THE COMMON LAW EMPLOYMENT-AT-WILL DOCTRINE: CURRENT EXCEPTIONS FOR IOWA EMPLOYEES

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I. INTRODUCTION

The most significant development in the last thirty years of employment law has been the continued erosion of the common law doctrine of employment-at-will. The employment-at-will doctrine can be summarized as follows: An employer may dismiss an employee at any time for any reason; a good reason, a bad reason, or for no reason at all. Over the past few decades, however, there has been a growing recognition of exceptions to the doctrine. These exceptions protect individual employees against wrongful dismissals. For example, a fired worker may be able to sue and recover damages when the employee can demon-

strate the termination violated a contractual agreement,[1] breached a clearly stated public policy,[2] or did not comport with a federal or state statute.[3]

Exceptions to the employment-at-will doctrine were virtually unknown before the mid-1960s.[4] Until then, businesses could discharge their employees for virtually any reason, or for no reason, leaving the worker without a remedy.[5] Iowa employment law now recognizes a variety of wrongful discharge remedies, that provide workers with legal redress if they show their terminations fit within the factual circumstances covered by a specific doctrine or statute.[6] Despite these exceptions, the employment-at-will doctrine is far from dead. In fact, the doctrine continues to thrive in virtually every American jurisdiction and continues to provide a presumption that an employee's dismissal is legal. In Iowa, the fired worker must counter that presumption by showing the dismissal violated either a statute or a recognized exception to the employment-at-will doctrine.[7]

After a discussion of the development of the employment-at-will doctrine,[8] this Article will identify and explore the manner in which the rule has been narrowed, as well as the current exceptions available to discharged workers in Iowa.[9]

II. DEVELOPMENT OF THE EMPLOYMENT-AT-WILL DOCTRINE

Prior to England's industrial revolution, between 1750 and 1850, employment relations had little importance in the law.[10] Most business activity was carried on by individual entrepreneurs, who maintained few, if any, employees.[11] Therefore, the parties' obligations were not typically governed by set rules. As a result, the law gave little concern to the parties' intent regarding the permanency of their employment relationship.

Because employment contracts were so rare, English law eventually established a rebuttable presumption that the employment relationship was created for one year.[12] Thus, in 1765, the legal commentator Blackstone stated:

> The first sort of servants, . . . acknowledged by the laws of England, are *menial servants*; so called from being *intra moeina*, or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hir-

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1. *See infra* parts II - III.
2. *See infra* parts V.
3. *See infra* parts VI - VII.
4. Gary E. Murg & Clifford Scharman, *Employment at Will: Do the Exceptions Overwhelm the Rule?*, 23 B.C. L. REV. 329, 329-30 (1982).
5. *Id.* at 329.
6. Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, 473 N.W.2d 31, 34 (Iowa 1991).
7. Springer v. Weeks & Leo Co., 429 N.W.2d 558, 559 (Iowa 1988).
8. *See infra* part II.
9. *See infra* parts III-VII. This Article will not address the manner in which labor agreements and union contracts provide relief to terminated union employees.
10. W. J. RORABAUGH, THE CRAFT APPRENTICE FROM FRANKLIN TO THE MACHINE AGE IN AMERICA 50-55 (1986).
11. *See id.*
12. 11 WILLIAM BLACKSTONE, COMMENTARIES *425.

> ing for a year; upon a principal of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done, as when there is not: but the contract may be made for any larger or smaller term.[13]

When the employment relationship was of unstated duration, the English law required employers to give workers notice prior to termination. The length of time varied according to the type of employees, with many employees accorded three months notice before dismissal.[14]

The industrial revolution brought with it an increase in the labor force, which again changed the relationship between employers and employees.[15] The length of workers' employment became dependent upon the demand for a business's product.[16] With demand determined by market forces, rather than by growing seasons, employers began to contest Blackstone's presumption that they were obligated to continue employment through all four seasons.[17] Businesses opposed any obligation to continue employment beyond the length of time needed to meet market demand for the business's particular product.[18]

In the late nineteenth century, American law abandoned the English presumption of a one-year employment contract in favor of the employment-at-will doctrine. The new doctrine was championed by H.G. Wood, a New York lawyer and treatise writer.[19] His 1877 treatise on master and servant law was influential in coalescing American jurisprudence around the new doctrine.[20] Wood expressed the American rule as follows:

> With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve. It is competent for either party to show what the mutual understanding of the parties was in reference to the matter; but unless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is deter-

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13. 11 *id.* at *422, 425.

14. The 1563 Statute of Artificers required masters to give three months notice before dismissing domestic servants. *See* PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 126 n.10 (1969).

15. *See generally id.* at 121-137 (explaining how the employer-employee relationship changed as a result of the industrial revolution).

16. *Id.*

17. *Id.*

18. PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 135-36 (1980).

19. Alfred W. Blumrosen, *Employer Discipline: United States Report*, 18 RUTGERS L. REV. 428, 432 (1964).

20. HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272-73 (Buffalo, William S. Hein & Co. 1981) (Albany, John D. Parsons 1877).

> minable at the will of either party, and in this respect there is no distinction between domestic and other servants.[21]

In 1913, the great majority of American jurisdictions rejected the English rule in favor of the Wood's rule presumption that a general hiring is to be construed as a hiring at will under which either party may end the employment relationship at any time.[22] In 1895, the New York Court of Appeals adopted this new rule in *Martin v. New York Life Insurance Co.*[23] In *Martin*, the court quoted Wood in support of its holding that a general hiring was *not* to be presumed to be a hiring for a one year term, but "a hiring at will, and [therefore] the defendant was at liberty to terminate the same at any time."[24]

The importance of the respective party's freedom to contract also supported the employment-at-will doctrine. In 1908, the United States Supreme Court in *Adair v. United States*[25] established its view of the law in this area:

> In the absence, however, of a valid contract between the parties controlling their conduct towards each other and fixing a period of service, it cannot be, we repeat, that an employer is under any legal obligation, against his will, to retain an employee in his personal service any more than an employee can be compelled, against his will, to remain in the personal service of another. . . . The [employee] was at liberty to quit the service without assigning any reason for his leaving. And the [employer] was at liberty, in his discretion, to discharge [the employee] from service without giving any reason for so doing.[26]

The *Adair* Court declared unconstitutional a law which made it a criminal offense for a railroad engaged in interstate commerce to terminate an employee because of the employee's membership in a labor organization.[27] The Court ruled the statute violated the employer's freedom of contract, protected by the Fifth Amendment's prohibition against depriving an individual of liberty or property without due process.[28]

Social and economic pressures eventually reversed these trends and led to legal developments protecting the welfare of employees. In 1941, the Supreme Court reversed its decision in *Adair* and held the National Labor Relations Act and the Railway Labor Act were constitutional even though both laws imposed restrictions similar to those struck down in *Adair*.[29] The Supreme Court further

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21. *Id.*

22. "The preponderance of American authority in favor of the doctrine that an indefinite hiring is presumptively a hiring at will is so great that it is now scarcely open to criticism." 1 C. LABATT, MASTER AND SERVANT, § 160, at 519 (1913).

23. Martin v. New York Life Ins. Co., 42 N.E. 416, 417 (N.Y. 1895).

24. *Id.*

25. Adair v. United States, 208 U.S. 161 (1908).

26. *Id.* at 175-76.

27. *Id.* at 174.

28. *Id.* at 172.

29. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (upholding the constitutionality of the National Labor Relations Act); Texas & New Orleans R.R. Co. v. Brotherhood of Ry.

limited an employer's right to fire unionized employees, stating the "employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation."[30] As a result, the employment-at-will doctrine is no longer completely protected from constitutional challenge.

Although statutes, contracts, and newly recognized doctrines have greatly narrowed its scope, Iowa courts have long adhered to the employment-at-will doctrine. Absent an exception to the rule, an employer may discharge for any reason an employee hired for an indefinite period of time.[31] The Iowa Supreme Court adopted this doctrine in *Faulkner v. Des Moines Drug Co.*[32] The court held "a contract for 'permanent employment' is construed to mean nothing more than that the employment is to continue indefinitely, and until one or the other of the parties desires for some good reason to sever the relation."[33] In *Harrod v. Wineman*,[34] the court noted "in this country it is held by an overwhelming weight of authority that a contract of indefinite employment may be abandoned at will by either party without incurring any liability to the other for damages."[35] More recently, the court stated the following as the rule:

> [I]n the absence of additional express or implied stipulation as to the duration of the employment or of a good consideration additional to the services contracted to be rendered, a contract for permanent employment, for life employment, for as long as the employee chooses, or for other terms purporting permanent employment, is no more than an indefinite general hiring terminable at the will of either party.[36]

The common law doctrine of employment-at-will, however, is gradually eroding in Iowa. The Iowa Supreme Court now recognizes different forms of wrongful discharge actions.[37] Nevertheless, unless a discharged employee falls

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Clerks, 281 U.S. 548, 570-71 (1930) (holding the Railway Labor Act is constitutional because it does not interfere with a carrier's right to hire or fire employees).

30. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).

31. Fogel v. Trustees of Iowa College, 446 N.W.2d 451, 455 (Iowa 1989) (finding only two exceptions to the employment-at-will doctrine: first, when discharge is in violation of a recognized public policy of the state, and second, when discharge occurs in violation of an employment contract); Wolfe v. Graether, 389 N.W.2d 643, 652 (Iowa 1986) (holding a contract which expressly offers, or can be interpreted as offering, permanent or lifetime employment will be interpreted as terminable at will in the absence of some executed consideration in addition to the services rendered).

32. Faulkner v. Des Moines Drug Co., 90 N.W. 585 (Iowa 1902).

33. *Id.* at 586.

34. Harrod v. Wineman, 125 N.W. 812 (Iowa 1910).

35. *Id.* at 813.

36. Hanson v. Cent. Show Printing Co., 130 N.W.2d 654, 655-56 (Iowa 1964).

37. *See e.g.*, Lara v. Thomas, 512 N.W.2d 770, 780 (Iowa 1994) (finding a cause of action for wrongful termination when an employee is discharged in retaliation for filing partial unemployment claims); Springer v. Weeks & Leo Co., 475 N.W.2d 630, 633 (Iowa 1991) (stating the discharge of an employee for filing a workers' compensation claim creates a wrongful discharge action); Wilcox v. Hy-Vee Food Stores, 458 N.W.2d 870, 872 (Iowa Ct. App. 1990) (finding a

within one of the exceptions to the rule, a remedy is unavailable. The Iowa Supreme Court continues to reiterate the doctrine that an employee hired for an indefinite period of time may be discharged without cause, and the employer will not incur liability.[38]

III. THE BREACH OF CONTRACT EXCEPTION

Common-law contract doctrines permit employees to recover damages when their employers violate certain principles of contract law. If the parties agree to a formal written contract of employment, the discharge of the worker before the end of the contract can give rise to liability under ordinary breach of contract principles.[39] Most employees, however, are not covered by employment contracts; therefore, the employment-at-will doctrine usually prevents recovery for wrongful termination. In order for employees who lack contractual agreements to be able to assert a breach of contract claim, they must proceed under a theory best described as an "implied-in-fact contract" claim. To recover on a breach of contract theory, the employee must establish the following elements to overcome the presumption of an employment at will:

> 1. A promise to employ [the worker] for a particular period of time or to terminate only for certain reasons or through certain procedures
> 2. Enforceability of the promise because [the employee gave] consideration . . . or through a doctrine that avoids the requirement of consideration and
> 3. Breach of the promise.[40]

The Iowa Supreme Court has recognized several contract exceptions to the employment-at-will doctrine.[41] Those exceptions have been recognized in the following circumstances: (1) breach of express contracts; (2) breach of implied-in-fact contracts; and (3) breach of employer policies or handbooks.

A. *Breach of Express Contracts*

Iowa courts have enforced written promises of job security more stringent than other wrongful discharge theories. Those written expressions of job security come in a variety of forms, including written contracts, letters, written negotiations, and purchase agreements. Current Iowa Civil Jury Instruction 3110.3 provides that in order for an employee to prevail on a claim alleging breach of an employment contract, the employee must prove: "1. The plaintiff had a contract

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cause of action for wrongful termination when employee is discharged for refusal to violate a law in the course of employment).

38. Wolfe v. Graether, 389 N.W.2d 643, 652 (Iowa 1986); Allen v. Highway Equip. Co., 239 N.W.2d 135, 139 (Iowa 1976); Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 311 (Iowa 1971).

39. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 958, at 937 (1951).

40. 1 HENRY H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE, § 4.1, at 261-62 (3d ed. 1992) (citations omitted).

41. *See infra* parts III(A) - (B), IV.

of employment with the defendant. 2. The defendant [discharged] . . . the plaintiff in violation of the contract. 3. The amount of any damage defendant has caused."[42]

An Iowa employer is bound by the provisions of an express employment agreement, notwithstanding the employment-at-will doctrine.[43] In *Kitchen*, Stockman recruited the plaintiff to leave his current job and residence to become Stockman's branch manager in Cedar Rapids, Iowa.[44] As part of the negotiations, the defendant gave the plaintiff a "Letter of Understanding" which provided in part: "Effective April 1, 1967 you are hereby appointed Branch Manager for our Company office in Cedar Rapids, Iowa. The salary for this position is $12,000.00 per year, plus 2% override on first year premiums produced by your full time men and received in cash at the Home Office."[45] After receiving the Letter of Understanding, the plaintiff resigned his prior position and moved his family to Cedar Rapids as directed by the defendant.[46] Shortly after his arrival in Cedar Rapids, however, he received a letter from the defendant, indicating Stockman was closing its Cedar Rapids office and terminating its relationship with the plaintiff.[47] The plaintiff subsequently brought a breach of contract suit against Stockman for the damages caused by its unpredictable dealings.[48]

In *Kitchen*, the court had "no doubt as to [the] existence of a written employment contract between Stockman and Kitchen."[49] Merely because the employment offer was communicated by means of a Letter of Understanding did not detract from its status as an integrated contract between the parties.[50] As the court noted, "[P]laintiff's Exhibit 2 [the Letter of Understanding] was a complete written expression of the offer made by Stockman to Kitchen. When unqualifiedly accepted by the latter a contractual relationship between Stockman and Kitchen was thereby effectively created."[51] Based on Kitchen's actions in anticipation of the job with Stockman[52] and the provisions of the letter granting Kitchen a two percent override on *first year* premiums, the court concluded the

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42. 2 IOWA STATE BAR ASSOCIATION, IOWA CIV. JURY INSTRUCTION 3110.3 (July 1990).
43. Kitchen v. Stockman Nat'l Life Ins. Co., 192 N.W.2d 796 (Iowa 1971).
44. *Id.* at 798.
45. *Id.*
46. *Id.* at 799.
47. *Id.*
48. *Id.* at 798.
49. *Id.* at 800.
50. *Id.*
51. *Id.* at 800-01.
52. In evaluating the duration of Kitchen's employment, the court used the following factors:

> Kitchen, with Stockman's knowledge, terminated his employment with another insurance company in order to accept Stockman's offer; commenced working for Stockman April 1, 1967; . . . moved his family from Roseville, Michigan, to Cedar Rapids where he established an office, undertook recruitment of personnel and otherwise entered upon performance of assigned agency duties; and suffered termination of employment with Stockman May 31, 1967, only because of its newly revised management philosophy.

Id. at 802.

"initial contractual period of employment was not temporary or at will but rather for an initial period of one year."[53]

Consequently, in *Allen v. Highway Equipment Co.*,[54] the court stated employment at will is terminable "at any time by either party for any reason or for no reason at all," and written contracts "for a definite term do not leave the parties so unconstrained."[55]

> "[I]f the employer made a promise, either express or implied, not only to pay for the service but also that the employment should continue for a period of time that is either definite or capable of being determined, that employment is not terminable by him 'at will' after the employee has begun or rendered some of the requested service or has given any other consideration."[56]

In *Collins v. Parsons College,*[57] the Iowa Supreme Court again was faced with interpreting a written employment contract.[58] The plaintiff, a full professor with tenure at a Wisconsin college, was interviewed for a position at Parsons College.[59] After the interview, Parsons tendered the plaintiff a written employment contract offering a salary of $25,000 annually, effective October 1, 1966.[60] "The last two paragraphs of the contract stated: 4. You are hereby placed on tenure; 5. You will receive annual increments of $1,000 to the level of $30,000 by 1971."[61] The Parsons College faculty bylaws provided that faculty members with tenure could be terminated or reduced in rank "only for just cause."[62]

The plaintiff accepted the contract and gave up his teaching position in Wisconsin.[63] The plaintiff had been teaching at Parsons College for approximately two years when Parsons asked the plaintiff to sign a new contract waiving any rights encompassed in the earlier agreement.[64] The plaintiff refused to sign the new contract, and Parsons notified the plaintiff that he would not be employed by Parsons the following year.[65] After his discharge, the plaintiff brought a breach of contract claim against the college, requesting as damages the difference between the amount he was promised by Parsons through 1971 and the amounts he was actually able to earn in new employment.[66]

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53. *Id.*
54. Allen v. Highway Equip. Co., 239 N.W.2d 135 (Iowa 1976).
55. *Id.* at 139.
56. *Id.* at 140 (quoting ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 152, at 14 (1951)).
57. Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973).
58. *Id.* at 595.
59. *Id.*
60. *Id.* at 596.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 597.

