filing the original complaint with the Commission.[352] Therefore, the complainant must allow the complaint to remain on file with the Commission no less than one hundred twenty days but no more than one year. Once the Commission issues a right-to-sue letter to the complainant, it cannot take any further action to process the complaint.[353]

2. *Invoking the District Court's Jurisdiction*

The complainant must commence an action in district court no later than ninety days after the issuance of the right-to-sue letter.[354] This ninety day limitation period, however, will be further shortened if the complaint has been on file with the Commission for one year during this period. In that event, the complainant's district court action is barred unless it is commenced within one year from the filing of the complaint.[355] A complainant should be extremely wary about requesting a right-to-sue letter when his or her complaint has been on file with the Commission for nearly one year.

The complainant's district court action is commenced by filing a petition with the court.[356] Proper venue lies in the county in which the respondent resides or has its principal place of business, or in the county in which the alleged discriminatory act occurred.[357]

3. *Discovery*

After the commencement of an action in district court, the complainant may utilize the discovery techniques permitted by the Iowa Rules of Civil Procedure.[358] While discovery is often the critical phase in the litigation,

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mean that the complainant has indicated in writing that the complaint has been resolved to his or her satisfaction, and that no further action is desired from the commission . . . .").

352. Iowa Code § 601A.16(3) (1981).
353. *Id.*
354. *Id.*
355. *Id.*
356. Iowa R. Civ. P. 48.
357. Iowa Code § 601A.16(4) (1981).
358. Iowa R. Civ. P. 121-34.

however, a detailed discussion of discovery tactics in employment discrimination cases is far beyond the scope of this article.[359] Some familiarity with disability issues is nevertheless essential in order to engage in meaningful discovery in this type of employment discrimination case.

a. *Is the Disability Protected Under Chapter 601A?* This is a threshold question which will be thoroughly analyzed later.[360] For discovery purposes, an employer will want to obtain complete information concerning the complainant's physical or mental impairments, medical treatment and history thereof, and the limitations the complainant's employability posed by such impairments. The employer may request that the complainant submit to a physical or mental examination.[361] Deposing the complainant and his or her treating physician might also be advisable, although the physician-patient privilege may limit the scope of discovery.[362] Ultimately, the employer may obtain summary judgment if the complainant's disability is not deemed to be within the ambit of the Iowa Civil Rights Act's protection.[363]

Even if the complainant's actual disability is not the type which is protected by the Act, the complainant may still preserve his cause of action by establishing that the employer *regarded* the complainant's disability as more serious than it actually was.[364] The complainant will want to probe the perceptions of the employer's decisionmakers. For instance, a complainant may be rejected for a job merely because he or she once was institutionalized for mental illness. If the employer's adverse action was based in some measure on the fear of hiring a former mental patient, the complainant's disability—even if it no longer existed—would be protected by the Act and the Commission rules promulgated thereunder.[365]

b. *Could the Employer Reasonably Accommodate the Complainant's Disability?* The complainant's ultimate objective is to prove that he or she could have satisfactorily performed the essential duties of the job—despite the handicap—if given a reasonable accommodation.[366] Of course, if the complainant could have competently performed the job without *any* accommodation, the case will be much stronger. Nevertheless, for purposes of this discussion it will be assumed that the complainant would require some kind of accommodation in order to satisfactorily perform the job in question.

The complainant must first acquire information about the particular

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359. *See* DANNER, PATTERN DISCOVERY: EMPLOYMENT DISCRIMINATION (1981); RUZICHO, CIVIL RIGHTS LITIGATION (1976 and Supp. 1981).

360. *See infra* text accompanying notes 452-568.

361. IOWA R. CIV. P. 132.

362. IOWA CODE § 622.10 (1981); IOWA R. CIV. P. 122(a).

363. IOWA R. CIV. P. 237-40. *See also infra* text accompanying notes 452-568.

364. 240 IOWA ADMIN. CODE § 6.1 (1979). *See also infra* text accompanying notes 494-98, 518-19.

365. *Id.*

366. *See* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167, 168-69 (Iowa 1982); 240 IOWA ADMIN. CODE § 6.2(6) (1980).

job and the employer's potential ability to accommodate the complainant's handicap. Essential and peripheral duties of the position should be distinguished. Perhaps the complainant could perform the essential but not some peripheral job duties. In that event, a reasonable accommodation might simply involve transferring the peripheral job duties to co-workers.

The complainant must ascertain whether a reasonable accommodation is structurally or technologically feasible. It is helpful if the cost of the accommodation can be estimated. The complainant may, in the course of discovery, propose various accommodations to the employer so as to elicit the employer's reasons for not implementing them.

Concomitantly, the complainant could ask whether the employer has accommodated other disabled employees. This line of inquiry might reveal that the employer's policy is *not* to accommodate employees' disabilities. Alternatively, it might reveal the feasibility of accommodating the complainant's disability, especially if the disabilities are comparable.

On the other hand, the employer will want to discover whether the disabled complainant was qualified to perform the position even if accorded a reasonable accommodation. The complainant might not be qualified by training or experience to perform the job. Or the complainant's physical or mental impairment may itself disqualify him from consideration—for instance, a blind applicant for a bus driver's position. Perhaps the complainant was formerly performing the job acceptably but could no longer do so because the disability had worsened. The employer might also discover that the complainant unsatisfactorily performed similar jobs in the past.

The reasonable accommodation concept defies generalizations because it is so factually specific. It is therefore impossible to exhaust the myriad discovery possibilities in disability discrimination cases. Nevertheless, the parties must be able to recognize the basic issues at the discovery stage in order to adequately prepare for trial.

c. *Would an Otherwise Reasonable Accommodation Impose an Undue Hardship on the Employer?* Suppose the complainant learns that he or she could have competently performed the job given some technologically feasible accommodation. The next question is whether that proposed accommodation would impose an undue hardship on the employer. The burden of proof on this issue rests with the employer.[367] Nevertheless, the discovery process may provide the complainant with ammunition to pierce the employer's defense.

Undue hardship is essentially a question of cost, degree of inconvenience or disruption. Both parties have an interest in estimating the cost of the potential accommodation. The complainant will want to establish that the cost is reasonable in light of the employer's size, revenue, budget, and

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367. *See infra* text accompanying notes 937-49, 970-79.

other relevant factors.[368] The complainant will also want to show that the accommodation would merely be, at worst, inconvenient but not require a substantial or disruptive alteration of the employer's *modus operandi*.[369]

The employer's interest will of course run in the opposite direction. The employer will want to show that the proposed accommodation would be prohibitively expensive given its revenues or projection of economic trends. Alternatively, the employer may establish that the accommodation would breed inefficiency or dangerous safety risks.[370] If the employer actually tried, albeit unsuccessfully, to accommodate the disabled complainant, this might be probative of the undue hardship of further accommodation efforts.

Again, it is difficult to generalize about this issue. But the enlightened party will have undue hardship questions in mind during discovery.

d. *Is the Commission's Investigative File Discoverable?* Depending on how long the complaint has been on file with the Commission when the complainant requests a right-to-sue letter, an investigation may or may not have been commenced. If the letter is requested immediately after the minimum one hundred twenty day period, it is doubtful whether the complainant's file will contain much investigative material. The longer the complainant defers the right-to-sue request, the more likely that an investigation will have been instituted. For purposes of this discussion, it will be assumed that the Commission's investigator has obtained some valuable evidence bearing on disability discrimination issues. The question now presented is whether the complainant's investigative file can be discovered by either party in the district court action.

The Commission staff is required, with some exceptions, to preserve the confidentiality of information gathered during the investigation.[371] The right-to-sue provision does not address the confidentiality issue.[372] One commentator has voiced concern that the Commission's investigative file might be privileged and therefore beyond the scope of discovery in right-to-sue actions.[373]

The confidentiality duty is couched as follows:

> The members of the commission and its staff shall not disclose the filing of a complaint, the information gathered during the investigation, or the endeavors to eliminate such discriminatory or unfair practice by conference, conciliation, and persuasion, unless such disclosure is made in connection with the conduct of such investigation.[374]

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368. 240 IOWA ADMIN. CODE § 6.2(6)(b)(1)-(3) (1980).
369. *See infra* text accompanying notes 829-32.
370. *See infra* text accompanying notes 833-37.
371. IOWA CODE § 601A.15(4) (1981).
372. IOWA CODE § 601A.16 (1981).
373. *See* Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 IOWA L. REV. at 744-45; IOWA R. CIV. P. 122(a).
374. IOWA CODE § 601A.15(4) (1981).

The aforementioned provision does not identify the population to which the Commission's information must not be disclosed. Obviously, the parties to the complaint will be aware of its filing.[375] They will also be cognizant of the proposals exchanged during conciliation. Finally, the Commission's disclosure of information to the parties during investigation will often expedite that process by "present[ing] the parties with specific facts for them to corroborate or rebut."[376]

By creating the right-to-sue option, the legislature casts the complainant in the role of a "private attorney general" whose purpose "in enforcing the ban on discrimination is parallel to that of the Commission itself."[377] It would be anomalous to deprive such a party—or the employer—access to the Commission's investigative file. Surely the legislature did not establish the right-to-sue procedure intending to encourage fruitless litigation.[378] If the parties can obtain access to the Commission's investigative file through the discovery process, they will be more aware of the strengths and weaknesses of their respective positions. Oftentimes this knowledge stimulates the parties to settle their dispute.[379]

The Commission recently requested an Iowa Attorney General's opinion as to whether section 601A.15(4) shielded its investigative files from disclosure to parties in a right-to-sue action. The opinion reasoned that section 601A.15(4) was not intended to create an evidentiary privilege as that concept was understood at common law.[380] Therefore, if an action were commenced in district court pursuant to the right-to-sue provision, the parties thereto could serve upon the Commission a request for production of the investigative file, and the Commission could lawfully satisfy such a request.[381]

4. *Trial of District Court Actions*

This article does not purport to provide a nuts-and-bolts outline for litigating lawsuits in district court. Instead, three of the most salient differences between this forum and the agency forum will merely be identified. Complainants and their counsel should consider the implications for their causes of action posed by these differences before they become committed to a forum.

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375. *See supra* text accompanying notes 34-35.

376. Equal Employment Opportunity Comm'n v. Associated Dry Goods Corp., 449 U.S. 590, 600-01 (1981).

377. Christianburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. 412, 421 (1978).

378. *See* IOWA CODE § 601A.16(5) (1981).

379. Equal Employment Opportunity Comm'n v. Associated Dry Goods Corp., 449 U.S. at 601.

380. 1980 Iowa Att'y Gen. Rep. 851.

381. *Id. See* IOWA R. CIV. P. 129-30.

First, a district court action is tried to a judge or a judge and jury.[382] Either party to the action may demand a jury trial.[383] It should be noted that the Commission and its hearing officers will have more experience in evaluating employment discrimination cases than their judicial counterparts. Given the added complexity of disability discrimination litigation, this may be a significant consideration.[384] Moreover, the Commission and its hearing officer might be more sensitive to the subtlties of employment discrimination based on their experience in enforcing Chapter 601A.

Second, the Iowa Rules of Civil Procedure govern the litigation of district court actions.[385] They are considerably more detailed and formal than the procedures governing contested case hearings.

Third, the rules of evidence in district court actions are much more stringent than those pertaining to contested case hearings. The latter liberally admit evidence unless it is patently irrelevant, immaterial, or cumulative.[386] In contrast, district court actions utilize common law rules of evidence which are exceedingly complex and prone to excluding hearsay testimony. This could be a significant factor for a complainant whose case would be strengthened by probative hearsay evidence. Such evidence would be admissible in an administrative hearing but might be excluded in a civil trial unless it came within one of the many exceptions to the hearsay rule.[387] The complainant has the ultimate burden of proving the existence of unlawful discrimination.[388] The complainant whose case relies in some significant measure on hearsay evidence may find the administrative forum to be the more advantageous of the two.

5. *Remedies for Unlawful Discriminatory Acts*

If the district court finds that unlawful discrimination has occurred, it has the same broad discretion to fashion an appropriate remedy as that enjoyed by the Commission.[389] The extent of that discretion has already been examined and will not be repeated here.[390] However, two potential remedies, awards of attorney fees and class action damages, deserve fuller explication.

a. *Awards of Attorney Fees.* The complainant who prevails in a district court action should ordinarily be awarded reasonable attorney fees. The

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382. Iowa R. Civ. P. 177-78.

383. Iowa R. Civ. P. 177(b).

384. The Commission may utilize its "experience . . . and specialized knowledge . . . in the evaluation of the evidence." Iowa Code § 17A.14(5) (1981).

385. Iowa R. Civ. P. 1.

386. Iowa Code § 17A.14(1) (1981).

387. *See, e.g.*, Iowa Code §§ 622.19, .20, .23, .27, .28 (1981).

388. Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733; Iron Workers Local No. 67 v. Hart, 191 N.W.2d at 772.

389. Iowa Code § 601A.16(5) (1981).

390. *See supra* text accompanying notes 191-258.

Iowa Civil Rights Act expressly authorizes such an award.[391]

Complainants and their counsel who remove a complaint from the Commission in order to proceed in district court act as " 'private attorney[s] general,' "[392] enforcing a statute embodying a vital state policy.[393] If successful, these complainants serve the public interest by eradicating unlawful employment discrimination. Under comparable federal statutes, the United States Supreme Court has held that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[394] Any other result would discourage complainants and their counsel from obtaining a right-to-sue letter.

The court has considerable discretion in determining the appropriate attorney's fee. The leading case establishing the factors to be considered is *Johnson v. Georgia Highway Express, Inc.*[395] There the court listed twelve criteria: (1) the time and labor expended by counsel; (2) the novelty and difficulty of the issues presented; (3) counsel's skill and level of preparation; (4) preclusion of other employment because of counsel's involvement with the case; (5) the customary fee in the particular community; (6) whether counsel's fee is fixed or contingent; (7) time constraints imposed by the client or circumstances of the case; (8) amount of damages at stake and the results obtained; (9) counsel's experience, reputation and ability; (10) the "undesirability" of the case;[396] (11) the nature and length of counsel's professional relationship with the client; and (12) fee awards in similar cases.[397] Counsel has the burden of making a record showing entitlement to attorney fees.[398]

The right-to-sue provision expressly authorizes the court to award reasonable attorney fees and costs to an employer "when the court finds that the complainant's action was frivolous."[399] Two important factors distinguish this award from that given to a prevailing complainant: (1) the employer is obviously not the legislature's "chosen instrument" to enforce the duties imposed by the Iowa Civil Rights Act;[400] and (2) the fee is not

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391. IOWA CODE § 601A.15(8)(a)(8) (1981), applicable to right-to-sue actions pursuant to IOWA CODE § 601A.16(5) (1981).

392. Christianburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. at 416 (quoting Newman v. Piggie Parks Enter., Inc., 390 U.S. 400, 402 (1968)).

393. Franklin Mfg. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d 829, 833 (Iowa 1978).

394. Newman v. Piggie Parks Enter., Inc., 390 U.S. 400, 402 (1968). *See also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975).

395. 488 F.2d 714 (5th Cir. 1974).

396. The court was cognizant of the obloquy and ostracism visited upon southern attorneys who represented black civil rights plaintiffs. *Id.* at 719. This would not be a significant factor in a disability discrimination case brought in Iowa.

397. *Id.* at 717-19.

398. *Id.* at 720.

399. IOWA CODE § 601A.16(5) (1981).

400. Christianburg Garment Co. v. Equal Employment Opportunity Comm'n, 434 U.S. at 418.

awarded against a violator of state law.[401] Therefore, such an award to the employer should be justified only if the complainant's "action was frivolous, unreasonable, or without foundation" or the complainant "continued to litigate after it clearly became so."[402] It should be noted that the employer does not have to establish that the complainant's action was "brought in subjective bad faith."[403] If the employer makes the requisite showing of entitlement, its reasonable attorney fees will presumably be calculated with reference to many of the factors enunciated in *Johnson v. Georgia Highway Express, Inc.*[404]

b. *Are Class Action Remedies Applicable?* The Iowa Rules of Civil Procedure provide for class action litigation.[405] There is nothing in the right-to-sue provision to suggest that the Iowa Rules of Civil Procedure are inapplicable to the litigation of right-to-sue actions in district court. Consequently, it could be argued that complainants who obtain right-to-sue letters can bring class actions under the rules of civil procedure. One commentator has urged that the right-to-sue provision should be so construed.[406]

An argument to the contrary can also be made. The court's authority to grant relief under the right-to-sue procedure is coterminous with the Commission's remedial authority.[407] In *Quaker Oats Co. v. Cedar Rapids Human Rights Commission,*[408] the court may have preempted the argument that Chapter 601A clothes the Commission with authority to award damages to a class.[409] If this limitation is incorporated in the right-to-sue provision,[410] then the district court could also be precluded from entertaining a class action. An employer might argue that the limitation on the court's ability to grant relief is specific,[411] whereas the applicability of the Iowa Rules of Civil Procedure is merely implicit in the right-to-sue provisions.[412] When statutory provisions are inconsistent, general provisions ordinarily defer to the specific.[413] If accepted, this rule of statutory construction would prohibit the district court from invoking a class remedy.

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401. *Id.*
402. *Id.* at 421-22.
403. *Id.* at 421.
404. 488 F.2d 714 (5th Cir. 1974).
405. IOWA R. CIV. P. 42.1-.20.
406. Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law,* 65 IOWA L. REV. at 743.
407. IOWA CODE §§ 601A.15(8), .16(5) (1981).
408. 268 N.W.2d 862 (Iowa 1978).
409. *Id.* at 867-68. *See supra* text accompanying notes 252-58.
410. IOWA CODE § 601A.16 (1981).
411. IOWA CODE § 601A.16(5) (1981).
412. IOWA CODE § 601A.16 (1981); IOWA R. CIV. P. 1.
413. IOWA CODE § 4.7 (1981).

6. *Appeals of District Court Judgments*

The Iowa Rules of Civil Procedure provide for various postjudgment motions designed to obviate the necessity for an appeal.[414] Assuming that a party unsuccessfully exhausts or foregoes these opportunities, the next question concerns the availability of an appeal.

It is clear that appeals of district court judgments pursuant to section 601A.16 are governed by the Iowa Rules of Appellate Procedure rather than the Iowa Administrative Procedure Act. The latter applies only to judicial review of "agency action."[415] The district court is by definition not an "agency."[416]

Significantly, an appeal of a district court's final judgment can be maintained only if the amount in controversy exceeds three thousand dollars.[417] A complainant who knows at the outset that his potential pecuniary damages will not exceed this amount should carefully consider whether the district court is the most advantageous forum.

The scope of review accorded to the district court's findings of fact will depend upon whether the case was tried at law or in equity.[418] If tried in equity the appellate court reviews the case de novo; it may grant some weight to the lower court's fact findings but is not bound thereby.[419] The scope of review for actions tried at law is considerably more deferential. The appellate court views the evidence in the light most favorable to the judgment and construes the fact findings liberally to support the judgment.[420] Moreover, the appellate court need only consider the evidence supporting the prevailing party even though it is contradicted by other evidence in the record.[421]

Whether tried at law or in equity, the scope of review accorded to the lower court's legal conclusions is uniform: the appellate court sits to correct errors of law.[422]

Both the right-to-sue and the Commission forums have now been discussed. This article will next consider each forum's advantages and disadvantages for disability complainants. Naturally, each case will present unique factors beyond the scope of this discussion. The advantages and disadvantages to respondents of the respective forums are not considered be-

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414. IOWA R. CIV. P. 179(b), 243, 244.

415. IOWA CODE §§ 17A.2(9), .19 (1981).

416. IOWA CODE § 17A.2(1) (" 'Agency' does not mean . . . the courts . . . .").

417. IOWA R. APP. P. 3.

418. IOWA R. CIV. P. 70.

419. IOWA R. APP. P. 14(f)(7).

420. *See* Koehler v. State, 263 N.W.2d 760, 761-62 (Iowa 1978); Hunt v. State, 252 N.W.2d 715, 717 (Iowa 1977); IOWA R. APP. P. 14(f)(1).

421. IOWA R. APP. P. 14(f)(1); City of Davenport v. Public Employment Relations Bd., 264 N.W.2d at 312.

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

cause, for purposes of selecting a forum, they are captives of their complainants.[423]

C. *The Right-to-Sue and Commission Forums: Advantages and Disadvantages to Complainants*

1. *The Commission Forum*

a. *Advantages to the Disability Complainant.* Probably the foremost advantage to disability complainants in the Commission forum is the benefit of the agency's expertise in this field of law. Since 1972 the Commission staff—intake personnel, investigators, conciliators, and hearing officers—have collectively processed hundreds of disability complaints. They have applied the reasonable accommodation and undue hardship concepts to untold numbers of disability cases. If a staff person encounters a novel question in the course of processing a disability complaint, the assistant Iowa attorney generals of the Civil Rights Division are available for consultation.[424]

Some of the difficulties encountered while investigating disability complaints have already been examined.[425] Much time and effort is often expended in these investigations. Most privately retained attorneys cannot match the knowledge of disability discrimination law possessed by or accessible to the Commission's investigators. In addition, counsel may simply not have the time to conduct a thorough investigation involving potential accommodations for a complainant's particular disability and the costs attendant thereto. And yet an inadequate investigation or discovery may doom the disability complainant's future chances for relief.

The farther a disability complaint proceeds in the agency forum, the greater the beneficial impact of the Commission's expertise. If the complaint proceeds to an evidentiary hearing it is prosecuted by an assistant Iowa attorney general[426] who may already be experienced in litigating disability cases. The Commission investigator may be called as a witness[427] to testify about the employer's ability to accommodate the complainant's handicap without incurring any undue hardship. Moreover, the hearing officer who presides at the evidentiary hearing and the reviewing Commission may be somewhat more sensitive to disability discrimination issues than a judge.[428] If the outcome of the case turns on witness credibility or inferences from the

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423. Complainants alone may request a right-to-sue letter. IOWA CODE § 601A.16(2) (1981).

424. The Civil Rights Division of the Iowa Dep't of Justice provides legal advice to the Commission staff. IOWA CODE § 13.4 (1981).

425. *See supra* text accompanying notes 52-66.

426. *See supra* note 424.

427. IOWA CODE § 601A.15(6) (1981).

428. Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 IOWA L. REV. at 748.

evidence, this heightened sensitivity could be a key factor.[429]

A second advantage to disability complainants who allow the agency to process their complaints is purely economic. It costs the complainant nothing to file a complaint with the Commission, have an agency investigator investigate it, a hearing officer determine probable cause, a conciliator conciliate it, and an assistant attorney general prosecute it. The Commission bears these expenses. In contrast, one of the disadvantages posed by the right-to-sue option is its potentially onerous cost to the complainant in attorney fees, filing fees, costs of discovery, and other litigation expenses.

Assuming that the Commission's final decision favors the disability complainant, additional advantages become manifest. If the employer appeals the Commission's decision to district court, an assistant Iowa attorney general defends the agency's decision. The complainant may intervene on appeal[430] but, with some important exceptions, his or her interests are often protected by the agency's counsel.[431] If either party appeals to the Supreme Court, the Commission continues to bear the costs of defending its final decision.

On appeal, the Commission's findings of fact are favored by the deferential scope of judicial review.[432] Particularly significant for disability complainants, this deferential scope of review is also bestowed upon the Commission's application of the reasonable accommodation concept to the particular facts of the case.[433]

Thus, there are several advantages enjoyed by disability complainants who allow the Commission to process their complaints. First, throughout the process they harvest the benefits of the Commission staff's expertise in this still relatively uncharted field of law. Second, the costs of the process—investigation and, ultimately for some complaints, litigation—are borne by the state. Third, on appeal, a Commission decision in the complainant's favor is accorded some deference by the reviewing courts. These advantages must be weighed against certain disadvantages which complainants may encounter during the Commission process.

b. *Disadvantages to the Disability Complainant.* Undoubtedly the greatest disadvantage in relying on the Commission process is the vaunted problem of delay. The right-to-sue provision owes its existence to the legis-

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429. *Id. See also supra* text accompanying notes 169-70, 308-10.

430. IOWA CODE § 17A.19(2) (1981).

431. Even when the Commission rules in the complainant's favor, the latter may not totally agree with the agency's remedial order. But even if the complainant and the Commission are in complete agreement, the complainant may still want to intervene in the district court proceeding. If the Commission's decision is reversed by the district court the agency could decide not to appeal to the Supreme Court. In that event, the complainant could obtain further review only if he or she had intervened in the district court proceeding. IOWA CODE §§ 17A.19(2) & .20 (1981).

432. *See supra* text accompanying notes 308-19.

433. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167-69.

lative concern for the problem of delay.[434]

The sources of this problem have been thoroughly discussed elsewhere.[435] The statutory scheme itself envisions a drawn out administrative process: the complaint must be investigated, probable cause found, conciliation attempted, further conciliation bypassed, and only then can the complaint be scheduled for an evidentiary hearing.[436] This protracted procedure allows the Commission to prosecute only the most meritorious complaints, and it provides the parties with a prolonged "cooling off" period often conducive to settlement. But bottlenecks can develop at any of these stages. Considering the breadth of the Commission's jurisdiction, the number of complaints filed, the agency's inadequate staffing and austere budget,[437] the Commission's performance in processing complaints deserves more praise than censure.

From the complainant's standpoint, the inability to influence the amount of time devoted by the agency to processing the complaint is frustrating. The complainant cannot control how quickly the complaint is assigned to an investigator, how soon the investigator can issue a recommendation of probable cause *vel non*, how soon the hearing officer can review the investigative file, how soon the conciliator can commence conciliation, or how soon the assistant attorney general can prosecute the complaint. In this sense, the complainant is essentially a pawn on an administrative chessboard.

The delay which lurks in the administrative process may have deleterious consequences for the complainant's ultimate ability to prevail. Witnesses may disappear; memories may dim; documents may disappear; employers may relocate or become bankrupt. The complainant's initial enthusiasm for redress may wane with the passage of time. The only favorable possibility for the complainant is the potentially lengthier back pay period.[438]

Another potential disadvantage is unique to disability complainants. The first question which the Commission addresses when processing a complaint is determining whether it falls within the agency's jurisdiction.[439] For most types of complaints, this determination is relatively simple. But it is not so simple with disability complaints. The agency must initially ascertain whether the particular disability is protected or not protected by the Iowa

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434. Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 IOWA L. REV. at 725-27.