On appeal, the *Collins* court noted the compensation terms of the contract were clear: $25,000 each year with annual increases to $30,000 in 1971.[67] The controversy revolved around the duration of the promised employment: The plaintiff contended he had a five-year agreement through 1971, while Parsons contended the contract was terminable at will.[68] The court agreed with the plaintiff, concluding, "Collins had an agreement for a permanent position and at a stated salary to 1971."[69] The court opined:

> We think that two provisions of the agreement, taken together, demonstrate that the promise of the college was not terminable at will if Collins performed or was ready and willing to perform, as in fact he was. The first provision is the one calling for annual salary increments to 1971. This not only fixed the amount of compensation; it also constituted some indication that the parties had in mind the employment would be ongoing, at least to 1971.[70]

Parsons insisted the contract was terminable at will because the plaintiff had every right to leave the college at the end of any teaching year.[71] While acknowledging this fact, the court nevertheless rejected the argument on the basis that the plaintiff had provided additional consideration for the contract by surrendering his prior teaching job in Wisconsin.[72] In light of this "extra consideration" on Collins's part, the court ruled that "mutuality" between the parties was not necessary to enforce the written agreement.[73]

The Iowa Supreme Court enforced an oral employment contract which was predated by the defendant's offer to purchase the plaintiff's business in *Stauter v. Walnut Grove Products*.[74] The defendant offered to purchase the plaintiff's fertilizer sales business, and the parties entered into a written agreement for the sale of the business to the defendant, with an accompanying oral agreement for the defendant to employ plaintiff as plant manager.[75] According to the plaintiff, the oral agreement provided that he was "to continue indefinitely as long as he kept up on his job."[76] Two years after the parties entered into the sale agreement, the defendant discharged the plaintiff from his managerial position.[77]

The plaintiff brought a breach of contract claim and recovered damages in a jury trial.[78] On appeal, the defendant argued it retained the right to terminate the plaintiff for poor job performance regardless of an oral contract.[79] According

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67. *Id.*
68. *Id.*
69. *Id.* at 598.
70. *Id.* at 597.
71. *Id.* at 598.
72. *Id.* at 598-99.
73. *Id.*
74. Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 306 (Iowa 1971).
75. *Id.*
76. *Id.* at 307.
77. *Id.*
78. *Id.*
79. *Id.*

to the defendant, the trial court erred by submitting the case to the jury because "when an employment contract is subject to the employee performing competently, and the employer in good faith discharges him, the court cannot substitute its own judgment of the standard of performance for the employer's judgment."[80] The court rejected this argument, holding: "Where the grounds for discharge are alleged to be the *incompetence* of the employee, and the evidence is in conflict, the question of the competency of the employee is one of fact to be determined by the jury."[81] The significance of the *Stauter* decision is twofold: (1) The court upheld an *oral* employment agreement which was incidental to a purchase agreement of a business;[82] and (2) under a "satisfactory performance" clause, the court determined the question of competency was one for the jury, and not solely the employer.[83]

Recently, the Iowa Supreme Court summarized the principles applicable to express employment agreements as follows:

> In a contract of employment which by its express terms is for a definite time or to last until a definite day, the employer may not discharge an employee prior to the stated time unless cause is shown based upon the employee's failure to perform in accordance with the contract of hire or there is some reason for discharge expressly provided in the contract. . . . Contracts expressly offering lifetime or permanent employment or which a trier of fact has interpreted as offering such employment based on extrinsic evidence will be interpreted as indefinite and terminable at will in the absence of some executed consideration in addition to the services to be rendered. . . . The question of what constitutes sufficient additional consideration must be determined on a case-to-case basis.[84]

The above cases demonstrate that, despite the continued existence of the employment-at-will rule, express contracts governing employment relations will be given effect in Iowa courts. Additionally, it appears such contracts will be strictly construed against employers when the employee gives additional consideration to support the agreement, such as resigning a prior job or moving to a new location.

B. *Implied-in-Fact Contracts*

Absent evidence of an express promise made by a business to a specific employee, the Iowa courts nevertheless have recognized situations in which an employment contract is "implied-in-fact."[85] To prove an implied-in-fact contract, an employee is typically required to prove something more "than mere perfor-

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80. *Id.* at 308.
81. *Id.* at 309.
82. *Id.* at 312. The court upheld the employment contract on the basis that the plaintiff gave additional consideration for the promise of permanent employment because he "gave up a competitive business to defendant." *Id.* at 312.
83. *Id.* at 309.
84. Wolfe v. Graether, 389 N.W.2d 643, 652-53 (Iowa 1986) (citations omitted).
85. *See infra* text accompanying notes 99-136.

mance of services for the employer."[86] Without something more than employment services from the employee, the employee lacks consideration to support the employer's promise of some form of job security.

> [N]early all states traditionally allowed consideration to be shown by proof of conduct above and beyond performing the ordinary job duties, such as quitting another job or turning down alternative job offers. If such special consideration is established, a promise of employment security is enforced even in the most conservative states.[87]

In Iowa, when no consideration is given beyond the employee's promise to perform, courts generally interpret an agreement for permanent employment to be for an indefinite time, terminable at the will of either party.[88] The Iowa Supreme Court has noted the following exception to the employment-at-will doctrine:

> [A] different situation arises where there is consideration *in addition* to the promise to perform services. Where the employee furnishes consideration in addition to his services, a contract for permanent or lifetime employment is valid and enforceable and continues to operate as long as the employer remains in business and has work for the employee, [so long as] the employee performs competently.[89]

When additional independent consideration exists, courts consider the contract enforceable even though the employee has the right to terminate the employment at any time.[90] "[I]f a promise is supported by other consideration, it is enforceable even though the promissee has the right to terminate his undertaking or indeed makes no promise at all, as in the case of unilateral contracts."[91]

The difficult question is what constitutes legally sufficient additional consideration to support enforcement of an employment agreement. In *Hanson v. Central Show Printing Co.*,[92] the plaintiff gave up an offer of alternative employment after negotiations with the defendant.[93] The defendant gave the plaintiff a letter stating it would guarantee the plaintiff forty hours of work each week until the plaintiff retired.[94] Approximately two years later, the defendant discharged the plaintiff from his job without cause.[95] The plaintiff brought a breach of contract claim against the defendant, requesting damages representing future wage losses.[96] The Iowa Supreme Court rejected the claim on the basis

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86. 1 PERRITT, *supra* note 42, § 4.1, at 263.
87. 1 *Id.*
88. Stauter v. Walnut Grove Prods., 188 N.W.2d 305, 311 (Iowa 1971).
89. Albert v. Davenport Osteopathic Hosp., 385 N.W.2d 237, 238 (Iowa 1986) (emphasis added).
90. Moody v. Bogue, 310 N.W.2d 655, 658 (Iowa Ct. App. 1981).
91. Collins v. Parsons College, 203 N.W.2d 594, 598 (Iowa 1973).
92. Hanson v. Central Show Printing Co., 130 N.W.2d 654 (Iowa 1964).
93. *Id.* at 655.
94. *Id.*
95. *Id.*
96. *Id.*

that the plaintiff gave no consideration.[97] The court held "'the mere giving up of a job, business or profession by one who decides to accept a contract for alleged life employment is but an incident necessary on his part to place himself in a position to accept and perform the contract, and is not consideration for a contract of life employment.'"[98]

The Iowa Supreme Court has subtly changed its direction. In *Collins v. Parsons College*,[99] the court held giving up a tenured teaching position at another college was sufficient additional consideration to enforce a five-year employment contract, adopting the following rule:

> After considering the question, we think the better rule to be that an employee who gives up other employment to accept an offer of a permanent job provides independent consideration—at least, when as here the employment surrendered was itself permanent and the new employer is aware of the facts.[100]

The difference between the *Collins* decision and the *Hanson* ruling was that, in *Collins*, the plaintiff had surrendered other permanent employment to accept the new job with the defendant.[101] By contrast, in *Hanson*, the plaintiff did not give up other employment, but only an offer of employment; as a result, the court decided there was no additional consideration to enforce the employment agreement.[102]

The *Collins* rule seems to have been the basis for the decision of the Iowa Court of Appeals in *Moody v. Bogue*.[103] In *Moody*, the defendant's representatives approached the plaintiff, who worked for a different company, and offered him a permanent position overseeing the defendant's material supply business.[104] Moody accepted the offer, resigned from his current job, sold his home in Des Moines, and moved to the defendant's location in Ida Grove, Iowa.[105] The defendant later reduced a bonus he had promised Moody, and when relations deteriorated, fired Moody.[106] Moody brought a breach of contract claim against the defendant, alleging that he had an enforceable lifetime employment contract.[107] Acknowledging the Iowa Supreme Court's ruling in *Collins*, the court of

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97. *Id.* at 656.

98. *Id.* (quoting Chesapeake & Potomac Tel. Co. v. Murray, 84 A.2d 870, 873 (Md. 1951)); *see also* Laird v. Eagle Iron Works, 249 N.W.2d 646, 648 (Iowa 1977) (stating that quitting an at will employment position in order to take a different position does not constitute legally sufficient additional consideration for permanent employment).

99. Collins v. Parsons College, 203 N.W.2d 594 (Iowa 1973).

100. *Id.* at 599.

101. *Id.*

102. Hanson v. Central Show Printing Co., 130 N.W.2d 654, 656-57 (Iowa 1964).

103. Moody v. Bogue, 310 N.W.2d 655 (Iowa Ct. App. 1981).

104. *Id.* at 656.

105. *Id.* at 657.

106. *Id.*

107. *Id.*

appeals nevertheless held there was no enforceable lifetime contract between the parties.[108] The *Moody* court stated:

> In the present case, plaintiff's [prior] job with Pittsburgh-Des Moines was terminable at will and thus did not provide sufficient additional consideration. We also believe that the sale of his house in Des Moines was merely incidental to his acceptance of new employment and, although a detriment, is analgous [sic] to the moving expenses incurred by the employee in *Bixby* and not sufficient additional consideration.[109]

The distinction made by the Iowa courts is that if the plaintiff leaves *tenured* job to accept an offer with the defendant, additional consideration exists to support the employment agreement. On the other hand, if the plaintiff simply gives up a job which was terminable at will to take a new position with the defendant, then no additional consideration exists to support the employment contract. These cases establish the proposition that in order to have an enforceable implied-in-fact employment agreement, the plaintiff must have resigned a previous job which promised permanent employment security.

The "additional consideration" requirement was construed in light of an oral contract in *Stauter v. Walnut Grove Products*.[110] In *Stauter*, the plaintiff sold his business to the defendants.[111] The written offer to purchase the business included a separate oral agreement on the defendant's part to employ the plaintiff as plant manager "indefinitely 'as long as he kept up on his job.'"[112] Two years after the parties entered into the oral employment agreement, the defendant discharged the plaintiff.[113] On the plaintiff's subsequent breach of contract claim, the defendant contended there was no valid contract of employment.[114] The Iowa Supreme Court disagreed and found "consideration in addition to the promise to perform services" by the plaintiff.[115] The *Stauter* court stated:

> In the case at bar, the alleged oral employment contract was incidental to the agreement for the sale of plaintiff's property to defendant W. R. Grace & Company. It is obvious this is not a case where the employee simply promises to perform services without additional consideration involved. . . .
>
> In the matter before us, plaintiff gave up a competitive business to defendant, and as a part of the agreement to sell the business and its equipment, an oral agreement to employ plaintiff under the terms indicated in Division I was entered into. Thus, the permanent employment contract had additional consideration to make it valid and enforceable, and not terminable at will.[116]

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108. *Id.* at 658-59.
109. *Id.* at 659.
110. Stauter v. Walnut Grove Prods., 188 N.W.2d 305 (Iowa 1971).
111. *Id.* at 306-07.
112. *Id.*
113. *Id.* at 307.
114. *Id.*
115. *Id.* at 311-12.
116. *Id.* at 312.

In *Stauter*, the additional consideration present to make the employment agreement enforceable was the fact that, as part of the overall negotiations between the parties, the plaintiff had sold his competitive business to the defendant.[117] The sale of that business put the plaintiff in the same circumstances as the teacher in *Collins* who had left a tenured position in Wisconsin for the job at Parsons College.[118] In both situations, the plaintiffs gave up an indefinite employment situation in order to accept the new job position, with the understanding that the new position promised some form of employment security.

The Iowa Supreme Court recently reconsidered the question of what additional consideration is necessary to enforce an employment agreement in *Wolfe v. Graether*.[119] In *Wolfe*, the plaintiff was a partner in a medical eye clinic, a business founded by his father.[120] In 1970, the partnership was converted into a professional corporation.[121] Prior to its incorporation, legal counsel advised the members of the partnership that the plaintiff, because he was an optometrist, would not be eligible for shareholder status.[122] The plaintiff contended that when this information became known he was assured by the other partners that he would be given permanent employment status with commensurate duties and responsibilities.[123] After the business was incorporated, the defendant provided the plaintiff a written employment agreement which stated the plaintiff's term of employment "shall be from the date hereof to the date of death of the employee, or his retirement, or permanent disability."[124] Three years later, the parties executed a new employment contract which stipulated that its intent was "to incorporate the original Employment Agreement, together with all amendments, into one new Employment Agreement."[125] The new agreement further recited:

> It is further agreed that while this contract of employment is a contract of employment for a period of specified time, that in the event either party hereto shall find the employment situation intolerable, the employment relationship may be terminated by either party, upon giving a one hundred twenty day notice of intention to terminate employment, in which event the employment situation and the relationship of employee-employer shall terminate at the end of said one hundred twenty day period.[126]

Several years after the execution of the parties' second employment contract, disputes arose, and the defendant fired the plaintiff.[127] The plaintiff's breach of contract suit against the defendant alleged premature termination of his

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117. *Id.*
118. Collins v. Parsons College, 203 N.W.2d 594, 598-99 (Iowa 1973).
119. Wolfe v. Graether, 389 N.W.2d 643, 654-55 (Iowa 1986).
120. *Id.* at 646.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 648.
125. *Id.*
126. *Id.*
127. *Id.* at 648-49.

position.[128] The jury returned a verdict in favor of Wolfe for over four million dollars.[129] On appeal, the defendant argued the employment contract was "indefinite as to time, and therefore terminable at the will of either party."[130]

The Iowa Supreme Court determined the plaintiff gave additional consideration at the time of the original negotiations and rejected the defendant's appeal.[131] The court distinguished the case from *Laird v. Eagle Iron Works*,[132] because Wolfe enjoyed "de facto permanent employment . . . by reason of family control" of the partnership.[133] Accordingly, Wolfe lost his right to be involved in discussions relating to his status with the partnership when he was made a mere employee of the professional corporation.[134] This transaction, if proven by Wolfe, would be sufficient to constitute additional consideration.[135] The court concluded:

> There is ample evidence in the present case that the change to a professional corporation was of immeasurable benefit to the other partners. It is impossible to know how plaintiff would have reacted had the alleged assurances of permanent employment not been made to him. From the evidence, the jury could have found that these assurances had been made and plaintiff relied upon them by acquiescing in the proposed change of business organization. That scenario, we believe, could generate a contract for permanent employment under our case law.[136]

In summary, when there is no iron clad express employment contract, it is incumbent upon the plaintiff in a breach of employment contract action to demonstrate substantial additional consideration in support of the purported employment agreement. It is not sufficient to simply state the plaintiff left a prior job which was terminable at will; the plaintiff must either have left another *secure* job position or altered certain business dealings in reliance upon the defendant's promises of permanent employment. An implied-in-fact contract in Iowa will be recognized only if the plaintiff gives up a secure position.[137]

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128. *Id.* at 649.
129. *Id.*
130. *Id.* at 650.
131. *Id.* at 653.
132. Laird v. Eagle Iron Works, 249 N.W.2d 646, 648 (Iowa 1977) (holding no additional consideration when an employee left one employment terminable at will to pursue another employment of indefinite duration).
133. Wolfe v. Graether, 389 N.W.2d 643, 653 (Iowa 1986).
134. *Id.*
135. *Id.*
136. *Id.* at 654.
137. The remedies available to successful plaintiffs in breach of employment contract actions are discussed in part IV of this Article.

IV. BREACH OF CONTRACT ACTIONS: EMPLOYEE HANDBOOKS AND POLICIES

An emerging form of agreement in the workplace is the employment manual or comparable employment policies. While such policies do not involve a true exchange of legal consideration, they are nevertheless one form of validation that the business has promised some job security to the worker. The courts have increasingly held the terms embodied in personnel manuals, employee handbooks, and business policies to constitute a form of contract between the employer and employee. Most jurisdictions hold a violation of these personnel policies and rules may support a breach of contract claim by the employee.[138]

One significant characteristic of the recognition of breach of handbook claims is that—unlike other breach of contract suits—representations made in a company manual are essentially unilateral. That is, while such policies provide protection to workers covered by the handbook, no reciprocal consideration is necessary for the employee to receive the benefit of the policy. Nevertheless, courts are increasingly recognizing such claims.

A. *Iowa Cases*

The first Iowa case to focus on the question of whether an employee handbook or manual could constitute an enforceable employment agreement was *Young v. Cedar County Work Activity Center*.[139] In *Young*, the plaintiff and the defendant entered into a written employment contract that provided either party could terminate the agreement with thirty days notice.[140] In addition, the defendant maintained an employee handbook, which contained a five-step disciplinary procedure.[141] The first four steps involved various warnings for job-related offenses, and the fifth step provided for termination of the worker.[142] Upon discharge, the plaintiff filed a breach of contract action claiming the defendant had not complied with the five-step procedure contained in its handbook.[143] The trial court determined the disciplinary and "discharge procedures contained in the employee's handbook had not been incorporated in the integrated employment agreement so as to require plaintiff's discharge to be carried out in accordance with the handbook procedures."[144] For this reason, the court determined the defendant was entitled to terminate the plaintiff's employment without cause on thirty days written notice.[145]

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138. *See* Wagenseller v. Scottsdale Memorial Hosp., 710 P.2d 1025, 1037-38 (Ariz. 1985); Staggs v. Blue Cross of Maryland, Inc., 486 A.2d 798, 801-02 (Md. Ct. Spec. App. 1985); Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445-46 (N.Y. 1982); Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702, 707 (Wyo. 1985).

139. Young v. Cedar County Work Activity Ctr., 418 N.W.2d 844 (Iowa 1987).

140. *Id.* at 845.

141. *Id.*

142. *Id.*

143. *Id.* at 846.