435. *Id.* at 731-36.

436. *Id.*

437. *See* Estabrook v. Iowa Civil Rights Comm'n, 283 N.W.2d at 310-11.

438. *See supra* text accompanying notes 209-14. Of course, the back pay period could be tolled if the employer were prejudiced by an unexcused and unreasonable delay caused by the Commission. Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n, 432 U.S. 355, 373 (1977).

439. *See supra* text accompanying notes 36-44.

Civil Rights Act.[440] If the disability is not deemed to be protected, the Commission dismisses the complaint. In the past, the Commission appeared to apply a durational test. Disabilities which lasted for under a year were generally dismissed.[441] The Commission now makes its jurisdictional determinations on a "disability-by-disability" basis.[442] The standards underlying these determinations are not yet completely clear.[443] Nevertheless, a complainant who has a temporary or short-term disability might be tempted to escape the administrative process as soon as possible.

This disadvantage is unavoidable. Even a complainant who, at the outset, plans to request a right-to-sue letter must allow his or her complaint to remain on file with the Commission for one hundred twenty days.[444] The Commission's jurisdictional review occurs during this period.[445] Thus, every disability complaint runs the risk of dismissal for want of jurisdiction before the complainant can obtain a right-to-sue letter.

2. *The Right-to-Sue Option*

a. *Advantages to the Disability Complainant.* The greatest advantage enjoyed by a complainant who obtains a right-to-sue letter is the opportunity to exert some control over the pace of litigation.[446] The complainant may commence discovery as soon as the action is filed in district court. The parties to the action—not the Commission—determine how expeditiously discovery proceeds. Thus, the time between commencement of the action and trial may be considerably shorter in district court than in the agency forum.

Another advantage is the immediate enforceability of a district court's final judgment (unless it is stayed on appeal). In contrast, the Commission cannot itself enforce its final orders; it must apply to a district court for an enforcement order.[447]

There are other advantages to the district court forum as well. It has been noted that the Commission can close a complaint as satisfactorily adjusted if the employer's settlement offer is deemed reasonable to the agency but not to the complainant.[448] Obtaining a right-to-sue letter forecloses this possibility. The complainant alone decides whether or not to accept an employer's offer of settlement.

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440. *See infra* text accompanying notes 452-568.
441. *See infra* text accompanying notes 522-59.
442. *See infra* text accompanying notes 555-59.
443. *See infra* text accompanying notes 559-68.
444. IOWA CODE § 601A.16(1)(b) (1981).
445. *See supra* text accompanying notes 36-38.
446. Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 IOWA L. REV. at 738-42.
447. *See supra* text accompanying notes 264-74.
448. *See supra* text accompanying notes 113-16.

A potential advantage posed by the right-to-sue option is the possibility of bringing a lawsuit as a class action with class relief.[449]

Finally, a significant benefit of the right-to-sue option may be the prospect of a district court trial by jury. Whether or not this is an advantage may depend on the nature of the complainant's disability, the identity and conduct of the employer, the particular job at issue, and other tactical considerations. But certainly this is a key factor to weigh in choosing a forum.

b. *Disadvantages to the Disability Complainant.* Instituting a district court action is likely to be a costly venture for the disability complainant. The complainant will need to retain an attorney in order to commence the action. A district court filing fee must be paid as well as sheriff's fees for serving the original notice on the employer. Pre-trial preparation can also be expensive. Depending on the nature of the alleged discrimination, the complainant's counsel may seek access to voluminous personnel records maintained by the employer and medical records kept by the complainant's physician. It may be necessary or desirable to depose witnesses, including medical and vocational experts. If the right-to-sue option is pursued, these discovery costs must be borne by the complainant. The complainant may ultimately recover these court costs and a reasonable attorney fee if he or she prevails.[450] Nevertheless, complainants risk their own resources when the agency forum is forsaken.

A second disadvantage is the loss of the agency's expertise in handling the case. Complainant's counsel may have to become self-educated on the nuances of disability discrimination law. Identifying the disability issues is crucial once discovery has been undertaken. Even more significant may be the trier of fact's lack of familiarity with disability discrimination law as compared with the Commission. Few courts have applied the reasonable accommodation or undue hardship concepts to as many kinds of disability cases as has the Commission. While a court is institutionally accustomed to applying new legal concepts to facts, it might not be quite as sensitive to the remedial purposes of the Iowa Civil Rights Act as is the Commission.

Finally, the right-to-sue option may not always be a panacea for lengthy pre-trial delays. The courts suffer from some of the same organizational constraints which plague the Commission. Too few judges and too many cases yield a judicial backlog which may particularly affect trials of civil cases.[451]

The Commission and right-to-sue forums have now both been explained in some detail. Each has advantages and disadvantages for a disability complainant. Complainants and their counsel must ultimately decide which forum best suits their needs. Having considered the procedural aspects of Iowa's disability discrimination law, the focus will now shift to the substan-

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449. Note, *Implications of the Right-to-Sue Amendment to Iowa's Civil Rights Law*, 65 IOWA L. REV. at 743.

450. IOWA CODE § 601A.15(8)(a)(8) (1981).

451. Criminal defendants have a right to a speedy trial. IOWA R. CRIM. P. 27(2).

tive principles to be applied in these cases.

III. Differentiating Protected from Unprotected Disabilities Under the Iowa Civil Rights Act

The Commission jurisdictionally reviews all civil rights complaints within one hundred twenty days of filing.[452] This is a particularly crucial period for disability complaints. The Iowa Civil Rights Act does not protect all disabilities; it only protects those which constitute a "substantial handicap."[453] Thus, during jurisdictional review the Commission dismisses disability complaints which allege insubstantial handicaps.

One striking difference between disability discrimination and other variants of employment discrimination is the difficulty in determining whether a particular handicap falls within the class protected by the Act. A person's race, sex, age, religion and national origin automatically enjoy protected class status.[454] In contrast, physical or mental impairments must be individually evaluated to determine whether they are protected.

This article will first discuss the statutory definition of disability.[455] In practice, the Act provides very little guidance in determining whether specific disabilities are protected. The Commission has sought to fill the void by promulgating more definitive rules.[456] In two recent contested case decisions, the Commission resolved the question of jurisdiction by focusing solely on the expected duration of the disability.[457] This standard has since been discarded as a result of intra-agency criticism. The Commission now determines the jurisdictional question on a "disability-by-disability" basis, relying on the totality of the circumstances rather than merely the expected duration of the disability.[458] This focus is preferable to the prior one. Nevertheless, it is unclear exactly what factors enter into the "totality of the circumstances" analysis.

For purposes of jurisdictional review, any disability complaint will fall in one of three categories. The category will depend on the nature of the particular disability and the specific allegations of discrimination. The first category consists of disabilities which, on their face, are acknowledged to be substantial handicaps. Blindness, deafness, epilepsy, paralysis—these and

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452. Iowa Code § 601A.16(6) (1981). *See also supra* text accompanying note 36-38.

453. Iowa Code § 601A.2(11) (1981).

454. Iowa Code § 601A.6(1)(a) (1981).

455. Iowa Code § 601A.2(11) (1981).

456. 240 Iowa Admin. Code § 6.1 (1979).

457. Cunningham v. AMF Lawn & Garden Div., No. 2-77-4293, slip op. at 9 (Iowa Civil Rights Comm'n June 18, 1981); George v. Clinton Corn Processing Co., No. 2075, slip op. at 9 (Iowa Civil Rights Comm'n June 23, 1980) (these cases will be published in 5 Iowa Civil Rights Comm'n Case Reports ___).

458. Oral directive issued by Iowa Civil Rights Comm'n Executive Director Artis I. Reis and Director of Compliance Louis Martin (June 25, 1982).

other permanent impairments are clearly protected. The second category consists of handicaps which the Commission regards as insubstantial *per se*. Migraine headaches, common colds, the flu, a simple fracture and other temporary conditions of a relatively trivial nature exemplify this category. The third category is the most difficult to describe. It consists of impairments which are neither permanent nor evanescent, but which fall somewhere in the middle. Addiction to drugs or alcohol, various kinds of mental illnesses, and periods of recovery from major surgery illustrate the types of intermediate-term impairments which, depending on the totality of the circumstances, may or may not be protected.

Unfortunately, the Commission's rule which defines "substantial handicap" does not provide authoritative standards for determining whether an intermediate-term disability is protected.[459] This article will suggest some standards which might help the Commission evaluate such disabilities.[460] Whatever standards the Commission selects, however, must be flexible enough to apply to myriad disabilities.

A. *Statutory Definition of Disability*

Unlike all the other types of employment discrimination, the legislature in section 601A.2(11) has sought to define only "disability":

> *Disability* means the physical or mental condition of a person which constitutes a substantial handicap. In reference to employment, under this chapter, "disability" also means the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation.[461]

This definition is not very helpful. The critical phrase—"substantial handicap"—is nowhere explained in the Act. But the second sentence in the definition could have spelled a disaster for disabled complainants. It suggests that the Act protected only those substantial handicaps which were "unrelated to [a] person's ability to engage in a particular occupation."[462] The cornerstone of the Commission's solicitude for disabled individuals is the concept of reasonable accommodation;[463] a literal interpretation of the phrase "unrelated to [a] person's ability to engage in a particular occupation" would eviscerate that concept. If a complainant's handicap is unrelated to his ability to work, a reasonable accommodation is by definition unnecessary. It is necessary only if the handicap *does* relate in some measure to the person's ability to perform a particular job.[464] A reasonable ac-

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459. 240 IOWA ADMIN. CODE § 6.1 (1979).
460. *See infra* text accompanying notes 560-68.
461. IOWA CODE § 601A.2(11) (1981).
462. *Id.*
463. *See infra* text accompanying notes 635-823.
464. *See infra* text accompanying notes 637-38.

commodation, then, enables the disabled individual to perform the job despite an otherwise disqualifying handicap.[465]But if the second sentence in the disability definition were construed literally, handicapped individuals who needed some accommodation would be excluded *en masse* from the Act's protection.

There is some meager support for a literal interpretation of section 601A.2(11). The state of New York had fair employment legislation which defined protected disabilities as "physical, mental or medical conditions which are unrelated to the ability to engage in the activities involved in the job or occupation."[466]

This provision, which is strikingly similar to section 601A.2(11), was literally construed in *State Division of Human Rights v. Averill Park Central School District.*[467] This case concerned the involuntary transfer of a hearing-impaired school bus driver to a custodial job after an examination revealed the extent of his hearing impairment. The State Division of Human Rights ruled that the complainant's hearing was adequate to safely drive a school bus.[468] Upon judicial review, the court reversed the agency's decision because "a conceded hearing defect is a physical impairment which is *related* to a person's ability to drive a bus for the transportation of school children."[469] The court ordered the Division not to intrude into cases where the complainant's disability was related to the ability to perform the job.[470]

Averill Park may have been distinguishable on its facts. There is obviously a lofty standard of care for busing school children. However, the New York Court of Appeals reaffirmed the literal definition of "disability" in *Westinghouse Electric Corp. v. State Division of Human Rights.*[471] But both cases were "overruled" by the legislature's amendment of New York's disability definition.[472]

The Iowa Supreme Court declined the opportunity to follow the *Averill Park* path when it recently construed Iowa's disability law. In *Foods, Inc. v. Iowa Civil Rights Commission,*[473] the employer sought a literal interpretation of a now-rescinded Commission rule which closely tracked the language in section 601A.2(11).[474] *Foods* involved an epileptic cafeteria employee who adequately performed her job duties for fourteen months without explicitly revealing her handicap to the employer. Her impairment finally came to the

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465. 240 IOWA ADMIN. CODE § 6.2(6) (1980).
466. N.Y. EXEC. LAW § 292(21) (McKinney 1978) (amended 1979).
467. 59 A.D.2d 449, 399 N.Y.S.2d 926 (N.Y. App. Div. 1977).
468. *Id.* at 451, 399 N.Y.S.2d at 927.
469. *Id.* at 452, 399 N.Y.S.2d at 928 (emphasis in original).
470. *Id.* at 452, 399 N.Y.S.2d at 928.
471. 49 N.Y.2d 234, 401 N.E.2d 196, 425 N.Y.S.2d 74 (1980).
472. 1979 N.Y. Laws, ch. 594, § 1 (codified at N.Y. EXEC. LAW § 292(21) (McKinney Supp. 1980)).
473. 318 N.W.2d 162 (Iowa 1982).
474. *Id.* at 165-67.

employer's attention when she suffered a *grand mal* seizure while at work.[476] Whether the impairment was protected by the Iowa Civil Rights Act depended on the interpretation of the following Commission rule: "The term 'physical and mental disability' shall mean blindness, deafness or any other physical or mental condition which constituted or constitutes a substantial handicap and which is unrelated to the person's ability to perform jobs or positions which are available to him or her. . . ."[476]

In its final decision, the Commission conceded that the complainant's epilepsy bore a slight relationship to her ability to perform the cafeteria job: she obviously could not work during a *grand mal* seizure.[477] Nevertheless, the Commission declined the employer's invitation to construe the definitional rule literally. It reasoned that such an interpretation "would be inconsistent with Commission rules requiring an employer to make 'reasonable accommodation' to the physical or mental limitations of employees and allowing the employer to discriminate on the basis of disability [only] when a particular physical or mental ability constitutes a 'bona fide occupational qualification.' "[478]

The Commission concluded that the employer unlawfully terminated the complainant because of her physical disability. The employer appealed the Commission's decision to the district court, where the employer argued that the Commission's refusal to literally construe its disability rule was unreasonable.[479] The district court agreed with the employer.[480]

On appeal to the Iowa Supreme Court the agency renewed its contention that a literal interpretation of its disability rule would be unreasonable. It would invalidate the employer's duty to reasonably accommodate the complainant as well as inflate what was intended to be a narrow bona fide occupational qualification concept.[481]

In deciding *Foods* the court upheld and elaborated upon the Commission's interpretation of its disability-definition rule. The court observed that Chapter 601A must be liberally construed to effectuate its remedial purposes.[482] Likewise, logic demanded that a liberal construction be accorded to Commission rules implementing, and authorized by, the Act.[483] The court recognized that a literal construction of the disability-definition rule

> would effectively defeat the remedial purpose of Chapter 601A. We therefore conclude that rule 6.1 must be interpreted to mean that a phys-

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475. *Id.* at 164.

476. *Id.* at 165 (citing 240 IOWA ADMIN. CODE § 6.1 (1977) (replaced by 240 IOWA ADMIN. CODE § 6.1(2) (1979)).

477. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 166-67.

478. *Id.*

479. *Id.* at 164.

480. *Id.* at 166.

481. *Id.* at 166-67. *See infra* text accompanying notes 644-87.

482. *Id.* at 167; IOWA CODE § 601A.18 (1981).

483. 318 N.W.2d at 167; IOWA CODE § 601A.5(10) (1981).

> ical or mental disability [means] "any . . . physical or mental condition which . . . constitutes a substantial handicap and which is unrelated to the person's ability to perform *[in a reasonably competent and satisfactory manner]* jobs or positions which are available to him or her."[484]

It should be understood that the court judicially construed a Commission rule which is no longer in existence.[485] Nevertheless, the court has thereby preempted any argument that section 601A.2(11) should be construed literally. A comparison of the operative language in rule 6.1 with section 601A.2(11) reveals that, in relevant part, the two provisions are virtually identical.[486] The court's expansive interpretation of the former demands a similar interpretation of the latter for several reasons. First, a literal construction of section 601A.2(11) would be even more destructive of the Act's remedial purposes than literal construction of an agency rule. The Commission itself can amend or repeal its rule (and it did so with old rule 6.1).[487] A judicial interpretation of a statute is not so easily altered. It can only be changed by a legislative amendment or by the court's reversal of its prior decision. Neither alteration can be implemented by the affected agency itself. Second, the court recognized that, unlike section 601A.2(11), rule 6.1 had been rescinded.[488] It would be anomalous for the court to liberally construe a defunct agency rule only to undo that construction when it addressed a similar statutory provision. Therefore, it seems reasonable to assume that the court in *Foods* amended section 601A.2(11), *sub silentio*, to read as follows:

> *Disability* means the physical or mental condition of a person which constitutes a substantial handicap. In reference to employment, under this chapter, "disability" also means the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to [perform, in a reasonably competent and satisfactory manner,] a particular occupation.[489]

Unfortunately, section 601A.2(11) does not provide much guidance in differentiating "substantial" from insubstantial handicaps. The Commission has addressed this problem by promulgating rules which further delineate the scope of protected versus unprotected disabilities.

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484. 318 N.W.2d at 167.

485. *Id.* at 165.

486. *Id.* at 165. Section 601A.2(11) states that: " 'disability' also means the physical or mental condition of a person which constitutes a substantial handicap, but is unrelated to such person's ability to engage in a particular occupation." IOWA CODE § 601A.2(11) (1981). Rule 6.1 referred to a "substantial handicap . . . which is unrelated to a person's ability to perform jobs or positions which are available to him or her." Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 165.

487. IOWA CODE § 601A.5(10) (1981).

488. 318 N.W.2d at 165.

489. *Id.* at 167.

B. *Commission Rules Defining Substantial Handicaps*

The Legislature, in enacting Chapter 601A, vested broad rulemaking authority in the Commission.[490] Rules implementing the Act's prohibition against disability discrimination surely fall within the Commission's scope of authority.[491] The Commission first defined "substantial handicap" as follows: "The term *'substantial handicap'* is a physical or mental disability which can constitute one of the following: Material rather than slight; permanent; stable, or slowly progressive and which is seldom fully corrected by medical treatment, therapy or surgical means."[492]

The rule quoted above did not limit the term "substantial handicap" to permanent disabilities. It simply established some general criteria for identifying a "substantial handicap." For example, an individual who was comatose for three months could have a physical condition which was "material rather than slight" without being permanent. Nevertheless, the rule was more confusing than helpful. It was rescinded on May 23, 1979[493] and replaced by the following rules:

> 6.1(1) The term "*substantially handicapped person*" shall mean any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
>
> 6.1(2) The term "*physical or mental impairment*" means:
>
> a. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genitourinary; hemic and lymphatic; skin, and endocrine; or
>
> b. Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
>
> 6.1(3) The term "*major life activities*" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
>
> 6.1(4) The term "*has a record of such an impairment*" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.
>
> 6.1(5) The term "*is regarded as having an impairment*" means:
>
> a. Has a physical or mental impairment that does not substantially

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490. IOWA CODE § 601A.5(10) (1981).

491. *Id.* "[W]hen a 'rational' agency could conclude that a rule is within its delegated authority, a reviewing court should not reach a contrary conclusion." Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d 907, 910 (Iowa 1979). The court tacitly approved the Commission's old disability definition rule in *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d at 166-67.

492. 240 IOWA ADMIN. CODE § 6.1 (1979).

493. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 165.

> limit major life activities but that is perceived as constituting such a limitation;
>
> b. Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
>
> c. Has none of the impairments defined to be "physical or mental impairments," but is perceived as having such an impairment.[494]

Rule 6.1 is modelled after the definition of "handicapped individual" in the Rehabilitation Act of 1973[495] and the concomitant regulations issued by the Department of Labor.[496] Rule 6.1 adds an administrative gloss to the term "substantial handicap" in section 601A.2(11). Being properly promulgated and published, rule 6.1 has the binding force and effect of law.[497]

The most striking feature of rule 6.1 is its sheer breadth in defining a "substantially handicapped person." It subsumes mental and physical impairments, both real and perceived. Its greater scope and specificity marks a significant improvement over its predecessor rule.

Rule 6.1 delineates two types of disabilities protected by the Iowa Civil Rights Act: (1) those which are real impairments and in fact "substantially [limit] one or more major life activities"; and (2) those which are merely perceived by others as being substantially limiting impairments, whether the condition is real or illusory.[498] The latter category is extremely significant. It protects an impairment which, objectively, may not be disabling *per se* but is substantially limiting because others regard it as anathema. Venereal diseases are a prime example of such conditions.

The "major life activities" enumerated in rule 6.1(3) are largely self-explanatory. An impairment is not protected under the rule unless it "substantially limits" a "major life activity" or is so perceived.[499] However, of all the "major life activities" listed in rule 6.1(3), the term "working" deserves special attention. Does "working" mean a complainant's ability to perform a *particular* job, a limited *type* of job, or *all* jobs? This semantic ambiguity was confronted in *E. E. Black, Ltd. v. Marshall.*[500] There the court wrestled with the definition of "handicapped individual" within the meaning of the Rehabilitation Act of 1973 and attendant Department of Labor regulations. The facts were as follows: An apprentice carpenter applied for a position with a federal contractor. The contractor required all applicants to undergo

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494. 240 IOWA ADMIN. CODE § 6.1 (1979).

495. 29 U.S.C. §§ 701-96 (1976 and Supp. IV 1980).

496. 29 C.F.R. § 32.3 (1981).

497. Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 909; IOWA CODE § 17A.4(3) (1981) (a rule is conclusively presumed to be in compliance with statutory procedural requirements if it has not been invalidated within two years of its effective date).

498. 240 IOWA ADMIN. CODE § 6.1 (1979).

499. 240 IOWA ADMIN. CODE §§ 6.1(1) (1979), (3)-(5) (1980).

500. 497 F. Supp. 1088 (D. Hawaii 1980).

a pre-employment physical examination. The contractor's physician discovered that the applicant had "a congenital back anomaly" which rendered him, in the physician's judgment, "a poor risk for heavy labor."[501] Consequently, the contractor rejected the applicant, who then filed a complaint with the federal agency charged with enforcing the Rehabilitation Act.[502]

After being rejected, the apprentice carpenter was able to secure some construction employment but was unable to obtain the necessary on-the-job training hours to become a journeyman.[503] The case hinged upon whether the complainant was a "substantially limited" handicapped individual as defined by the federal regulations.[504]

The federal Administrative Law Judge (ALJ) held that the complainant was not a "handicapped individual" because his perceived back impairment did not restrict his general employability.[505] At most, it disqualified him from a narrow spectrum of employment requiring heavy labor.[506] This determination was reversed by the Assistant Secretary of Labor.[507]

These torturous administrative proceedings were reviewed by the court, which squarely rejected the ALJ's restrictive interpretation of a "substantially limited" handicapped individual.[508] The court first imputed the disqualifying physical standard utilized by the federal contractor—the "congenital back anomaly"—to all other contractors in the same area offering similar employment.[509] In essence, the court assumed that the complainant's perceived back condition would disqualify him from all similar positions in the area. Thus, the court concluded that the complainant's perceived handicap substantially limited his ability to progress from an apprentice to a journeyman carpenter in that area.[510]

If the court's reasoning in *E. E. Black, Ltd. v. Marshall*[511] is applicable to the term "working" as used in rule 6.1(3), then it would denote a complainant's physical or mental ability to perform a *type* of work (e.g. carpentry) as opposed to ability to perform either *specific* work (e.g. carpenter for the City of Des Moines) or *any* gainful work. Now the question is whether *E. E. Black* has any precedential value in Iowa.

It is well established that judicial interpretations of Title VII do not

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501. *Id.* at 1091.
502. *Id.* at 1091-92.
503. *Id.* at 1092.
504. The dispositive federal regulation stated that: "[A] handicapped individual is 'substantially limited' if he or she is likely to experience difficulty in securing, retaining or advancing in employment because of a handicap." 41 C.F.R. § 60-741.2 (1981).
505. E. E. Black, Ltd. v. Marshall, 497 F. Supp. at 1094.
506. *Id.* at 1093-94.
507. *Id.* at 1094-95.
508. *Id.* at 1099-1100.
509. *Id.* at 1100-02.
510. *Id.* at 1100-03.
511. 497 F. Supp. 1088 (D. Hawaii 1980).

dictate similar interpretations of Chapter 601A.[512] Interpretations of a federal regulation promulgated under the Rehabilitation Act of 1973 would appear to be an even more tenuous basis for construing Iowa's disability rules. But rule 6.1(3) is almost textually identical to the federal regulations issued under the Rehabilitation Act.[513] This suggests that interpretations of those federal regulations may be useful in determining the meaning of Iowa's disability rules.[514]

The Commission's interpretation of its disability rule will probably be decisive. Courts tend to be more deferential toward an agency's construction of its own rule than its construction of a statute.[515] Ordinarily, an agency's interpretation of its rule will be upheld by the court if it is reasonable and consistent with the statute as well as the legislative intent.[516]

The interpretation accorded to the term "working" in *E. E. Black* seems reasonable. "Working" should mean more than the ability to obtain a particular job, but less than a demonstrable inability to obtain any job at all. Instead, if complainants show that their ability to obtain jobs in a chosen field of employment is thwarted by an impairment, they are indeed substantially limited in the "major life activity" of "working".[517] These complainants should be within the class of disabled persons protected by chapter 601A.

In summary, the Commission's disability rules provide more specificity to the statute's bare-bones phrase "substantial handicap".[518] A substantial handicap is a mental or physical impairment which, in actuality, substantially limits at least one major life activity. The rule also protects perceived yet illusory impairments, as well as real impairments which are limiting only because of the attitudes they elicit in others. For instance, if a complainant's history of having an impairment—albeit one which no longer exists—is "a factor" in the employer's challenged action,[519] the complainant should be deemed "disabled" within the meaning of the Act. A common example is a person who was institutionalized for a mental illness which has since been rectified but who is nonetheless denied employment because of that history.

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512. Loras College v. Iowa Civil Rights Comm'n, 285 N.W.2d 143, 147 (Iowa 1979); Franklin Mfg. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d at 831. *Cf.* Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293, 296 (Iowa 1982).

513. *Compare* 240 IOWA ADMIN. CODE § 6.1 (1979) and 29 C.F.R. § 32.3 (1981), which defines "handicapped individual" in terms similar to the Iowa disability rule.

514. *See infra* text accompanying notes 515-17.

515. Bowles, Price Administration v. Seminole Rock & Sand Co., 325 U.S. 410, 413-14 (1945); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.22 (2d ed. 1979).

516. McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 196 (Iowa 1980).

517. 240 IOWA ADMIN. CODE § 6.1(3) (1980).

518. IOWA CODE § 601A.2(11) (1981).

519. *See, e.g.*, Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d at 296 (analysis under Title VII treatment). *Cf.* Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981) (quoting Satz v. ITT Fin. Corp., 619 F.2d 738, 746 (8th Cir. 1980)) (the rule under sex discrimination cases).

The person's mental condition no longer substantially limits any major life activity. But if it is mistakenly perceived by the employer as being substantially limiting, the person is considered to be "disabled" under Chapter 601A.[520] This situation also arises with conditions which are generally controlled by medication, such as epilepsy and diabetes, but which nonetheless cause uneasiness among some employers.[521]

Unfortunately, the Commission's disability rules do not offer any standards for determining whether a particular disability *substantially* limits or *insubstantially* limits a major life activity. The Commission confronted this question in two recent contested case decisions. An examination of these decisions will suggest some of the practical difficulties faced by an agency which must separate "substantial" from "insubstantial" handicaps.

C. *Commission Contested Case Decisions Differentiating Protected from Unprotected Disabilities*

Recently the Commission has adjudicated two contested cases which turned on whether a temporarily handicapped complainant fell within the class protected by the Iowa Civil Rights Act.[522] These decisions have been subjected to stringent intra-agency criticism and are now of dubious precedential value.[523] However, because these decisions attempt to articulate a standard for distinguishing protected from unprotected disabilities, they will be discussed in detail.

George v. Clinton Corn Processing Co.[524] confronted the Commission with the perplexing issue of whether a short-term physical impairment was protected by the Act.[525] The complainant suffered an injury while working which his physician diagnosed as a collapsed lung complicated by pleurisy. Two months later, during his convalescence, the complainant was examined by the company's physician. The company physician determined that the complainant was presently able to work.[526] The complainant's physician disagreed; the complainant therefore did not return to work. The employer responded by terminating the complainant. At the time of the termination, the complainant's physician estimated that his patient's full recovery from

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520. 240 Iowa Admin. Code § 6.1(5) (1980).

521. *See, e.g.*, Allen v. Eagle Iron Works, No. 04-78-5113, slip op. at 2, 7 (Iowa Civil Rights Comm'n Sept. 16, 1980) (to be published in 5 Iowa Civil Rights Comm'n Case Reports ___), *rev'd*, No. CL 37-21560 (Iowa Dist. Ct. Polk County, June 30, 1981).

522. Cunningham v. AMF Lawn & Garden Div., No. 2-77-4293, slip op. (Iowa Civil Rights Comm'n June 18, 1981); George v. Clinton Corn Processing Co., No. 2075, slip op. (Iowa Civil Rights Comm'n June 23, 1980) (to be published in 5 Iowa Civil Rights Comm'n Case Reports ___).

523. *See infra* text accompanying notes 548-59.

524. No. 2075, slip op. (Iowa Civil Rights Comm'n June 23, 1980).

525. *Id.* at 5.

526. *Id.* at 2-4.

the collapsed lung and pleurisy would require another six weeks of rest.[527]

The Commission's hearing officer acknowledged that the decisive issue was whether the complainant's admittedly temporary impairment was protected by Chapter 601A.[528] Since the filing of the complaint predated the Commission's disability rules,[529] they were not dispositive of the issue. Nevertheless, the hearing officer quoted the current and rescinded disability definition rules, and adverted to federal regulations promulgated under the Rehabilitation Act of 1973.[530] Those regulations were considered "helpful in determining the meaning of disability under the Iowa Civil Rights Act."[531]

In dicta, the scope of rule 6.1[532] was explained as follows:

> [T]he present Rule . . . [6.1] . . . contains the term "substantially limits." While a short term recovery from a broken arm, or respiratory problem such as a serious cold, or the flu, may substantially limit one or more major life activities for a short period of time, they would not be considered as physical disabilities unless long-term consequences are expected to result, such as a substantial limit on the use of a limb, or long-term [recovery] (more than a few months). A respiratory problem such as asthma or emphysema would be considered a disability because of long-term consequences. Further, if a short-term disability is perceived by the employer, or is misdiagnosed as having long-term consequences it would be covered under the present rules. . . .[533]

The hearing officer concluded that the complainant's impairment was not within the class of disabilities protected by the Iowa Civil Rights Act.[534] The proposed decision turned solely on the expected duration of the impairment.[535] It disregarded both its severity and the temporary functional limitations which it posed for the complainant's ability to work.

The members of the Iowa Civil Rights Commission reviewed the proposed decision. They deadlocked over whether to accept or reject it.[536] Because of this impasse, the hearing officer's proposed decision became the Commission's final decision in *George v. Clinton Corn Processing Co.*[537]

The Commission's second opportunity to differentiate protected from unprotected disabilities arose in *Cunningham v. AMF Lawn & Garden Divi-*

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527. *Id.* at 3.
528. *Id.* at 5.
529. *Id.*
530. *Id.* at 5-6.
531. *Id.* at 6.
532. 240 IOWA ADMIN. CODE § 6.1 (1979) (effective May 23, 1979).
533. George v. Clinton Corn Processing Co., No. 2075, slip op. at 9.
534. *Id.*
535. *Id.*
536. Minutes of Iowa Civil Rights Comm'n Meeting, at 4-5 (Aug. 15, 1980) (on file with the author).
537. *Id. See also* Cunningham v. AMF Lawn & Garden Div., No. 2-77-4293, slip op. at 7-8 (The proposed decision in *George* was affirmed by an equally divided Comm'n.).

sion.[538] There the parties stipulated to the operative facts for the purpose of resolving the employer's motion to dismiss the complaint. The employer contended that the complainant's impairment was a short-term and hence unprotected disability.[539] The complainant had suffered an on-the-job injury necessitating corrective surgery; AMF granted him a leave of absence during his recovery period. The complainant's physician performed the surgery in May 1976. In April 1977 the physician released the complainant to return to work, albeit with a twenty-five pound lifting restriction. The release stated that the complainant "would have no restrictions one year after [the] time of initial surgery" (i.e. May 1977).[540]

The complainant requested that AMF reinstate him in February 1977. When AMF declined, he filed a complaint with the Commission.[541]

The hearing officer considered the employer's motion to dismiss in light of the Commission's rules defining disability extant in 1977[542] and the intervening decision in *George v. Clinton Corn Processing Co.*[543] In proposing to grant the employer's motion to dismiss, the hearing officer observed that:

> In the present case, the condition of Dick Cunningham's back was in the process of full functional recovery at the time of the complaint. His own physician predicted that Dick Cunningham could return to work without limits in May, 1977, within three months of the complaint. The Complainant was [reinstated] in his old job in May, 1977, when he was certified as able to return to work with [no] lifting restrictions. If one looks at the condition from the time of origin to the time of expected recovery, twelve months would have passed (May, 1976 to May, 1977) . . . . If, however, one looks from the time of the complaint to the time of expected recovery, only three months would have passed (February, 1977 to May, 1977). *The focus should be on the condition at the time of the alleged discriminatory act.* As that was alleged to have occurred in February, 1977 . . . the condition was one which was clearly temporary, and was clearly expected to be short-term in nature.
>
> As the Complainant's condition in the present case was a short-term disability, he is not a member of the protected class, as he did not and does not suffer one of the disabilities covered by the Iowa Civil Rights Act. Therefore the present complaint is not supported by a prima facie case, and must be dismissed . . . .
>
> The general [principle] in this ruling [is] . . . . that *a back injury expected to last less than one year from the time of the complaint [sic]*

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538. No. 2-77-4293, slip op. (Iowa Civil Rights Comm'n June 18, 1981) (to be published in 5 Iowa Civil Rights Comm'n Case Reports ___).

539. *Id.* at 3, 7.

540. *Id.* at 1-3.

541. *Id.* at 2.

542. *Id.* at 8-9.

543. No. 2075, slip op. (Iowa Civil Rights Comm'n June 23, 1980). *See also supra* text accompanying notes 524-37.

is not a covered injury, and is short-term in nature.[544]

The proposed dismissal of the complaint was thereafter adopted by the Commission as its final decision.[545]

The Commission's decision in *Cunningham* suggested three possible measurements of a disability's duration. First, the disability's duration could be plotted from the time of the alleged discriminatory act.[546] Second, the disability's duration could be measured from the time that the complaint was filed.[547] Third, the disability's duration could be measured without reference to external events by determining the time between its onset and expected cessation.[548] The hearing officer and Commission adopted the first measurement technique in *Cunningham.*[549]

Certain problems plague all three yardsticks or any standard in which a disability's duration is the determinative criterion. Disabilities are notoriously idiosyncratic. Each individual's recooperative power is different. These two characteristics alone vitiate any truly accurate prediction about most disabilities' expected durations. At best, the jurisdictional measurement adopted in *Cunningham* would often be based on some medical expert's ballpark estimate of a given disability's expected duration.

The accuracy of this prediction will depend on many factors, including the experience, qualifications, and knowledge brought to bear by the medical expert. If the disability is unusual, a specialist's opinion will undoubtedly be more accurate than that of a general practitioner. The accuracy of the expert's prediction will of course depend upon the expert's familiarity with the disability and the patient. The expert whose estimate is based on one fifteen minute physical examination of a hitherto unknown individual is less trustworthy than that of an expert who has examined the patient regularly and who has detailed knowledge of the patient's personality, life style, and other environmental factors. Finally, the accuracy of the prediction may simply depend upon the dissability's level of progression when the prediction is made. Many disabilities are not static. They have a tendency to ebb and flow in severity. A prediction boldly made during a disability's incipiency may be wholly inaccurate several weeks later. Finally, how would the Commission categorize a disability which simply defied any meaningful estimate of duration? And what if medical experts sharply disagreed about a disability's anticipated duration? *Cunningham* does not provide any clues to these vexing possibilities. At least in *Cunningham* the disability's duration

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544. Cunningham v. AMF Lawn & Garden Div., No. 2-77-4293, slip op. at 9 (emphasis added).

545. *Id.* at 10.

546. *Id.* at 9.

547. *Id.*

548. *Id.* at 9.

549. *Id.*

was predicted with precision.[550] In many other disability complaints, however, the jurisdictional determination could rest on a medically dubious prediction of the imponderable.

Until recently, after *Cunningham* the Commission staff as a rule of thumb apparently considered a disability to be unprotected under the Act if it were expected to last less than a year after the alleged discriminatory act.[551] To the extent that this informal agency policy derived from the *Cunningham* decision, it was subject to serious legal criticism.

On its facts *Cunningham* involved a disability which either lasted one year from onset to expected cessation or lasted three months from both the filing of the complaint and the alleged discriminatory act to the predicted recovery. The Commission adopted the period from the discriminatory act to the expected recovery as the proper frame of reference.[552] Hence, *Cunningham*'s narrow holding is that a disability which is expected to disappear within three months from the occurrence of the alleged discriminatory act is a temporary impairment beyond the scope of the Act's protection.[553] The statement "that a back injury expected to last . . . one year from the time of the complaint [sic] is not a covered injury"[554] is dictum. Moreover, had the Commission adopted the onset-to-cessation formula, the complainant's "temporary," unprotected impairment would have been magically transformed into a long-term, and thus protected, disability.

There was a more serious objection concerning the *manner* in which the *Cunningham* decision was apparently applied as agency policy. During the jurisdictional review phase[555] complaints were dismissed if the alleged disabilities were not expected to last at least one year after the alleged discriminatory act. This policy was inaccessible to the public. The policy was not contained in a published rule—but was based on the interpretation of the Iowa disability rule embodied by *Cunningham v. AMF Lawn & Garden Division*,[556] an unpublished contested case decision. The Iowa Attorney General's office suggested that this situation represented an improper general application of an unpublished contested case decision as if it were a rule binding upon the public.[557] In response to this and other intra-agency criticism, the Commission has discarded the one-year durational requirement for determining whether a disability falls within its jurisdiction.[558] The agency's informal jurisdictional review decision is now based instead on the "totality

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550. *See supra* text accompanying note 544.
551. *See supra* note 458.
552. Cunningham v. AMF Lawn & Garden Div., No. 2-77-4293, slip op. at 9.
553. *Id.*
554. *Id.*
555. *See supra* text accompanying notes 36-38.
556. No. 2-77-4293, slip op. (Iowa Civil Rights Comm'n June 18, 1981).
557. Memorandum from Assistant Attorney General Scott Nichols to Iowa Civil Rights Comm'n Executive Director Artis Reis (June 7, 1982) (on file with the author).
558. *Id.*

of circumstances" surrounding the particular disability.[559]

Now that the term "substantially limits" as used in Iowa's disability rule is not determined with special reference to the duration of a disability, the standards which the agency applies in its jurisdictional determinations must be ascertained.

D. *Ruminations on the Standards to Apply in Differentiating Protected from Unprotected Disabilities*

When does a physical or mental impairment substantially limit a major life activity? How will the Commission and the courts draw the line between substantial and insubstantial limitations? Given the infinite variety of human disabilities, a universal standard seems neither practicable nor desirable. The Commission's frustrating attempt to forge a universal durational standard illustrates the futility of this approach. The Commission's "totality of the circumstances" analysis is much more supple and will permit standards to evolve as the agency gains additional experience in evaluating disabilities. For now, the "totality of the circumstances" test is more of a slogan than a clear standard for differentiating substantial from insubstantial impairments. What circumstances are relevant? Are some circumstances more important than others? These are questions with which this article will now grapple.

The phrase "substantially limits" in Iowa's disability rule[560] suggests that the severity of an impairment's symptoms is an important factor to be considered. Severity should be measured in objective terms if possible: to what extent or degree does the impairment limit the major life activities of caring for one's self, working, hearing, seeing, walking, and other important functions.[561] Of course, such a measurement will not be quantifiable but instead will necessarily rely on medical opinions and records, the testimony of the complainant as well as family, friends, and co-workers.

Inextricably linked to the severity of an impairment is its duration. The severity of many disabilities fluctuates greatly; emphasizing the severity at a snapshot in time will likely yield a distorted picture. The Commission's former obsession with a disability's duration seemed misplaced, but that is undeniably a significant factor to be weighed in the totality of the circumstances. In fact, the "substantially limits" language in the Iowa disability rule seems to connote not only the momentary severity of an impairment but also the duration of those symptoms. Nevertheless, the Commission should not place excessive emphasis on determining with precision how long an impairment will last. Its primary focus should instead be on whether the impairment is so transitory that it falls outside of the class of handicaps

559. *See supra* note 458.
560. 240 IOWA ADMIN. CODE § 6.1(3) (1980).
561. *Id.*

which the legislature intended to protect when it amended Chapter 601A to proscribe disability discrimination.[562] An explicit durational minimum may be undesirable given the inherent unpredictability of many disabilities. Furthermore, an express durational requirement warps the balancing process represented by a "totality of the circumstances" test. Perhaps a relatively short but severe disability warrants more protection than a slightly longer but less limiting condition.

A third factor to consider in evaluating an impairment is whether it carries a social stigma. Iowa's disability rule explicitly protects non-existent but nonetheless perceived impairments, as well as real impairments which do not limit major life activities but are so limiting only because of the attitude of others.[563] The legislature may have had such illusory impairments in mind when it defined "disability" to include a "substantial handicap [which] is unrelated to such person's ability to engage in a particular occupation."[564]

An impairment can be disabling merely because it evokes fear, anxiety or disgust in others. Herpes, epilepsy, alcoholism, mental illness and many other conditions carry a serious stigma which may be much more debilitating than the duration or severity of the objective symptoms. A person with a stigmatizing impairment may be qualified for innumerable jobs but rejected simply because of an employer's fear or ignorance about the condition. This is an evil which the Iowa Civil Rights Act is designed to eradicate. Therefore, a disability's stigmatizing effect should be considered in determining whether it is protected under the Act.

A fourth factor to consider is whether the impairment bears any relation to the person's ability to engage in his or her chosen field of employment. If not and if the disability is otherwise substantial, the legislature has clearly expressed its intent that such a person be shielded from adverse employment decisions predicated on the handicap.[565]

In summary, there are at least four factors which the Commission should examine when it decides whether a particular disability is "substantially limiting." First, and most important, what is the severity of the impairment's symptoms and how greatly do they affect the person's major life activities? Secondly, how long has the person been so limited, and what are his future prospects? The greater the severity and length of an impairment's symptoms, the more likely the Legislature intended to bring the impairment within the scope of the Civil Rights Act's protection. These first two factors should be considered in tandem. Third, is the impairment one which is stig-

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562. Act of March 22, 1972, ch. 1031, §§ 1-7, 1972 Iowa Acts 129 (codified at IOWA CODE §§ 601A.2(11), .6(a), .6(b), .7(1), .8(2), .13(1)-(3), .16, .5(5), .5(7) (1973) (current version at IOWA CODE § 601A (1981)).

563. *See supra* text accompanying notes 494-98, 519.

564. IOWA CODE § 601A.2(11) (1981).

565. *Id.*

matizing? If so, it may well be entitled to protection even if, objectively, its symptoms are mild and not substantially limiting at all. Fourth, is the impairment functionally unrelated to the person's ability to perform his or her chosen occupation? If so, the impairment should be protected even though, objectively, the symptoms are neither severe nor lengthy in duration, as long as the employer's adverse action is in some measure based thereon. If the impairment *is* related to the person's ability to perform, then it should be evaluated in light of the first three factors.

At least one commentator criticized the tendency to exclude temporary disabilities from the class of handicapped persons protected by fair employment laws.[566] This commentator correctly noted that stereotypes based on handicaps do not usually observe such fine distinctions as long-term versus short-term duration.[567] If the law permits discrimination against persons having temporary disabilities, this seems to undermine its philosophical basis for prohibiting discrimination against persons with permanent or long-term disabilities.[568] After all, it would seem easier for, and hence reasonable to require, employers to accommodate persons afflicted with temporary disabilities.

This is a vexing issue of policy as much as law. The legislature has expressed its solicitude for persons who have *substantial* handicaps. By negative implication this seems to exclude insubstantial handicaps of a fleeting or common nature. As a policy matter, this allows the Commission to devote its limited resources to those handicapped people whose impairments are most severe. But what happens when an employer arbitrarily rejects or terminates a person because of a temporary disability which is patently unrelated to job performance? Disability discrimination law often turns not on the handicap's objective limitations but on those subjective, attitudinal barriers raised by others. It can at least be argued that an objectively trivial handicap is transformed, as a matter of law, into a "substantial" handicap whenever it forms the basis for adverse action by an employer.

IV. History and Validity of Reasonable Accommodation in Iowa

Thus far the substantive analysis of this article has sought to differentiate disabilities which are covered under the Iowa Civil Rights Act from those which are not. The focus will now shift dramatically. Here it will be assumed that a complainant's disability is within the scope of the Act's protection. But what are the employment rights of the disabled complainant? Conversely, what are the employer's obligations with respect to a handicapped individual?

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566. Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 De Paul L. Rev. 953, 982-84 (1978).

567. *Id.* at 982-83.

568. *Id.*

Given the multiplicity of disabilities and types of employment, these questions defy any all-encompassing answer. The only truly universal statement which can be advanced is that each disability case must be determined on its own unique merits. However, this determination will be easier if the parties understand the general principles which apply to this species of employment discrimination law.

Grasping the flexibility of the reasonable accommodation concept is the key to unlocking the mystery of disability discrimination law. But before the history and current legal status of this concept is discussed, a few fundamental observations need to be addressed.

A disability is qualitatively different from a person's race, sex, religion, and national origin. The latter characteristics usually bear no relationship to the individual's ability to perform a specific job.[569] Chapter 601A proscribes adverse employment decisions based upon these characteristics.[570] But a physical or mental impairment often *does* bear some relationship to the person's ability to perform a particular job. If the Act required that the disabled be treated identically *vis-a-vis* the non-disabled, the former would often be disqualified in the course of the competition. For instance, it would be impossible for a wheelchair-bound person to compete for a job opening which was inaccessible to him or her. "Equal treatment" *vis-a-vis* the non-disabled is clearly not the proper standard to apply to the disabled.[571] The Commission's rules acknowledge the uniqueness of disabilities in employment by requiring employers to reasonably accommodate them. The Act not only permits differential treatment on behalf of the disabled, it often *requires* it. If a complainant, despite a disability, is qualified to perform a job given a little assistance—for instance, modification of the job duties—then the employer cannot lawfully reject or terminate the complainant because of the disability.[572]

Reasonable accommodation is an inherently flexible concept. It comes in as many guises as there are disabilities, jobs, and employers. The potential for reasonable accommodation depends on such factors as the nature of the occupation, the kind and severity of the disability, size of the employer, and the feasibility and cost of the accommodation.[573] However, there is a limit to an employer's accommodation obligation. An arrangement which constitutes an "undue hardship"[574] is not mandated by the Commission's rules. Furthermore, the reasonable accommodation duty is not a bludgeon

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569. Holland v. Boeing Co., 90 Wash. 2d 384, 388, 583 P.2d 621, 623 (1978); Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. at 967.

570. IOWA CODE § 601A.6(1)(a) (1981).

571. *See* Holland v. Boeing Co., 90 Wash. 2d at 388, 583 P.2d at 623; Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953 *passim*.

572. *See* 240 IOWA ADMIN. CODE § 6.2(6) (1980).

573. *Id.*

574. *Id.*

which compels employers to hire or retain unqualified or incompetent disabled individuals.

With this background in mind, the legal derivation, history, and current validity of the reasonable accommodation duty in Iowa will now be explored.

A. *The Source of the Reasonable Accommodation Duty*

Many provisions of the Iowa Civil Rights Act bear a striking resemblance to provisions in Title VII.[575] Title VII, however, does not prohibit disability discrimination. Nevertheless, the reasonable accommodation concept developed as an offshoot of Title VII's prohibition of religious discrimination in employment.[576]

In 1967 the Equal Employment Opportunity Commission (EEOC) issued guidelines requiring employers "to make reasonable accommodations to the religious needs of employees" provided such accommodations did not impose an "undue hardship" on the employer's operation.[577]

The legal validity of the guidelines was not entirely clear.[578] Congress responded to the uncertainty by amending Title VII in 1972 to explicitly require employers to undertake the accommodations first mandated by the EEOC guidelines.[579] After Congress enacted the Rehabilitation Act of 1973, the reasonable accommodation concept was adopted in the federal regulations promulgated thereunder.[580] It is now firmly entrenched in disability discrimination law at the federal level.

B. *Administrative History of Reasonable Accommodation in Iowa*

Section 601A.6(1)(a) is Iowa's statutory bulwark against discrimination in employment. In 1972 it was amended to proscribe disability discrimination.[581] It now reads as follows:

> It shall be an unfair or discriminatory practice for any:
>
> Person to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion, or disability of

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575. 42 U.S.C. §§ 2000e-2000e-17 (1976 and Supp. IV 1980).

576. 42 U.S.C. § 2000c-2(a)(1) (1976). *See generally* Note, *Anderson v. General Dynamics Convair Aerospace Division: First Amendment Establishment Clause Challenge to Title VII's Mandated Accommodation of Religion*, 76 Nw. U.L. Rev. 487 (1981).

577. 29 C.F.R. § 1605.1(b) (1968).

578. *See* Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971) (equally divided court).

579. Equal Employment Opportunity Act of 1972, § 701(j) (codified at 42 U.S.C. § 2000e(j) (1976)).

580. *See* 29 C.F.R. §§ 32.3, .13, Appendix A (1981); 41 C.F.R. § 60-741.6(d), Appendix A (1981).

581. *See supra* note 562.

> such applicant or employee, 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 subsection.[582]

Section 601A.6(1)(a) does not expressly impose a reasonable accommodation duty on employers. Nevertheless, it can be argued that this duty is implicit in the statutory scheme. Section 601A.6(1)(a) sanctions discrimination against the disabled if justified by "the nature of the occupation."[583] But then the provision adds the following caveat: "If a disabled person is qualified to perform a particular occupation, by reason of training or experience," the employer cannot rely on "the nature of the occupation" in rejecting or terminating the disabled individual.[584] This caveat envisions that individuals whose disabilities would seemingly exclude them from a particular occupation might nonetheless be qualified by virtue of prior training or experience. It may be inferred that, in order to competently perform the occupation in question, such qualified disabled individuals might need some reasonable accommodation to compensate for their disabilities. Thus, section 601A.6(1)(a) implicitly supports the requirement that employers take reasonable steps to accommodate disabled applicants or employees whose training or experience qualifies them to perform their particular jobs.

The Iowa Civil Rights Act invests the Commission with broad rulemaking authority.[585] Relying on this authority, and on section 601A.6(1)(a), the Commission issued the following reasonable accommodation rule:

> An employer must attempt to make a reasonable accommodation to the physical and mental limitations of an employee or applicant unless the employer can demonstrate that such accommodation would impose an undue hardship on the conduct of the employer's business. In determining the extent of the employer's accommodation obligations, the following factors shall be included: (a) business necessity and (b) financial cost and expenses.[586]

Because this rule was rescinded and replaced in 1979,[587] it will be referred to as the "old" reasonable accommodation rule.

To be valid, an agency rule must fall within the scope of the agency's delegated authority. It must not be inconsistent with either statutory provisions or legislative intent.[588] Once a rule is promulgated in a procedurally

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582. Iowa Code § 601A.6(1)(a) (1981).
583. *Id.*
584. *Id.*
585. *See* Iowa Code § 601A.5(10) (1981).
586. 240 Iowa Admin. Code § 7.2(6) (1975), effective January 22, 1975. Iowa Departmental Rules at 38-39 (Jan. 1975 Supp.).
587. *See* 1 Iowa Admin. Bull. 1301-02 (Apr. 18, 1979).
588. McSpadden v. Big Ben Coal Co., 288 N.W.2d at 196.

proper manner the burden of invalidating it rests with the challenger.[589] This challenge is usually mounted in a proceeding for judicial review of agency action applying the rule to the aggrieved party. With some exceptions to be discussed later,[590] the appropriate scope of judicial review is whether a rational agency, in the exercise of its informed discretion, could believe that the challenged rule was within the scope of its delegated authority.[591]

The old reasonable accommodation rule is textually similar to a regulation issued by the Office of Federal Contract Compliance implementing section 503(a) of the Rehabilitation Act of 1973.[592] Section 503(a), like section 601A.6(1)(a),[593] does not expressly require employers to make a reasonable accommodation for the disabled. Nevertheless, the U.S. Supreme Court in *Southeastern Community College v. Davis*[594] seemed to equate the term "affirmative action" in section 503(a) with the reasonable accommodation concept.[595] While the Rehabilitation Act of 1973 and concomitant regulations are hardly authoritative indications of the intent of Iowa's Legislature, their existence adds legitimacy to the Commission's reasonable accommodation rules.