144. *Id.*

145. *Id.*

The Iowa Supreme Court affirmed, deferring to the trial court's determination that the conditions set forth in the employee handbook did not form a part of the plaintiff's written employment contract.[146] Because the question of interpretation of the written agreement was to be determined by the trier of fact, the court refused to interfere with the lower court's ruling.[147] The court noted "that the precise intentions of parties to an employment agreement are often left unexpressed," and therefore, employee manuals can be considered in determining the parties' intentions.[148] In its decision, the *Young* court stated "[b]ased upon the foregoing principles, we conclude that the trial court might have found on the evidence that the conditions set forth in the employee's manual formed a part of plaintiff's contract of employment."[149] The court concluded the primary consideration in determining whether an employee manual was enforceable and binding is "the reasonable expectations of the parties."[150]

One year after *Young*, the Iowa Supreme Court was faced with another employee handbook claim in *Cannon v. National By-Products, Inc.*[151] The employer's handbook in *Cannon* contained a personnel policy which stated "no employee will be suspended, demoted, or dismissed without just and sufficient cause."[152] When the plaintiff was summarily terminated, ostensibly because of a back injury, he brought a breach of handbook claim against the employer.[153] The trial court submitted the breach of contract claim to the jury and allowed the jury to consider whether the personnel policies at issue constituted an employment contract.[154] Under the trial court's instructions, if the jury determined the policies constituted a contract, the jury was permitted to determine whether the plaintiff's discharge was improper.[155] The jury returned a verdict for the plaintiff.[156]

In its appeal, the defendant contended the personnel policies created no contractual obligations on its part.[157] The Iowa Supreme Court disagreed, holding an employment contract may be derived from an employer's written personnel policies.[158] The court stated:

> In applying the principles which we approved in *Young*, we conclude that in the present case the question of whether the written personnel policies became part of plaintiff's contract is to be determined on the basis of plaintiff's reasonable expectations. Even if it was not defendant's intention that these policies confer contractual rights, a contract may be found to exist if this was the plaintiff's understanding and defendant had reason to suppose

146. *Id.* at 848.
147. *Id.*
148. *Id.* at 847-48.
149. *Id.* at 848.
150. *Id.* at 847.
151. Cannon v. National By-Products, Inc., 422 N.W.2d 638 (Iowa 1988).
152. *Id.* at 639.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 640.
157. *Id.*
158. *Id.*

> that plaintiff understood it in that light. . . . The issue of how these written personnel policies were perceived by plaintiff was, on the present record, an issue to be determined by the trier of fact.[159]

Significantly, the court rejected the employer's argument that the employee handbook did not constitute an enforceable contract because the employee had not furnished independent consideration in support of the contract.[160] The thrust of the *Cannon* ruling is that the requirement of additional consideration for contract formation does not apply if the employer issues a personnel manual that purports to limit its right to discharge a worker for cause or other stipulated events. Additional support for the *Cannon* holding is found in the general rule that ambiguities in a contract are to be construed strictly against the drafter.[161]

In both *Cannon* and *Young*, the Iowa Supreme Court held that whether job security provisions in an employer's handbook constitute an enforceable employment contract depends upon the parties' intentions.[162] The court refined its earlier decisions on the handbook claims in *McBride v. City of Sioux City*.[163] Because handbook claims involve unilateral contracts, *McBride* held the plaintiff has the burden to prove the following elements in support of such a breach of contract claim: "(1) the handbook must be sufficiently definite in its terms to create an *offer*; (2) the handbook must be communicated to and accepted by the employee so as to create an *acceptance*; and (3) the employee must continue working, so as to provide *consideration*."[164]

The court noted "[c]laims under unilateral contract theory frequently break down because the disciplinary provisions are too indefinite to create an offer, or there is no acceptance because the disciplinary provisions are never communicated to the employee."[165] Unfortunately for McBride, his claim failed for that very reason; the employee manual made no clear reference to disciplinary steps which were necessary prior to termination, and thus could not constitute an offer of continued employment.[166]

In *Hunter v. Board of Trustees*,[167] the Iowa Supreme Court was faced with a breach of handbook claim brought by an executive of Broadlawns Medical

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159. *Id.* (citations omitted).
160. *Id.* at 641.
161. Iowa Fuel & Minerals v. Iowa Bd. of Regents, 471 N.W.2d 859, 863 (Iowa 1991).
162. Hamilton v. First Baptist Elderly Housing Found., 436 N.W.2d 336, 340 (Iowa 1989).
163. McBride v. City of Sioux City, 444 N.W.2d 85 (Iowa 1989).
164. *Id.* at 91.
165. *Id.*
166. *Id.* at 90-91.

Shortly after the *McBride* decision, the Iowa Supreme Court reached a similar result in Fogel v. Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989). In *Fogel*, the plaintiff contended the company handbook indicated he could be discharged only for misconduct. *Id.* at 455. The first sentence of the dismissal section of the handbook however, stated employees could be fired for reasons "not prejudicial to the employee." *Id.* at 452. According to the court, the handbook did not guarantee permanent employment. *Id.* at 456. As a result, the *Fogel* court concluded the manual was too indefinite to create an enforceable contract. *Id.*

167. Hunter v. Board of Trustees, 481 N.W.2d 510 (Iowa 1992).

Center (Broadlawns).[168] At the time, Broadlawns had a personnel manual that indicated discharge could occur on one of only seven grounds set out in the handbook: voluntary resignation, voluntary quit, retirement, three-day quit, expired leave, discharge for cause, and staff reduction.[169] Broadlawns allegedly terminated the plaintiff because of a staff reduction, but his position was filled within two months.[170] On a motion for summary judgment, the trial court concluded the personnel manual created an employment contract, and the contract limited Broadlawns's right to terminate the plaintiff to one of the seven events described in the policy.[171] At trial, the jury determined no true reduction in staff had occurred, and the employer had illegally breached its handbook by terminating the plaintiff.[172]

On appeal, the Iowa Supreme Court discussed handbook contract claims extensively. The court stated:

> [W]e have recognized that an employee policy manual distributed to employees may constitute an offer by the employer that is then accepted by performance on the part of the employee. The result of this bargaining process is a unilateral contract. In exchange for the employer's guarantee not to discharge in the absence of cause or certain specified conditions, the employer reaps the benefits of a more secure and presumably more productive work force. The consideration for the bargain arises from the employee remaining on the job, given that she would otherwise be free to leave at any time.[173]

The *Hunter* court rejected the employer's appeal and upheld the trial court's ruling that the personnel manual created an employment contract.[174] According to the court, the language used in the policy "was sufficiently definite to manifest the parties assent to an employment contract that is properly terminable only for one or more of the seven enumerated reasons."[175] The *Hunter* court distinguished its prior ruling in *Fogel*, noting the manual relied upon in *Fogel* contained a clear reservation of the employer's right to terminate at will.[176] Because the *Hunter* court concluded an employment agreement existed, it was for the jury to determine whether Broadlawns's stated reason for the plaintiff's firing—a staff reduction—was pretextual and thus a breach of the contract.[177] In short, once the manual was deemed sufficiently definite to create a contract, whether the employer breached the contract was a question for the jury.

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168. *Id.* at 512.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 513.
173. *Id.* at 513-14 (citations omitted).
174. *Id.* at 515.
175. *Id.*
176. *Id.*
177. *Id.* at 516.

The most recent case concerning a breach of handbook claim is *French v. Foods, Inc.*[178] In *French*, the employee argued that a contract could be derived from various sections of his employee manual.[179] The manual, however, contained no limitations upon the company's right to terminate the worker; on the contrary, one section of the policy stated: *"Just as you retain the right to terminate your employment at any time for any reason, Dahl's retains a similar right."*[180] Another section of the policy stated the parties recognized "that either Dahl's or I may terminate the employment relationship at any time for any reason."[181] The *French* court distinguished the situation from the one discussed in *Hunter* and rejected the plaintiff's claim because the handbook did not purport to limit the grounds for termination.[182]

It appears a viable breach of contract claim under the handbook exception requires the manual to clearly define the specific manner in which employees may be terminated. If the policy is ambiguous, the Iowa Supreme Court is reluctant to enforce it. Likewise, if the handbook contains a reservation stating the business retains the right to terminate at will, the court will not find a binding contract.

B. *Contract Remedies*

The usual remedy for a breach of contract is compensation for disappointed expectations.[183] The party whose contract has been breached is entitled to the benefit of the bargain.[184] Under Iowa law, when a contract has been breached, the innocent party is generally entitled to be placed in the position the party would have occupied had there been performance of the contract.[185] These expectation damages are comprised of the actual damages the plaintiff suffered as a result of the breach as well as any certain consequential damages the plaintiff suffered.[186]

An employee's damages for the breach of an employment contract for a definite period is the agreed upon compensation for the unexpired term, less what the employee actually earned elsewhere during the unexpired term or what the employee could have earned elsewhere during the unexpired term in other available employment of the same general nature.[187] The amount the injured

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178. French v. Foods, Inc., 495 N.W.2d 768 (Iowa 1993).
179. *Id.* at 770-71.
180. *Id.* at 770.
181. *Id.*
182. *Id.* at 770-71.
183. JOHN E. MURRAY, MURRAY ON CONTRACTS § 221, at 442 (2d ed. 1974).
184. WILLIAM J. HOLLOWAY & MICHAEL J. LEACH, EMPLOYMENT TERMINATION, RIGHTS AND REMEDIES 399 (1985).
185. *See* Lakota Girl Scout Council, Inc. v. Havey Fund Raising Management, Inc., 519 F.2d 634, 639-40 (8th Cir. 1975); Folkers v. Southwest Leasing, 431 N.W.2d 177, 181 (Iowa Ct. App. 1988).
186. ROBERT A. HILLMAN, CONTRACT REMEDIES, EQUITY, AND RESTITUTION IN IOWA, § 6.1, at 126 (1979).
187. Holden v. Construction Mach. Co., 202 N.W.2d 348, 363 (Iowa 1972); Kitchen v. Stockman Nat'l Life Ins. Co., 192 N.W.2d 796, 802 (Iowa 1971).

employee could have earned in substitute work which is inferior in grade, not in geographic proximity to the original employment, or otherwise dissimilar to the original employment, will not be deducted from the employee's damage award.[188] Furthermore, an injured employee need not accept an offer of re-employment from the defendant in order to minimize damages, unless the new job was similar to the first position and acceptance of the new offer would not amount to an accord and satisfaction.[189] Courts have generally found expecting an injured employee to accept a new offer from the breaching employer to be unreasonable because the courts are reluctant to require discharged employees to suffer psychological harm and other unpleasant side effects which may result from working for a business which had already fired them.[190]

Under the expectancy doctrine, if the term of promised employment has not ended by the date of trial, the employee may also be entitled to recover for future losses. In *Hunter v. Board of Trustees*,[191] the plaintiff sought damages for future loss of wages due to his "dismal" employment prospects.[192] After noting the defendant bore the burden of proving the plaintiff failed to mitigate his losses, the court upheld the future damage award, stating:

> As a final matter, award of future damages is consistent with both the traditional damage award for breach of contract as well as the award contemplated by our employment contract case law. In *Cannon*, a personnel policy manual case, we approved of jury instructions that provided for recovery in the amount plaintiff "would have earned . . . had his employment contract not been breached." This approach to recovery is consistent with that adopted by other jurisdictions in personnel manual cases. We, therefore, find no error in the award of future damages on the breach-of-contract action.[193]

Damage awards for emotional distress in breach of contract actions are not available if the suit is solely based on contract.[194] The Iowa Supreme Court, however, appears to be relaxing this rule. In *Meyer v. Nottger*,[195] the plaintiff's action involved the defendant's alleged breach of contract to perform funeral services according to acceptable standards.[196] The *Meyer* court endorsed the view

188. Shill v. School Township of Rock Creek, 227 N.W. 412, 414 (Iowa 1929); Byrne v. Independent Sch. Dist., 117 N.W. 983, 984 (Iowa 1908).

189. Jackson v. Independent Sch. Dist., 81 N.W. 596, 507 (Iowa 1900).

190. Robert A. Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 U. COLO. L. REV. 553, 570-72 (1976).

191. Hunter v. Board of Trustees, 481 N.W.2d 510 (Iowa 1992).

192. *Id.* at 516-17.

193. *Id.* at 517.

194. Smith v. Sanborn State Bank, 126 N.W. 779, 780 (Iowa 1910); Mentzer v. Western Union Tel. Co., 62 N.W. 1, 4 (Iowa 1895).

195. Meyer v. Nottger, 241 N.W.2d 911 (Iowa 1976).

196. *Id.* at 913.

that emotional distress damages are proper in certain types of breach of contract suits.[197] Specifically, the *Meyer* court approved of the following passage:

> "Where the character of the contract is of such a nature that a natural and probable consequence of the breach will be to inflict mental pain or anguish on the person to whom performance is due, some courts have held that the parties may be presumed to have contracted with respect to mental anguish as an element of damage and that a recovery may be had therefor."[198]

The *Meyer* court concluded "recovery of damages may be had in appropriate cases for mental distress" arising out of a breach of contract to perform funeral services.[199] The decision in *Meyer* is also significant because the Iowa Supreme Court reversed the trial court's grant of summary judgment in a contract action requesting punitive damages.[200]

Similarly, the common-law rule is that punitive damages are not available on breach of contract actions unless a tort is associated with the wrongdoing.[201] This rule, however, may not be a complete bar to such awards.

In *Engel v. Vernon*,[202] a partnership existed to operate a food brokerage.[203] The partnership agreement included a clause prohibiting the partners from competing with each other in Iowa if the partnership dissolved, and allowing liquidated damages for a breach of the clause.[204] When the partnership dissolved, one partner carried on a new business in Iowa and was subsequently sued for both liquidated and punitive damages.[205] In considering the punitive damage claim, the *Engel* court stated "[p]unitive damages are never allowed as a matter of right; when malice is shown or when a party acts with wanton and reckless disregard of the rights of others, punitive damages may be allowed."[206] The *Engel* court determined that because neither malice nor reckless conduct was present, punitive damages were not recoverable.[207]

In *Kuiken v. Garrett*,[208] the supreme court deviated from the general rule disallowing punitive damages in contract suits and held:

> This rule does not obtain, however, in those exceptional cases where the breach amounts to an independent, willful tort, in which event exemplary damages may be recovered under proper allegations of malice, wantonness, or oppression . . . . In some states they are recoverable for breach of con-

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197. *Id.* at 920.
198. *Id.* (quoting 25 C.J.S. *Damages* § 69, at 828 (1966)).
199. *Id.* at 921.
200. *Id.* at 922.
201. *See* Thompson v. Mutual Beneficial Health & Accident Ass'n, 83 F. Supp. 656, 660 (N.D. Iowa 1949); Kuiken v. Garrett, 51 N.W.2d 149, 157-58 (Iowa 1952).
202. Engel v. Vernon, 215 N.W.2d 506 (Iowa 1974).
203. *Id.* at 508.
204. *Id.* at 510.
205. *Id.* at 511-12.
206. *Id.* at 517.
207. *Id.*
208. Kuiken v. Garrett, 51 N.W.2d 149 (Iowa 1952).

> tract where there has been some intentional wrong, insult, abuse, harshness, or such gross neglect of duty as to evince reckless indifference of the rights of others or where, and only where, the breach is accompanied with a fraudulent act.[209]

In view of these decisions, punitive damage awards are recoverable in breach of contract actions, but only when the breach is accompanied by a grossly neglectful or reckless act.

V. THE "PUBLIC POLICY" EXCEPTION—THE RULE OF THE *SPRINGER* DECISION

In recent years, courts have declined to uphold an employer's right to terminate employment at will when the discharge conflicts with clearly recognized public policy.[210] As a result, workers who engage in conduct supported by public policy are protected, and employers cannot retaliate against them. Because of the damage to the community, courts have intervened to restrain employers who discharge employees in a way which threatens the public interest.[211] The most accurate label for the tort is retaliatory discharge in violation of public policy. In general, three categories of protected employee conduct have emerged under the public policy exception: (1) exercising a statutory right or civil obligation; (2) refusing to engage in illegal activities; or (3) reporting criminal conduct to supervisors or outside agencies.[212]

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209. *Id.* at 158.

210. 1 PERRITT, *supra* note 40, § 5.1, at 431.

211. 1 *Id.*, at 432.

212. *See* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931, 1932 (1983). In the following cases, the courts have granted a judicial remedy for the discharge of at will employee's for reasons deemed contrary to public policy: Novosel v. Nationwide Ins. Co., 721 F.2d 894, 900 (3d Cir. 1983) (concerning an employee's discharge for refusing to support employer's political agenda and lobbying campaign); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979) (discussing an employee's termination for refusing to submit to polygraph test); Hansrote v. Amer Indus. Technologies, Inc., 586 F. Supp. 113, 115 (W.D. Pa. 1984) (involving an employee's discharge after he refused to improperly influence his former employer to award a job bid to his new company), *aff'd*, 770 F.2d 1070 (1985); Petermann v. International Bhd. of Teamsters, 344 P.2d 25, 27 (Cal. Dist. Ct. App. 1959) (involving an employee's discharge for refusing to commit perjury at employer's behest); Sheets v. Teddy's Frosted Foods, Inc., 427 A.2d 385, 388-89 (Conn. 1980) (discussing a quality control inspector's discharge for insisting on his employer's compliance with state food and drug laws); Parnar v. Americana Hotels, 652 P.2d 625, 631 (Haw. 1982) (involving an employee's discharge for cooperation with grand jury investigating employer's anticompetitive business practices); Palmateer v. International Harvester Co., 421 N.E.2d 876, 879-80 (Ill. 1981) (discussing an employee's discharge for supplying law enforcement authorities with information concerning criminal acts of co-employee); Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974) (discussing employee's discharge for refusal to submit to supervisor's sexual advances); Nees v. Hocks, 536 P.2d 512, 514-15 (Or. 1975) (concerning employee's discharge for serving on a jury); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 734-35 (Tex. 1985) (involving employee's discharge for refusing to pump bilges into clean water contrary to federal law); Wandry v. Bull's Eye Credit Union, 384 N.W.2d 325, 330 (Wis. 1986) (concerning an employee's discharge for refusing

One commentator has stated that in order to win a public policy suit for wrongful dismissal, the employee must show:

> 1. "The existence of a clear and substantial public policy";
> 2. "Jeopardy to that policy if employers are allowed to escape liability for terminating employees in circumstances such as those involving the plaintiff, and thus to chill policy-linked conduct";
> 3. "Actual conduct by the employee promoting the public policy, which caused the dismissal"; and
> 4. "Lack of legitimate employer interest (other than the employment at will rule) justifying the dismissal."[213]

The judiciary has accepted the general concept of the public policy exception, although the degree to which public policy overrides the employment-at-will doctrine varies depending upon the policies implicated. In future years, the exception will undoubtedly expand on a case by case and state by state basis.

A. *The* Springer *Decision—Recognizing a Cause of Action for Iowa Employees Discharged in Retaliation for Pursuing a Workers' Compensation Claim.*

The most common public policy exceptions to the employment-at-will doctrine are those recognizing a cause of action for employees terminated in retaliation for pursuing a workers' compensation claim.[214] The rationale supporting this exception is quite simple: A great public interest exists in allowing employees to pursue workers' compensation benefits against their employers, and employees must be able to pursue such claims without fear of reprisal. Therefore, the termination of any employee in retaliation for pursuing a workers' compensation claim frustrates the intent and policy of the law.

The action for retaliatory discharge precipitated by an employee's request for workers' compensation benefits has its origin in *Frampton v. Central Indiana Gas Co.*[215] An employee brought suit claiming his termination was the result of a prior claim for workers' compensation benefits.[216] Because the Indiana court had little or no authority on this issue, it premised its decision upon language found in the Indiana workers' compensation statute, which provided "No contract or

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to reimburse employer for loss on forged check which had been cashed with approval of employee's supervisor).

213. 1 PERRITT, *supra* note 40, § 5.1, at 432.