The validity of the Commission's old reasonable accommodation rule was upheld in *Foods, Inc. v. Iowa Civil Rights Commission*.[596] In that case, an epileptic cafeteria employee was terminated after suffering an on-the-job convulsion. The Commission acknowledged that the complainant might occasionally suffer seizures in the future.[597] It considered the employer's policy that each cafeteria worker must be capable of performing every task involved in the cafeteria's operation. Nevertheless, the Commission in effect ordered the employer to restructure the job to accommodate the complainant's disability.

> Some of the tasks in the cafeteria did not subject the employee to a high risk of injury.
>
> The tasks of clearing dishes, washing dishes, carrying dishes, operating the steam table, and operating the cash register fell into this

589. Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 909.

590. *See infra* text accompanying notes 604-08.

591. Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 910.

592. Section 503(a) provides that federal contracts exceeding $2,500 "shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals . . . ." 29 U.S.C. § 793 (1976 and Supp. IV 1980).

593. IOWA CODE § 601A.6(1)(a) (1981).

594. 442 U.S. 397 (1979).

595. *Id.* at 410-11.

596. 318 N.W.2d 162, 167, 169 (Iowa 1982).

597. *Id.* at 169.

> category.
>
> Some of the tasks subjected the employees to a higher risk of injury. Operating the grill, slicing meat or cheese, and operating the deep fat fryer fell into this category.
>
> Dahl's could have retained Harkin as an employee doing, for the most part, less dangerous tasks, but also occasionally doing the more dangerous tasks, with little or no detriment to the efficient operation of the cafeteria.[598]

The Iowa Supreme Court concluded that: "Under rule 6.2(6) Foods was required to attempt reasonable accommodation of Harkin's handicap."[599]

The court in *Foods* cited with approval its decision in *Iowa Department of Social Services v. Iowa Merit Employment Department*.[600] The latter case considered the possibilities of restructuring the duties of a prison guard in a male correctional facility to permit a female to perform the essential tasks without impinging on the inmates' privacy. The court refused to require that the prison's facility and procedures be substantially altered.[601] The court, however, endorsed the concept of requiring "reasonable adjustments" to accommodate the individual's sex.[602] A similar balancing effort underlies the reasonable accommodation concept applicable to disabilities.

The Commission rescinded old rule 6.2(6) and replaced it with the following rule:

> 6.2(6). An employer shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
>
> a. Reasonable accommodation may include:
>
> (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and
>
> (2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.
>
> b. In determining pursuant to the first paragraph of this subrule whether an accommodation would impose an undue hardship on the operation of the employer's program, factors to be considered include:
>
> (1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of budget;
>
> (2) The type of the employer's operation, including the composition and structure of the employer's workforce; and

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598. *Id.* at 168.

599. *Id.* at 169.

600. 261 N.W.2d 161 (Iowa 1977) (cited in Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 168).

601. 261 N.W.2d at 167.

602. *Id.*

> (3) The nature and cost of the accommodation needed.
>
> c. An employer may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.[603]

This is the "new" reasonable accommodation rule.

The Iowa Administrative Procedure Act provides that rules may be reviewed by the Legislature's Administrative Rules Review Committee.[604] The Committee may object to all or part of a proposed rule because it is deemed to be unreasonable, arbitrary or beyond the authority delegated to the agency.[605] The Committee's objection reverses the usual burden of proof in an action challenging the agency's rule. The *agency* must "establish that the rule or portion of the rule timely objected to . . . is not unreasonable, arbitrary, capricious, or otherwise beyond the authority delegated to it."[606] If the agency fails to sustain its burden of proof, the court is instructed to assess "court costs", including "a reasonable attorney's fee", against the agency.[607] This provision is designed to force the agency to rethink its rule or face the consequences of an unsuccessful defense.[608]

The Legislative Rules Review Committee lodged objections against sections 6.2(6)(a)(2) and 6.2(6)(b) of the new reasonable accommodation rule.[609] The Committee asserted that these provisions were unreasonable and beyond the statutory authority delegated to the Iowa Civil Rights Commission.[610] The Committee further opined that the reasonable accommodation duty should not fluctuate depending on the employer's size or affluence.[611]

The question now addressed is whether the portions of the new reasonable accommodation rule tainted by the objection are unreasonable or beyond the Commission's scope of authority under Chapter 601A.

C. *Validity of the New Reasonable Accommodation Rule*

The Commission's new reasonable accommodation rule is textually similar to the Department of Labor's regulations implementing section 504 of

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603. 240 IOWA ADMIN. CODE § 6.2(6) (1980) (effective date of May 23, 1979, was delayed for seventy days by action of the legislative rules review committee pursuant to Iowa Code section 17A.4(4)(a) (1979); 1 Iowa Admin. Bull. 1460 (May 30, 1979)).

604. IOWA CODE § 17A.8(6) (1981).

605. IOWA CODE § 17A.4(4)(a) (1981).

606. *Id.*

607. IOWA CODE § 17A.4(4)(b) (1981).

608. *See* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731, 923 (1975).

609. *See* 2 Iowa Admin. Bull. 108 (July 25, 1979).

610. *Id.*

611. *Id.*

the Rehabilitation Act of 1973.[612] Those regulations impose a reasonable accommodation duty on "programs and activities receiving or benefiting from" Department of Labor funds.[613] Those federal regulations do not, however, furnish solid support for the validity of the Commission's new reasonable accommodation rule. The Department of Labor's regulations apply only to programs or activities receiving federal funds. The Iowa Civil Rights Commission's rule applies to all employers covered by Chapter 601A whether they receive governmental largesse or not. Moreover, the Department of Labor's regulations may be vulnerable to attack in the wake of *Southeastern Community College v. Davis*.[614]

In that case, the United States Supreme Court interpreted section 504 of the Rehabilitation Act as *not* requiring recipients of federal funds to undertake affirmative action on behalf of the handicapped:

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps. Section 501(b), governing the employment of handicapped individuals by the Federal Government, requires each federal agency to submit "an affirmative action program plan for the hiring, placement, and advancement of handicapped individuals . . . ." These plans "shall include a description of the extent to which and methods whereby the special needs of handicapped employees are being met." Similarily, [section] 503(a), governing hiring by federal contractors, requires employers to "take affirmative action to employ and advance in employment qualified handicapped individuals . . . ." The President is required to promulgate regulations to enforce this section.
>
> Under [section] 501(c) of the Act, by contrast, state agencies such as Southeastern are only "encourage[d] . . . to adopt and implement such policies and procedures." Section 504 does not refer at all to affirmative action, and except as it applies to federal employers it does not provide for implementation by administrative action. A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it in those instances where it wished to do so.[615]

In assessing the reasonableness of those portions of the Commission's new reasonable accommodation rule tainted by the Legislative Committee's objection, it is instructive to consider the portions of the new rule to which

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612. *See* 29 C.F.R. § 32.13 (1981). Section 504 of the Rehabilitation Act provides in part that: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794 (1976 and Supp. IV 1980).

613. *See* 29 C.F.R. § 32.1 (1981).

614. 442 U.S. 397 (1979).

615. *Id.* at 410-11.

the Committee did not object.

Significantly, the Committee did not object to the broad concept that an employer must accord a reasonable accommodation to the "known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the employer can demonstrate that the accommodation would impose an undue hardship . . . ."[616] Nor did the Committee object to requiring accommodations making the employer's facilities accessible to the disabled.[617] But it objected to other kinds of potential accommodations such as job restructuring, modified work schedules, and other similar accommodations.[618] Finally, although the Committee apparently agreed that an employer should only be required to implement accommodations which do not impose an "undue hardship", it objected to the Commission's list of "factors to be considered" in making this determination.[619]

Given the Legislative Committee's acquiescence in the broad principle of reasonable accommodation, its specific objections seem inconsistent. Obviously, the reasonable accommodation duty can only be fashioned on a case-by-case basis. If an "otherwise qualified" disabled individual could competently perform a job which was restructured to suit the person's impairment, that would seem to be no less reasonable than requiring the employer to make its facilities accessible to the disabled person in the first place. Job restructuring might be much less costly than making facilities accessible to the handicapped individual. Moreover, if the proposed job restructuring were extremely onerous or disruptive, it would constitute an "undue hardship" which the employer could lawfully reject. Whether a given accommodation poses an "undue hardship" will of course depend upon the specific facts of the case. But it seems eminently desirable for the Commission to identify the "factors to be considered" in arriving at this determination rather than leaving those factors to the public's and employers' imaginations.

In essence, the Legislative Committee objected to the Commission's effort to fashion a reasonable accommodation duty flexible enough to fit the circumstances of each disability complaint. The Legislative Committee apparently rebelled at the idea that large, affluent employers should be more accommodating to the disabled than the mom and pop grocery store.[620] But how is that unreasonable? Large, affluent employers are expected to pay more taxes and comply with more government regulations than small businesses. Such impositions are simply a cost of doing business. It seems far more unreasonable to expect John Deere and Company to provide no more of an accommodation than that expected of the corner drugstore. The large

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616. 240 Iowa Admin. Code § 6.2(6) (1980).
617. 240 Iowa Admin. Code § 6.2(6)(a)(1) (1980).
618. 240 Iowa Admin. Code § 6.2(6)(a)(2) (1980).
619. 240 Iowa Admin. Code § 6.2(6)(b)(1)-(3) (1980).
620. *See* 2 Iowa Admin. Bull. 108 (July 25, 1979).

employer will ordinarily have greater resources to finance potential accommodations and greater flexibility in allocating its workforce to accommodate an individual's disability. In short, if no more is required of John Deere and Company than is required of the most impecunious small employer, then the reasonable accommodation duty will be reduced to an empty shell.

If the portions of the Commission's new reasonable accommodation rule tainted by the legislative committee's objection are not unreasonable *per se*, the next question is whether they exceed the agency's statutory authority.

Section 601A.6(1)(a) does not expressly provide for a reasonable accommodation duty. Nevertheless, it has been suggested that the language in section 601A.6(1)(a), concerning "the nature of the occupation," implies the existence of a reasonable accommodation duty.[621] At least one state court has upheld an agency's reasonable accommodation rule despite the lack of express statutory authority.[622] In *Holland v. Boeing Co.*,[623] the Washington Supreme Court noted that disability discrimination "is far more complex" than other forms of employment discrimination:[624]

> The physically disabled employee is clearly different from the nonhandicapped employee by virtue of the disability. But the difference is a disadvantage only when the work environment fails to take into account the unique characteristics of the handicapped person. [Citation omitted] Identical treatment may be a source of discrimination in the case of the handicapped, whereas *different* treatment may eliminate discrimination against the handicapped and open the door to employment opportunities.[625]

The court concluded that the legislative mandate to end disability discrimination could only be realized if employers were required to make reasonable accommodations for the handicapped.[626] Furthermore, at least one commentator has emphasized that equal employment opportunity for the disabled is a pipe dream unless accompanied by a reasonable accommodation duty.[627]

Assuming the validity of the reasonable accommodation duty, no rational legislature would quarrel with fashioning the duty in a flexible manner, taking into account the differences in disabilities, occupations and employers. The concept simply defies any predictable across-the-board application. The particular impairment, the particular job at issue, and the particular employer must all be considered.

The sparseness of legislative guidance on the subject of disability dis-

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621. *See supra* text accompanying note 583.
622. Holland v. Boeing Co., 90 Wash. 2d 384, 583 P.2d 621 (1978).
623. 90 Wash. 2d 384, 583 P.2d 621 (1978).
624. *Id.* at 388, 583 P.2d at 623.
625. *Id.*
626. *Id.* at 389, 583 P.2d at 623-24.
627. Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. 953 *passim*.

crimination further supports the idea that the Commission was encouraged to fashion applicable rules.[628] It would seem desirable that the Commission publicly identify the factors to be considered in distinguishing reasonable accommodations from those which constitute an undue hardship. The statutory delegation of authority to impose the reasonable accommodation duty necessarily allows the agency to adopt standards for exercising its informed discretion in this area. Otherwise, the agency would develop the duty in piecemeal contested case adjudications rather than in the more open, publicly accessible format of rulemaking.[629]

By now it is too late to argue that the Iowa Civil Rights Act does not encompass a duty to reasonably accommodate the disabled in employment. The Legislature has acquiesced in the Commission rules imposing such a duty since 1975.[630] If the Legislature had not intended the Act to impose such a duty, it could have repealed the Commission's reasonable accommodation rules. It has not done so. By its inaction, the Legislature has signalled that the reasonable accommodation duty comports with its benign purpose in enacting Chapter 601A. Furthermore, the Iowa Supreme Court endorsed the reasonable accommodation concept without any reservation in *Foods, Inc. v. Iowa Civil Rights Commission*.[631]

As noted before, the Commission held that the employer in *Foods* could have safely and efficiently accommodated the disabled employee by generally assigning her the less dangerous cafeteria tasks.[632] This is a prime example of "job restructuring". Unlike the Legislative Rules Review Committee, the court did not question the Commission's statutory authority to prod the employer into assigning work compatible with the complainant's epilepsy. In fact, the court held that the Commission's findings were supported by substantial evidence in the record.[633]

The court in *Foods* paid homage to the legislative intent that Chapter 601A should be broadly construed to effectuate its remedial purposes.[634] The flexible, variegated reasonable accommodation rule achieves the Act's goal of expanding the employment horizons of the handicapped. In contrast, were the Legislative Rules Review Committee's objection accepted, doors which are now open to the disabled would be slammed shut. For their sake, it must be assumed that the same court which endorsed the employment rights of the disabled in *Foods* will not deviate from that progressive course.

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628. *See* IOWA CODE § 601A.5(10) (1981).

629. *See* IOWA CODE § 17A.4 (1981); Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731 *passim*.

630. *See supra* notes 585-603.

631. 318 N.W.2d 162 (Iowa 1982).

632. *Id.* at 168-69.

633. *Id.*

634. *Id.* at 167; IOWA CODE § 601A.18 (1981).

V. Application of the Reasonable Accommodation Duty to Disabled Applicants and Employees

The flexibility of the reasonable accommodation duty cannot be overemphasized. Its scope generally depends on such factors as the nature of the complainant's disability, the essential duties of the particular job, the complainant's qualifications for the job, the feasibility of accommodating the complainant's disability, the effectiveness of the accommodation, the accomodation's cost, and the size of the employer.[635] The reasonable accommodation duty redounds to the benefit of disabled applicants and employees alike.[636] However, employers should recognize that there are some practical variations in applying the duty to a disabled applicant as opposed to accommodating an employee who becomes disabled or whose disability first manifests itself during a term of employment.

The reasonable accommodation duty arises when a disabled applicant or employee's impairment affects in some manner his ability to perform the particular job. If the person's handicap does not impede job performance, a reasonable accommodation is obviously unnecessary. Such is the situation when a person's disability is "unrelated to [his] ability to engage in a particular occupation."[637] Of course, a handicapped individual who does not require any reasonable accommodation is not for that reason unprotected by the Iowa Civil Rights Act. These individuals should simply be treated no differently than the non-handicapped. But if an employer invidiously discriminates against such handicapped applicants or employees, it violates the Act.[638]

For purposes of further discussion, it will be assumed that the employer confronts a disabled individual whose physical or mental impairment will affect job performance to some degree. This situation should evoke thoughts of the employer's reasonable accommodation duty. For a disabled applicant seeking employment, the therhold question is whether he or she is qualified to perform the job.[639] In making this determination, the employer may consider the adverse effects on job performance posed by the applicant's handicap.[640] But the threshold question really amounts to this: Is the disabled applicant *qualified* to perform the job and *able* to perform the job in a reasonably competent and satisfactory manner, despite the handicap, if afforded some accommodation?[641] If the answer to this question is "yes," the

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635. 240 Iowa Admin. Code § 6.2(6) (1980).

636. *Id.*

637. Iowa Code § 601A.2(11) (1981).

638. This kind of fact pattern would be analyzed in accordance with the traditional "disparate treatment" theory of employment discrimination. *See infra* text accompanying notes 884-88.

639. Iowa Code § 601A.6(1)(a) (1981); 240 Iowa Admin. Code § 6.2(6) (1980).

640. Southeastern Community College v. Davis, 422 U.S. at 406-07.

641. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 166-69.

employer is entitled to ask a second question: Can an accommodation be implemented which will not pose an undue hardship for the business?[642] If so, the employer may be obligated to hire the disabled applicant and institute the reasonable accommodation.[643] If not, the employer may lawfully reject the disabled applicant.

A. *Bona Fide Occupational Qualifications*

The Iowa Civil Rights Act forbids employment discrimination against the disabled "unless based upon the nature of the occupation . . . ."[644] This language has been deemed to be akin to the "bona fide occupational qualification" (BFOQ) defense in federal fair employment statutes.[645] The Title VII BFOQ exception permits discrimination based on religion, sex, or national origin when those attributes are "reasonably necessary to the normal operation of [the] particular business."[646] A similar defense exists to a federal Age Discrimination in Employment Act charge.[647] Under Iowa's disability law, a BFOQ is said to exist if a certain physical or mental ability is reasonably necessary to the normal operation of the business.[648]

The existence of the BFOQ is essentially a license to lawfully and intentionally reject disabled applicants who do not possess the requisite physical or mental ability. The Commission's disability rules warn that the BFOQ defense is narrow in scope and is not synonymous with the mere preference or convenience of the employer.[649] Some greater showing is necessary to establish a BFOQ. The employer bears the burden of coming within this exception to the Act's prohibition against disability discrimination.[650]

There is a crucial distinction between the BFOQ concept as applied to disability discrimination in Iowa, and that which applies to sex, religion, national origin, and age under the federal statutes.[651] If the employer establishes a BFOQ based on sex, religion, national origin, or age, this permits the

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642. 240 IOWA ADMIN. CODE § 6.2(6) (1980).

643. Chapter 601A, like Title VII, was not intended to supplant "traditional management prerogatives." United Steelworkers v. Weber, 443 U.S. 193, 207 (1979). Accordingly, employers may freely "choose among equally qualified candidates, provided the decision is not based upon unlawful criteria" such as an unwillingness to reasonably accommodate a disabled applicant. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 259 (1981). *See also* 240 IOWA ADMIN. CODE § 6.2(6)(c) (1980).

644. IOWA CODE § 601A.6(1)(a) (1981).

645. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 168; Cedar Rapids Community School Dist. v. Parr, 227 N.W.2d 486, 492 (Iowa 1975).

646. 42 U.S.C. § 2000e-2(e) (1976).

647. 29 U.S.C. § 623(f)(1) (1976).

648. 240 IOWA ADMIN. CODE § 6.7(1) (1980).

649. 240 IOWA ADMIN. CODE § 6.7(2) (1980).

650. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 168-69; Cedar Rapids Community School Dist. v. Parr, 227 N.W.2d at 492.

651. *See supra* text accompanying notes 645-47.

blanket disqualification of a class of applicants without regard to their individual abilities.[652] But under Iowa's disability law, a BFOQ based on physical or mental ability does not permit the exclusion of *all* handicapped applicants. Every person's disability and qualifications should be individually evaluated.[653]

This "individualized" BFOQ exclusion is implicit in the court's analysis in *Foods, Inc. v. Iowa Civil Rights Commission.*[654] The district court had held that the employer's termination of an epileptic cafeteria worker was justified by a BFOQ.[655] It noted that the employee, who might suffer an epileptic seizure in the future, worked near grills, fryers, meat slicers, and other potentially dangerous cafeteria equipment.[656] The district court concluded that "work duties which may not be hazardous for a healthy employee may well be highly dangerous for an employee who irregularly suffers dizzy spells."[657] The Iowa Supreme Court reversed the district court on this issue. In great part, this reversal is attributable to the lower court's improper scope of review of the Commission's fact findings.[658] But the high court also adverted to the complainant's prior work experience and her fourteen months of satisfactory performance as a cafeteria worker prior to being terminated.[659] The court thereby endorsed the Commission's individualized BFOQ analysis: could the *complainant* (not all epileptics or all disabled individuals) perform the cafeteria service job reasonably competently despite her disability?[660]

In *Foods* the court cited with approval a Colorado state court decision which unmistakably adopted an individualized BFOQ analysis in determining the employability of handicapped applicants.[661] In *Silverstein v. Sisters of Charity of Leavenworth Health Services Corp.*,[662] a hospital's employment policy excluded all applicants with a history of epilepsy from positions involving direct patient care.[663] This blanket policy resulted in the disquali-

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652. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. at 977-78.

653. *See* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 166-69 (quoting with approval Silverstein v. Sisters of Charity of Leavenworth Health Servs. Corp., 43 Colo. App. 446, _, 614 P.2d 891, 894 (1979)). *See also* Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. at 978-81.

654. 318 N.W.2d 162 (Iowa 1982).

655. *Id.* at 167-68.

656. *Id.* at 168.

657. *Id.*

658. *Id.* at 168-69.

659. *Id.*

660. *Id.* at 167-69.

661. Silverstein v. Sisters of Charity of Leavenworth Health Services Corp., 43 Colo. App. at _, 614 P.2d at 894 (cited with approval in Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167).

662. 43 Colo. App. 446, 614 P.2d 891 (1979).

663. *Id.* at _, 614 P.2d at 893.

fication of an otherwise qualified applicant whose epilepsy was virtually under complete control.[664] The employer's blanket exclusionary policy was deemed unlawful. The Colorado Court of Appeals held that the statute "necessarily requires individual consideration of each application to determine whether that person is prevented from performing the work by the particular disability."[665]

A non-individualized, class-wide BFOQ exclusion would conflict with statutory provisions governing disability discrimination in Iowa. The court in *Foods* essentially modified the statutory definition of disability to encompass "a substantial handicap . . . which is unrelated to the person's ability to perform [*in a reasonably competent and satisfactory manner*] jobs or positions which are available to him or her."[666] There is a clear emphasis in this definition on the *individual's particular handicap* and its effect on his or her ability to perform a specific job. The court's use of the term "reasonably" to modify the degree of competent job performance required also interjects an individualized element into the definition. Finally, the BFOQ exception in section 601A.6(1)(a) contemplates individualized screening of disabled applicants. The "nature of the occupation" simply does not permit the blanket exclusion of a class of handicapped applicants because: "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."[667] A class-wide exclusion of handicapped applicants would be inconsistent with a consideration of the applicant's individual training, experience, and ability.

Basically, the individualized BFOQ exclusion represents the application of the reasonable accommodation concept to pre-employment screening of handicapped applicants. The BFOQ concept readily lends itself to the reasonable accommodation and undue hardship phraseology. Thus, if a particular physical or mental ability is reasonably necessary to the employer's business and the disabled applicant's training or experience cannot adequately compensate for the lack of the requisite physical or mental ability, then the employer will have shown that it could not accommodate the applicant's disability or, alternatively, that any conceivable accommodation would impose an undue hardship on its business.

The fungibility of these concepts was revealed in the *Foods* decision. Although the case involved a termination rather than a pre-employment screening decision, the court referred to the "nature of the occupation,"

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664. *Id.* at _, 614 P.2d at 894.

665. *Id.*

666. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167. *See also supra* text accompanying notes 474-89.

667. IOWA CODE § 601A.6(1)(a) (1981).

BFOQ, and reasonable accommodation concepts interchangeably.[668] The district court couched its analysis of the facts in BFOQ terms.[669] In rejecting the lower court's conclusion, the Iowa high court held that there was substantial evidence to support the Commission's finding that the employer could have reasonably accommodated the complainant's disability.[670] The court concluded that there was substantial evidence to support the Commission's finding that the epileptic employee's discharge was not based on the nature of the occupation.[671]

To reiterate, the BFOQ and reasonable accommodation concepts, versus the undue hardship concepts, are functionally interchangeable insofar as they pertain to disability discrimination. But because the phraseology accompanying the two concepts is slightly different, the impression is created that a particular disability case can be analyzed in two different ways. The result is semantic and intellectual confusion.

The confusion stems from the BFOQ concept's genesis as a blanket exclusionary device when a particular sex, religion, national origin, or age is reasonably necessary to an employer's business.[672] It has been seen that this is contrary to the individualized evaluation of disabled applicants required by Iowa's disability law.[673] Couching the disability analysis in BFOQ terms redolent of class-wide exclusionary implications subtly undermines the individualized reasonable accommodation test.

This confusion may be attributable to the Commission's disability rules. They include both reasonable accommodation and BFOQ tests.[674] Clearly, the former would suffice.

The potentially bitter harvest yielded by this situation is starkly illustrated by the Commission's decision in *Brown v. Iowa Beer & Liquor Control Department*.[675] In that case, the disabled complainant was hired as a liquor store clerk at one of the Department's larger stores despite her inability, due to a heart condition, to do heavy lifting.[676] She worked for three months at the store but then was discharged after management a change.[677] The store's management had accommodated her disability by assigning heavy lifting tasks to other employees.[678] The Commission determined that

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668. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167-69.
669. *Id.* at 168.
670. *Id.* at 168-69.
671. *Id.* at 169.
672. *See supra* text accompanying notes 645-47.
673. *See supra* text accompanying notes 651-71.
674. *Compare* 240 IOWA ADMIN. CODE § 6.2(6) (1980) *with* 240 IOWA ADMIN. CODE § 6.7 (1980).
675. No. 10-77-4816, slip op. (Iowa Civil Rights Comm'n Nov. 4, 1980), (to be published in 5 Iowa Civil Rights Comm'n Case Reports _).
676. *Id.* at 3.
677. *Id.* at 3-5.
678. *Id.* at 3-4.

the Department's unilateral termination of the complainant's accommodation was unreasonable and not based upon an undue hardship.[679] The Commission muddied the waters, however, by determining that the Department had also failed to establish that a liquor store clerk's physical ability to do heavy lifting constituted a BFOQ.[680]

If the thesis of this article is accepted, the proper focus should have been solely on the Department's ability to reasonably accommodate the complainant's physical disability as a clerk at the particular liquor store. On appeal the district court, however, primarily analyzed the case in BFOQ terms.[681] The evidence before the Commission admittedly underscored the overall importance of employing liquor store clerks who could lift heavy objects.[682] The court's focus subtly shifted away from the Department's ability to accommodate the complainant's disability at a particular store and shifted to whether the ability to do heavy lifting was crucial to the liquor store clerk's position in general.[683] The court reversed the Commission, finding that the Department's discharge of the complainant was sanctioned by a BFOQ.[684] The case is currently pending on appeal to the Iowa Court of Appeals.[685]

Brown illustrates that a joint BFOQ and reasonable accommodation analysis can produce confusing, even contradictory, results. This is inimical to the development of a consistent body of disability discrimination law.

This article proposes that the BFOQ analysis be expunged from disability discrimination law. In its place, the reasonable accommodation versus undue hardship test should be applied. The latter is tailor-made for the individualized case-by-case analysis of disability complaints which is mandated by Chapter 601A.[686] In contrast, the BFOQ analysis is alien to this species of employment discrimination; it is best left to cases of employment discrimination based on sex, religion, age and national origin. The Commission could promote this goal by rescinding its BFOQ disability rules.[687]

In keeping with this premise, this article will now address pre-employment screening issues in terms of reasonable accommodation rather than

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679. *Id.* at 18-19.

680. *Id.*

681. Iowa Beer & Liquor Control Dep't v. Iowa Civil Rights Comm'n, No. CE 773-0781, slip op. at 4, 5-8 (Iowa Dist. Ct., Des Moines County Nov. 30, 1981).

682. *Id.* at 12.

683. *Compare id.* at 5-8 *with* Brown v. Iowa Beer & Liquor Control Dep't, No. 10-77-4816, slip op. at 18 (Iowa Civil Rights Comm'n, Nov. 4, 1980).

684. Iowa Beer & Liquor Control Dep't v. Iowa Civil Rights Comm'n, No. CE 773-0781, slip op. at 13-14.

685. Iowa Beer & Liquor Control Dep't. v. Iowa Civil Rights Comm'n, No. 2-68272 (Iowa Apr. 6, 1982).

686. *See supra* text accompanying notes 651-67.

687. Iowa Code section 601A.5(10) (1981) would permit the Commission to rescind 240 Iowa Admin. Code section 6.7 (1980).

BFOQ.

B. *Evaluating Disabled Applicants for Employment*

1. *Physical and Mental Employment Standards*

An employer is entitled to evaluate all applicants, handicapped or not, to determine whether they are physically or mentally able to perform a job's essential duties. The physical and mental employment standards, however, must be based on a realistic appraisal of the job's essential duties as well as complete knowledge of the working conditions and potential hazards.[688]

Much Title VII litigation has been generated by facially neutral pre-employment screening devices (e.g. a high school diploma requirement, test scores, minimum height and weight requirements, etc.) which disproportionately disqualify minorities from employment. Although pre-employment evaluations of disabled applicants raise some different issues, the principles which have emerged from Title VII litigation are instructive.

The landmark Title VII case in the pre-employment screening field was *Griggs v. Duke Power Co.*[689] The employer in *Griggs* instituted a policy requiring new hirees or transferees to have a high school diploma or pass a standardized aptitude test.[690] This requirement disproportionately disqualified blacks. The Supreme Court noted that the screening devices bore no demonstrable relationship to any ability to perform a particular job or category of jobs at the employer's facility.[691] The court held that this employment practice violated Title VII:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [blacks] cannot be shown to be related to job performance, the practice is prohibited.
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> . . . .
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> . . . [G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[692]

Iowa courts have adopted *Griggs* in construing the meaning of the Iowa Civil Rights Act.[693]

Measuring the physical or mental abilities of disabled applicants is significantly different than the use of facially neutral screening devices which

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688. 240 IOWA ADMIN. CODE § 6.2(3) (1980).
689. 401 U.S. 424 (1971).
690. *Id.* at 427-28.
691. *Id.* at 428, 431-32.
692. *Id.* at 431-32.
693. Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133, 140 (Iowa 1973).

disproportionately exclude blacks, females, or other protected classes. This article has already emphasized the employer's duty to make an individualized determination of a disabled applicant's ability to perform the specific job for which he or she applies. Thus, unlike *Griggs*, the emphasis in Iowa's disability law is upon how the physical or mental standards affect a particular disabled applicant, not their impact on a class. Furthermore, physical or mental standards as applied to the handicapped are far from "facially neutral." They are *deliberately* designed to exclude those who cannot satisfy them. It will be seen that these significant distinctions compel modification of the *Griggs* "disparate impact" theory of discrimination if it is applied to litigation under Iowa's disability law.[694]

Griggs mandates that physical or mental standards which disproportionately weed out minority applicants must be based on "business necessity."[695] This principle is applicable by analogy to standards which deliberately exclude a disabled applicant from employment. An oft-quoted description of this "business necessity" defense appears in *Robinson v. Lorillard Corp.*:[696]

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any [discriminatory] impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact.[697]

Robinson v. Lorillard Corp.[698] has been cited with approval by the Iowa Supreme Court,[699] although not in the disability context.

Physical or mental standards tailored to the particular job in question undoubtedly "serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' "[700] Of course, to the extent that such standards deviate from the actual requirements for performing the essential job duties, they will not "effectively carry out" their avowed legitimate business purpose.[701] Needless to say, a defective standard would not justify the rejection of an otherwise qualified disabled applicant.[702]

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694. *See infra* text accompanying notes 863-82.
695. 401 U.S. at 431, 432.
696. 444 F.2d 791 (4th Cir. 1971).
697. *Id.* at 798.
698. 444 F.2d 791 (4th Cir. 1971).
699. Iowa Dep't of Social Serv. v. Iowa Merit Employment Dep't, 261 N.W.2d at 167.
700. Albemarle Paper Co. v. Moody, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973)).
701. Robinson v. Lorillard Corp., 444 F.2d at 798.
702. 240 IOWA ADMIN. CODE §§ 2.1 (1982), 2.2, 2.3(3) (1975) & 6.2(1)(a) (1980).

The employer carries the burden of proving that the physical or mental standards which exclude a disabled applicant are "job-related."[703] Basically, the employer must persuade the trier of fact that a disabled applicant who cannot meet the mental or physical standards would be unable to safely and effeciently perform the essential duties of the job.[704]

This showing would not necessarily end the inquiry. The disabled complainant must be afforded the opportunity to show that he or she could have safely and efficiently performed the essential duties of the job, despite the handicap, if given some accommodation.[705] This would vitiate the business necessity relied upon to reject the disabled applicant. It would establish that the employer's legitimate business purpose in hiring a safe and efficient worker could be accomplished in a less discriminatory manner.[706] But even this showing by the complainant would not necessarily conclude the matter. The employer may still ultimately prevail by persuading the trier that the accommodation envisioned by the complainant would constitute an undue hardship on its operation.[707]

2. *Eliciting Disability Information in Interviews and Application Questionnaires*

Employers do not have unlimited discretion to probe into an applicant's mental and physical disabilities. Thus, the Commission's disability rules forbid questions on employment application forms seeking to elicit information about disabilities unless the question is based on a bona fide occupational qualification.[708] Forsaking the BFOQ terminology for the reasons discussed earlier,[709] this concept can be rephrased in "business necessity" terms. The scope of this inquiry would be limited to determining whether applicants possess disabilities which might reasonably jeopardize their safe and efficient performance of essential job duties.[710]

This carefully circumscribed scope of inquiry helps protect disabled applicants from unnecessarily disclosing non-job-related impairments. Some handicaps are traditionally or inherently stigmatizing.[711] Overly broad inquiries tend to chill individuals afflicted with such disabilities from seeking employment. If not chilled, such individuals are confronted with a dilemma.

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703. Griggs v. Duke Power Co., 401 U.S. at 431-32; Prewitt v. United States Postal Serv., 662 F.2d 292, 306 (5th Cir. 1981).

704. Prewitt v. United States Postal Serv., 662 F.2d at 306.

705. *Id.* at 310; Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167-69; 240 IOWA ADMIN. CODE § 6.2(6) (1980).

706. Robinson v. Lorillard Corp., 444 F.2d at 798.

707. Prewitt v. U.S. Postal Serv., 662 F.2d at 310; 240 IOWA ADMIN. CODE § 6.2(6) (1980).

708. 240 IOWA ADMIN. CODE § 6.6(2) (1980).

709. *See supra* text accompanying notes 651-99.

710. *See supra* text accompanying notes 706-14.

711. *See supra* text accompanying notes 563-64.

They could risk immediate disqualification and embarrassment by revealing their disability in the first place, or they could conceal the disability, which would create anxiety as well as risk the future revelation of the misrepresentation along with the consequential prospect of dismissal. In this context the Iowa courts recognize the need to protect the privacy of disabled individuals.[712] The Commission's rule helps to preserve personal privacy rights in the pre-employment screening context.

From the employer's perspective, the Commission's disability disclosure rule might represent an inconvenience. It renders across-the-board inquiries concerning disabilities at best unwise and at worse unlawful. The employer should resist inquiring about an applicant's disabilities unless he can adduce some business necessity for such inquiries.[713] In any event, the employer should consider developing different application forms for various job categories requiring significantly different physical or mental abilities or posing materially different safety hazards.

The Commission's disability disclosure rule seems to strike a reasonable balance between the individual's right to privacy and the employer's need to ascertain whether the applicant can safely and efficiently perform the job. Employers should be expected to show compelling reasons for requiring applicants to disclose sensitive mental and physical impairments. As with most aspects of disability discrimination law, this limited "duty to disclose" is fact-specific. It depends on the mental and physical abilities necessary to safely and efficiently perform the job in question. No employer today should be entitled to ask nor any applicants expected to answer such horrendous questions as: "Do you have any physical defects?"

It would seem that the carefully circumscribed "duty to disclose" should be equally applicable regardless of the medium of inquiry. The same strictures which govern written questions on application forms should also govern oral inquiries during pre-employment interviews. The disabled applicant's privacy interest is the same regardless of the medium of communication. Applicants should not have inferior privacy rights merely because the employer elicits information during an interview.

Unfortunately, the Commission's rule governing oral inquiries is dangerously ambiguous. It states that "an employment interviewer may inquire as to a physical or mental disability provided the inquiry is made in good faith for a nondiscriminatory purpose."[714] It will undoubtedly be difficult, after-the-fact, to determine the real intentions and purpose behind an interviewer's inquiry. More unsettling is the possibility that the interviewer may delve into an applicant's disabilities without there being a reasonable nexus between the job requirements and the disabilities probed.

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712. Iowa Civil Rights Comm'n v. City of Des Moines, 313 N.W.2d 491, 495-97 (Iowa 1981).

713. *See supra* text accompanying notes 706-14.

714. 240 IOWA ADMIN. CODE § 6.6(3) (1980).

It seems unnecessarily confusing to suggest that the "duty to disclose" may vary depending on whether the employer's questions are written or oral. The duty should depend on the abilities necessary to perform the job safely and efficiently, not on the mode of inquiry. The Commission's rule governing written inquiries[715] is clear and seems to strike the appropriate balance between the employer's legitimate "need to know" and the applicant's right to privacy. The Commission could eliminate this confusion by amending the rule governing written inquiries to also encompass oral interviews. Alternatively, the Commission and courts might interpret the ambiguous phraseology of the rule governing oral interviews[716] to correspond with the limited "duty to disclose" embodied by the written-inquiry rule. In any event, there is no justification for differentiating the scope of the "duty to disclose" based on the mode of inquiry.

3. *Medical Examinations of Disabled Applicants*

As part of its pre-employment screening process, an employer may require all applicants to undergo a medical examination to determine whether they possess the physical or mental ability to safely and efficiently perform the essential job duties.[717] It should be noted at the outset that medical examinations cannot be utilized simply as a device to winnow out applicants whose mental or physical abilities are less than Olympian. A medical examiner's disqualification is not necessarily an air-tight defense to a charge of disability discrimination.[718] The examination and medical expert's disqualification must be "reasonably arrived at"[719] and consistent with the Commission's rules.[720]

The medical expert's examination of a disabled applicant and recommendation to hire *vel non* must be based on a reasonably thorough evaluation of the applicant as well as an understanding of the job for which the person has applied.[721] Like a facially neutral pre-employment test, an examination "must measure the person for the job and not the person in the abstract."[722] A physical or mental impairment revealed during an examination cannot be the basis for the applicant's rejection unless the condition precludes the person's ability to safely and efficiently perform the essential

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715. 240 Iowa Admin. Code § 6.6(2) (1980).

716. 240 Iowa Admin. Code § 6.6(3) (1980).

717. 240 Iowa Admin. Code § 6.2(1) (1980).

718. *See infra* text accompanying notes 719-48.

719. Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. at 483-88, 388 A.2d at 635-39 (cited with approval in Versteegh v. Iowa S. Utils., 4 Iowa Civil Rights Comm'n Case Reports 156, 162 (Iowa Civil Rights Comm'n May 15, 1980).

720. 240 Iowa Admin. Code §§ 6.2(1)-(3) (1980).

721. Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. at 489, 388 A.2d at 638; 240 Iowa Admin. Code § 6.2(3) (1980).

722. Griggs v. Duke Power Co., 401 U.S. at 436.

job duties even if given a reasonable accommodation.[723]

The Commission's rules require that medical examiners "should consider the degree to which [a disabled applicant] has compensated for his limitations and the rehabilitation service he has received."[724] This is consistent with the law's emphasis on measuring the disabled person for the job and not the person in the abstract. Accordingly, the examiner's inquiry should not end with the mere revelation that an impairment exists. The medical examiner should also ascertain whether the person can overcome or compensate for the effects of the impairment.

An interesting question is whether the employer's medical examiner has a duty to consult the disabled applicant's physician before making a recommendation to reject the applicant. The Commission has never imposed such a duty.[725] Nevertheless, the Commission's rule requiring the examiner to take into account the disabled applicant's rehabilitation and ability to compensate for the disability could be interpreted as mandating some consultation with the applicant's physician. An examiner's recommendation which is contrary to that of the applicant's own physician could be challenged as unreasonable if the examiner knowingly disregarded the applicant's physician's assessment without even a brief consultation. *Panettieri v. C. V. Hill Refrigeration*[726] is a case in point. The employee in *Panettieri* sought reinstatement after recovering from a heart attack. He furnished the employer with a medical clearance from his own physician.[727] The company physician's recommendation to deny reinstatement completely disregarded the employee's physician's assessment. The court held that the company physician's recommendation was unreasonably arrived at because it was made "over the contrary opinion of Panettieri's physician, without even a cursory physical examination, without knowledge of the demands of the job to which Panettieri sought reinstatement, and solely on the basis of [the company doctor's] experience and the prior practice of his predecessor in office."[728] *Panettieri* has been cited with approval by the Commission.[729]

Whether the employer's medical examiner has an obligation to consult with the disabled applicant's physician will probably depend upon the specific factual circumstances. Factors such as the nature of the job and the disability, the respective specialties of the employer's and the applicant's physicians, the thoroughness of the employer's medical examination, the company doctor's knowledge of the particular job duties, the specificity of

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723. *See supra* text accompanying notes 706-16.

724. 240 IOWA ADMIN. CODE § 6.2(2) (1980).

725. Niemeyer v. City of Des Moines, No. 11-79-6393, slip op. at 10-11 (Iowa Civil Rights Comm'n Sept. 8, 1982) (to be published in 5 Iowa Civil Rights Comm'n Case Reports).

726. 159 N.J. Super. 472, 388 A.2d 630 (N.J. Super. App. Div. 1978).

727. *Id.* at 478, 388 A.2d at 633.

728. *Id.* at 488-89, 388 A.2d at 638.

729. Versteegh v. Iowa S. Utils., 4 Iowa Civil Rights Comm'n Case Reports at 162; Niemeyer v. City of Des Moines, No. 11-79-6393, slip op. at 11.

the applicant's physician's recommendation and its degree of divergence from that of the employer's physician would all be relevant.

Medical examinations of disabled applicants occasionally reveal impairments which, while not normally disabling, are deemed to create a future risk of injury to the applicant or others. Epilepsy and high blood pressure exemplify such latent conditions which may be the basis for an applicant's disqualification. The question which arises is what kind of showing must an employer make to disqualify an applicant whose disability is *potentially* dangerous.

There is a line of Wisconsin court cases construing that state's disability discrimination law[730] which establish a very stringent burden on the employer.[731] The leading case is *Bucyrus-Erie Co. v. Department of Industry, Labor and Human Relations.*[732] In that case there was an employer which, based upon its physician's recommendation, rejected an otherwise qualified applicant for a welding job because of his congenital back condition.[733] The employer's medical expert testified that hiring the applicant as a welder would have substantially increased the likelihood that he would injure his back.[734] The expert, however, could not predict whether or when the back condition would become disabling, nor what percentage of persons with such latent back impairments eventually became disabled.[735] Furthermore, the complainant established that he had satisfactorily performed physically strenuous jobs before, and comparable jobs after his rejection by the employer.[736]

Wisconsin employers may lawfully reject "any [applicant] who because of a handicap is physically or otherwise unable to efficiently perform . . . the duties required in that job . . . ."[737] The court construed the statutory term "efficiently" as "embrac[ing] the ability to perform without a materially enhanced risk of death, or serious injury to the employee or others in the future . . . ."[738] The onus of establishing such a risk is borne by the employer. The Wisconsin Supreme Court phrased the burden of proof as follows:

> An employer cannot be said to have discriminated against an employee if

730. Wis. Stat. Ann. §§ 111.31-.37 (West's 1974).

731. Bucyrus-Erie Co. v. Dep't of Indus., Labor & Human Relations, 90 Wis. 2d 408, 280 N.W.2d 142 (1979); Dairy Equip. Co. v. Dep't of Indus., Labor & Human Relations, 95 Wis. 2d 319, 290 N.W.2d 330 (Ct. App. 1980); Chicago & N.W.R.R. v. Labor & Indus. Review Comm'n, 91 Wis. 2d 462, 283 N.W.2d 603 (Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980).

732. 90 Wis. 2d 408, 280 N.W.2d 142 (1979).

733. *Id.* at 413, 280 N.W.2d at 144.

734. *Id.* at 413-14, 280 N.W.2d at 145.

735. *Id.* at 424-25, 280 N.W.2d at 150.

736. *Id.* at 425, 280 N.W.2d at 150.

737. Wis. Stat. Ann. § 111.32(5)(f) (1974) repealed by Act of 1975 Wis. Laws § 18 (effective May 27, 1976).

738. 90 Wis. 2d at 423, 280 N.W.2d at 149.

> it can prove to a reasonable probability that job duties and working conditions would be hazardous to the employee's health in the future or that the employee's disability would present a hazard to other employees or frequenters.[739]

The court concluded that the employer unlawfully rejected the disabled applicant.[740]

Does a similar burden of proof apply in Iowa? The Iowa Supreme Court in *Foods, Inc. v. Iowa Civil Rights Commission*[741] relied in part on *Chicago & N.W.R.R. v. Labor & Industry Review Commission*,[742] a Wisconsin Court of Appeals case which expressly turned on that state's "future hazards" exception as articulated in *Bucyrus-Erie*.[743] The *Foods* case cited *Chicago & N.W.R.R.* in support of the proposition that Iowa's definition of a protected disability includes a substantial handicap "which is unrelated to the person's ability to perform [*in a reasonably competent and satisfactory manner*] jobs or positions which are available to him or her."[744] By citing *Chicago & N.W.R.R.* in support of this definition, the court in *Foods* apparently equated the ability to perform a job "in a reasonably competent and satisfactory manner" with the ability to perform a job without presenting a reasonable probability of future serious injury.[745]

The Iowa Supreme Court in *Foods* recognized the possibility that the epileptic cafeteria employee "might occasionally suffer an epileptic seizure during the course of her employment."[746] Despite this foreboding, the court concluded that the evidence did not establish "that such a seizure would present a risk of danger to" the epilepetic employee, co-workers, or customers, particularly if the employer reasonably accommodated the complainant's disability.[747]

The *Foods* decision once again underscores the relationship of the reasonable accommodation duty to the "risk of danger" which will justify an employer's rejection of a disabled applicant. In assessing the risk of danger, the employer and its medical examiner should take into account any reasonable accommodation which could enable the disabled applicant to efficiently perform the job while *simultaneously* alleviating the foreseeable hazards. The employer must show that it is unreasonably dangerous to hire a disabled applicant. If the applicant could then establish that an accommoda-

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739. *Id.* at 421, 280 N.W.2d at 148.

740. *Id.* at 424-25, 280 N.W.2d at 150.

741. 318 N.W.2d 162 (Iowa 1982).

742. 91 Wis. 2d 462, 283 N.W.2d 603 (Wis. Ct. App. 1979) (cited in Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167).

743. 90 Wis. 2d at 420-25, 280 N.W.2d at 148-50.

744. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.

745. Chicago & N.W.R.R. v. Labor & Indus. Review Comm'n, 91 Wis. 2d 462, 467-78, 283 N.W.2d 603, 606 (Wis. Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (Wis. 1980).

746. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 169.

747. *Id.*

tion would minimize the risk, the employer would prevail only by showing that such an accommodation would impose an undue hardship on its business.

There is an inherent tension in evaluating disabled applicants for employment. To what extent should the risk of future injury overshadow the applicant's present ability to do the job? By citing Wisconsin case law on the subject, the Commission and the court in *Foods* seem to favor present ability. At least one commentator has strongly endorsed this emphasis:

> Certain safeguards are built into the recommendation that present ability control. The definition of "ability" . . . includes [such] factors [as] safety to the individual and customers, as well as business efficiency. This broad definition of ability coupled with the requirement that *present* ability be determinative, protects the employer's interests while at the same time removing speculation regarding future ability from the employment decision.[748]

It should be noted that the employer's burden of showing a risk of danger will vary with the type of occupation. The Wisconsin cases recognize that a risk which might be tolerable for a welder may well be unacceptable in an occupation which owes a higher standard of care to the public.[749] For instance, occupations which involve transporting the public or traversing the highways should not tolerate the same degree of risk which was deemed acceptable in *Foods* and *Bucyrus-Erie*.

To reiterate, the employer's medical evaluation should measure the individual applicant's present ability to safely and efficiently perform the essential duties of the particular job. The evaluation should take into account any reasonable accommodation which could facilitate the applicant's job performance or cushion potential safety hazards. Finally, the employer's physician might be well-advised to consult the disabled applicant's treating physician if some medical disagreement arises about the applicant's actual ability to perform a particular job.

4. *Pre-Employment Testing of Disabled Applicants*

The Commission's disability rules require that an employer adapt any pre-employment testing to the particular impairments of its disabled applicants.[750] It should be noted that the rule does not explicitly permit the employer to subject *only* disabled applicants to such pre-employment testing.[751]

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748. Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. at 985.

749. Bucyrus-Erie Co. v. Dep't of Indus., Labor & Human Relations, 90 Wis. 2d at 421-23, 280 N.W.2d at 148-49.

750. 240 IOWA ADMIN. CODE § 6.2(4) (1980).

751. *Id.*

It could be argued that the Iowa Civil Rights Act does not allow employers to subject the handicapped to pre-employment tests which are not likewise required for nonhandicapped applicants. The "disparate treatment" theory of employment discrimination, applicable to actions under Chapter 601A,[752] prohibits employers from singling out a protected individual and treating him less favorably than others.[753] On its face, this theory would apparently not countenance a test given only to handicapped applicants.

This article has emphasized the individualized evaluation of disabled applications for employment. It would seem that this duty might permit employers, in good faith, to single out disabled applicants for some testing purposes. The disability rule already requires any pre-employment test to be modified to suit the disabled applicant's "special circumstances."[754] This is by definition a form of "disparate treatment" mandated by law but shorn of its usual pejorative connotation.

Employers should determine whether a disabled applicant can perform the essential job duties, either with or without a reasonable accommodation. The disabled applicant's particular training and experience must be considered, as well as his or her ability to compensate for the impairment. What better way is there to evaluate such a person than to observe whether the applicant can *actually* perform or learn to perform the particular job before making a hiring decision. An employer who is skeptical of a disabled applicant's ability to perform the work may be assuaged after observing the applicant's performance during a realistic test. Pre-employment tests which are fair, practical, and adapted to the applicant's particular disability should not be discouraged. They may in fact open doors hitherto closed to the handicapped.

The Commission's rules permit an employer to institute "[p]robationary trial periods . . . for entry-level positions . . . to prevent arbitrary elimination of the disabled."[755] The rule conditions such probationary periods on a showing of "business necessity."[756] It *allows* employers to single out disabled hirees for a probationary period—another example of a permissible, non-invidious form of "disparate treatment." The "business necessity" requirement might be taken with a grain of salt. After all, employers should not be penalized for attempting to accommodate disabled hirees on a trial-type basis. During the probationary period the disabled hiree's actual ability to perform the job in a reasonably competent manner can be assessed. Furthermore, the employer will be better able to determine the cost and efficacy of any necessary accommodations. This is a practical

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752. Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293, 296 (Iowa 1982); Linn Cooperative Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981).

753. *See infra* text accompanying notes 884-916.

754. 240 Iowa Admin. Code § 6.2(4) (1980).

755. 240 Iowa Admin. Code § 6.2(5) (1980).

756. *Id.*

way to measure the disabled person for the job, rather than "the person in the abstract."[757] Such a *modus operandi* should be encouraged by the Commission and the courts, for it may make employers more amenable to hiring disabled applicants.

5. *Summary*

Evaluating disabled applicants for employment raises a plethora of sensitive practical questions. First, the employer should be able to distinguish the essential duties of a job from its more peripheral duties. The mental and physical standards by which a disabled applicant is judged must be firmly tied to the actual abilities needed to perform the essential job duties. Indeed, the employer's permissible scope of inquiry concerning an applicant's disabilities is coextensive with its legitimate need to determine whether the applicant can perform the essential job duties in a reasonably efficient and safe manner.

Evaluating a disabled applicant is a highly individualized process. Identifying a "job-related" disability is only the beginning of the process.[758] Next, the employer must determine to what degree the applicant can overcome the limitations of the disability by virtue of training, experience, and rehabilitation. The employer must also consider whether the applicant might be capable of performing the essential job duties if accorded some accommodation. If so, the employer may then assess the cost, efficiency, and disruptiveness of such a potential accommodation in an effort to determine whether it would constitute an undue hardship.