214. *See* Midgett v. Sackett-Chicago, Inc., 473 N.E.2d 1280, 1283-84 (Ill. 1984), *cert. denied sub nom.*, Prestress Eng'g Corp. v. Gonzalez, 472 U.S. 1032 (1985); Frampton v. Central Indiana Gas Co., 297 N.E.2d 425, 428 (Ind. 1973); Murphy v. Shawnee County Dep't of Labor Serv., 630 P.2d 186, 192 (Kan. Ct. App. 1981); Sventko v. Kroger Co., 245 N.W.2d 151, 153 (Mich. Ct. App. 1976); Hansen v. Harrah's, 675 P.2d 394, 396-97 (Nev. 1984); Krein v. Marian Manor Nursing Home, 415 N.W.2d 793, 794-95 (N.D. 1987); Clanton v. Cain-Sloan Co., 677 S.W.2d 441, 445 (Tenn. 1984); Shanholtz v. Monongahela Power Co., 270 S.E.2d 178, 182-83 (W. Va. 1980).

215. Frampton v. Central Indiana Gas Co., 297 N.E.2d 425 (Ind. 1973).

216. *Id.* at 426-27.

agreement, written or implied, no rule, regulation or *other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act."[217]

The court viewed the threat of the discharge of a workers' compensation claimant as a device prohibited by the Workers' Compensation Act.[218] The court reasoned that permitting such a retaliatory termination to stand would violate the public policy of the State of Indiana.[219] The Indiana Supreme Court's emphasis on the retaliation element was apparent:

> The Act creates a *duty* in the employer to compensate employees for work-related injuries (through insurance) and a *right* in the employee to receive such compensation . . . . If employers are permitted to penalize employees for filing workmen's compensation claims . . . [e]mployees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation.[220]

Following the *Frampton* decision, a significant number of states followed its direction either legislatively or judicially. In *Kelsay v. Motorola, Inc.*,[221] the Illinois Supreme Court held its workers' compensation scheme "would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act."[222] The *Kelsay* court concluded the legislature, even in the absence of an explicit statutory proscription against such dismissals, could not have intended that businesses should be able to discourage workers from pursuing such claims.[223] In *Krein v. Marian Manor Nursing Home*,[224] the North Dakota Supreme Court came to a similar conclusion:

> The "sure and certain relief" for an injured workman in our Workmen's Compensation Act would be largely illusory and do little for the workman's "well being" if the price were loss of his immediate livelihood. We agree with those courts which hold that discharge of an employee for seeking workmen's compensation profanes public policy and permits a tort action against the employer.[225]

Some state laws expressly create a cause of action for employees dismissed in retaliation for pursuing a workers' compensation claim.[226] In other states,

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217. *Id.* at 427-28 (quoting IND. CODE § 22-3-2-15 (1971)).
218. *Id.* at 428.
219. *Id.*
220. *Id.* at 427.
221. Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978).
222. *Id.* at 357.
223. *Id.*
224. Krein v. Marian Manor Nursing Home, 415 N.W.2d 793 (N.D. 1987).
225. *Id.* at 794.
226. Ohio Revised Code § 4123.90 forbids any punitive action against an employee filing a claim for workers' compensation and permits the employee to recover reinstatement, back pay, and

administrative remedies are available for discharges resulting from the filing of a workers' compensation claim.[227]

In Iowa, the public policy exception to the employment-at-will doctrine has only recently been recognized in *Springer v. Weeks & Leo Co.*[228] In *Springer*, the Iowa Supreme Court recognized a cause of action for a violation of public policy when an employer terminates an employee for exercising rights under Iowa's workers' compensation statute.[229] The plaintiff had filed a workers' compensation claim with her employer's insurance company for carpal tunnel injuries she believed were caused by her employment.[230] After receiving benefits while recuperating from carpal tunnel surgery, the plaintiff attempted to return to her employment with a full medical release.[231] Her manager, however, would not permit her to return to work unless she signed a document stating her carpal tunnel problems were not work-related.[232] When the plaintiff refused to sign the document, she was discharged from her position.[233]

The plaintiff filed her suit with the district court, but the court dismissed the case under the employment-at-will doctrine.[234] Because the public policy exception to the employment-at-will doctrine had not yet been recognized in Iowa, the plaintiff's discharge was not actionable.[235] On appeal, the Iowa Supreme Court held:

> We believe a cause of action should exist for tortious interference with the contract of hire when the discharge serves to frustrate a well-recognized and defined public policy of the state. It is provided in Iowa Code section 85.18 (1987) that:
> "No contract, rule, or device whatsoever shall operate to relieve the employer, in whole or in part, from any liability created by this chapter except as herein provided."
> We deem this to be a clear expression that it is the public policy of this state that an employee's right to seek the compensation which is granted by law for work-related injuries should not be interfered with regardless of the terms of the contract of hire. To permit the type of retaliatory discharge

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reasonable attorney fees. OHIO REV. CODE ANN. § 4123.90 (Anderson 1991); *see also* Ducote v. J. A. Jones Constr. Co., 471 So. 2d 704, 707 (La. 1985) (reinstating judgment for employee under statute prohibiting retaliation for filing workers' compensation claim); Webb v. Dayton Tire & Rubber Co., 697 P.2d 519 522-23 (Okla. 1985) (accepting claim for dismissal in violation of state statute).

227. MacDonald v. Eastern Fine Paper, Inc., 485 A.2d 228, 230 (Me. 1984) (holding Maine statute provides exclusive remedy for dismissal and retaliation for workers' compensation claim, but no separate tort action is available); Farrimond v. Louisiana-Pacific Corp., 798 P.2d 697, 699 (Or. Ct. App. 1990) (deciding the statutory remedies for workers' compensation and retaliatory discharge were adequate, and a separate tort remedy was unnecessary).

228. Springer v. Weeks & Leo Co., 429 N.W.2d 558 (Iowa 1988).

229. *Id.* at 559.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 560.

> which has been alleged in this case to go without a remedy would fly in the face of this policy.[236]

The employer in *Springer* argued the matter should have been left to the legislature.[237] The court disagreed, stating that "by sanctioning wrongful discharge actions for contravention of a public policy which has been articulated in a statutory scheme, we are acting to advance a legislatively declared goal."[238]

Significantly, the employer argued it did not terminate the plaintiff for simply bringing a workers' compensation claim, but rather fired her because her claim was false and groundless.[239] After noting the defendant's workers' compensation insurance carrier had accepted the plaintiff's claim and had paid her workers' compensation benefits, the court rejected the argument:

> [W]e believe that, if it is contrary to public policy to discharge an employee for filing a workers' compensation claim, it is also against public policy to discharge an employee solely on the employer's subjective judgment as to the bona fides of a pending claim prior to its resolution by the industrial commissioner. Indeed, there may be situations where a workers' compensation claim is ultimately unsuccessful and yet a discharge based on the filing of the claim would violate public policy.[240]

The *Springer* court thus emphasized that the workers' compensation claim, the subject of the retaliatory discharge action, need not prove successful; when the employer's defense is that it doubted the validity of the claim, liability will still be imposed.

B. *Burden of Proof Under* Springer

In the *Springer* decision, the Iowa Supreme Court did not state the appropriate burden of proof in public policy claims alleging retaliatory discharge for pursuing workers' compensation benefits. In fact, although the court labeled the cause of action one for "tortious interference with the contract of hire,"[241] it did not set out the elements of the claim. Upon remand, Springer prevailed and was awarded separate damages for past lost wages and emotional distress.[242] The employer's appeal from that verdict brought the *Springer* case before the Iowa Supreme Court for the second time.[243]

In *Springer II*, the employer contended because the original *Springer* ruling labeled the cause as "tortious interference with the contract of hire," the district court should have required proof of the elements of the tortious interference

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236. *Id.* at 560-61.
237. *Id.* at 561.
238. *Id.* (citing Brockmeyer v. Dun & Bradstreet, 335 N.W.2d 834, 842 (Wis. 1983)).
239. *Id.* at 562.
240. *Id.*
241. *Id.* at 560.
242. Springer v. Weeks & Leo Co., 475 N.W.2d 630, 631 (Iowa 1991).
243. *Id.*

claim.[244] After noting its original opinion vaguely identified the elements of the tort, the *Springer II* court held it was not incumbent upon the plaintiff to prove the elements of a tortious interference with contract claim.[245] Rather, the court noted the key element was whether the plaintiff had proven her termination "was in retaliation for her making claim for, and receiving, workers' compensation benefits for her work injury."[246] The court further stated that, in order to avoid confusion, in the future it would refer to the claim as a retaliatory or wrongful discharge claim.[247]

In *Springer II*, the Iowa Supreme Court approved jury instructions which stated:

> Plaintiff must prove all of the following propositions:
> 1. Plaintiff was an employee of defendant.
> 2. Defendant discharged plaintiff from employment.
> 3. Defendant discharged the plaintiff because she filed a workers' compensation claim.
> 4. The discharge was a proximate cause of damage to plaintiff.
> 5. The nature and extent of the damage.[248]

A separate Iowa Supreme Court ruling expanded on the plaintiff's burden. In *Smith v. Smithway Motor Xpress, Inc.*,[249] an employee had obtained a jury award in a *Springer*-type suit.[250] On appeal, the employer argued the trial court erred in instructing the jury that Smith's burden was to prove his claim for workers' compensation benefits was the determining factor in Smithway's decision to fire him.[251] The employer argued Smith had the burden to prove his workers' compensation claim was the "predominant and improper purpose" behind the termination.[252] The *Smithway* court disagreed, stating:

> The type of retaliatory discharge alleged is improper. It is not necessary for the plaintiff to prove that the discharge was both due to the claim of workers' compensation benefits *and* improper; if the former is true then the latter is true also. . . .
>
> The real issue is whether the claim for workers' compensation benefits must be the determining factor or the predominant purpose behind the firing. A purpose is predominant if it is the primary consideration in making a decision; while other reasons may exist, they are less influential than the predominant purpose. A "determinative factor," on the other hand, need not be the main reason behind the decision. It need only be the reason which tips the scales decisively one way or the other. . . .

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244. *Id.* at 632.
245. *Id.* at 632-33.
246. *Id.* at 632.
247. *Id.* at 633.
248. *Id.*
249. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682 (Iowa 1990).
250. *Id.* at 683.
251. *Id.* at 686.
252. *Id.*

> As we pointed out in *Springer*, 429 N.W.2d at 561, retaliatory discharge relieves the employer of his responsibility by intimidating employees into foregoing the benefits to which they are entitled in order to keep their jobs. This intimidation occurs even if retaliation is not the predominant purpose for the firing. If retaliation is allowed to weigh at all in the employer's decision to discharge, there will be a chilling effect on employees entitled to claim benefits. This would clearly conflict with the public policy expressed in section 85.18. The trial court did not err in instructing the jury as it did.[253]

In light of the *Smithway* decision, public policy plaintiffs need only prove their claim for benefits was a "determining factor" in the termination decision.

C. *Remedies Available in* Springer-*Type Claims*

Because the *Springer* theory has only recently been recognized in Iowa, there is little case law regarding the remedies available to a successful plaintiff. Nevertheless, the following remedies appear to be available under this tort action: (1) Damages for past lost wages and past fringe benefits; (2) damages for future lost wages and lost benefits; (3) damages for mental anguish and emotional pain; and (4) punitive damages.

1. *Past Lost Wages and Benefits*

As in all wrongful discharge cases, the primary remedy in a *Springer*-type suit is an award for past lost wages and benefits. In *Springer II*, the Iowa Supreme Court stated that after its original decision in *Springer*, "we later recognized a wrongfully discharged employee was entitled to a remedy for his or her complete injury."[254] The *Springer II* court stated:

> [I]n *Smith*, . . . we held it was error for the District Court not to submit the issue of loss of future earnings. Thus, it is clear from the law developed since *Springer* that lost wages are recoverable and are properly considered part of an employee's damages in a wrongful or retaliatory discharge claim.[255]

2. *Future Lost Wages and Benefits*

In addition to an award for past lost wages and benefits, a *Springer*-type plaintiff may also recover an award for future lost wages and benefits, if appropriate. Such a damage award may be proper when, at the time of trial, the plaintiff has not obtained new employment which pays a wage comparable to that earned while employed by the defendant. As noted in *Springer II*, the court's ruling in *Smithway* made it clear future losses were recoverable in a public policy

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253. *Id.*
254. Springer v. Weeks & Leo Co., 475 N.W.2d 630, 634 (Iowa 1991).
255. *Id.* at 634-35 (citations omitted).

suit.[256] In *Smithway*, the trial court refused to submit the issue of future losses to the jury, stating that "in a tort action such as this, all future damages are limited to those arising out of a loss of future earning capacity."[257] The *Smithway* court reversed the lower court, noting "future damages in this context are very similar to the award of front pay in employment discrimination actions."[258] The court also noted preclusion of future damages would permit the defendant's liability for its unlawful action to end at the time of trial.[259] The court held such a result would be unjust, concluding:

> We agree with these courts that under proper circumstances a wrongfully discharged employee should be permitted to recover lost future earnings if the employee's new job provides less remuneration than did his job with the defendant. "The award for such loss must be based on the likely duration of the terminated employment."[260]

The court indicated its concern for the speculative nature of future damage awards, noting it is often difficult to know how long the employee would have continued to work for the defendant.[261] As a result, the court ruled that in order to determine future lost income awards, juries must first determine the likely duration of the plaintiff's employment with the defendant.[262] The court indicated the proper award would "then be the difference between [the employee's] wages [with the defendant] and his wages at his new job for that [future] period."[263] It is also significant that the *Smithway* court ruled the determination of future losses was for the jury, and not for the trial judge.[264]

3. *Damages for Emotional Pain and Distress*

Under *Springer*, successful plaintiffs may recover damage awards for emotional pain, distress, and humiliation. In *Niblo v. Parr Manufacturing, Inc.*,[265] the Iowa Supreme Court expanded the remedies available in *Springer*-type cases. In *Niblo*, the trial court allowed the jury to assess damages for emotional distress as part of the recovery allowed in a *Springer*-type public policy claim.[266] The employer objected to the jury instructions, arguing emotional distress was not a proper element of damage for the tort.[267] On appeal, the *Niblo* court recognized the issue was one of first impression in Iowa.[268] The court

256. *Id.* at 634.
257. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 687 (Iowa 1990).
258. *Id.* at 688.
259. *Id.*
260. *Id.* at 687 (quoting Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057, 1064 n.23 (5th Cir. 1981)).
261. *Id.* at 688.
262. *Id.*
263. *Id.*
264. *Id.*
265. Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (Iowa 1989).
266. *Id.* at 353.
267. *Id.*
268. *Id.*

rejected the employer's argument, recognizing an employee's recovery under the public policy tort could include awards for mental distress.[269] The court distinguished between torts involving willful and unlawful conduct and those involving only negligence.[270] In the former, "recovery of mental distress damages has been allowed despite a lack of injury."[271] The court also noted it had "been lenient in allowing incidental damages for mental distress in tort cases when the theory of recovery includes intentional acts or those arising out of illegal conduct."[272] The *Niblo* court concluded by stating:

> In considering the cause of action for wrongful discharge, we believe that damages caused by mental distress may properly be considered in addition to the lost earnings caused by the termination of employment. . . . A wrongful or retaliatory discharge in violation of public policy is an intentional wrong committed by the employer against an employee who chooses to exercise some substantial right. . . . We believe that public policy also requires us to allow a wrongfully discharged employee a remedy for his or her complete injury. . . . We know of no logical reason why a wrongfully discharged employee's damages should be limited to out of pocket loss of income, when the employee also suffers causally connected emotional harm. . . . We believe that fairness alone justifies the allowance of a full recovery in this type of a tort.[273]

The defendant also argued the plaintiff must prove the distress was severe before damages for emotional distress could be awarded in a public policy claim.[274] The court, however, rejected that argument.[275]

> When the tort arises out of the willful act of the employer, an employee should not be limited to damages for only serious emotional distress. Under such circumstances we believe that factfinders can properly distinguish genuine from phony claims. We ask them to perform the same task in a myriad of other situations. Requiring proof of severe injury would take away damages from those plaintiffs who suffered less, but nevertheless suffered genuine emotional harm.[276]

In view of the *Niblo* ruling, *Springer*-type plaintiffs can recover for emotional distress, even in situations where the distress is not psychologically debilitating.

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269. *Id.* at 355.
270. *Id.* at 353-55.
271. *Id.* at 354.
272. *Id.* at 355.
273. *Id.*
274. *Id.* at 356.
275. *Id.* at 356-57.
276. *Id.* at 356.

4. *Punitive Damages*

In *Springer II* and *Smithway*, the Iowa Supreme Court disallowed awards of punitive damages.[277] As noted in *Springer II*, prior to the original *Springer* decision "there was in Iowa no recognized cause of action for retaliatory discharge arising from a claim for workers' compensation benefits."[278] As a result, in *Springer II*, the court stated it would "not punish an actor for conduct that the actor cannot know to be wrong."[279] Therefore, because the employer's "actions took place prior to our recognizing the tort of retaliatory or wrongful discharge, the trial court correctly refused to allow the punitive damage claim to be submitted to the jury."[280] The thrust of this part of the *Springer II* ruling is that the Iowa Supreme Court did not allow punitive damages because the case was one of first impression.

Likewise, in *Smithway* the trial court awarded the plaintiff $100,000 in punitive damages.[281] On appeal, the employer argued it could not have willfully disregarded the plaintiff's rights because, at the time of the discharge, Iowa had not yet adopted the public policy exception to the employment-at-will doctrine.[282] The employer urged because it did not know the plaintiff had a right not to be discharged for filing a workers' compensation claim, it could not have willfully and wantonly disregarded that right.[283] The *Smithway* court agreed, noting "punitive damages should not be awarded in the case that first recognizes the tort of retaliatory discharge due to a workers' compensation claim."[284] The court also noted that while the *Smithway* case was "not the first of its kind in Iowa, all the relevant events took place prior to our decision in *Springer*, and thus [the employer] received no benefit from that decision."[285]

In sum, the only reason the Iowa Supreme Court disallowed punitive damage awards in *Springer II* and *Smithway* was because the actions complained of took place prior to the initial *Springer* ruling. As a result, the employer had no advance notice its conduct was unlawful. Accordingly, in situations where the actions complained of took place subsequent to the first *Springer* decision, there would be no basis for disallowing punitive damages. Because the *Springer I* court initially termed the action as tortious interference with the employment contract, the court's holdings on the issue of punitive damages in other cases involving tortious interference with contracts should be controlling in public policy suits. As noted in *Westway Trading Corp. v. River Terminal Corp.*, "punitive damages may be awarded for the tort of intentional interference with a

277. Springer v. Weeks & Leo Co., 475 N.W.2d 630, 635 (Iowa 1991); Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d 682, 686-87 (Iowa 1990).
278. Springer v. Weeks & Leo Co., 475 N.W.2d at 635.
279. *Id.*
280. *Id.*
281. Smith v. Smithway Motor Xpress, Inc., 464 N.W.2d at 683.
282. *Id.* at 687.
283. *Id.*
284. *Id.*
285. *Id.*

business relationship if the tort is committed with legal malice."[286] Future Iowa Supreme Court cases may permit punitive damage awards in *Springer*-type suits.