C. *Reasonable Accommodations of Disabled Employees*

Thus far the reasonable accommodation duty has been discussed in the context of evaluating disabled applicants for employment. The reasonable accommodation duty also extends to employees who are already, or who become, disabled during a term of employment. In fact, the Commission's general reasonable accommodation rule expressly protects both disabled applicants and disabled employees.[759]

The reasonable accommodation and undue hardship principles which apply to disabled employees are fundamentally the same as those which apply to applicants. The overriding question remains: can the disabled employee perform the essential duties of the particular job in a reasonably competent manner if given a reasonable accommodation?[760] Of course, if the

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757. Griggs v. Duke Power Co., 401 U.S. at 436.

758. Non-job-related disabilities, of course, should not adversely influence an employment decision. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 167 (Iowa 1982); Iowa Code §§ 601A.2(11) & .6(1)(a) (1981); 240 Iowa Admin. Code §§ 6.2(1) & (3), 6.6 (2), & 6.7 (1981).

759. 240 Iowa Admin. Code § 6.2(6) (1980).

760. *Compare* Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167-69 *with* 240

disabled employee can safely and efficiently discharge the essential duties without the need for any accommodation, it goes without saying that his or her disability cannot lawfully be a factor in any adverse employment decision. If, on the other hand, the disabled worker does require an accommodation to his disability, the question becomes whether the accommodation would impose an undue hardship on the employer's operation.[761] The analysis will continue to assume that the employee's disability requires some accommodation.

There are several practical differences between applying the reasonable accommodation duty to disabled employees as compared to disabled applicants. First, accommodation of the latter may largely revolve around making the employer's facilities accessible to the individual in the first place.[762] With a disabled employee, accessibility has already been achieved except in those instances when a previously nonhandicapped employee suddenly becomes disabled during a term of employment. For the disabled employee, the accommodation emphasis usually focuses upon restructuring or modifying the job duties to permit continued performance of the job despite the disability. Secondly, the reasonable accommodation and undue hardship concepts, as applied to disabled applicants, invariably involve a much higher degree of uncertainty and speculation than when they are applied to a disabled employee. Given the history of the employment relationship, the employer should have a much better grasp of the disabled employee's capability to perform the essential job duties despite his or her handicap. If, at the outset, the employee's handicap has required some modification or alteration of the job duties or working conditions, the employer should have a fairly accurate idea about the cost and efficiency of perpetuating the arrangement. This track record will remove some of the uncertainties which plague the application of the reasonable accommodation duty to the hypothesized job performance of a disabled applicant.

Time and again this article has emphasized the factually specific nature of disability discrimination law. This obviously applies to the employer's duty to reasonably accommodate its disabled employees. This discussion will begin by examining Commission rules which specifically relate to the accommodation of disabled employees. Next, the Commission's application of the reasonable accommodation duty to the particular facts of four cases will be analyzed. Based on this agency experience, the general principles of the reasonable accommodation duty will be summarized.

IOWA ADMIN. CODE § 6.2(6) (1980).

761. 240 IOWA ADMIN. CODE § 6.2(6) (1980).

762. 240 IOWA ADMIN. CODE § 6.2(6)(a)(1) (1980). This type of accommodation is recognized as a *sine qua non* of equal employment opportunity for the handicapped. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 DE PAUL L. REV. at 958-64.

1. *Commission Rules Governing Accommodations of Disabled Employees*

It has already been noted that the Commission's general reasonable accommodation/undue hardship rule applies to disabled employees and applicants alike.[763] The employer's duty *vis-a-vis* its employees is also subject to the following rule:

> When an individual becomes disabled, from whatever cause, during a term of employment, the employer shall make every reasonable effort to continue the individual in the same position or to retain and reassign the employee and to assist in his or her rehabilitation. No terms in this section shall be construed to mean that the employer must erect a training and skills center.[764]

Employers are obligated to extend a reasonable accommodation to employees whose disabilities are manifested at the time of hiring. This rule requires employers to undertake similar efforts on behalf of employees who *become* disabled during the course of their employment.[765] The rule does not distinguish between disabilities attributable to employment and those which arise from some cause unrelated to the job. Nor does it distinguish between involuntary disabilities and those which may in some sense be incurred voluntarily—for instance, alcoholism or drug addiction.[766] Some employers may have personnel policies which contemplate accommodating employees who become disabled from job-related causes whereas employees whose disabilities are incurred off the job are not similarly accommodated. Such distinctions are not authorized by the Commission's reasonable accommodation rules.[767] In fact, if the employer accommodates employees injured on-the-job, it might be hard-pressed to argue that similarly accommodating other disabled employees would constitute an undue hardship.

It would appear that this Commission rule imposes a higher accommodation duty on employers, with respect to disabled employees, than that which applies to disabled applicants. Employers are required to "make every reasonable effort to continue the individual in the same position or to retain and reassign the employee and to assist in his or her rehabilitation . . . ."[768] The employer's burden of establishing that every proposed accommodation would create an undue hardship[769] may be more difficult in light of this mandatory language.

If an employee becomes disabled and is no longer able to satisfactorily perform his job even with some accommodation, the employer must make

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763. 240 IOWA ADMIN. CODE § 6.2(6) (1980).
764. 240 IOWA ADMIN. CODE § 6.3 (1980).
765. *Id.*
766. *Id.*
767. 240 IOWA ADMIN. CODE §§ 6.2(6), 6.3 (1980).
768. 240 IOWA ADMIN. CODE § 6.3 (1980).
769. 240 IOWA ADMIN. CODE § 6.2 (1980).

"every reasonable effort" to "reassign the employee" to a job which he *can* perform, with a reasonable accommodation, if necessary.[770] The Iowa Civil Rights Act, however, provides a *caveat:*

> After a handicapped individual is employed, the employer shall not be required under this chapter to promote or transfer such handicapped person to another job or occupation, unless, prior to such transfer, such handicapped person by training or experience is qualified for such job or occupation. Any collective bargaining agreement between an employer and labor organization shall contain this section as part of such agreement.[771]

Thus, Commission rule 6.3 cannot be construed as requiring an employer to transfer a disabled employee to a job for which he is not qualified.

On the other hand, the employer's duty to reassign a disabled employee to another position for which he is qualified cannot be diminished by provisions in a collective bargaining agreement. The Commission's rules, having the binding force of law, supersede inconsistent provisions in a collective bargaining agreement.[772]

2. *Cases Involving Reasonable Accommodation of Disabled Employees*

The Commission has recently adjudicated four contested cases which focused on the employer's duty to reasonably accommodate a disabled employee. These cases illustrate the flexible and factually specific nature of the reasonable accommodation and undue hardship concepts. The leading case is *Foods, Inc. v. Iowa Civil Rights Commission.*[773] Because the factual specifics in *Foods* have been discussed earlier,[774] the underlying principles will simply be summarized here.

a. *Foods, Inc. v. Iowa Civil Rights Commission.*[775] The *Foods* decision emphasizes the employer's obligation to reasonably accommodate an employee's disability. The court accepted the Commission's findings that the employer could assign the various tasks in the cafeteria operation in such a manner that retaining the epileptic employee would neither be inefficient or unduly dangerous.[776] The cafeteria supervisor's testimony that such an allocation of work assignments would be inconvenient was not enough to disturb the Commission's conclusion that the accommodation would not pose an undue hardship.[777] Nor was the likelihood that the employee would suffer

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770. 240 IOWA ADMIN. CODE §§ 6.2(b), 6.3 (1980).

771. IOWA CODE § 601A.14 (1981).

772. *See* Davenport Community School Dist. v. Iowa Civil Rights Comm'n, 277 N.W.2d at 909-10; Franklin Mfr. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d at 833-34.

773. 318 N.W.2d 162 (Iowa 1982).

774. *See supra* text accompanying notes 473-75, 596-98.

775. 318 N.W.2d 162 (Iowa 1982).

776. *Id.* at 168-69.

777. *Id.* at 169.

future epileptic seizures while working enough to establish a "risk of danger" transforming an otherwise reasonable accommodation into an undue hardship.[778] The Commission found that such hazards would have been largely alleviated by the reasonable accommodation.[779] The Commission and the court emphasized that the employee had satisfactorily performed her job for fourteen months before being terminated in the wake of her on-the-job seizure.[780] In addition, the employer failed to adduce any evidence that it contemplated, let alone attempted to implement, any reasonable accommodation of the employee's disability before discharging her.[781] Its ability to argue that any conceivable accommodation would represent an undue hardship was thereby impaired.

b. *Versteegh v. Iowa Southern Utilities.*[782] The *Versteegh* case illustrates the limits of the reasonable accommodation duty. The disabled employee was a utility service worker whose job often required him to work in close proximity to electrical transmission lines. Several times he sustained serious injuries while working. As a result of these accidents, the employee lost some mobility in his arms and shoulders. He became physically unable to perform his work in accordance with the employer's stringent safety rules.[783] Nevertheless, he devised tools and techniques which enabled him to do his work despite his physical limitations.[784] The utility terminated his employment despite his ingenuity.[785]

Much of the evidence adduced at the hearing emphasized the inherent risks of the employee's occupation, the utility's overriding need to enforce work rules minimizing those risks, and the disabled complainant's physical inability to abide by the company's work rules after several accidents.[786] In its decision, the Commission noted that the employee had resisted every effort by the employer to reassign him.[787] Accordingly, the Commission analyzed the evidence surrounding the employee's discharge and concluded that the employer met its burden of showing a business necessity therefor:

> [O]ne of the major obstacles to employment of [the] disabled . . . is over-protective employers, and a good faith protective action which is not based in fact will not be upheld [citations omitted]. But where, as

778. *Id.*
779. *Id.*
780. *Id.*
781. *Id.* at 167. The employer had argued that its termination of the employee was based on her alleged misrepresentations of her physical condition on the employment application form. *Id.* at 167-68.
782. 4 Iowa Civil Rights Comm'n Case Reports 156 (Iowa Civil Rights Comm'n May 15, 1980).
783. *Id.* at 157-58, 161-62.
784. *Id.* at 158.
785. *Id.* at 158, 162.
786. *Id.*
787. *Id.* at 158-59, 162.

> here, there is a record of multiple previous mishaps, and there is a "reasonable probability" [citation omitted] of mishaps of a more serious nature resulting from the disability, the employer's action cannot be held to be [unlawful] discrimination.[788]

The Iowa Court of Appeals affirmed the Commission's decision in *Versteegh* shortly after *Foods* was decided.[789] The court squarely rejected the complainant's contention that "the nature of the occupation" could not justify the termination because of his prior training and experience.[790] Citing *Foods*, the court observed that the termination was lawful because, at that precise moment in time, the complainant was no longer capable of performing his job duties in a reasonably competent and satisfactory manner.[791] In other words, retaining the disabled employee would have imposed an undue hardship on the utility.

c. *Janes v. City of Burlington.*[792] The complainant in this case was hired as a sanitation worker and assigned to a garbage pickup crew. The complainant's mental disability (low intelligence as measured by the Wechsler Adult Intelligence Test) impaired his ability to satisfactorily perform his job duties.[793] The complainant was terminated after almost six months of inadequate job performance working with the same crew and showing no signs of improvement.[794] The Commission's hearing officer submitted a proposed decision concluding that the employer's termination was lawful.[795] The Commission reversed the hearing officer's proposed decision, concluding that the employer failed to reasonably accommodate the complainant by declining to assign him to a different crew before terminating him.[796]

The employer appealed the Commission's decision to the district court. The court reversed the Commission's order, relying on section 601A.14.[797] According to the court, the Commission's suggested reasonable accommoda-

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788. *Id.* at 161 (citing Chicago & N.W.R.R. v. Labor & Indus. Review Comm'n, 91 Wis. 2d 462, __, 283 N.W.2d 603, 606 (Wis. Ct. App. 1979), *aff'd*, 98 Wis. 2d 592, 297 N.W.2d 819 (Wis. 1980)); Bucyrus-Erie Co. v. Dep't of Indus., Labor and Human Relations, 90 Wis. 2d 408, __, 280 N.W.2d 142, 150 (1979).

789. Versteegh v. Iowa S. Utils., No. 2-66089, slip op. (Iowa Ct. App. May 25, 1982); *Foods* was decided on April 21, 1982.

790. Versteegh v. Iowa S. Utils. No. 2-66089, slip op. at 4 (Iowa Ct. App. May 25, 1982).

791. *Id.*

792. No. 1-79-5633, slip op. (Iowa Civil Rights Comm'n Sept. 22, 1980) (to be published in 5 Iowa Civil Rights Comm'n Case Reports __).

793. *Id.* at 2-3.

794. *Id.*

795. Minutes of Iowa Civil Rights Comm'n Meeting at 5 (Aug. 15, 1980) (on file with the author).

796. Janes v. City of Burlington, No. 1-79-5633, slip op. at 4, 7 (Iowa Civil Rights Comm'n Sept. 22, 1980).

797. City of Burlington v. Iowa Civil Rights Comm'n, No. CE 401-1080, slip op. at 7-9, 12-13 (Iowa Dist. Ct., Des Moines County Aug. 11, 1981).

tion, a job transfer, was *not* required by section 601A.14.[798] The Commission did not appeal the court's decision.

d. *Brown v. Iowa Beer & Liquor Control Department.*[799] Here, the complainant was hired by a liquor store's manager as a clerk even though she was physically unable to lift heavy objects because of a heart ailment.[800] The complainant's duties as a clerk were informally modified. The heavy lifting functions were assigned to the nonhandicapped clerks.[801] The complainant specialized in light duties such as operating the cash register, keeping the books, and general housekeeping in the store.[802] Shortly after a managerial shakeup in the store, the complainant was terminated pursuant to the employer's pre-existing policy that all clerks be able to perform every task necessary to operate a liquor store.[803]

The hearing officer and Commission concluded that the employer's severance of the previous reasonable accommodation was not based on an undue hardship.[804] Instead, the employer apparently feared that an accommodation of one clerk's disability might encourage other disabled applicants and employees to demand similar accommodations throughout the employer's network of liquor stores.[805] The employer opined that this would eventually paralyze its overall operation.[806]

The district court reversed the Commission's decision because it determined that the ability to perform heavy lifting was a BFOQ for the liquor store clerk's position.[807] In addition, the court noted that the Commission was, in effect, requiring the employer to restructure the clerk's job to accommodate the complainant's disability.[808] Relying on the Legislative Rules Review Committee's objection to the Commission's reasonable accommodation rule,[809] the court held that the Commission's implicit modification of the clerk's job exceeded its statutory authority.[810] This controversy is presently pending before the Iowa Court of Appeals.[811]

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798. *Id. See also supra* text accompanying note 792-96.

799. No. 10-77-4816 slip op. (Iowa Civil Rights Comm'n Nov. 4, 1980) (to be published in Iowa Civil Rights Comm'n Case Reports _).

800. *Id.* at 2.

801. *Id.* at 3-4.

802. *Id.* at 4.

803. *Id.* at 5.

804. *Id.* at 18-19.

805. *Id.* at 6.

806. *Id.* at 6, 18.

807. Iowa Beer & Liquor Control Dep't of Iowa Civil Rights Comm'n, No. CE 773-0781, slip op. at 7-8. *See also supra* text notes 675-85.

808. No. CE 773-781, slip op. at 8-10.

809. *Id.* at 8. *See also supra* text accompanying notes 609-11.

810. No. CE 773-0781, slip op. at 8-10.

811. Iowa Beer & Liquor Control Dep't v. Iowa Civil Rights Comm'n, No. 2-68272 (Iowa Apr. 6, 1982).

3. *Reasonably Accommodating Disabled Employees: A Synthesis*

The reasonable accommodation analysis which pertains to disabled employees is not unlike that which pertains to disabled applicants. The starting point is the same: what are the essential duties of the particular job? Second, to what degree does the employee's disability preclude him or her from performing those essential job duties? If the employee's impairment has no effect at all on job performance, or a very marginal effect, then a reasonable accommodation is either unnecessary or merely consists of overlooking the disability's tangential effect on job performance.

Problems arise when the employee's disability adversely affects the performance of essential job duties. This adverse effect may amount to inefficient job performance, an unacceptable risk of danger to the employee or others, or some combination of the two. This situation evokes the delicate balancing process so characteristic of the reasonable accommodation duty.

The interests of the principals can be stated succinctly. The disabled employee has a monumental interest in retaining his or her job with the aid of whatever accommodation is technically feasible. In our society a job is more than a mere source of economic sustenance. It is also a source of self-esteem. A job may have even more importance to a disabled individual who understands that he or she is less able to compete in a labor market already swelled with nonhandicapped, unemployed competitors.

The employer's perspective is obviously different. It has an overriding interest in "efficient and trustworthy workmanship."[812] Its interest lies in marketing a satisfactory product or service at the lowest possible cost. To an employer scrambling in the competitive marketplace, cutting labor costs wherever possible, *any* accommodation demanded by a disabled employee may seem onerous.

But employers and disabled employees are not the only ones interested in the balancing process. The Iowa Legislature has unmistakably expressed an interest in providing employment opportunities to qualified disabled individuals.[813] Society has a general interest in preserving the dignity and independence which employment confers on a disabled person. It also has a pecuniary interest. A disabled employee makes an economic contribution to society by producing goods or services and by paying taxes. In contrast, an unemployed disabled individual increases the overall demands on the public treasury. Given the inherent difficulties facing all unemployed people—but magnified by the nature and degree of one's handicap—a displaced and disabled person is likely to require considerable long-term governmental assistance. Finally, a society's collective image of itself may be shaped by the manner in which it treats its most disadvantaged members. Eskimo clans living on the threshold of material subsistence could be excused for dis-

812. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).
813. Iowa Code § 601A.6(1)(a) (1981).

patching their elderly and disabled members to the ice floes; a technologically sophisticated society which permitted the functional equivalent would invite cynical self-destruction.

It should be apparent that balancing the discordant interests of the disabled employee and the cost-conscious employer is a legal exercise laced with humanistic overtones. Striking the appropriate balance is like untangling a Gordian knot. The Commission and courts are only beginning to unravel the complexities of disability discrimination law, so the analysis which follows must be offered with this *caveat* in mind.

To begin with, the Commission's disability rules require the employer to make every reasonable effort to retain, reassign, and rehabilitate the disabled employee.[814] This rule has not played a prominent part in disability litigation thus far, but it suggests that the Commission may place more weight on the disabled employee's scale. Consequently, the prudent employer should explore all reasonable avenues of avoiding the termination of disabled employees in the first place.

Assuming that every reasonable alternative to termination has been found wanting, the employer can lawfully discharge the disabled employee if one of the following conditions exists: (1) there is no technologically feasible accommodation which would enable the disabled employee to perform the job in a reasonably competent and satisfactory manner;[815] (2) although some technologically feasible accommodation exists, it would be so expensive, so inefficient, or would so substantially alter the employer's operation that its implementation would constitute an undue hardship;[816] or (3) although some technologically feasible accommodation exists, it still would not permit the retention of the disabled employee without exposing him or others to unreasonable danger.[817]

Hypothetical "undue hardships" are often not very persuasive, but they are virtually useless as justifications for an employer's decision to terminate a disabled employee. The employer's chosen solution to its dilemma will be upheld only if it securely rests on some factual footing.[818] This is not an unfair requirement. No rational employer terminates *any* employee, with all the attendant psychological and legal fireworks, without some sound business reasons.[819] If there is one consistent thread which runs throughout every termination case cited herein, it is the overriding significance of the

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814. 240 IOWA ADMIN. CODE § 6.3 (1980).

815. 240 IOWA ADMIN. CODE § 6.2(6) (1980).

816. Southeastern Community College v. Davis, 442 U.S. at 409-10, 412-13; Iowa Dep't of Social Serv. v. Iowa Merit Employment Dep't, 261 N.W.2d at 167; 240 IOWA ADMIN. CODE § 6.2(6)(b) (1980).

817. Versteegh v. Iowa S. Utils. 4 Iowa Civil Rights Comm'n Case Reports at 160. Bucyrus-Erie Co. v. Dep't of Ind., Labor and Human Relations, 90 Wis. 2d at __, 280 N.W.2d at 144-46.

818. Versteegh v. Iowa S. Utils. 4 Iowa Civil Rights Comm'n Case Reports at 161.

819. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).

specific employment relationship between the disabled worker and the employer. In *Versteegh*, the history of that employment relationship went far toward demonstrating the unconscionable risks which the employer would have faced had it retained the disabled employee.[820] Compare this history with that in *Foods*. There the disabled employee performed her job satisfactorily for fourteen months, only to be discharged shortly after her epilepsy first manifested itself on the job.[821] Clearly, the history of that employment relationship showed neither the employer's inability to accommodate the disabled worker nor an unreasonable risk of danger. The employment relationships in *Janes*[822] and *Brown*[823] are also revealing. In the former, the employee was unable to master the job after six months; there were apparently no further accommodations which could have transformed him into a reasonably competent sanitation worker.[824] In *Brown*, the feasibility and minimal cost of accommodating the employee's disability were manifested by her three-month tenure as a liquor store clerk.[825]

Thus, the cardinal difference between the disabled applicant and employee rests upon the existence and duration of the employment relationship. Both the employer and employee should be fully cognizant of the information in support of their respective positions. Hopefully, by knowing where to look, the parties may amicably resolve their dispute before it erupts into a civil rights action.

D. *A Note on Undue Hardships*

Much of the discussion thus far has centered on the employer's duty to reasonably accommodate disabled applicants and employees. Employers understandably wonder where such a duty ends. Unfortunately, the limitation on the reasonable accommodation duty is no more precise than the phrase "undue hardship." The employer's duty to make a reasonable accommodation extends to the point where the accommodation demonstrably imposes an undue hardship on the employer's operation.[826]

Neither the Commission nor the courts have provided much practical guidance for determining when an accommodation will be deemed an undue hardship. The Commission's reasonable accommodation rule[827] contains the clearest expression of the factors which the Commission considers in making such a determination: "(1) The overall size of the employer's program with respect to number of employees, number and type of facilities, and size of

820. *See supra* text accompanying notes 795-806.
821. *See supra* text accompanying notes 788-94.
822. *See supra* text accompanying notes 792-98.
823. *See supra* text accompanying notes 799-811.
824. Janes v. City of Burlington, No. 01-79-5633, slip op. at 2-3.
825. Brown v. Iowa Beer & Liquor Control Dep't, No. 10-77-4816, slip op. at 18-19.
826. 240 IOWA ADMIN. CODE § 6.2(6) (1980).
827. *Id.*

budget; (2) The type of the employer's operation including the composition and structure of the employer's workforce; and (3) The nature and cost of the accommodation needed."[828]

Just as the reasonable accommodation duty varies depending on the specific circumstances of the case, so too does the undue hardship defense. The relevant factors which the Commission has enumerated underscore the idea that a potential accommodation which could wreak havoc on a small employer may well not impose an undue hardship on Iowa Beef Processors or John Deere & Co.

The factors listed in the Commission's undue harship rule are not exclusive. Additional relevant factors readily come to mind. The degree to which a proposed accommodation requires an employer to alter its physical plan or procedure will certainly be a key factor in the balance. In *Iowa Department of Social Services v. Iowa Merit Employment Department*,[829] the court discussed the accommodations which a male reformatory might make to enable a female corrections officer to perform the essential job duties without impinging upon the inmates' privacy rights. The court endorsed the notion that "reasonable adjustments should be made" but it would not compel the institution "to substantially adjust its physical plant or procedure" to accommodate the female corrections officer.[830] In an educational context the United States Supreme Court in *Southeastern Community College v. Davis*[831] has held that the Rehabilitation Act of 1973 and concomitant federal regulations do not require a college nursing program to make fundamental alterations in its curriculum in order to accommodate a hearing-impaired applicant.[832] These cases suggest that there is a significant correlation between the substantiality of physical or procedural modifications demanded by a proposed accommodation and the undue hardship defense.

The nature of the disability and efficacy of the proposed accommodation should also be weighed in the balance. An accommodation which, even if it were smoothly implemented, still would not enable the disabled individual to perform the job "in a reasonably competent and satisfactory manner"[833] would undoubtedly impose an undue hardship on the employer.[834] Likewise, the Commission would presumably not mandate an accommodation which created or perpetuated a high risk of danger as in *Versteegh v. Iowa Southern Utilities*.[835] These considerations were weighed by the Court

828. 240 Iowa Admin. Code § 6.2(6)(b) (1980).

829. 261 N.W.2d 161 (Iowa 1977).

830. *Id.* at 167.

831. 422 U.S. 397 (1979).

832. *Id.* at 409-10, 413.

833. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.

834. *See, e.g.*, Niemeyer v. City of Des Moines, No. 11-79-6393, slip op. at 8-9.

835. 4 Iowa Civil Rights Comm'n Case Reports 156 (Iowa Civil Rights Comm'n May 15, 1980).

in *Southeastern Community College v. Davis*.[836] The Supreme Court examined the rigorous nature of the college's nursing program and concluded that it could not be efficaciously adapted to a student with a severe hearing impairment.[837]

It has been seen that the reasonable accommodation and undue hardship concepts had their genesis in Title VII's prohibition against religious discrimination in employment.[838] In *Trans World Airlines v. Hardison*,[839] the United States Supreme Court analyzed the extent of the employer's statutory obligation to accommodate an employee's religious practices.[840] The Court concluded that an accommodation involving more than a *de minimis* cost to the employer constituted an undue hardship.[841]

The *de minimis* cost standard judicially grafted on Title VII's reasonable accommodation to religion provision[842] should not be imported into the disability discrimination arena.[843] Unlike the vast majority of disabilities, one's religion is voluntarily acquired. The religious employee has freedom to choose whether or not his or her beliefs will take precedence over conflicting employment imperatives. In contrast, the disabled individual cannot shed his or her disability so easily.[844] Moreover, many religious-motivated accommodations revolve around the possibility of replacing the employee on his Sabbath or holy days with co-workers.[845] If one's Sabbath falls on a Saturday, it may be difficult for the employer to find co-workers willing to exchange places with the complainant. Thus, in *Trans World Airlines v. Hardison*[846] and other cases of this genre, the potential accommodation interferes with the desires or seniority expectations of co-workers. In contrast, most accommodations in the disability area primarily affect the disabled individual and only incidentally affect nonhandicapped co-workers.[847]

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836. 442 U.S. 397 (1979).