VI. EXCEPTION UNDER IOWA'S EMPLOYMENT DISCRIMINATION LAW: THE IOWA CIVIL RIGHTS ACT

The Iowa Civil Rights Act of 1965 is Iowa's antidiscrimination law.[287] As such, it provides a statutory exception to the employment-at-will doctrine.[288] In many respects, it is a "mirror" of the primary federal antidiscrimination law, Title VII of the Civil Rights Act of 1964. The employment discrimination section of the Iowa Civil Rights Act bans the following forms of employment discrimination in Iowa: age, race, creed, color, sex, national origin, religion or disability.[289] The law also provides protection to employees terminated as a result of their pregnancy.[290]

The Iowa Civil Rights Act prohibits employers from considering or using protected personal characteristics (such as race or sex) in making personnel decisions.[291] The Act was enacted in 1965 and was a product of the civil rights turbulence of the 1960s.[292] In its initial form, the Act proscribed all of the above forms of employment discrimination except disability discrimination.[293] In 1972, the Iowa legislature amended the Act to prohibit employment discrimination against the physically and mentally disabled.[294]

The employment discrimination prohibitions in the Act affect virtually every employer in Iowa by forcing compliance with its nondiscriminatory mandate.[295] The only employers not bound by the law are those who regularly employ fewer than four employees.[296] The provisions of the law are enforced by the Iowa Civil Rights Commission.[297]

A. *The Administrative Process*

1. *Filing the Complaint*

All claims brought under the Act, whether ultimately prosecuted before the agency or before a court of law, must initially be filed with the Iowa Civil Rights Commission.[298] Any employment discrimination suit brought in an Iowa court will be subject to dismissal if the plaintiff did not initially resort to the state

286. Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 404 (Iowa 1982).
287. IOWA CODE § 216 (1993).
288. *Id.* § 216.6.
289. *Id.*
290. *Id.* § 216.6(2)(d).
291. *Id.*
292. *Id.* § 216.1.
293. *Id.* § 105A.7 (1966).
294. Act of Mar. 22, 1972, ch. 1031, 1972 Iowa Acts 129.
295. IOWA CODE § 216.1(7) (1993).
296. *Id.* § 216.6(6)(a).
297. *Id.* § 216.3.
298. *Id.* § 216.16(1).

agency.[299] All discrimination complaints must be filed with the Civil Rights Commission within 180 days of the alleged discriminatory act.[300]

In most situations, the date which commences the running of the 180-day limitations period is clear; the date will usually be the date of discharge or the refusal-to-hire date. In certain circumstances, however, discriminatory practices are of a continuing nature. For instance, a pattern of sexual harassment can continue over a lengthy period of time. In such instances, the complainant can file charges of discrimination with the Civil Rights Commission within 180 days after the last complained of act by the perpetrator.[301]

In district court suits, the general requirement for filing a complaint with the Commission is notice pleading.[302] While the complaint must set forth the particulars of the alleged discrimination, it is not necessary to include each and every possible action of an employer which may give rise to the claim.[303] The complaint process begins when the individual employee contacts the Iowa Civil Rights Commission's representatives and provides a statement concerning the alleged discrimination.[304] The Commission's representatives draft a proposed complaint for the worker and file it after the individual has reviewed and signed the complaint.[305] If the individual is represented by an attorney, the attorney can also draft the complaint and submit it for filing.[306] After filing the complaint, the employee must serve a copy of it on the employer within twenty days.[307]

2. *The Commission's Initial Review of Complaints*

Once an employee files a complaint, the Iowa Civil Rights Commission has exclusive jurisdiction over all complaints for sixty days.[308] Although the Commission has the responsibility of making a prompt investigation of all complaints,[309] its overloaded docket makes that prompt investigation a rarity. If the Commission finds probable cause in the complaint, the complainant may withdraw the matter from the Commission and request a Letter of Right to Sue sixty days from the date the complaint was filed.[310] The Letter of Right to Sue enables the complainant to take the entire discrimination action into the district court for further proceeding under the provisions of the Iowa Civil Rights Act.[311] Because of the large backlog of complaints before the Commission, this course is often taken by discharged employees who seek a speedy remedy.

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299. Taylor v. Department of Transp., 260 N.W.2d 521, 522-23 (Iowa 1977).
300. IOWA CODE § 216.15(12) (1993).
301. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 517 (Iowa 1990).
302. IOWA CODE § 216.15 (1993).
303. *Id.* § 216.15(1).
304. *Id.* § 216.15.
305. *Id.* § 216.15(1).
306. *Id.*
307. *Id.* § 216.15(3)(a).
308. *Id.* § 216.16(1)(b).
309. *Id.* § 216.15(3)(a).
310. *Id.* § 216.16(2).
311. *Id.* § 216.16(1).

The employee also can leave the complaint before the Commission for investigation and determination.[312] Formal investigation usually begins by mailing to the complainant a questionnaire seeking information pertaining to the alleged discrimination.[313] The Commission also mails to the employer an informational request, seeking a thorough explanation of the challenged employment decision.[314] Eventually, the Commission must determine whether probable cause exists to believe a discriminatory employment practice has occurred.[315] If the Commission finds probable cause, it then proceeds to further stages such as conciliation and a potential hearing on the merits of the complaint.[316]

If the Commission finds no probable cause, a final order dismissing the complaint is promptly served upon all parties.[317] A complainant who wishes to contest the agency's finding of no probable cause may file a petition for judicial review with the district court.[318]

If the Commission's investigation results in a probable cause finding, a Commission officer is assigned to the complaint to attempt conciliation.[319] After probable cause is found, "the staff of the Commission shall promptly endeavor to eliminate the discriminatory or unfair practice by conference, conciliation, and persuasion."[320] Continued attempts at conciliation are required for at least thirty days after the initial conciliation meeting between the employer and the Commission staff.[321] If the Commission finds probable cause, it is no longer a neutral fact-finder.[322] The Commission's representatives become the advocate of the complainant.[323] If, after thirty days, the employer is not interested in conciliation or if the parties cannot agree on settlement terms, the Commission's director may order the parties to bypass further conciliation.[324] The complaint is then placed on the Commission's docket for a formal hearing on the merits of the claim.[325]

3. *The Agency Hearing*

Once the matter is placed on the Commission's docket for hearing, an Assistant Iowa Attorney General is assigned to present the evidence in support of the complainant.[326] The complainant may retain private counsel.[327] The

312. *Id.* § 216.15(3)(a).
313. *Id.*
314. *Id.*
315. *Id.* § 216.15(3)(b).
316. *Id.* § 216.15(3)(c)-(5).
317. *Id.* § 216.15(3)(c).
318. *Id.* § 216.17(1).
319. *Id.*
320. *Id.* § 216.15(3)(c).
321. *Id.* § 216.15(3)(d).
322. *Id.* § 216.15(b).
323. *Id.*
324. *Id.* § 216.15(3)(d).
325. *Id.* § 216.15(5).
326. *Id.* § 216.15(6).
327. *Id.* § 17A.12(4).

Commission appoints a hearing officer to preside over the hearing; the official who initially investigated the complaint may not participate in the hearing.[328] The hearing is conducted in accordance with the procedures for contested case hearings set out in the Iowa Administrative Procedure Act.[329]

After the hearing, the hearing officer who presided at the reception of the evidence renders a proposed decision.[330] The proposed decision must contain "findings of fact and conclusions of law, separately stated."[331] If the hearing officer determines employment discrimination occurred, the proposed decision will then include a recommended remedy.[332]

The Commissioners of the Iowa Civil Rights Commission must review the ruling.[333] When formulating its final decision, the Commission is not bound by the proposed decision; rather, in reviewing 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."[334] If the Commission determines the employer engaged in discriminatory conduct, "the Commission shall then state its findings of fact and conclusions of law and shall issue an order requiring the [employer] to cease and desist from the discriminatory [practice]."[335] The Commission is also directed to "take the necessary remedial action [against the employer] as in the judgment of the [C]ommission will carry out the purposes" of the Iowa Civil Rights Act.[336]

4. *Agency Remedies*

When the Iowa Civil Rights Commission determines an employer engaged in discrimination, the Commission will then fashion a remedy for the discrimination victim. The Commission's directive is to make the complainant whole and place the victim in the position the victim would have been had the discrimination never occurred.[337] The remedial action provided by the Act includes the following:

> (a) Hiring, reinstatement or upgrading of employees with or without pay;
> (b) 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;
> (c) Reporting as to the manner of compliance;
> (d) Posting notices in conspicuous places in the [employer's] place of business in a form prescribed by the [C]ommission and inclusion of notices in advertising materials; [and]

328. *Id.* § 216.15(5)-(6).
329. *Id.* § 216.15(7).
330. *Id.* § 17A.15(2).
331. *Id.* § 17A.16(1).
332. *Id.* § 216.15(8)-(9).
333. *Id.* § 17A.15(3).
334. *Id.*
335. *Id.* § 216.15(8).
336. *Id.*
337. *Id.*

> (e) Payment to the complainant of damages for the 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.[338]

B. *The Right to Sue Option and Judicial Relief*

1. *Commencing the District Court Suit*

Sixty days after the filing of the complaint, the complainant has the right to request a Letter of Right to Sue from the Commission.[339] The Right to Sue Letter enables the employee to proceed in a district court suit under the Act.[340] The Civil Rights Commission must grant the employee's request for the Right to Sue Letter if all the following conditions are satisfied:

> (a) The complaint was timely filed with the Commission;
> (b) The complaint was on file with the Commission for a period of at least sixty days;
> (c) The Commission has not issued a "no probable cause" finding on the complaint;
> (d) A conciliation agreement has not been executed by the parties;
> (e) A notice of contested case hearing has not been served upon the employer; and
> (f) The complaint has not been closed by the Commission as an administrative closure, and two years have not elapsed since the issuance date of the closure.[341]

The employee can obtain a Right to Sue Letter, assuming the Commission has taken no action on the charge. Upon receipt of the letter, the employee has ninety days to commence an action in the district court by filing a petition with the court.[342] Proper venue lies in the county in which the defendant resides or has its principal place of business, or in the county in which the alleged discriminatory act occurred.[343] The Commission is then barred from further action on the complaint.[344]

2. *District Court Actions*

The Iowa Civil Rights Act does not provide for the right to a jury trial. Nevertheless, most Iowa courts honored jury demands in suits under the Act. The rationale was the Act was not simply an equitable remedy because the language specifically permitted damages that "include but are not limited to actual

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338. *Id.* § 216.15(8)(a).
339. *Id.* § 216.16(1).
340. *Id.*
341. *Id.* § 216.16(1)-(2).
342. *Id.* § 216.16(3).
343. *Id.* § 216.16(4).
344. *Id.* § 216.16(3).

damages."[345] Courts have allowed awards for past lost wages, future lost wages, and emotional distress damages. Because the Seventh Amendment to the United States Constitution provides for a jury trial when any form of damages relief is requested, most Iowa courts, prior to 1990, permitted jury trials under the Act.[346]

In 1990, the Iowa Supreme Court ruled on the jury trial question in *Smith v. ADM Feed Corp.*[347] The plaintiff brought an action in district court alleging disability discrimination against his employer.[348] The employer filed a motion to strike the plaintiff's jury demand, and the court sustained the employer's motion and eventually dismissed the suit.[349] On appeal, the plaintiff contended he was entitled to a jury trial on his discrimination claim under the Iowa Civil Rights Act.[350] The Iowa Supreme Court disagreed, noting that in enacting the Iowa Civil Rights Act "the legislature gave the court power to provide a wide variety of relief, most of which is equitable in nature."[351] The court stated:

> Permitting a jury trial in district court would substantially interfere with a statutory scheme which delegates to the court only that limited power held by the [C]ommission. Not only would the procedure change radically, but we believe that a greater emphasis would be placed on a money recovery over other available relief. We conclude that if the legislature intended to provide a different procedure when a case was removed from an administrative hearing it would have done so.[352]

After noting the Act itself was silent on the issue of a jury trial right, the court concluded "the purpose of the chapter is inconsistent with an intent to provide a jury trial."[353] *Smith*'s denial of jury trials under the Act is still the law in Iowa, despite the amendment of federal employment discrimination acts to specifically provide for jury trials under Title VII and the Americans with Disabilities Act of 1990 (ADA).[354]

3. *Burden of Proof*

The United States Supreme Court and the Iowa Supreme Court both recognize two theories for proving employment discrimination. The first is the disparate *treatment* theory; the second is the disparate *impact* theory. The two theories were defined in *International Brotherhood of Teamsters v. United States*:[355]

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345. *Id.* § 216.15(8)(a)(8).
346. *See* Smith v. ADM Feed Corp., 456 N.W.2d 378, 383 (Iowa 1990).
347. Smith v. ADM Feed Corp., 456 N.W.2d 378 (Iowa 1990).
348. *Id.* at 380.
349. *Id.*
350. *Id.*
351. *Id.* at 381.
352. *Id.*
353. *Id.* at 380-81.
354. *See* 29 U.S.C. § 794a(a)(1) (Supp. IV 1992); 42 U.S.C. § 1981a(c)(1) (Supp. IV 1992).
355. International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

> "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, we have held, is not required under a disparate impact theory. Either theory may, of course, be applied to a particular set of facts.[356]

The disparate treatment theory focuses on the employer's motivation, while the disparate impact theory focuses on the consequences of the employer's conduct.

i. *Disparate Treatment Theory*

The disparate treatment framework under the Act comes from two United States Supreme Court decisions: *McDonnell-Douglas Corp. v. Green*[357] and *Texas Department of Community Affairs v. Burdine*.[358] This method of proof uses an indirect, burden-shifting method. In the first stage, the employee must establish a prima facie case of discrimination by showing:

> (i) [T]hat [the employee] belongs to a [protected group];
> (ii) [T]hat [the employee] applied and was qualified for a job for which the employer was seeking applicants;
> (iii) [T]hat, despite his qualifications, [the employee] was rejected; and
> (iv) [T]hat after [the employee's] rejection, the position remained open and the employer continued to seek applicants [with similar] qualifications.[359]

Under the *McDonnell-Douglas* test, once the employee establishes a prima facie case of discrimination, a presumption of discrimination arises.[360] At this point, the burden shifts to the employer who must go forward with evidence to rebut the presumption of discrimination.[361] The employer's burden is to raise a "genuine issue of fact as to whether it discriminated against the plaintiff."[362] The employer must articulate a "legitimate, nondiscriminatory reason" for the adverse

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356. *Id.* at 335 n.15.
357. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).
358. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).
359. McDonnell-Douglas Corp. v. Green, 411 U.S. at 802.
360. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 254.
361. *Id.*
362. *Id.*

employment decision.[363] Once the employer satisfies this burden, the presumption of discrimination drops from the case.[364]

The burden then shifts back to the plaintiff to demonstrate that the proffered reasons were pretextual.[365] The plaintiff may succeed by either persuading the court that a discriminatory reason motivated the employer, or showing the employer's explanation is unworthy of credence.[366] Ultimately, the proof of pretext through evidence of the defendant's discriminatory motivation, or the proof of unbelievability or the falsity of the employer's rationale, establishes a case of discrimination.[367] The court may consider the plaintiff's initial evidence and inferences on the issue of pretext.[368] The employee's burden to show pretext does not require the plaintiff to show direct evidence of intent to discriminate, but only requires the plaintiff to demonstrate the employer's reasons for its conduct are unbelievable.[369] The employee need not show the prohibited factor was the employer's sole or exclusive consideration; rather, the plaintiff "must prove that [the factor] made a difference or was a 'determinative factor' in the employer's decision."[370]

ii. *Disparate Impact Theory*

As an alternative to the *McDonnell-Douglas* disparate treatment analysis, a discrimination plaintiff may establish a prima facie case of discrimination by showing the "disparate impact" on a minority group of an employer's general policies, procedures, or tests utilized in hiring, promotion, or discharge decisions. The United States Supreme Court first applied the disparate impact theory to a Title VII claim in the case of *Griggs v. Duke Power Co.*[371] In *Albemarle Paper Co. v. Moody*,[372] the Court more fully developed the elements of proof under this theory.[373] This disparate impact analysis is also used in class action suits involving challenges to an employer's general policies or procedures.[374]

Under the disparate impact theory developed in *Griggs* and *Albemarle*, a case proceeds through three stages. "In the first stage the employee must demonstrate that a particular employment practice has an adverse impact on a protected group in 'marked disproportion to its impact on employees outside that

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363. Linn Coop. Oil Co. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981); Wing v. Iowa Lutheran Hosp., 426 N.W.2d 175, 178 (Iowa Ct. App. 1989).
364. Trobaugh v. Hy-Vee Food Stores, 392 N.W.2d 154, 156 (Iowa 1986).
365. *Id.* at 157.
366. Hamilton v. First Baptist Elderly Housing Found., 436 N.W.2d 336, 339 (Iowa 1989).
367. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).
368. *Id.* at 255 n.10.
369. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 718 (1983).
370. Hulme v. Barrett, 449 N.W.2d 629, 632 (Iowa 1989).
371. Griggs v. Duke Power Co., 401 U.S. 424 (1971).
372. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
373. *Id.* at 422.
374. Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981).

group.'"[375] "This stage depends almost entirely on statistical evidence" and must be proven through voluminous discovery and "detailed analysis of the employer's total organization and operation."[376] Furthermore, under the United States Supreme Court's recent decision in *Wards Cove Packing Co. v. Atonio*,[377] the employee's burden goes beyond the need to show statistical disparities in the employer's work force.[378] The employee "must begin by identifying the specific employment practice that is challenged" and is responsible "for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[379]

Under *Hy-Vee Food Stores v. Iowa Civil Rights Commission*,[380] the employee in a disparate impact case "must show a causal link between the challenged employment practice and the disparate impact."[381] To establish this link, the worker "may not simply rely on statistics that show an imbalance of a protected class in the work force."[382] By rejecting such statistical comparisons in the work force, the Supreme Court significantly limited the role of statistics in this first stage of disparate impact suits.[383] The plaintiffs now must prove "the disparity they complain of is the result of one or more of the employment practices that they are attacking" and must specifically show "that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[384]

Once the employee establishes a prima facie case of disparate impact, the case then proceeds to the second stage. At this point, the burden shifts to the employer to show the business necessity of the challenged practice.[385] The dispositive issue in the second stage is "whether the challenged practice serves, in a significant way, the legitimate employment goals of the employer."[386] As stated in *Wards Cove*:

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices. At the same time, though, there is no requirement that the challenged practice be 'essential' or

375. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 517 (Iowa 1990) (citing Linda L. Holdeman, Watson v. Fort Worth Bank & Trust: *The Changing Face of Disparate Impact*, 66 DENV. U. L. REV. 179, 182 (1989)).