837. *Id.* at 409-10, 413.

838. *See supra* text accompanying notes 575-80.

839. 432 U.S. 63 (1977).

840. *Id.* at 63-65.

841. *Id.* at 84.

842. 42 U.S.C. § 2000e(j) (1976).

843. The Commission has explicitly refused to equate "de minimis" cost with "undue hardship" in a disability discrimination context. *See* Brown v. Iowa Beer & Liquor Control Dep't, No. 10-77-4816, slip op. at 14-15.

844. *See* Gittler, *Fair Employment and the Handicapped: A Legal Perspectibe*, 27 DE PAUL L. REV. at 966 n.39.

845. *See, e.g.*, Trans World Airlines v. Hardison, 432 U.S. 63, 76-77, 79-83 (1977).

846. 432 U.S. 63 (1977).

847. *See* Gittler, *supra* note 844, at 966 n.39. Co-workers may complain when they are requested to perform certain job functions which the disabled employee cannot do. *See, e.g.*, Brown v. Iowa Beer & Liquor Control Dep't, No. 10-77-4816, slip op. at 3-4. In *Brown* the Commission held, *sub silentio*, that the objections of the complainant's co-workers did not rise to the level of an undue hardship upon the employer. *Id.* at 16-19.

In *Holland v. Boeing Co.*,[848] the employer contended that its obligation to reasonably accommodate a disabled employee was limited by the *de minimis* cost standard articulated in *Trans World Airlines*. The Washington Supreme Court rejected this argument. It noted that disability discrimination was qualitatively different than other types of employment discrimination.[849] But the court did not specifically explain *why* religious discrimination was different than disability discrimination. Thus, while the result in *Holland v. Boeing Co.*[850] is laudible, the analytical route taken by the court is difficult to retrace. It should also be noted that the Fifth Circuit Court of Appeals has declined to adopt the *de minimis* cost defense in an action brought pursuant to the Rehabilitation Act of 1973.[851]

It should be apparent that the Commission's reasonable accommodation and undue hardship rules[852] do not incorporate the *de minimis* cost defense. Neither the court's decision in *Foods* nor the three state disability cases cited therein[853] lend any support to such a facile defense.

Throughout this article, the flexible and factually-specific nature of the reasonable accommodation and undue hardship concepts has been stressed. Because it would undermine that flexibility, the Legislative Rules Review Committee's objection to portions of the Commission's reasonable accommodation rule was severely criticized earlier.[854] Any attempt to equate undue hardship with *de minimis* cost, for disability purposes, merits similar criticism. The balance between employers and the handicapped would thereafter tip heavily toward the former. The overriding emphasis would be directed toward the cost of the accommodation, rather than the disabled individual's ability to satisfactorily perform the work if given the accommodation. It is beyond dispute that an accommodation's cost is a significant factor to be weighed in the balance, but the *de minimis* cost defense would effectively overshadow every other factor in the equation.

Ultimately, the undue hardship concept is no easier to apply than the reasonable accommodation duty. Both depend on a variety of factors which will vary with the specific facts of the case.

VI. Disability Law and Legal Theories of Employment Discrimination

The Iowa Civil Rights Act is in many respects comparable to Title VII.

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848. 90 Wash. 2d 384, 583 P.2d 621 (1979).

849. Holland v. Boeing, Co., 90 Wash. 2d at 388-389, 583 P.2d at 623-624.

850. 90 Wash. 2d 384, 583 P.2d 621 (1979).

851. Prewitt v. United States Postal Serv., 662 F.2d at 308 n.22.

852. 240 Iowa Admin. Code § 6.2(6) (1980).

853. Silverstein v. Sisters of Charity of Leavenworth Health Servs. Corp., 43 Colo. App. 446, 614 P.2d 891 (1979); Rose v. Hanna Mining Co., 94 Wash. 2d 307, 616 P.2d 1229 (1980); Chicago v. N.W.R.R. v. Labor & Indus. Review Comm'n, 98 Wis. 2d 592, 297 N.W.2d 819 (1980) (cited in Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167).

854. *See supra* text accompanying notes 609-34.

Under Title VII, two major legal theories of employment discrimination have evolved: the disparate impact and disparate treatment models. The disparate impact theory originated with *Griggs v. Duke Power Co.*[855] The disparate treatment theory stemmed from *McDonnell Douglas Corp. v. Green*[856] and finds its most recent elaboration in *Texas Department of Community Affairs v. Burdine.*[857]

The distinction between these two theories has been described as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity . . . . Proof of discriminatory motive . . . is not required under a disparate impact theory . . . . Either theory may, of course, be applied to a particular set of facts.[858]

For purposes of construing the Iowa Civil Rights Act, the *Griggs* disparate impact theory was adopted in *Wilson-Sinclair Co. v. Griggs.*[859] The *McDonnell-Douglas* disparate treatment theory in its latest permutation was followed in *Linn Co-Operative Oil Company v. Quigley.*[860] No attempt has yet been made by the Iowa Supreme Court to apply either theory to a disability discrimination case in Iowa.

The disparate impact and treatment theories arose out of race and sex-based employment discrimination prohibited by the Title VII.[861] The question to be considered here is whether either theory can be applied to disability discrimination in employment. If so, when? Also, what modifications, if any, are necessary?

A. *Disparate Impact Theory*

As already noted, the disparate impact theory is invoked when an employer utilizes a facially neutral pre-employment screening device, promotional criterion, or some other general policy which disproportionately af-

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855. 401 U.S. 424 (1971).
856. 411 U.S. 792 (1973).
857. 450 U.S. 248 (1981).
858. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).
859. 211 N.W.2d 133 (Iowa 1973).
860. 305 N.W.2d 729 (Iowa 1981).
861. *See supra* text accompanying notes 855-58.

fects members of a protected class.[862] From a legal practitioner's viewpoint, the key characteristic of this theory is the insignificance of the employer's intent. It will be seen that proving discriminatory intent is essential under the disparate treatment theory. Under the disparate impact theory the courts look "to the *consequences* of employment practices, not simply the motivation."[863]

1. *Establishing the Prima Facie Case*

A complainant who alleges disparate impact discrimination must initially establish a prima facie case. Like the disparate treatment model, this initial burden is not onerous.[864] The complainant "need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern."[865] Obviously, the requisite showing will vary depending on whether the challenge is directed towards hiring criteria, promotional criteria, or some other general employment policy.

The "significantly discriminatory pattern" is most often revealed through statistics.[866] The nuances of statistically presenting a prima facie case of disparate impact discrimination are complex and beyond the scope of this article.[867] Of course, a *sine qua non* is the availability of reliable statistics. This threshold requirement is invariably lacking in disability discrimination cases.

A class consisting of all disabled individuals is unlike the other traditional protected classes such as blacks, women, ethnic groups and religious minorities. The class of disabled includes people with mental and physical impairments—real or perceived, visible or invisible—of every imaginable type and degree. It is a fragmented class which, unlike the other protected classes, lacks any single unifying characteristic. Because of the widely varying nature and severity of impairments, the legal status of being "disabled" is not really a unifying characteristic.[868] "Courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because 'the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person.' "[869] Statistically speaking, there is no practical way to measure the

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862. *See supra* text accompanying note 858.

863. Griggs v. Duke Power Co., 401 U.S. at 432.

864. *See infra* text accompanying notes 889-90.

865. Dothard v. Rawlinson, 433 U.S. 321, 329 (1977).

866. *Id.* at 329-30; Teamsters v. United States, 431 U.S. at 337-42; Hazelwood School Dist. v. United States, 433 U.S. 299, 307-13 (1977).

867. *See generally* D. Baldus & J. Cole, Statistical Proof of Discrimination (1980); Comment, *Judicial Refinement of Statistical Evidence in Title VII Cases*, 13 Conn. L. Rev. 515 (1981).

868. *See* Prewitt v. United States Postal Serv., 662 F.2d at 307; Gittler, *Fair Employment and the Handicapped: A Legal Perspective*, 27 De Paul L. Rev. at 972.

869. Prewitt v. United States Postal Serv., 662 F.2d at 307 (quoting Gittler, *Fair Employ-*

relevant class of disabled people.[870]

The whole tenor of disability discrimination law demands an individualized, case-by-case consideration of the disabled person's unique qualifications for the particular job. It demands an inquiry into the employer's ability to reasonably accommodate the individual's disability. Unfortunately, the statistical prima facie showing associated with the disparate impact theory is an instrument which is too blunt to capture these nuances.

Fortunately, the prima facie showing is flexible even as applied in the traditional disparate impact contexts. There is no logical reason why it could not be modified to suit the realities of disability discrimination. In fact, the necessary modification would be quite straightforward.

The disparate impact theory looks to the effect of a facially neutral employment practice on a class. The two key elements are (1) the facial neutrality of the challenged employment practice, and (2) the existence of a statistically discernible class.[871] Neither element grasps the essence of disability discrimination. First, the disabled individual is usually challenging an employment practice which is *not* facially neutral as applied to his or her handicap. More often than not, the employer fails to hire or fires a disabled individual simply because he or she is unable to satisfy some physical or mental standard. This is not a facially neutral impact; it is facially exclusionary. Second, there is no statistically meaningful class of disabled persons which can be identified. The focus must of necessity be on the specific disabled individual's disqualification by a facially exclusionary standard.

If these essential distinctions are accepted, the contours of a prima facie showing adapted to a disability case become apparent. These concepts will be discussed in the context of an employer's rejection of a disabled applicant. First, the complainant must show that his disability is protected by the Iowa Civil Rights Act.[872] Second, the complainant must show that he applied for the job in question.[873] Third, the complainant must show that, apart from his inability to satisfy a physical or mental requirement imposed by the employer, he was "otherwise qualified" for the position.[874]

When a complainant establishes a prima facie case of discrimination under this modified disparate impact theory, the burden of proof should shift to the employer to show that the disqualifying mental or physical criterion has a "manifest relationship to the employment in question."[875] In

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ment and the Handicapped: A Legal Perspective, 27 DE PAUL L. REV. at 972).

870. Gittler, *supra* note 844, at 971-73.

871. *See supra* text accompanying notes 865-67.

872. *See supra* text accompanying notes 519-68.

873. If the complainant had not applied for the job there would be no discrimination.

874. Pushkin v. Regents of Univ. of Colo., 658 F.2d 1372, 1385, 1387 (10th Cir. 1981); 240 IOWA ADMIN. CODE § 6.2(6) (1980).

875. Griggs v. Duke Power Co., 401 U.S. at 432. "Underlying this allocation of proof burden is recognition that the party to whom the burden shifts is in a better position to meet it than is the other party." Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. at 484, 388 A.2d

other words, the challenged criterion must be shown to be related to the ability to perform the job "in a reasonably competent and satisfactory manner."[876]

2. *The Disparate Impact Theory and Reasonable Accommodation*

This article has already dwelled at length on the employer's burden to establish the job-relatedness of physical and mental standards which disqualify a disabled applicant.[877] In a nutshell, the employer must show that one's ability to meet the challenged standard is necessary to the safe and efficient performance of the particular job.

Once the employer has established the job-relatedness of the disqualifying physical or mental standard, the disparate impact theory permits the complainant to show that "the employer's legitimate interest in 'efficient and trustworthy workmanship' "[878] could be equally well served in a less discriminatory manner.[879] In the disability discrimination context, this is akin to the complainant's offer of evidence that he could perform the essential job duties in a reasonably competent manner despite his disability if accorded an accommodation. The complexities of this showing have already been discussed.[880] Unlike the traditional disparate impact model, the complainant's proof that a less discriminatory alternative exists would not conclude the inquiry. The employer would then be given the opportunity to show that the proposed accommodation would be unreasonable, i.e., it would impose an undue hardship on its operation.[881]

In the end, the modified disparate impact theory is simply the reasonable accommodation versus undue hardship test couched in Title VII terminology. Is this Procrustean exercise desirable? To begin with, intellectual resources would be conserved simply by analyzing a disability case along reasonable accommodation lines rather than attempting to adapt the Title VII disparate impact theory. There is, however, a weightier reason for eschewing the disparate impact theory altogether.

Recall the confusion surrounding a disability case which is evaluated in both reasonable accommodation and BFOQ terms.[882] It became apparent that the concepts might not be synonymous after all. The BFOQ language, with its connotations of a blanket disqualification of an entire class, subtly undermined the individualized reasonable accommodation duty. Procrus-

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at 636.

876. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.

877. *See supra* text accompanying notes 688-707.

878. Albemarle Paper Co. v. Moody, 422 U.S. at 425 (quoting McDonnell Douglas Corp. v. Green, 411 U.S. at 801).

879. Robinson v. Lorillard Corp., 444 F.2d at 798.

880. *See supra* text accompanying notes 635-86, 717-849.

881. 240 IOWA ADMIN. CODE § 6.2(6)(b) (1980).

882. *See supra* text accompanying notes 644-87.

tean adaptation of the disparate impact theory to disability discrimination might breed similar confusion. *Griggs* and its progeny emphasize the adverse impact of *facially neutral* standards on a protected *class*. The focus in a disability case is utterly different. A disabled *individual* usually is being rejected or terminated for failing to meet *facially disqualifying* standards. The *Griggs* terminology might insidiously draw the analysis away from the application of the reasonable accommodation and undue hardship concepts to the specific facts of the disability case. In short, disability discrimination law is complicated enough without trying to impose the alien disparate impact theory on it.

B. *Disparate Treatment Theory*

Title VII has spawned a second major theory of employment discrimination: the disparate treatment model. This is the most commonly applied theory in Iowa.[883] It is invoked when an individual protected by Title VII or the Iowa Civil Rights Act claims to have been invidiously singled out for harsh treatment by the employer. In other words, the individual asserts that he is being treated less favorably than others because of his race, sex, national origin, age or religion.[884] Its major distinction, compared to the disparate impact theory, is the necessity to prove that the employer acted with discriminatory intent.[885] Accordingly, a tripartite process of analyzing evidence of employment discrimination has evolved under the disparate treatment theory. First, the complainant must establish a prima facie case of discrimination.[886] Next, the employer must articulate, by producing admissible evidence, legitimate, nondiscriminatory reasons for the challenged employment decision.[887] Finally, the complainant must be afforded the opportunity to show that the employer's articulated reasons are in actuality pretexts for unlawful discrimination.[888]

1. *Establishing the Prima Facie Case*

The first hurdle facing a complainant in a disparate treatment case is to

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883. *See e.g.*, Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293 (Iowa 1982); Peoples Memorial Hosp. v. Iowa Civil Rights Comm'n, 322 N.W.2d 87 (Iowa 1982); Linn Cooperative Oil Co. v. Quigley, 305 N.W.2d 729 (Iowa 1981); Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W.2d 443 (Iowa Ct. App. 1981). Most of the complaints prosecuted by the author at contested case hearings have involved allegations of disparate treatment in employment. Unfortunately, Iowa's relatively homogeneous population often makes it difficult to establish that a challenged employment practice has a statistically disproportionate impact on a protected class. *See supra* text accompanying notes 865-67.

884. Teamsters v. United States, 431 U.S. at 335 n.15.

885. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254-56.

886. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

887. *Id.*

888. *Id.* at 802-804; Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 252-56.

make a prima facie showing of employment discrimination.[889] The exact contours of the prima facie case depend on the nature of the alleged discrimination. A failure-to-hire case will differ from a discharge case or a terms-and-conditions-of-employment case. Nevertheless, the prima facie showing is not designed to be onerous. The complainant must simply adduce evidence which "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[890]

The functional significance of the prima facie case lies in dispelling the most common nondiscriminatory reasons for the employer's challenged action.[891] Thus, in a failure-to-hire case, the most common nondiscriminatory reasons for an applicant's rejection would be (1) the applicant's absolute or relative lack of qualifications for the job; or (2) the nonexistence of a vacancy in the job being sought.[892] The elements of a prima facie failure-to-hire case are designed to eliminate these possible legitimate explanations for the employer's rejection. Accordingly, the complainant must show: (1) membership in a protected class; (2) application and qualification for a job for which the employer sought applicants;[893] (3) rejection despite being qualifies; and (4) that the employer continued to seek other applicants after rejecting the complainant.[894] Once the complainant marshals a prima facie case, the burden of producing evidence to explain the reasons for the challenged action shifts to the employer.[895]

2. *Articulating Legitimate Reasons for the Employment Decision*

If the employer is silent in the face of the complainant's prima facie case, the trier of fact may enter a judgment for the complainant.[896] Thus, the employer must rebut the inference of discrimination represented by the prima facie case. After the Court's decision in *McDonnell Douglas Corp. v. Green*,[897] it was unclear whether the burden which shifted to the employer was one of proof, persuasion, or merely the production of evidence to rebut the prima facie case.[898] The Fifth Circuit Court of Appeals held that the

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889. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

890. Furnco Construction Corp. v. Waters, 438 U.S. at 577; Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254.

891. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254.

892. Teamsters v. United States, 431 U.S. at 358 n.44.

893. *Cf.* Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W.2d at 451 ("where an employer's acts deter an employee from applying, strict adherence to the 'application' requirement is not mandated").

894. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

895. *Id.* at 802-03; Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254-56.

896. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254.

897. 411 U.S. 792 (1973).

898. The Court in *McDonnell Douglas Corp. v. Green* referred to the employer's burden of articulating a legitimate non-discriminatory reason for its challenged action as one of

employer's burden was to *prove* by a preponderance of evidence that its challenged action was premised upon legitimate, nondiscriminatory reasons.[899] This approach was rejected in *Texas Department of Community Affairs v. Burdine*.[900]

In *Burdine*, a female plaintiff claimed that she was passed over for a promotion and later terminated because of her sex. The Court of Appeals held that, after the plaintiff established her prima facie case of sex discrimination, the employer failed to meet its burden of *proving* that those who were hired or promoted in lieu of the plaintiff were *better* qualified.[901] The Supreme Court reversed this determination. In so doing, the Court clarified the nature of the employer's intermediate burden:

> The burden that shifts to the [employer] . . . is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The [employer] need not persuade the court that it was actually motivated by the proffered reasons. [citation omitted] It is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the [employer] must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the [employer]. If the [employer] carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the [employer] thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the [employer's] evidence should be evaluated by the extent to which it fulfills these functions.[902]

The Court of Appeals erred by requiring the employer to *prove* that its preferred hirees were more qualified than the plaintiff. The Supreme Court observed that Title VII was not intended to compel employers to "give preferential treatment to minorities or women."[903] Nor was it "intended to 'diminish traditional management prerogatives.' "[904] Consequently, the employer could freely "choose among equally qualified candidates, provided the decision is not based upon unlawful criteria."[905]

"proof." *Id.* at 802.

899. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256.
900. *Id.* at 256-58.
901. *Id.* at 256.
902. *Id.* at 254-56.
903. *Id.* at 259.
904. *Id.* (quoting United Steelworkers v. Weber, 443 U.S. at 207).
905. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 259.

Nevertheless, the Court recognized that the employer's articulation of legitimate, nondiscriminatory reasons for its challenged action is merely the penultimate step in the analysis.[906] The complainant must still "be afforded 'a full and fair opportunity' " to unmask the employer's avowedly legitimate reasons for its action as pretexts for unlawful, intentional discrimination.[907]

3. *Showing Pretext*

The ultimate issue in a disparate treatment case under Title VII or Chapter 601A is whether the proscribed criterion—be it race, sex, age, etc.—"was a *factor* in the challenged employment decision."[908] The complainant retains this ultimate burden of persuasion throughout the litigation.[909] Once the employer articulates its legitimate reasons for the challenged action, the complainant must persuade the trier of fact that the *real* reason for the action was a discriminatory animus. "[The complainant] may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[910]

Debunking an employer's articulated reasons for an employment decision is clearly a sensitive and demanding process for a complainant. "Principles governing proof of discrimination are based on recognition that discriminatory motive will rarely be boldly announced or readily apparent."[911] Often, the complainant's case will be devoid of direct evidence of discriminatory intent but depends instead on subtle differences in the way an employer treats minorities *vis-a-vis* non-minority applicants or employees.

Not even the supple three-step formulation in *Burdine* should be mechanically applied in every disparate treatment case. *Muntin v. State of California Parks Department*[912] illustrates this point. In *Muntin* an experienced female deckhand was the first woman to apply for such a position with the state employer.[913] She placed third out of sixty applicants. Nevertheless, the employer deviated from its standard business procedure of interviewing the top three candidates and declined to interview Ms. Muntin.[914] The court concluded that, in the course of establishing her prima

906. *Id.* at 257-58.

907. *Id.* at 258.

908. Satz v. ITT Fin. Corp., 619 F.2d at 746 (emphasis in original) (cited with approval in Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d at 296.

909. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256; Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733.

910. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256 (quoted in Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733).

911. Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 738-39 (McCormick, J., dissenting); Wilson-Sinclair Co. v. Griggs, 211 N.W.2d 133, 140 (Iowa 1973).

912. 671 F.2d 360 (9th Cir. 1982).

913. *Id.* at 361.

914. *Id.*

facie case, the complainant conclusively proved that the employer had been motivated by a discriminatory animus.[915] The court paid obeisance to the theoretical shifting of burdens posed by *Burdine*. However, the court refused to even consider any legitimate reasons articulated by the employer because "[n]o such explanation could be sufficient, as a matter of law, to justify a judgment that unlawful discrimination did not occur."[916]

4. *The Disparate Treatment Theory and Disability Discrimination*

The disparate treatment theory is adapted to the increasingly subtle forms taken by employment discrimination against traditionally victimized minorities. But the theory is not always so well suited to disability discrimination.

In contrast to a person's race or sex, one's disability may indeed have some effect on job performance. Employers often reject or terminate disabled individuals "under the guise of extending a helping hand or a mistaken restrictive belief as to the limitations of handicapped persons."[917] The issue often is not *whether* the employer intentionally discriminated against a disabled individual, but whether such intentional discrimination was justified by the lack of any reasonable accommodation. In *Pushkin v. Regents of University of Colorado*,[918] the employer contended that the disparate treatment theory should be applied to a failure-to-hire claim under section 504 of the Rehabilitation Act.[919] The court declined to apply the *McDonnell Douglas* theory to the disability discrimination case.[920]

Clearly, the disparate treatment theory is inappropriate when the employer candidly admits that it knowingly rejected or discharged a disabled individual because of his or her handicap. But cases may arise in which an employer invidiously discriminates against a disabled person but articulates some plausible, nondiscriminatory reason. The disparate treatment theory could be applied to these cases. If the complainant shows that the purportedly legitimate reasons are "unworthy of credence," the employer's lack of candor should not be rewarded by further requiring the disabled complainant to demonstrate the possibility of a reasonable accommodation.

C. *Proving Unlawful Disability Discrimination Under the Iowa Civil Rights Act*

If the thesis of this article is accepted, the trier of fact will decline to apply the disparate impact theory and will often be unable to apply the

915. *Id.* at 362-63.
916. *Id.* at 363.
917. Pushkin v. Regents of Univ. of Colo., 658 F.2d at 1385.
918. 658 F.2d 1372 (10th Cir. 1981).
919. 29 U.S.C. § 794 (1976 and Supp. IV 1980).
920. Pushkin v. Regents of Univ. of Colo., 658 F.2d at 1385.

disparate treatment theory to disability discrimination cases. The trier will also avoid confusing the issue if it forsakes the BFOQ analysis.[921]

Disability cases share one characteristic with religious discrimination cases. Both species of employment discrimination demand a unique theory for evaluating the merits of an action. The theory generally applicable to both types of discrimination is couched in a deceptively similar phraseology. Can the complainant be reasonably accommodated without imposing an undue hardship on the employer's operation? This surface similarity, however, should not obscure the crucial substantive differences between disability and religious discrimination.[922]

A major theme in this article is the factually specific nature of disability discrimination cases. This inevitably renders problematic any elaboration of "the" appropriate legal theory for evaluating the evidence in specific disability cases. Thus, the following discussion is designed to suggest some possible ways of evaluating the evidence in various types of disability cases. Because the two most common forms taken by disability discrimination are failures-to-hire and terminations, tests will be formulated for each category.

1. *Failure-to-Hire Cases*

Commonly, an employer's failure-to-hire a disabled applicant is based either on the applicant's lack of qualifications or on a candid assessment that the applicant's disability renders him unfit for the job. The reasonable accommodation theory as applied to this situation is a hybrid. It borrows elements from both the disparate impact and disparate treatment theories. But, on balance, the appropriate evidentiary burdens make it more analogous to *Griggs v. Duke Power Co.*[923] than *McDonnell Douglas* or *Burdine*.

a. *Establishing a Prima Facie Case.* It seems that no theory of employment discrimination is complete without the preliminary requirement that the complainant establish a prima facie case before proceeding further. Disability discrimination is no different in this regard. The prima facie case, however, is not so easily established as in other variants of employment discrimination law.

One of the functions of the prima facie case, borrowed from the disparate treatment theory, is dispelling the most common nondiscriminatory reasons for an applicant's rejection.[924] Therefore, a disability complainant must at least show that a job opening actually existed and that he or she possessed the minimum qualifications demanded by the job.[925] In addition, complainants must show that their disabilities are protected under the Iowa

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921. *See supra* text accompanying notes 644-87.
922. *See supra* text accompanying notes 838-54.
923. 401 U.S. 424 (1971).
924. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253-54.
925. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

Civil Rights Act.[926] Merely being handicapped—unlike being black, ethnic, or female—does not automatically confer protection under the Act.

Broadly speaking, four elements constitute a prima facie disability case. First, the complainant must establish that his disability entitles him to protection under the Act. Second, the complainant must show that he or she applied for a bona fide job opening.[927] This can be shown simply by establishing that the employer continued to seek applicants after the disabled individual was rejected.[928] Third, the complainant must show that he possessed the minimum qualifications required for performing the essential duties of the job.[929] Finally, the complainant must establish that his application was rejected. Of these four elements, the first and third will ordinarily be the most difficult to establish. The first element has already been thoroughly explored; the third element now bears further examination.

In its protection of disabled applicants, the Iowa Civil Rights Act strikes a delicate balance. On the one hand, it does not purport to displace the employer's "traditional management prerogatives"[930] associated with choosing a hiree from among equally qualified applicants.[931] It does not require employers to prefer a disabled applicant over equally qualified nonhandicapped applicants as long as the employer's choice is unrelated to the rejected applicant's handicap.[932]

The reasonable accommodation duty must be taken into account in determining whether a disabled complainant meets the standard of being at least minimally qualified for a job. If the trier concludes that an accommodation would enable the disabled applicant to perform the job in a reasonably competent manner,[933] it follows that the complainant is "qualified" for purposes of establishing his prima facie case. Furthermore, if the disabled applicant is rejected because of failure to satisfy a physical or mental standard, the trier must consider the validity of the standard.[934]

At this point, the appropriate legal test will vary depending upon the disabled applicant's evidence of qualification and the employer's articulated reasons for the rejection. Hereafter it will be assumed that the disabled applicant has established his prima facie case.

b. *Shifting the Burden to the Employer.* Once the complainant establishes a prima facie case, the burden shifts to the employer to rebut that

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926. *See supra* text accompanying notes 452-568.

927. It should not be assumed that a complainant's failure to submit a formal application for a job is necessarily fatal to the prima facie case. *See* Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W.2d at 451.

928. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

929. *See infra* text accompanying notes 930-32.

930. United Steelworkers v. Weber, 443 U.S. at 207.

931. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 259.

932. *Id.*, 240 IOWA ADMIN. CODE § 6.2(6)(c) (1980).

933. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.

934. *See infra* text accompanying notes 937-49.

showing. In a disparate impact case, the burden which shifts is one of proof.[935] Under the disparate treatment theory, the shifting burden is merely one of producing rebuttal evidence.[936] The burden which shifts in a disability case should depend on the complainant's evidence of qualification and the employer's articulated reasons for the rejection.

1. *The complainant's failure to meet mental or physical job standards.* Suppose the employer rejects the disabled applicant because his handicap prevents him from satisfying some mental or physical employment standard required of all applicants. This situation is somewhat akin to the disparate impact theory. The employer is applying a standard to all applicants, handicapped and nonhandicapped alike. But unlike the traditional disparate impact context, those standards are not facially neutral *vis-a-vis* the disabled complainant. They by definition identify certain categories of handicapped applicants for intentional disqualification. Nevertheless, a reasonable accommodation analysis borrowing heavily from the traditional disparate impact theory seems most appropriate for evaluating the evidence in these cases.

This approach was adopted in *Prewitt v. United States Postal Service*.[937] In that case, a handicapped applicant challenged his rejection by a federal agency under section 501 of the Rehabilitation Act.[938] The court required the complainant to establish that he was qualified for the position under all but the challenged physical standards.[939] At that juncture:

> The burden of persuasion then shifts to the employer to prove that the challenged criteria are "job related," i.e., that they are required by "business necessity." [Citations omitted].
>
> . . . [T]he test is whether a handicapped individual who meets all employment criteria except for the challenged discriminatory criterion "can perform the essential functions of the position in question without endangering the health and safety of the individual or others." If the individual can so perform, he must not be subjected to discrimination . . . .[940]

The first sentence above creates confusion by juxtaposing burdens of persuasion and proof. It would appear that the burden which should shift is one of *proof*, not persuasion.[941] The employer has presumably adopted the physical or mental standards in order to assure a safe and efficient workforce. It follows that the employer is in a far better position than the complainant to show how the challenged standards effectuate that objec-

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935. Griggs v. Duke Power Co., 401 U.S. at 431-32.
936. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254-56.
937. 662 F.2d 292 (5th Cir. 1981).
938. 29 U.S.C. § 791 (1976 and Supp. IV 1980).
939. Prewitt v. United States Postal Serv., 662 F.2d at 306.
940. *Id.* at 306-07.
941. Griggs v. Duke Power Co., 401 U.S. at 431-32.

tive.[942] The employer, then, must show that the complainant's handicap prevents him from performing the essential job duties "in a reasonably competent and satisfactory manner."[943] To the extent that the employer rejects a presently capable disabled applicant because of speculation about future safety hazards, the burden can be refined even further: Is there a reasonable probability of some future serious injury?[944]

This fairly elaborate analysis assumes that the complainant cannot adequately perform the essential job duties without *some* accommodation. If the complainant, despite his handicap, *can* perform those duties without any accommodation, it follows that the disqualifying standards are not job related and the applicant's rejection is not based on a business necessity.

Assuming that the employer proves that the disqualifying standards are job related, the analysis now should proceed to a higher level of inquiry. The complainant should be allowed to propose potential accommodations which would enable him to perform the essential job duties despite his handicap.[945] The proposed accommodations may take the form of job accessibility, job restructuring, modified work schedules, or the modification or acquisition of special equipment.[946]

At this point, the employer faces the burden of persuading the trier that the proposed accommodation, if implemented, would constitute an undue hardship.[947] In this respect, the analysis borrows elements from both the disparate impact and disparate treatment theories. The analysis is similar to the disparate impact theory in that the complainant may persuade the trier that the ends served by the employer's discriminatory, though job related, standards could be equally well served in a less discriminatory manner.[948] The analysis is also somewhat similar to the disparate treatment theory. Here, however, the process is turned on its head. Instead of the complainant persuading the trier that the employer's legitimate reasons are in fact pretexts for discrimination, the complainant enumerates various accommodations and the employer must refute each one.[949]

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942. *See* Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. at 484, 388 A.2d at 636.

943. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.

944. *See supra* text accompanying notes 730-49.

945. Prewitt v. United States Postal Serv., 662 F.2d at 308, 310.

946. *See* 240 IOWA ADMIN. CODE § 6.2(6)(a) (1980). The factual circumstances of the case may suggest potential accommodations other than those listed in the aforementioned rule.

947. Prewitt v. United States Postal Serv., 662 F.2d at 308, 310. "[T]he burden of proving inability to accommodate is upon the employer . . . . The employer has greater knowledge of the essentials of the job than does the handicapped applicant." *Id.* at 308. "When the issue of reasonable accommodation is raised, the burden of persuasion in proving inability to accommodate always remains on the employer . . . ." *Id.* at 310. *See also* 240 IOWA ADMIN. CODE § 6.2(6) (1980). *See also* text accompanying notes 826-54.

948. *See* Robinson v. Lorillard Corp., 444 F.2d at 798.

949. Prewitt v. United States Postal Serv., 662 F.2d at 308, 310. In this respect, disability discrimination cases are similar to religious discrimination cases. In the latter: "Once the employer has made more than a negligible effort to accommodate the employee and that effort is

2. *Complainant rejected for purported reasons unrelated to their handicaps.* It has been suggested that many employment decisions adverse to disabled individuals are candidly based on the employer's awareness or perception of a person's mental or physical limitations. Employers, however, may reject disabled applicants for other purportedly legitimate reasons such as a lack of absolute qualifications or the availability of relatively more qualified applicants. It would appear that a reasonable accommodation analysis analogous to the disparate treatment theory is appropriate in such cases.

In substance, the prima facie case would be virtually identical to that in *McDonnell Douglas Corp. v. Green.*[950] If the disabled applicant satisfied the elements of a prima facie case, the employer would then be expected to produce evidence showing that the rejection was based on legitimate non-discriminatory reasons. Finally, the disabled applicant would have the opportunity to show that those reasons were "unworthy of credence" or that the employer was more likely motivated by a discriminatory animus.[951]

In order to establish a prima facie case, the disabled applicant might have to show that his qualification for the job depended on being accorded some accommodation by the employer. In other words, as part of his prima facie case the disabled applicant must be given the opportunity to show that he could perform the essential job duties "in a reasonably competent and satisfactory manner" if accorded some reasonable accommodation.[952] The employer could rebut this showing by persuading the trier that the proposed accommodation would not actually yield the desired effect or would constitute an undue hardship. Alternatively, the employer could simply stand on its articulated reason for the complainant's rejection. But in some cases this latter tactic could call into question the authenticity of the employer's non-discriminatory reasons for the rejection. If the purported reason was the disabled applicant's lack of absolute qualifications, the complainant's showing of a viable accommodation might render him or her qualified as a matter of law. If the employer purportedly hired a more qualified applicant than the complainant, the trier of fact must consider the evidence of a viable accommodation in weighing the respective qualifications of the disabled individual and the preferred applicant.

The possibilities of reasonably accommodating the rejected handicapped applicant might also be relevant at the pretext stage. The Commission's disability rules proscribe rejections of qualified handicapped appli-

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viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship" . . . . [T]he burden of proving undue hardship rests upon the employer . . . ." Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 406 (9th Cir. 1978).

950. 411 U.S. 792 (1973).

951. *Id.* at 802, 807; Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256.

952. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167; 240 IOWA ADMIN. CODE § 6.2(6) (1980).

cants "if the basis for the denial is the [employer's] need to make reasonable accommodation to the physical or mental limitations . . . of the applicant."[953] Through discovery or cross examination, handicapped complainants may be able to show that the necessity of accommodating their disabilities was the real reason for their rejection by the employer. Alternatively, rejected applicants may be able to testify with respect to some occurrences or statements during the pre-employment screening process which demonstrated the employer's unwillingness to accommodate their disabilities.

The nature of the complainant's disability may also be taken into account in determining whether the employer's professed reason for the rejection is worthy of credence.[954] Some disabilities carry a severe stigma.[955] The disabled complainant may convince the trier that his impairment was anathema to the employer and that this revulsion was the real reason for the rejection.[956]

3. *The complainant's rejection based on an unreasonable pre-employment screening process.* A disabled applicant may be rejected in the course of an unlawfully discriminatory pre-employment evaluation. For example, a disabled applicant may establish that he or she was asked a battery of questions concerning physical or mental impairments which bore no relationship to the ability to perform essential job duties.[957] The complainant may also show that a pre-employment physical or mental examination failed to consider the applicant's ability to compensate for the disability.[958]

If the case is proceeding along disparate treatment lines, such evidence would be relevant to the "qualifications" and "pretext" inquiries. This showing could also be significant under the disparate impact hybrid.[959] It might convince the trier that the applicant was rejected for non-job-related reasons.

c. *Summary.* The reasonable accommodation concept looms rather largely in disability cases involving failures-to-hire. Unfortunately, the concept is sometimes difficult to apply because such accommodations are generally hypothetical in this kind of disability case. In any event, the evaluation of the evidence and shifting burdens of proof or persuasion should depend on the employer's reasons for rejecting the disabled applicant. If the employer's rejection is candidly based on the person's handicap, a reasonable accommodation analysis, borrowing heavily from the disparate impact the-

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953. 240 Iowa Admin. Code § 6.2(6)(c) (1980).

954. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256.

955. *See supra* text accompanying notes 563-64.

956. *See, e.g.*, Allen v. Eagle Iron Works, No. 04-78-5113, slip op. at 4-5 (Iowa Civil Rights Comm'n Sept. 16, 1980) (to be published in 5 Iowa Civil Rights Comm'n Case Reports _), *rev'd*, Eagle Iron Works v. Iowa Civil Rights Comm'n, No. CL 37-21560 (Iowa Dist. Ct., Polk County June 30, 1981).

957. *See supra* text accompanying notes 708-16.

958. 240 Iowa Admin. Code § 6.2(2) (1980).

959. *See supra* text accompanying notes 936-49.

ory, seems most appropriate. But, if the employer's rejection is purportedly based on legitimate factors other than the handicap, the reasonable accommodation analysis is more analogous to the disparate treatment theory.

2. *Termination Cases*

The legal evaluation of termination cases involving disabled employees should be somewhat easier than failure-to-hire cases. In the latter cases, rejected applicants have usually not been given an opportunity to show their capabilities.[960] Accommodations may have been proposed but certainly not implemented. Accordingly, any undue hardship is largely hypothetical. Many of these analytical problems are alleviated in termination cases since an employment relationship has been established. Disabled employees' capabilities, whether for better or for worse, have been exhibited over the course of their employment tenure. The necessity or desirability of accommodating the disabled employee has presumably become apparent. The feasibility and cost of an accommodation are easier to assess when the employee's capabilities are manifest. Likewise, whether a particular accommodation imposes an undue hardship becomes much clearer after its implementation. Even if an accommodation has not been implemented, the magnitude of the accommodation needed by the disabled employee as well as the plausibility of the employer's undue hardship argument are more readily discernible. Finally, the trier of fact should have a better grasp of the real dangers, if any, posed by the employee's disability.

The evaluation of termination cases follows the same pattern as failure-to-hire cases. First, the disabled complainant must establish a prima facie case. Thereafter, *some* burden is borne by the employer. Whether it is a burden of proof or merely a burden of persuasion should depend on the employer's articulated reasons for terminating the complainant. If the employer's discharge is candidly based on the complainant's physical or mental limitations, the burden of proving that any necessary accommodation created an undue hardship rests with the employer.[961] This will be recognized as the reasonable accommodation analysis incorporating elements of the disparate impact theory. In contrast, the employer's termination may rest on factors other than the employee's disability. Here the disparate treatment theory seems more appropriate. The complainant could prevail by convincing the trier that the employer's purportedly legitimate reason for the discharge was in fact a pretext for disability discrimination.[962]

a. *Establishing a Prima Facie Case.* As in the failure-to-hire cases, the

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960. *But see supra* text accompanying notes 750-57.

961. Griggs v. Duke Power Co., 401 U.S. at 431-32; Prewitt v. United States Postal Serv., 662 F.2d at 308, 310; 240 IOWA ADMIN. CODE § 6.2(6) (1980).

962. Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981)).

first element in the complainant's prima facie case is establishing that the individual's disability is among the class protected by the Iowa Civil Rights Act.[963] The other three elements generally are as follows:

> (2) that he was qualified for the job from which he was discharged,
> (3) that, despite his qualifications, he was terminated, and
> (4) that, after his termination, the employer hired a person not in complainant's protected class or retained persons with comparable or lesser qualifications who are not in the protected group.[964]

The reasonable accommodation concept must be incorporated in these elements of a prima facie case. Thus, the complainant's "qualifications" must take into account the individual's ability to perform the essential job duties "in a reasonably competent and satisfactory manner" if given an accommodation.[965] The fourth element in the prima facie case also demands a sensitive inquiry. The complainant's relative qualifications must include his or her enhanced ability to perform the essential job duties with an accommodation.[966]

The function of the prima facie case is to dispel what appears to be the most common nondiscriminatory reason for an employee's discharge: i.e., elimination of the job itself. The employer may relocate its facility, the job might become technologically obsolete, or an economic slump might trigger a reduction-in-force. If the job itself disappears, the employer is obviously not basing its termination decision on an unlawful criterion.

b. *Termination Based on the Employee's Disability.* Suppose that the disabled employee is terminated because of his or her disability. The factual variations on this theme are innumerable. The employer may have knowingly hired a disabled individual and unsuccessfully attempted to accommodate the person's handicap. The employee may have become disabled after being hired. The employee may have concealed a disability when he was hired and was terminated after the condition became manifest. The employee's disability may have progressively worsened, adversely affecting his or her job performance.

Terminating an employee because of his or her disability is not unlawful *per se*. The Commission's rules, however, require employers to extend a reasonable accommodation to qualified handicapped employees.[967] *Southeastern Community College v. Davis*[968] makes it clear that the employer can consider the handicap in determining whether the individual is qualified.[969]

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963. *See supra* text accompanying notes 452-568.
964. Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d at 296.
965. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167.
966. This is a logical extension of 240 Iowa Admin. Code section 6.2(6) (1980) and *Foods, Inc. v. Iowa Civil Rights Comm'n*, 318 N.W.2d at 168-69.
967. 240 Iowa Admin. Code §§ 6.2(6), 6.3 (1980).
968. 442 U.S. 397 (1979).
969. *Id.* at 406-07.

But again, a disabled person's qualification *also* depends upon the availability and efficacy of a reasonable accommodation.

Rational employers do not discharge disabled employees simply because they are disabled. Rather, they discharge them because the business operation is not functioning as well as it might with a nonhandicapped replacement. Presumably having made this calculation in the first place, employers should be required to establish that the needed accommodation would impose an undue hardship on their business.[970] This burden of proof comports with the language of section 601A.6(1)(a).[971] The employer should know whether an accommodation is feasible; in some instances, a disabled employee may be accommodated before being terminated.[972] If the employee is discharged for safety reasons, the employer should be able to explain the magnitude of the risk and the impossibility of reasonably accommodating the worker. Oftentimes an accommodation is costly. But only the employer can demonstrate that an accommodation has become too expensive or inefficient to continue. To shift the burden of proof on the employer is to recognize modern economic realities.[973] After all, the real economic and psychological burden in a termination is borne by the victim. If the employer cannot satisfactorily explain the business necessity for such a drastic decision, it—not the discharged employee—should suffer the consequences.

Foods, Inc. v. Iowa Civil Rights Commission[974] reflects the remedial, protective philosophy embodied by the Iowa Civil Rights Act. There the Commission was not convinced that the employer had attempted to reasonably accommodate the epileptic worker. Indeed, she was discharged only three days after her disability became apparent to the employer.[975] Without realizing it, the employer had already demonstrated the reasonable nature of accommodating the worker as she had performed her duties satisfactorily for fourteen months prior to her seizure.[976] Whatever dangers her retention posed could have been further minimized by a slight restructuring of her job duties.[977]

The court in *Foods* approved the Commission's rule requiring employers to reasonably accommodate qualified handicapped employees "unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation . . . ."[978] This remains the employer's burden whether it terminates employees (1) who *become* disabled during their

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970. The Commission's rules expressly impose this burden on the employers. *See* 240 IOWA ADMIN. CODE § 6.2(6) (1980).

971. IOWA CODE § 601A.(1)(a) (1981).

972. *See supra* text accompanying notes 792-811.

973. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980).

974. 318 N.W.2d 162 (Iowa 1981).

975. *Id.* at 164.

976. *Id.* at 164, 168-69.

977. *Id.* at 168-69.

978. 240 IOWA ADMIN. CODE § 6.2(6) (1980).

tenure of employment,[979] (2) who are knowingly hired despite their disabilities, or (3) whose disabilities become manifest during their tenure of employment.

c. *Termination of Disabled Employees for Purported Reasons Unrelated to Their Handicaps.* An employer may dismiss a disabled employee for reasons having nothing to do with his or her handicap. For instance, a handicapped employee may violate some policy or work rule which justifies automatic dismissal. The employee may be insubordinate or incompetent. The reasonable accommodation duty does not compel employers to tolerate the undesirable behavior of disabled individuals which would not be tolerated in others.

Employers, of course, must at least be able to articulate a legitimate, non-discriminatory reason for discharging *any* employee. If a disabled employee is discharged for some reason unrelated to his handicap, it would seem incongruous to require the employer to demonstrate its inability to reasonably accommodate the employee. The employer is purportedly discharging the person because of some reason unrelated to his disability.

This situation calls for a modified disparate treatment analysis. After the disabled complainant satisfies his prima facie case the employer must articulate, with reasonable clarity and specificity, its legitimate reasons for discharging the disabled individual.[980] This is merely a burden of producing admissible evidence. The ultimate burden reposes with the complainant. He or she must convince the trier that the reasons proffered by the employer are a pretext for disability discrimination.[981] Stated differently, the complainant must pursuade the trier that his or her disability was "a *factor*" in the termination.[982]

At this point the reasonable accommodation concept might come into play. For instance, the complainant might persuade the trier that the employer's actual reason for its decision was to cut labor costs by ending an accommodation. This would reveal the employer's stated reason for the discharge as a pretext for disability discrimination. In this situation the trier might be tempted to let the employer produce evidence bearing on the undue hardship of maintaining the accommodation. This would add another level of inquiry not found in the traditional disparate treatment model. But the trier might conclude instead that an accommodation which was not so onerous as to form the articulated basis for the discharge could not, as a matter of law, constitute an undue hardship.

The employer may not become aware of an employee's disability until after the hiring decision. If the employer terminates the employee shortly

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979. 240 Iowa Admin. Code § 6.3 (1980).

980. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 255-56.

981. *Id.* at 256; Linn Co-Operative Oil Co. v. Quigley, 305 N.W.2d at 733.

982. Satz v. ITT Fin. Corp., 619 F.2d at 746 (emphasis in original) (cited in Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d at 296).

after discovering the disability, the trier should carefully scrutinize the employer's professed non-discriminatory reason for the discharge. The sequence of events alone may be sufficient to convince the trier that the complainant's disability was the reason for the discharge.[983] In addition, the nature of the disability will be relevant to the pretext issue. If the impairment is stigmatizing, the employer's articulated reason for the discharge may appear less credible.

d. *Summary.* The reasonable accommodation duty is somewhat easier to apply in termination cases because the prior employment relationship sheds some light on actual accommodations—their efficacy as well as their cost. Nevertheless, as with a failure-to-hire case, the precise method of evaluating the evidence should vary with the employer's explanation for the discharge. An employer which acknowledges terminating a disabled employee because of his handicap should be required to prove that the person could not be reasonably accommodated. This is the disparate impact theory adapted to disability discrimination. On the other hand, if the employer's purported reason for terminating a disabled employee is unrelated to his handicap, a modified disparate treatment theory is more appropriate. Once the employer produces evidence showing a nondiscriminatory reason for the disabled person's termination, the complainant must be afforded a full and fair opportunity to demonstrate that the articulated reason is a pretext for discrimination. "Pretext" will rarely involve malice toward the handicapped. More often it will take the form of a desire to avoid the costs, stigma or inconvenience of accommodating a handicapped employee.

There is a paradox in this analysis. The employer which candidly discriminates against a disabled complainant suffers the heightened disparate impact-type burden of proof whereas the employer which surreptitiously discriminates against a disabled complainant is "rewarded" with the lesser, disparate treatment-type burden.

This paradox may be more disturbing in theory than in practice. For the candid employer can fully adduce its evidence that accommodating the disabled employee was costly and inefficient. On the other hand, the employer which articulates a nondiscriminatory reason for its action may find that the complainant's burden of proving "pretext" is easier in disability discrimination cases than in race or sex discrimination cases. A black or female employee does not require any reasonable accommodation. But a disabled complainant can often show that his employment exacted some cost in terms of a needed accommodation. The costlier the accommodation, the easier it may be for the complainant to persuade the trier of fact that the employer was more likely motivated by a discriminatory criterion than by the articulated reason.[984] Similarly, pretext may be relatively easy to establish if

983. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 256.
984. *Id.*

the complainant's disability is stigmatizing.

VII. Conclusion

Disabled people in Iowa were not protected against employment discrimination until 1972. In chronological terms, disability discrimination law is still in its early stages of development. The law's evolution has been retarded by the sheer complexity of the subject. It has also been hampered by the need to forge new legal principles responsive to the realities of employing the handicapped.

The problems facing disabled people in employment are fundamentally different from those faced by blacks, women, and other protected classes. One's disability may have an adverse effect on job performance. And it will often not suffice for employers to treat the disabled person exactly the same as the nondisabled. The employer must instead recognize the practical problems posed by a person's disability and the corresponding necessity to take reasonable steps enabling the person to overcome those problems. This is the crux of the reasonable accommodation concept. Without it, the law's promise of equal employment opportunity would be as empty as the promise of freedom to a pauper: "freedom to starve."

Reasonable accommodation means making the employment site accessible to the handicapped. It means attempting to tailor the job to suit the limitations posed by a person's disability.

There are limits, however, to the reasonable accommodation duty. The employer is not obligated to incur an undue hardship. The employer is not expected to accommodate an unqualified disabled person. The law recognizes that some occupations are simply not suitable to persons with some kinds of disabilities. Nevertheless, the reasonable accommodation duty presupposes that employers must be prepared to incur some expense or inconvenience in order to employ qualified disabled workers.

The scope of the reasonable accommodation duty is difficult to predict because it depends on the factual circumstances of the case. It will depend on such factors as the person's disability, the person's qualifications, the nature of the occupation, the feasibility of the accommodation, the efficacy of an accommodation, the resulting cost or disruptiveness of an accommodation, and the employer's ability to withstand those costs.

Litigating disability discrimination cases is no easier. The threshold question—is the complainant's disability entitled to protection under the Civil Rights Act?—often defies a simple answer. Even this question demands a searching inquiry into the specific facts of the case. What is the person's disability, how severe is it, how long will it last, is it stigmatizing, is it related to the person's ability to perform the job, and how was it perceived by the employer?

Assuming that the disabled complainant overcomes this initial obstacle, the next question is how to analyze the evidence in the case. Given the uni-

queness of disability discrimination, it should not be surprising that some theories which are suitable for race or sex discrimination cases are not readily adaptable to the disability area. The factors encompassed in the reasonable accommodation versus undue hardship analysis must be applied to the specific facts of the case. This is by necessity a discrete, highly individualized analysis. Great confusion and undesirable results occur if the analysis attempts to incorporate the class-wide concepts of the bona fide occupational qualification and the disparate impact theory.

As with other types of employment discrimination actions, the complainant in a disability action must first generate a prima facie case. Thereafter, this article has suggested that the evidence be evaluated in accordance with the employer's explanation for the challenged decision. In those instances where an employer has intentionally rejected a disabled person because of a disability, the employer should be required to establish a business necessity as justification for its decision. The complainant could rebut the employer's showing of a business necessity by persuading the trier that his or her handicap could have been accommodated. The employer could in turn negate this rebuttal by establishing that the proposed accommodation would impose an undue hardship on its operation. This analysis has been characterized as the reasonable accommodation test, borrowing the burden-shifting techniques of the disparate impact theory.

In contrast, the employer's articulated reason for its challenged decision may be unrelated to the complainant's disability. Such cases could be evaluated in accordance with the disparate treatment model. First, the complainant must establish a prima facie case. The employer must then produce admissible evidence articulating a legitimate, non-discriminatory reason for its action. Ultimately, the complainant must be afforded an opportunity to show that the employer's articulated reason for the employment decision masks a discriminatory intent. But the reasonable accommodation duty is still relevant to the analysis. The cost or inconvenience of accommodating the complainant may convince the trier that the employer's real reason for the challenged decision rests on his decision to shirk the reasonable accommodation duty.

Disability discrimination law is undeniably complicated. But despite this complexity, the people of Iowa must now transform the slogan of equal employment opportunity for the disabled into reality.