376. *Id.*

377. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

378. *Id.* at 656.

379. *Id.*

380. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512 (Iowa 1990).

381. *Id.* at 518.

382. *Id.*

383. *Id.*

384. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989).

385. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1974); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

386. Wards Cove Packing Co. v. Atonio, 490 U.S. at 659.

> 'indispensable' to the employer's business for it to pass muster: this degree of scrutiny would be almost impossible for most employers to meet, and would result in a host of evils . . . .[387]

The Iowa Supreme Court relied on the *Wards Cove* decision in *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission.*[388] In the *Hy-Vee* decision, "[t]he employer's burden in the second stage is now clearly one of producing evidence of a business justification and *not* a burden of persuasion."[389]

If the employer succeeds in demonstrating the business necessity of the challenged practice, the case enters the third stage. In this stage, "the employee must convince the fact finder that (1) the employer has alternative hiring practices that could reduce the disparate impact and (2) the employer refuses to adopt these alternatives."[390] Assuming the matter gets to this third stage, and assuming the employee demonstrates the defendant refused to adopt less harmful alternatives, the plaintiff should be entitled to prevail on the disparate impact claim.

4. *Judicial Remedies*

In successful discrimination claims under the Iowa Civil Rights Act, the plaintiff may seek a variety of remedies, both equitable and legal. The Iowa Code specifically provides for damages which "shall include but are not limited to actual damages, court costs and reasonable attorney fees."[391] The Act also provides for the hiring, reinstatement, or upgrading of employees who have been subjected to discrimination.[392] If the district court finds unlawful discrimination has occurred, it has the same broad discretion to fashion an appropriate remedy as that enjoyed by the Civil Rights Commission. The ultimate goal the district court considers when choosing a remedy is to make persons whole for injuries suffered on account of unlawful employment discrimination.[393] The primary forms of relief available to successful employees in actions brought under the Iowa Civil Rights Act are back pay and lost benefits; future lost wages and benefits; hiring, reinstatement, upgrading or other affirmative action; emotional distress damages; punitive damages; attorney fees; and litigation expenses.

i. *Back Pay and Lost Benefits*

A primary remedy awarded in any successful employment discrimination is an award of back pay and lost benefits. Iowa Code sections 216.15(8)(a)(1) and 216.15(8)(a)(8) specifically provide for awards for past lost wages and benefits.[394] Back pay is generally considered to be the amount of money and benefits

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387. *Id.*
388. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 518-19 (Iowa 1990).
389. *Id.* at 519 (citing Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 659 (1989)).
390. *Id.* (citing Wards Cove Packing Co. v. Atonio, 490 U.S. at 660-61).
391. IOWA CODE § 216.15(8)(a)(8) (1993).
392. *Id.* § 216.15(8)(a)(1).
393. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 171 (Iowa 1982).
394. *Id.*

the plaintiff would have earned but for the discriminatory practice, minus the amount of money and benefits the plaintiff actually earned from the date of the discriminatory conduct through the time of trial. Any unemployment compensation the plaintiff receives is credited against the total back pay award.[395] The award of back pay and back benefits terminates if the employee obtains comparable employment prior to trial, or ceases to look for alternative employment.[396]

In computing back pay awards, the Iowa Supreme Court approved two basic principles. "First, an unrealistic exactitude is not required. Secondly, uncertainties in determining what an employee would have earned before the discrimination should be resolved against the employer."[397] As noted by the Iowa Supreme Court, "difficulty of ascertainment is no longer confused with right of recovery."[398]

ii. *Future Lost Wages and Benefits*

In addition to awards for past losses, the Iowa Civil Rights Act has been construed to authorize an award of "front pay" for future lost wages and benefits. "Front pay" is the amount which the plaintiff would have earned but for the discriminatory act and which accrues *after* the trial. The authority to award front pay under the Act was challenged in *Foods, Inc. v. Iowa Civil Rights Commission*.[399] In rejecting the challenge, the Iowa Supreme Court took note of the statutory provision which allowed courts to "take such affirmative action . . . as in the judgment of the commission shall effectuate the purposes of their charter."[400] After acknowledging this provision "invests the Commission with considerable discretion in fashioning an appropriate remedy,"[401] the *Foods* court concluded:

> 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. . . . [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 purposes of the Civil Rights Act.[402]

Front pay awards are subject to the same limitations as back pay awards: The plaintiff's actual earnings from future employment expected to be received

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395. IOWA CODE § 216.15(8)(a)(1) (1993).

396. *See* DiSalvo v. Chamber of Commerce, 568 F.2d 593, 597-98 (8th Cir. 1978).

397. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 530-31 (Iowa 1990).

398. *Id.* (quoting Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973)).

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

400. *Id.* at 171 (quoting IOWA CODE § 601A.14(12) (1977) (current version at IOWA CODE § 216.15(8) (1993)).

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

402. *Id.* (citations omitted).

must be deducted from the award.[403] In addition, if the plaintiff does not make reasonable efforts to mitigate the economic loss expected during the front pay period, the employer's front pay liability may be correspondingly reduced.[404]

iii. *Hiring, Reinstatement, Upgrading, or Other Affirmative Action*

The Iowa Civil Rights Act specifically gives courts the discretion to grant the equitable remedies of hiring, reinstatement, or upgrading employees.[405] The court in *Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Commission*[406] specifically recognized equitable remedies when an employer, who was found guilty of sex and national origin discrimination, was ordered to promote the plaintiff to the first available position as an aisle coordinator.[407] The court found the principle of reinstatement consistent with the ultimate goal of compensating employees subjected to discrimination—placing the injured person in the position the person would have been had the discrimination never occurred.[408]

The Iowa Supreme Court has also construed the Act to authorize affirmative action in appropriate circumstances. The city of Des Moines was held liable for sexual harassment against a female police officer in *Lynch v. City of Des Moines*.[409] As part of the relief awarded, the trial court ordered the city to develop and implement an education and training plan to prevent and detect sexual harassment at the city's police department.[410] On appeal, the city argued there was no statutory basis for such an affirmative action order.[411] The court rejected the argument, noting the Iowa Civil Rights Act directed courts "'to take the necessary remedial action as in the judgment of the commission will carry out the purposes of this chapter.'"[412] While the court also noted development and implementation of an educational program is not a remedy specified in the Act, the statute did not limit the term "remedial action" to those remedies specifically enumerated in the statute.[413] The *Lynch* court concluded:

> Allowing the sort of remedy ordered by the district court in this case would further the purposes of the Iowa Civil Rights Act, and this remedy is not more intrusive than those remedies specifically enumerated in section 601A.15(8). We hold, therefore, that one remedy available under the Iowa

403. IOWA CODE § 216.15(8)(a)(1) (1993).
404. This is basic Title VII law. *See* Sprogis v. United Air Lines, 517 F.2d 387, 392-93 (7th Cir. 1975).
405. IOWA CODE § 216.15(8)(a)(1) (1993).
406. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512 (Iowa 1990).
407. *Id.* at 530-32.
408. *Id.* at 530.
409. Lynch v. City of Des Moines, 454 N.W.2d 827 (1990).
410. *Id.* at 835.
411. *Id.*
412. *Id.* (quoting IOWA CODE § 601A.15(8) (1989) (*currently* IOWA CODE § 216.15(8) (1993)).
413. *Id.* at 835-36.

> Civil Rights Act is an order requiring a violator to educate and train its employees not to engage in conduct prohibited by the Act.[414]

iv. *Emotional Distress Damages*

The Iowa Civil Rights Act is silent on the question of whether a successful discrimination plaintiff can obtain an award of monetary damages for emotional pain and distress. The monetary damages provision of the Act simply provides that any damages awarded "shall include but are not limited to actual damages, court costs, and reasonable attorney fees."[415]

In 1986, the Iowa Supreme Court decided the appropriateness of monetary damages for emotional pain and distress. In *Chauffers, Local Union No. 238 v. Iowa Civil Rights Commission*,[416] the union argued the Iowa Civil Rights Act did not provide authority to award either compensatory or emotional distress damages.[417] The court rejected the argument, noting the remedial action authorized by the Act included damages "not limited to actual damages."[418] The court also noted "the Iowa Civil Rights Act is to be liberally construed to eliminate unfair and discriminatory acts and practices in employment."[419] The court concluded:

> We agree with those jurisdictions allowing the award of emotional distress damages by the civil rights commission or its equivalent. This result seems only natural because emotional distress is generally a compensable injury, and the language of the statute allows actual damages which are synonymous with compensatory damages. Allowing the award of emotional distress damages is also consistent with the commission's discretion in fashioning an appropriate remedy under section 601A.15(8).[420]

In *Chauffers*, the court did not address the "question of whether a civil rights complainant must show outrageous conduct" in order to obtain emotional distress damages in a suit under the Act.[421] The Iowa Supreme Court addressed this issue in *Hy-Vee Food Stores v. Iowa Civil Rights Commission*,[422] citing *Niblo v. Parr Manufacturing, Inc.*[423] for the proposition that it had previously "been lenient in allowing incidental damages without a showing of physical injury in

414. *Id.* at 836; *see also* Iron Workers Local No. 67 v. Hart, 191 N.W.2d 758, 770 (Iowa 1971) (ordering a local union to submit an affirmative action program to the Civil Rights Commission to recruit minorities to its membership).

415. IOWA CODE § 216.15(8)(a)(8) (1993).

416. Chauffers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375 (Iowa 1986).

417. *Id.* at 381-82.

418. *Id.* at 382.

419. *Id.*

420. *Id.* at 383.

421. *Id.*

422. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512 (Iowa 1990).

423. Niblo v. Parr Mfg., Inc., 445 N.W.2d 351 (Iowa 1989).

tort cases involving intentional or illegal conduct."[424] The *Hy-Vee* court concluded "a civil rights complainant may recover compensable damages for emotional distress without a showing of physical injury, severe distress, or outrageous conduct."[425]

v. *Punitive Damages*

The Iowa Civil Rights Act is silent on the types of monetary damages which may be awarded to a successful plaintiff. For many years, litigants debated whether the statute permitted an award of punitive damages. The Iowa Supreme Court's decision in *Chauffers* answered this question in the negative.[426] In *Chauffers*, the Iowa Civil Rights Commission awarded punitive damages to a successful discrimination plaintiff.[427] On appeal, the union contended the Act did not encompass an award of punitive damages, and the punitive damage award deprived the union of its constitutional right to a jury trial.[428] The court agreed, initially noting "[t]he general rule is that an administrative agency cannot award punitive damages absent express statutory language allowing such an award."[429] The court concluded:

> We see no reason to differ from this settled rule of law. The Iowa Civil Rights Act does not give the Commission the express authority to award punitive damages. The language "but not limited to actual damages" in Section 601A.15(8)(a)(8) does not necessarily imply punitive damages are available. While the legislature broadened the remedial scope of the Commission's powers in 1978, the express language of the revision referred to actual damages and not specifically to punitive damages.[430]

Although the *Chauffers* court liberally interpreted the Act to permit damages for emotional distress, it restrictively interpreted the Act to deny punitive damage awards.

vi. *Attorney Fees*

A 1978 amendment to the Iowa Civil Rights Act authorized reasonable attorney fees awards to successful plaintiffs.[431] Plaintiffs who pursue employ-

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424. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 525 (citing Niblo v. Parr Mfg., Inc., 445 N.W.2d at 354-55).

425. *Id.* at 526.

426. Chauffers, Local Union No. 238 v. Iowa Civil Rights Comm'n, 394 N.W.2d 375, 384 (Iowa 1986).

427. *Id.* at 377.

428. *Id.* at 383-84.

429. *Id.* at 384.

430. *Id.*

431. Act of June 29, 1978, ch. 1179, sec. 16, § 12(a)(8), 1978 Iowa Acts 851, 857 (codified at IOWA CODE § 216.15(8)(a)(8) (1993)); Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990).

ment discrimination actions in district court act as private attorneys general,[432] enforcing a statute which embodies a significant state policy.[433] The legislative objective of the fee award statute is to "encourage lawsuits by private litigants of modest means so that underlying substantive laws will be enforced effectively."[434]

The matter of attorney fees under the Act is separate and distinct from the underlying civil rights action. The court must first determine whether a violation of the Iowa Civil Rights Act occurred before it can consider the issue of an appropriate attorney fee award.[435] The assessment of attorney fees, therefore, cannot be accomplished until liability has been established.[436] In *Ayala v. Center Line, Inc.*,[437] the court set out the following reasons for allowing the court to award attorney fees only *after* the conclusion of trial:

> (1) [T]he presumed expertise of courts in matters of attorney fees[;]
> (2) [T]he inordinate waste of time and expense which would be required to educate lay jurors on those matters about which the court is presumed expert and[;]
> (3) [T]he unacceptable expense and delay of bifurcating trials in order to separate issues of liability from lawyer skill and preparedness.[438]

The court, however, decided *Ayala* prior to *Smith v. ADM Feed Corp.*,[439] which stated plaintiffs have no right to a jury trial under the Iowa Civil Rights Act.[440] The procedure for an Iowa civil rights action is to first try the Chapter 216 action to the court, and if successful, the court then retains jurisdiction to make an appropriate attorney fee award.[441]

Assuming the plaintiff is successful in proving a violation of the Act, the court later holds an evidentiary hearing on reasonable attorney fees.[442] Trial courts have considerable discretion in making such awards, and the Iowa Supreme Court reviews the award of attorney fees under an abuse of discretion standard.[443] The applicant bears the burden of proving the attorney's services were reasonably necessary and the charges were reasonable.[444] When granting attorney fees under the Act, the district court must consider:

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432. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416 (1978).
433. *See* Franklin Mfg. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d 829, 833 (Iowa 1978).
434. Peter N. Cubita et al., Note, *Awards of Attorney Fees in the Federal Courts*, 56 ST. JOHN'S L. REV. 277, 287 n.34 (1982).
435. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987).
436. *Id.*
437. Ayala v. Center Line, Inc., 415 N.W.2d 603 (Iowa 1987).
438. *Id.* at 605.
439. Smith v. ADM Feed Corp., 456 N.W.2d 378 (Iowa 1990).
440. *Id.* at 380.
441. Ayala v. Center Line, Inc., 415 N.W.2d at 605.
442. *Id.* at 606.
443. Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990).
444. *Id.*

> the time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and the importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service. The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case."[445]

The policy considerations favoring an award of attorney fees to successful plaintiffs in employment discrimination suits do not apply to victorious defendants.[446] Such a policy would likely discourage private suits in all but the clearest discrimination cases.[447] While attorney fees may be awarded to prevailing defendants in discrimination suits, courts award such fees only upon a finding that the plaintiff's action is "'unfounded, meritless, frivolous or vexatiously brought.'"[448] The Iowa Civil Rights Act codifies this principle by providing that "[t]he district court may also award the respondent reasonable attorney's fees and court costs when the court finds that the complainant's action was frivolous."[449] As a result, when a plaintiff prevails in a suit under the Act, an award of attorney fees is virtually mandatory; however, for an employer to recover attorney fees, the employer must show the underlying suit was frivolous.

Finally, district courts have "no authority to award prejudgment interest on the attorney fees under Iowa Code section 535.3."[450] "The employer's obligation to pay . . . attorney fees arose at the time of judgment and [the plaintiff] suffered no lost value of the use of money for attorney fees."[451] Once the trial court awards attorney fees, however, the plaintiff's attorney is entitled to a further award for additional attorney fees on an appeal filed by the employer.[452]

vii. *Litigation Expenses*

The Iowa Supreme Court permits recovery of various litigation expenses as part of the attorney fee award in suits brought under the Act. In *Landals*, the court awarded attorney fees for reasonably incurred paralegal assistance, with the compensation set at the paralegal's hourly rate.[453] The *Landals* court also approved a limited recovery under the Act for "deposition expenses, expert wit-

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445. *Id.* (citations omitted).
446. Mosby v. Webster College, 563 F.2d 901, 905 (8th Cir. 1977).
447. *Id.*
448. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (quoting United States Steel Corp. v. United States, 519 F.2d 359, 363 (3d Cir. 1975)); *see also* Glymph v. Spartanburg Gen. Hosp., 783 F.2d 476, 479 (4th Cir. 1986) (finding the district court abused its discretion in the award of the fees when the award was based on the outcome and not the merits of the case.)
449. IOWA CODE § 216.16(5) (1993).
450. Landals v. George A. Rolfes Co., 454 N.W.2d 891, 898 (Iowa 1990).
451. *Id.*
452. Ayala v. Center Line, Inc., 415 N.W.2d 603, 606 (Iowa 1987).
453. Landals v. George A. Rolfes Co., 454 N.W.2d at 898.

ness compensation, and other court costs . . . allowed by Iowa Rule of Civil Procedure 157(a) and Iowa Code chapters 622 and 625."[454]

VII. FEDERAL EMPLOYMENT DISCRIMINATION LAWS

Congress has enacted a series of civil rights statutes dealing with discrimination in employment: Title VII of the Civil Rights Act of 1964 (Title VII);[455] Age Discrimination in Employment Act of 1967 (ADEA);[456] the Americans with Disabilities Act of 1990 (ADA);[457] Civil Rights Act of 1866;[458] and the Equal Pay Act of 1963.[459] Title VII is the federal government's most comprehensive response to the problem of employment discrimination, and provides the major substantive structure for the other civil rights statutes.

A. *Federal Remedies*

1. *Title VII of the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 was the first comprehensive federal legislation prohibiting discrimination in private employment. Title VII prohibits an employer, employment agency, or labor organization from engaging in employment discrimination against any individual because of such individual's "race, color, religion, sex, or national origin."[460] The Act bans discriminatory practices with respect to hiring, discharges, compensation, promotion, classification training, or retaliation against workers for exercising their equal employment rights.[461] Title VII's proscriptions apply to employers who affect commerce and maintain fifteen or more employees for twenty or more weeks during the year.[462] The Act extends coverage to state and local governments, governmental agencies, and political subdivisions.[463] The Act forbids employment agencies from discriminating in their referrals and prohibits labor organizations from engaging in discriminatory practices.[464]

2. *The Age Discrimination in Employment Act*

In 1967, Congress passed the Age Discrimination in Employment Act to prohibit discrimination on the basis of age.[465] Congress enacted the statute "to promote employment of older persons based on their ability rather than age; to

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454. *Id.*
455. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).
456. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992).
457. 42 U.S.C. §§ 12101-12213 (Supp. IV 1992).
458. *Id.* § 1981 (1988 & Supp. IV 1992).
459. 29 U.S.C. § 206(d) (1988).
460. 42 U.S.C. § 2000e-2(a)-(c) (1988).
461. *See id.* § 2000e-2.
462. *Id.* § 2000e(b).
463. *Id.* § 2000e(a).
464. *Id.* § 2000e-2(b)-(c).
465. 29 U.S.C. §§ 621-634 (1988 & Supp. IV 1992).

prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[466] The ADEA forbids employers from discriminating on the basis of age against employees, or applicants for employment, between the ages of forty and seventy.[467] The ADEA is modeled after Title VII, although some of its remedial features are more similar to the Fair Labor Standards Act.[468] The coverage provisions of the ADEA are, with certain exceptions, substantially the same as those seen in Title VII. The ADEA reaches state and local government employers and employers who have "twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year."[469]

3. *The Americans with Disabilities Act of 1990*

The Americans with Disabilities Act of 1990 prohibits covered employers from discriminating "against a qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[470] The purpose of the statute was four-fold:

> (1) [T]o provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
> (2) [T]o provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
> (3) [T]o ensure that the Federal Government plays a central role in enforcing the standards established in [the Act] on behalf of individuals with disabilities; and
> (4) [T]o invoke the sweep of congressional authority . . . in order to address the major areas of discrimination faced day to day by people with disabilities.[471]

The ADA's prohibition against disability discrimination includes the requirement that employers make reasonable accommodation to known physical or mental limitations of an otherwise qualified applicant or employee with a disability.[472] As of July 25, 1992, the ADA applied to employers with twenty-five or more employees.[473] After July 26, 1994, the ADA will cover employers with fifteen or more employees.[474]

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466. *Id.* § 621(b).
467. *Id.* § 631(a)-(d) (1988 & Supp. IV 1992).
468. *Id.* §§ 623(a), 631(a); *see id.* §§ 201-219 (1988 & Supp. IV 1992).
469. *Id.* § 630(b).
470. 42 U.S.C. § 12112 (Supp. IV 1992).
471. *Id.* § 12101(b) (Supp. IV 1992).
472. *Id.* § 12112(b)(5)(A).
473. *Id.* § 12111(5)(A).
474. *Id.*

first file the charge with that state agency.[497] The complainant must also file the complaint with the EEOC within 300 days of the unlawful practice or within thirty days of receiving notice that the state agency has terminated its proceedings, whichever is earlier.[498]

Identifying the time when a discriminatory practice occurred, for purposes of determining whether the complainant filed a timely charge, is often difficult. When one of the acts complained of arguably occurred outside the limitations period, complainants will often contend the discrimination was a continuing violation—a practice which continued into the limitations period—and therefore the charge is not time barred. A continuing violation is defined as a series of related acts, one of which falls within the statute of limitations, or the maintenance of a discriminatory practice or policy.[499] In order to establish a continuing violation, the complainant must demonstrate the series of acts were reasonably related to each other, and one of the discriminatory acts fell within the limitations period.[500] The time limitation for filing a charge of discrimination does not generally begin to run until the facts supporting such a charge are apparent to the complainant.[501] "Under Title VII, if an employee did not at the time know or have reason to know that an employment decision was discriminatory in nature, the time limits for filing an administrative complaint may be tolled."[502]

It is significant that the administrative requirements of Title VII, the ADEA, and the ADA have no applicability to suits brought under section 1981, perhaps because section 1981 originated in a less administratively-oriented time. Whatever the reason, the consequence is that a section 1981 suit is not burdened with the procedural technicalities attending the other antidiscrimination laws. While the remedies available under Title VII and section 1981 are related, and although they are directed to most of the same activities, they are nevertheless separate and distinct causes of action.[503] Thus, "resort to Title VII's administrative machinery [is not a prerequisite] for the institution of a [section] 1981 action."[504] Section 1981 suits can initially be pursued in federal or state courts, and the controlling statute of limitations is ordinarily "the most appropriate one provided by state law."[505]

The Equal Pay Act lacks the elaborate procedural requirements of other antidiscrimination statutes. The law permits any employee aggrieved by the alleged unlawful practice to bring a civil action in any state or federal court for the amount of wages in dispute and an additional equal amount as liquidated

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497. *Id.* § 626(d)(2).

498. *Id.*

499. United Air Lines v. Evans, 431 U.S. 553, 557 (1977); Torres v. Wisconsin Dep't of Health & Social Servs., 838 F.2d 944, 948 n.3 (7th Cir. 1988), *cert. denied*, 489 U.S. 1017 (1989).

500. Sabree v. United Bhd. of Carpenters & Joiners Local No. 33, 921 F.2d 396, 400 (1st Cir. 1990).

501. Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975).

502. Stoller v. Marsh, 682 F.2d 971, 974 (D.C. Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983).

503. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 461 (1975).

504. *Id.* at 460.

505. *Id.* at 462.

damages.[506] The Act also permits the aggrieved employee to file a claim with the EEOC; the EEOC may inspect and investigate the matter to determine if the Equal Pay Act has been violated.[507] The EEOC may then bring a civil action on behalf of the employee in any court of competent jurisdiction for the amount of unpaid wages and an additional equal amount of liquidated damages.[508] Whether the suit is brought by the individual or the EEOC, the action must be brought within two years of its accrual; however, an action arising from a willful violation may be commenced within three years of accrual.[509]

2. *Intra-Agency Procedures*

Once a discrimination charge is filed with the EEOC, the agency follows procedures similar to those followed by the Iowa Civil Rights Commission in complaints alleging a violation of the Iowa Civil Rights Act. Initially, the agency investigates the action to determine whether there is reasonable cause to believe the complaint is true.[510] The EEOC accords substantial weight to the findings and orders made by state or local authorities.[511] If the EEOC determines no reasonable cause exists, it must dismiss the charge and promptly notify each party.[512]

If the EEOC determines reasonable cause exists, the agency must attempt to mediate the matter.[513] If the EEOC is not successful in its mediation between the parties, it may bring a civil action in federal district court on behalf of the complainant.[514] The aggrieved person has the right of intervention in the civil suit.[515] When the EEOC commences an action in federal court, the procedures and remedies available are the same as if the action was brought solely by the individual.[516]

3. *Right to Sue Release*

Filing a timely charge of discrimination with the EEOC is a prerequisite to a private suit to vindicate employment discrimination rights. Contrary to normal administrative law principles, however, exhaustion of agency procedures is not required.[517] This reflects a congressional decision not to subject private plaintiffs to the lengthy delays which usually plague the EEOC's charge processing.[518]

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506. 29 U.S.C. § 216(b) (1988).
507. *Id.* § 211(a).
508. *Id.* § 216(c).
509. *Id.* §§ 216(c), 255.
510. Ward v. EEOC, 719 F.2d 311, 312 (9th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984).
511. Cottrell v. Newspaper Agency Corp., 590 F.2d 836, 837 (10th Cir. 1979).
512. *Id.*
513. EEOC v. Zia Co., 582 F.2d 527, 532-33 (10th Cir. 1978).
514. 42 U.S.C. § 2000e-5(f)(1) (1988).
515. *Id.*
516. *Id.*
517. *Id.* § 2000e-5(f)(3) (1988).
518. H.R. REP. NO. 238, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2147-48.

The EEOC has exclusive jurisdiction over all discrimination charges for the first 180 days after the charge is filed.[519] After 180 days, the complainant may elect to circumvent the EEOC procedures and request a Right to Sue Letter.[520] If the EEOC did not conclude a conciliation agreement, or has not previously filed a civil action on behalf of the employee, the requested Right to Sue Release must be issued.[521] The EEOC may issue the Right to Sue Release prior to the expiration of the 180-day period, provided a responsible EEOC official has determined the agency will probably be unable to complete its processing of the charge within 180 days from its filing.[522] A Right to Sue Release terminates further proceedings within the EEOC.[523] Upon receipt of the Right to Sue Release, the complainant has ninety days to bring a civil action in federal district court.[524]

ADEA plaintiffs are treated differently from other complainants before the EEOC. Under the ADEA, an individual has the right to file a private suit sixty days after the complaint is filed with the EEOC.[525] Unlike Title VII, the ADEA does not establish a right to sue procedure after the expiration of the sixty-day period. Rather, the plaintiff has the right to commence an action in a court of law, and the EEOC will immediately close its file.[526] The ADEA does, however, provide that the district court suit must be brought within two years of its accrual, except that a cause of action arising from a willful violation of the ADEA may be commenced within three years of its accrual.[527]

C. *Judicial Remedies*

1. *Venue*

Title VII contains special venue provisions that identify the federal judicial districts in which employment discrimination suits may be brought.[528] The Act provides that a Title VII suit may be brought:

> in any judicial district in the state in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the unlawful employment practice.[529]

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519. 42 U.S.C. § 2000e-5(f)(1) (1988).
520. 29 C.F.R. § 1601.28(a)(1) (1993).
521. 42 U.S.C. § 2000e-5(f)(1) (1988).
522. 29 C.F.R. § 1601.28(a)(2) (1993).
523. *Id.* § 1601.28(a)(3).
524. 42 U.S.C. § 2000e-5(f)(1) (1988).
525. 29 U.S.C. § 626(d) (1988).
526. *Id.*
527. *Id.* § 255, 626(e)(1).
528. 42 U.S.C. § 2000e-5(f)(3) (1988).
529. *Id.*

If the employer is not subject to jurisdiction in any of these three districts, the action may be brought in the judicial district where the employer has its principal office.[530] Because the venue provisions applicable to Title VII suits (and ADA actions) specify the exclusive jurisdiction for discrimination actions, a litigant may not use the venue provisions of 28 U.S.C. section 1391 to broaden a litigant's jurisdictional options.[531]

2. *Jury Trial Right*

i. *ADEA Actions*

Prior to the 1978 amendments to the ADEA, the Act contained no express provision recognizing or forbidding the right to a jury trial. The 1978 amendments added a new section which provides:

> In an action brought under [section 7(c)(1)] a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this act, regardless of whether equitable relief is sought by any party in such action.[532]

Although it is apparent the Act mandates a jury trial on all claims for monetary damages, some courts have held the statute does not accord a right to a jury trial on the issues of injunctive relief, attorney fees, and costs.[533]

ii. *Title VII and the ADA*

For many years whether a constitutional right to a jury trial existed in Title VII actions was a subject of much debate. The Act was silent on the question, causing much consternation among Title VII litigants. The generally accepted rule was that Title VII was primarily an equitable remedy; therefore, there was no right to a jury trial.[534] Other courts reached a contrary conclusion, reasoning that a jury trial was required because Title VII is the modern counterpart of breach of contract actions which are generally tried to juries.[535]

With the enactment of the Civil Rights Act of 1991, the jury trial question was finally resolved. Section 102(c) of the Civil Rights Act of 1991 provides that "[i]f a complaining party seeks compensatory or punitive damages" in Title VII or ADA actions, "any party may demand a trial by jury."[536] The term "any

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530. *Id.*

531. Stebbins v. State Farm Mut. Auto Ins. Co., 413 F.2d 1100, 1102-03 (D.C. Cir.), *cert. denied*, 396 U.S. 895 (1969).

532. 29 U.S.C. § 626(c)(2) (1988).

533. Lee v. Sears, Roebuck & Co., 17 Fair Empl. Prac. Cases (BNA) 23, 24 (W.D. Tenn. 1978); Cleverly v. Western Elec. Co., 69 F.R.D. 348, 352-53 (W.D. Mo. 1975).

534. Harmon v. May Broadcasting Co., 583 F.2d 410, 411 (8th Cir. 1978); Slack v. Havens, 522 F.2d 1091, 1094 (9th Cir. 1975).

535. Ochon v. American Oil Co., 338 F. Supp. 914, 919 (S.D. Tex. 1972).

536. 42 U.S.C. § 1981a(c)(1) (Supp. IV 1992). The jury trial provision of the bill was not prompted by any specific Supreme Court ruling. Employers strongly resisted the provision, fearing

party" is significant because employers from whom compensatory or punitive damages are sought also have a right to a jury trial.

iii. *42 U.S.C. Section 1981*

Broad remedial relief is available in section 1981 actions. A successful plaintiff in a section 1981 action may be entitled to both equitable and legal relief, including compensatory and possible punitive damages.[537] Because section 1981 suits encompass damage relief, they are considered legal in nature and must be tried to a jury on demand.[538] The jury's determination of the legal claim binds the court on any accompanying claim for equitable relief.[539]

iv. *Equal Pay Act*

In private suits brought under the Equal Pay Act, the jury trial issue is complicated by the law's provision for two distinct monetary awards—unpaid wages and liquidated damages. The United States Supreme Court has held, however, that there is a right to a jury trial on any claim for unpaid wages under the ADEA.[540] As a result, there should be little question that a right to a jury trial exists when unpaid wages is the issue. Because awards of liquidated damages are likened to punitive damages, such claims should be decided by a jury in Equal Pay Act claims. Federal court decisions, however, are not in agreement.[541]

D. *Burden of Proof*

1. *Title VII and ADEA Actions*

In *McDonnell-Douglas Corp. v. Green*,[542] the United States Supreme Court first sought to clarify the standards and burden of proof governing the disposition of Title VII suits.[543] The *McDonnell-Douglas* framework has also been applied to age discrimination actions under the ADEA.[544] In *McDonnell-Douglas*, the Court approved the following allocation of proof in employment discrimination actions:

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more employment discrimination suits would result. Management also resisted the jury trial provision, believing jury trials would make it easier for plaintiffs to win discrimination actions.

537. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

538. *Id.*

539. Lincoln v. Board of Regents, 697 F.2d 928, 934 (11th Cir. 1983).

540. Lorillard Inc. v. Pons, 434 U.S. 575, 581-83 (1978).

541. McClanahan v. Mathews, 440 F.2d 320, 325 (6th Cir. 1971) (holding the plaintiff was not entitled to a jury trial). *But see* Lewis v. Times Publishing Co., 185 F.2d 457 (5th Cir. 1950) (allowing a jury trial).

542. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).

543. *Id.* at 800.

544. Loeb v. Textron, Inc., 600 F.2d 1003, 1010 (1st Cir. 1979); Kentroti v. Frontier Airlines, Inc., 585 F.2d 967, 969 (10th Cir. 1978); Marshall v. Goodyear Tire & Rubber Co., 554 F.2d 730, 735-36 (5th Cir. 1977).

> (1) The plaintiff has the initial burden of establishing a prima facie case of discrimination;
> (2) Once a prima facie case of discrimination has been made out, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason for the employee's rejection";[545] and
> (3) If the employer meets the "articulation" requirement, then the burden shifts back to the plaintiff to demonstrate that the employer's proffered reason for its action is, in fact, a pretext for a discriminatory decision.[546]

The burden of persuasion remains at all times with the plaintiff.[547] Subsequent to the *McDonnell-Douglas* ruling, the United States Supreme Court specifically held the burden which shifts to the employer is not the burden of persuasion, but is the burden to rebut the presumption of discrimination by producing evidence that its challenged actions were legitimate and nondiscriminatory.[548]

Unlike disparate treatment cases, disparate impact claims have little to do with the employer's motives or intentions. The focus is on the effect of a company's policy or practice: Does it screen out more minorities than nonminorities? The concept of disparate impact was first endorsed by the United States Supreme Court in *Griggs v. Duke Power Co.*[549] The disparate impact burden of proof established in *Griggs* is generally applicable to ADEA suits as well.[550]

2. *ADA Actions*

The ADA explicitly adopted the powers, remedies, and procedures set forth in Title VII.[551] Because the ADA has only recently been adopted, it can only be assumed that the analysis set out in *McDonnell-Douglas* and *Griggs* is applicable to ADA suits.

Congress enacted the ADA to provide a clear and comprehensive national mandate for the elimination of disability discrimination.[552] The underlying premise of the ADA is that persons with disabilities—notwithstanding the pervasive stereotypes and misconceptions about the abilities and inabilities of such persons—should not be excluded from employment opportunities unless they are actually unable to do the job.[553] The law protects employees with disabilities, defined as individuals with either a physical or mental impairment that substan-

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545. McDonnell-Douglas Corp. v. Green, 411 U.S. at 802.
546. *Id.* at 804.
547. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
548. *Id.* at 254.
549. Griggs v. Duke Power Co., 401 U.S. 424 (1971). See *supra* text accompanying notes 371-379 for a discussion of *Griggs*.
550. Geller v. Markham, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).
551. 42 U.S.C. § 12117 (Supp. IV 1992).
552. Americans with Disabilities Act of 1990, H.R. REP. No. 485, 101st Cong., 2d Sess, 31 (1990), *reprinted in* 1990 U.S.C.C.A.N. 267.
553. 42 U.S.C. § 12101(7),(9) (Supp. IV 1992).

tially limits the individual's major life activities, those who have a record of such an impairment, or those who are regarded as having such an impairment.[554]

The ADA requires employers to reasonably accommodate disabled workers.[555] The law not only permits differential treatment by employers on behalf of the disabled, it *requires* the differential treatment. If the law required employers to treat disabled individuals exactly as the nondisabled, the former would often be disqualified in the course of competition in the marketplace. Equal treatment vis-a-vis the nondisabled is therefore clearly not the proper standard to apply to disabled workers.[556]

Generally, it is a discriminatory employment practice for a business not to make a reasonable accommodation to the physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the business can demonstrate the accommodation would impose an undue hardship on the business's operation.[557] Factors to be considered in determining the undue hardship issue include: "(1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget; (2) [t]he type of agency operation, including the composition and structure of the agency's work force; and (3) [t]he nature and cost of the accommodation."[558] A reasonable accommodation of a disability may include: (1) Making facilities used "readily accessible to and usable by" handicapped persons, and (2) "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of readers and interpreters," and similar actions.[559] This is not an exhaustive compilation of accommodation possibilities. "For example, other accommodations could include permitting the use of accrued paid leave, or providing additional unpaid leave for necessary medical treatment, . . . [p]roviding reserved parking spaces, . . . [and] providing personal assistants such as a . . .

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554. *Id.* § 12102(2) (Supp. IV 1992). The regulations also define "a physical or mental impairment" and "major life activities." 29 C.F.R. § 1630.2(h)-(i) (1993).

> Physical or mental impairment means:
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> (1) 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, genito-urinary, hemic and lymphatic, skin, and endocrine; or
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> (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id. § 1630.2(h).

> Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

Id. § 1630.2(i).

555. 42 U.S.C. § 12111(a)(5)(A) (Supp. IV 1992).

556. Amy J. Gittler, *Fair Employment and the Handicapped, A Legal Perspective*, 27 DEPAUL L. REV. 953, 961-63 (1978).

557. 29 C.F.R. § 1613.704(a) (1993).

558. *Id.* § 1613.704(c).

559. 42 U.S.C. § 12111(9) (Supp. IV 1992).

sighted guide to assist a blind employee on occasional business trips."[560] The accommodation chosen by the employer need not be the best accommodation possible, but must be sufficient to meet the job-related needs of the disabled worker.[561] The employer may choose a less expensive accommodation or an accommodation that is easier for the business to provide.[562]

3. *Civil Rights Act of 1866*

The substantive core of lawsuits under section 1981 turn on contractual rights. Nevertheless, the Supreme Court has held the principles adopted in *McDonnell-Douglas* and *Burdine* are applicable to section 1981 suits alleging disparate treatment.[563] Likewise, in *Washington v. Davis*,[564] the Supreme Court applied a modified version of Title VII's disparate impact analysis in its treatment of a test issue under section 1981.[565] Both the district court and the court of appeals in *Washington* applied disparate impact analysis, ruling the plaintiffs established a prima facie case of racial discrimination by demonstrating that blacks failed an employment test at a rate four times that of whites.[566] Although the Supreme Court reversed the lower court, it did not dispute the applicability of disparate impact analysis in section 1981 suits.[567]

4. *The Equal Pay Act*

The Equal Pay Act and Title VII provide overlapping remedies for sex discrimination with respect to compensation. Courts generally reject the notion that liability under the Equal Pay Act leads automatically to Title VII liability, noting the two Acts require not only different proof, but also different allocations of the burden of proof.[568] Under Title VII, the burden of proof remains with the plaintiff at all times to show discriminatory intent; on the other hand, "the Equal Pay Act creates a type of strict liability in that no intent to discriminate need be shown."[569]

Four requirements are necessary to make out a prima facie case of a violation of the Equal Pay Act: Two workers of opposite sex in (1) the same "establishment" are (2) receiving unequal pay (3) "on the basis of sex" (4) for

560. 29 C.F.R. § 1630.2(o) (1993).
561. *Id.* § 1630.9.
562. *Id.*
563. Patterson v. McLean Credit Union, 491 U.S. 164, 186 (1989).
564. Washington v. Davis, 426 U.S. 229 (1976).
565. *Id.* at 246-48.
566. *Id.* at 249-50.
567. *Id.* at 246-48. While the parties did not challenge the use of disparate impact analysis in the section 1981 claim, the Court did not find the lower court's use of the disparate impact methodology to be error. *Id.* On remand, the Ninth Circuit again determined that disparate impact analysis applied in section 1981 actions. Davis v. County of Los Angeles, 566 F.2d 1334, 1341 (9th Cir. 1977).
568. Fallon v. State, 882 F.2d 1206, 1213 (7th Cir. 1989).
569. *Id.*

equal work.[570] The Act requires equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."[571] As the Supreme Court noted in *Corning Glassworks v. Brennan*,[572] the plaintiff has the burden of establishing the work was equal:

> The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the secretary must show that an employer pays different wages to employees of opposite sexes [for equal work]. Although the Act is silent on this point, its legislative history makes plain that the secretary has the burden of proof on this issue.[573]

E. *Forms of Relief*

1. *Title VII and ADA Actions*

Congress's purpose for giving the courts discretionary powers under Title VII was to make it possible to fashion complete relief to make the victim whole.[574] As a result, once a court determines an employer has engaged in an unlawful employment practice, the Act empowers the court to enjoin the defendant from engaging in discrimination and order "affirmative relief" where appropriate.[575] Affirmative relief may include reinstatement or hiring of employees with or without back pay or any other equitable relief that the court deems appropriate.[576] Historically, Title VII was viewed as an equitable remedy, and it was not until the recent adoption of the Civil Rights Act of 1991 that other forms of monetary damage relief were made available to Title VII plaintiffs.[577] The Americans with Disabilities Act of 1990 incorporates the remedies available under Title VII.[578]

Back pay is the most common form of monetary relief in Title VII and ADA suits. Although courts have discretion to determine whether to award back pay, such awards are routinely granted barring extraordinary circumstances.[579] Back pay generally consists of the wages, salary and fringe benefits the plaintiff would have earned but for the discrimination, and is measured from the date of the discriminatory act through the time of trial.[580] Title VII provides that

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570. CHARLES A. SULLIVAN, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION § 10.03, at 591 (1980).
571. 29 U.S.C. § 206(d)(1) (1988).
572. Corning Glassworks v. Brennan, 417 U.S. 188 (1974).
573. *Id.* at 195.
574. Kilgo v. Bowman Transp., Inc., 789 F.2d 859, 876 (11th Cir. 1986).
575. 42 U.S.C. § 2000e-5(g) (1988).
576. *Id.*
577. *Id.* § 1981a (Supp. IV 1992).
578. *Id.* §§ 12111-12117 (Supp. IV 1992).
579. Franks v. Bowman Transp. Co., 495 F.2d 398, 422 (5th Cir. 1974).
580. Bowe v. Colgate-Palmolive Co., 489 F.2d 896, 902-04 (7th Cir. 1973).

"interim earnings" and "amounts earnable with reasonable diligence" must be deducted from the back pay award.[581]

In addition to the equitable relief of reinstatement and a back pay award, discharged employees may also be entitled to an award of "front pay." Front pay compensates the plaintiff for anticipated losses to be incurred because of the plaintiff's continuing loss of wages and benefits beyond trial. If the plaintiff is still suffering a loss of income in the new job at the time of trial, the court will compare those losses to what the plaintiff earned while employed for the defendant, and those lost wages can be projected into the future so as to compensate the plaintiff for the ongoing loss beyond the date of trial. Front pay is typically granted as a substitute for reinstatement.[582] Prior to the enactment of the remedies provision in the Civil Rights Act of 1991, most federal courts recognized awards of front pay in Title VII actions.[583]

The Civil Rights Act of 1991 altered the injunctive remedial scheme previously available under Title VII. Under the Act, employees suing under Title VII or the ADA can recover compensatory and punitive damages.[584] These damages are only available for *intentional* discrimination; they are not available in disparate impact suits.[585] Compensatory damages are available for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses."[586] A compensatory damage award does not include back pay, medical expenses, or other relief authorized under Title VII.[587]

Under the Civil Rights Act of 1991, a complaining party may seek punitive damages if the complainant can show the defendant engaged in unlawful intentional discrimination.[588] In order to obtain punitive damages, the plaintiff must prove the employer engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of the victim.[589] Punitive damages, however, are not recoverable from the government, a government agency, or a political subdivision.[590]

In the Civil Rights Act of 1991, Congress placed limitations on the amount of compensatory and punitive damages that a court can award.[591] The amount depends upon the size of the defendant's business. For each complaining party, the award of compensatory and punitive damages cannot exceed the following:

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581. 42 U.S.C. § 2000e-5(g) (1988); *see also* Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975) (holding that it was proper to set off remuneration received following discharge from damages to the extent it actually mitigated losses), *cert. denied*, 422 U.S. 1045 (1974).

582. Thorne v. City of El Segundo, 802 F.2d 1131, 1137 (9th Cir. 1986).

583. Shore v. Federal Express Corp., 777 F.2d 1155, 1159 (6th Cir. 1985); Fadhl v. San Francisco, 741 F.2d 1163, 1167 (9th Cir. 1984); Briseno v. Central Technical Community College, 739 F.2d 344, 348 (8th Cir. 1984).

584. 42 U.S.C. § 1981(a) (Supp. III 1991).

585. 42 U.S.C. § 1981(a)(2) (Supp. IV 1992).

586. *Id.* § 1981(b)(3) (Supp. IV 1992).

587. *Id.* § 1981(b)(2) (Supp. IV 1992).

588. *Id.* § 1981(a)(2) (Supp. IV 1992).

589. *Id.* § 1981(b)(1) (Supp. IV 1992).

590. *Id.*

591. *Id.* § 1981(b)(3) (Supp. IV 1992).

(a) Fifty thousand dollars if the employer has 100 or fewer employees;
(b) One hundred thousand dollars if the employer has between 101 and 200 employees;
(c) Two hundred thousand dollars if the employer has between 201 and 500 employees; and
(d) Three hundred thousand dollars if the employer has more than 500 employees.[592]

In addition to the above remedies, Title VII expressly provides for awarding attorney fees to a prevailing plaintiff.[593] Attorney fees are awarded to prevailing plaintiffs in all discrimination suits except in "very unusual" or "special" circumstances.[594] The legislative objective is to encourage lawsuits by private litigants of modest means so that underlying substantive laws will be enforced effectively.[595] Attorney fees are generally assessed in favor of the employer only when the court determines the plaintiff's claim was frivolous, unreasonable, groundless, or brought or continued in bad faith.[596]

2. *ADEA Suits*

Because the ADEA provides for a statutory remedy separate from the remedial scheme in Title VII, subtle differences exist in the remedies available to ADEA plaintiffs. The ADEA provides for "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."[597] Reinstatement, promotion, back pay, liquidated damages, attorney fees, and costs are specifically enumerated, but are not necessarily the exclusive forms of relief provided by the ADEA.[598] Compensatory damages for pain and suffering, as well as punitive damages, are not available under the ADEA.[599]

While compensatory and punitive damages are not available under the Act, an award of liquidated damages may be sought.[600] A court may grant liquidated damages in the same amount as an employee's actual back pay award if the plaintiff can establish a willful violation of the ADEA.[601] The United States Supreme Court has held a willful violation is demonstrated if the employer has shown a knowing or reckless disregard for whether its conduct was prohibited by the ADEA.[602] Furthermore, the Supreme Court has rejected the concept that a

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592. *Id.*
593. *Id.* § 2000e-5(k) (Supp. IV 1993).
594. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978).
595. Cubita et al, *supra* note 434, at 287 n.34.
596. Christianburg Garment Co. v. EEOC, 434 U.S. at 421.
597. 29 U.S.C. § 626(b) (1988).
598. *Id.*
599. Johnson v. Al Tech Specialties Steel, 731 F.2d 143, 147 (2d Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233, 235 (6th Cir. 1983); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977).
600. *See* 29 U.S.C. § 626(b) (1988).
601. *Id.*
602. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 128 (1985).

violation of the Act is willful if the employer merely knew of the potential applicability of the ADEA.[603]

The ADEA does not contain a provision authorizing an award of attorney fees to a prevailing plaintiff. The Act expressly incorporates section 16(b) of the Fair Labor Standards Act, however, which makes an award of attorney fees mandatory to a prevailing employee.[604] As a result, a prevailing employee in an ADEA suit is entitled to reasonable attorney fees.[605] The ADEA also authorizes a separate determination of fees in the event of appellate level legal services.[606] Although section 16(b) of the Fair Labor Standards Act does not authorize a fee award to a prevailing employer,[607] An employer can generally recover attorney fees from an unsuccessful plaintiff in an ADEA suit if the employer can demonstrate the action was frivolous or brought in bad faith.[608]

3. *Civil Rights Act of 1866*

Broad remedial relief is available in section 1981 actions. As noted by the United States Supreme Court in *Johnson v. Railway Express Agency, Inc.*,[609] "[a]n individual who establishes a cause of action under section 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages."[610]

As a result of the decision, the remedies available under section 1981 have been greatly expanded. Initially, section 1981, like Title VII, permits back pay awards in appropriate circumstances.[611] Numerous federal court decisions have awarded damages for mental distress in section 1981 actions.[612] The Supreme Court validated this approach in *Carey v. Piphus*,[613] by awarding damages for mental distress in a civil rights action.[614] Employees have occasionally recovered out of pocket and incidental expenses caused by unlawful discrimination.[615]

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603. *Id.* at 127-28; *see also* Gilliam v. Armtex, Inc., 820 F.2d 1387, 1390 (4th Cir. 1987) (admission by Armtex representative that he knew it was generally illegal to discharge employees because of their age does not constitute willful violation).

604. 29 U.S.C. § 216(b) (1988).

605. Cova v. Coca-Cola Bottling Co., 574 F.2d 958, 962 (8th Cir. 1978); Rodriguez v. Taylor, 569 F.2d 1231, 1249 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

606. Cleverly v. Western Elec. Co., 594 F.2d 638, 642 (8th Cir. 1979).

607. Fellows v. Medford Corp., 16 Fair Empl. Prac. Cas. (BNA) 764, 768 (D. Or. 1978).

608. Lane v. Sotheby Parke Bernet, Inc., 758 F.2d 71, 72-73 (2d Cir. 1985).

609. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

610. *Id.* at 460.

611. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 251 (5th Cir. 1974); Smith v. Board of Educ., 365 F.2d 770, 784 (8th Cir. 1966).

612. Gore v. Turner, 563 F.2d 159, 164 (5th Cir. 1977); Morales v. Benitez de Rexach, 541 F.2d 882, 886 (1st Cir. 1976).

613. Carey v. Piphus, 435 U.S. 247 (1978).

614. *Id.* at 258-59.

615. Wall v. Stanley County Bd. of Educ., 378 F.2d 275, 278 (4th Cir. 1967); Mims v. Wilson, 10 Fair Empl. Prac. Cas. (BNA) 1357, 1359 (N.D. Fla. 1973).

Punitive damages are recoverable in civil rights actions.[616] In *Johnson v. Railway Express Agency, Inc.*,[617] the Supreme Court, in dictum, noted punitive damages are available under the Act "under certain circumstances."[618] The Eighth Circuit has stated punitive damages are appropriate only when the plaintiff shows "oppression, malice, gross negligence, willful or wanton misconduct, or a reckless disregard" for the civil rights of the plaintiff.[619]

Finally, the Civil Rights Attorney's Fees Act of 1976 provides a statutory basis for the award of attorney fees in suits brought under section 1981.[620] That statute provides, "[i]n any action or proceeding to enforce a provision of sections 1981, 1982, 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[621]

In determining whether a section 1981 plaintiff is entitled to an attorney fee award, the question is not whether the plaintiff prevailed on the entire issue; "it is enough that plaintiffs received some of the benefits they sought in bringing the suit."[622] To obtain an attorney fee award, the key question is whether the plaintiff's "ends are accomplished as a result of the litigation."[623] Nevertheless, a reduced fee award is appropriate if the relief, however significant, is limited in comparison to the scope of the litigation as a whole.[624]

4. *Equal Pay Act*

The remedies available under the Equal Pay Act are provided for in the Fair Labor Standards Act. In any civil suit brought under the Equal Pay Act, the employee may be eligible to recover unpaid wages, an equal amount of liquidated damages, as well as attorney fees and costs.[625]

The primary monetary recovery for a violation of the Equal Pay Act is the amount of the wages unlawfully withheld.[626] To compute the amount of wages owed to the employee, the court must determine the amount which would place the employee in the same monetary position the employee would have been in had the employee been of the opposite sex.[627] As a result, the employee is entitled to recover the difference between the basic hourly rate or salary received

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616. Allen v. Amalgamated Transit Union, 554 F.2d 876, 883-84 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977); Gore v. Turner, 563 F.2d 159, 164-65 (5th Cir. 1977).

617. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

618. *Id.* at 460.

619. Guzman v. Western State Bank, 540 F.2d 948, 953 (8th Cir. 1976).

620. 42 U.S.C. § 1981(b) (1988 & Supp. IV 1992).

621. *Id.* § 1981 (1988).

622. Clark v. City of Los Angeles, 803 F.2d 987, 989 (9th Cir. 1986).

623. Associated Builders & Contractors v. Orleans Parish School Bd., 919 F.2d 374, 378 (5th Cir. 1990).

624. Hensley v. Eckerhart, 461 U.S. 424, 439-40 (1983).

625. EEOC v. White & Son Enters., 881 F.2d 1006, 1008 (11th Cir. 1989); 29 C.F.R. § 1620.27(a) (1993).

626. EEOC v. White & Son Enters., 881 F.2d at 1012 (quoting 29 U.S.C. § 216(b) (1988)).

627. Katz v. School Dist. of Clayton, 557 F.2d 153, 157 (8th Cir. 1977); Brennan v. Board of Educ., 374 F. Supp. 817, 834 (D.N.J. 1974).

and the comparable wages paid to members of the opposite sex.[628] Fringe benefits such as paid leave, life insurance, incentive pay, and pension programs are also reimbursable,[629] as are overtime pay, vacation pay, and holiday pay.[630]

As noted above, an employer found guilty of violating the Equal Pay Act may also be held liable for liquidated damages in an amount equal to the amount of unpaid wages withheld.[631] Liquidated damages are generally awarded unless the employer can show its actions were in good faith and it had reasonable grounds to believe it was not violating the Act.[632] An employer's lack of "good faith" may be shown by the employer's malice, willfulness, or knowledge, or the lack of an honest intention to comply with the statute.[633] Even if the employer demonstrates it acted reasonably and in good faith, a court still has the discretion to award any amount of liquidated damages up to the amount of unpaid wages.[634]

A prevailing plaintiff in a suit under the Equal Pay Act may also recover a reasonable attorney fee award. The Fair Labor Standards Act, which applies to claims under the Equal Pay Act, provides "the court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant."[635] This language makes it apparent that an award of reasonable attorney fees to a prevailing plaintiff in an Equal Pay Act suit is mandatory.[636] The successful plaintiff is also entitled to attorney fees for a successful appeal.[637] Prevailing employers, however, are not entitled to an attorney fee award under the Act, except possibly in situations in which the plaintiff has brought the action in bad faith.[638]

VIII. CONCLUSION

As noted at the outset of this Article, the common-law doctrine of employment-at-will is still alive and well in Iowa. Absent an exception to the rule, Iowa employees generally may be terminated at any time, for any reason. Historically, the Iowa Supreme Court has been reluctant to recognize exceptions to the doctrine; for a plaintiff to prevail in a wrongful termination claim, the employee must fall within one of the recognized exceptions to the rule. Nevertheless, in the future, the employment-at-will doctrine will be further eroded, as more and more employees challenge their terminations.

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628. Brennan v. City Stores, Inc., 479 F.2d 235, 242 (5th Cir. 1973).

629. Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382, 1385 (D.D.C. 1974).

630. 29 C.F.R. § 800.100 (1993).

631. 29 U.S.C. § 216(b)-(c) (1988).

632. *Id.* § 260; Richard v. Marriott Corp., 549 F.2d 303, 305 (4th Cir.), *cert. denied*, 433 U.S. 915 (1977).

633. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 463 (D.C. Cir. 1976); Pearce v. Wichita County, 590 F.2d 128, 134 (5th Cir. 1979).

634. Pearce v. Wichita County, 590 F.2d at 134; McClanahan v. Mathews, 440 F.2d 320, 322 (6th Cir. 1971).

635. 29 U.S.C. § 216(b) (1988).

636. Houser v. Matson, 447 F.2d 860, 863 (9th Cir. 1971); Wright v. Carrigg, 275 F.2d 448, 449 (4th Cir. 1960).

637. Katz v. School Dist. of Clayton, 557 F.2d 153, 157 (8th Cir. 1977).

638. Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 240, 264 n.37 (1975).