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A SURVEY OF ILLINOIS EMPLOYMENT DISCRIMINATION LAW

*Susan Marie Connor**

In 1980, the Illinois legislature enacted the Human Rights Act¹ to consolidate and expand upon several then-existing employment discrimination statutes.² The Human Rights Act prohibits an employer³ from making employment decisions⁴ on the basis of "unlawful discrimination," a term defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap, or unfavorable discharge from the military service . . ."⁵ In addition, five provisions

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1. ILL. REV. STAT. ch. 68, §§ 1-101 to 9-102 (1981). The Human Rights Act was enacted to "secure for all individuals within Illinois the freedom from discrimination because of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations." *Id.* § 1-102(A). This Article addresses only the subject of employment discrimination.

2. Employment discrimination statutes superseded by the Human Rights Act include: Illinois Equal Employment Opportunity Act, Pub. Act No. 80-1455, 1978 Ill. Laws 1740, *repealed* by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854; Equal Opportunities for the Handicapped Act, Pub. Act No. 77-1211, 1977 Ill. Laws 2169, *repealed* by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854; Age Discrimination Act, 1967 Ill. Laws 2044, *repealed* by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854; Violation of Civil Rights, 1961 Ill. Laws 1983, *repealed* by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854; Fair Employment Practices Act, 1961 Ill. Laws 1845, *repealed* by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854; Human Relations Commission, 1947 Ill. Laws 1680, 1994, *amended* by Pub. Act No. 76-1389, § 1, Pub. Act No. 76-1789, § 1, and Pub. Act No. 80-57, § 40, *repealed* by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854.

3. An employer is defined as any person employing 15 or more persons within Illinois for 20 or more calendar weeks during a year. Moreover, the state, its political subdivisions or governmental units, and all parties to public contracts, joint apprenticeships, and training committees are included within the statutory definition of an employer without any requirement regarding the number of employees retained. ILL. REV. STAT. ch. 68, § 2-101(B) (1981). In addition, if the discrimination complained of is based upon a person's physical or mental handicap, an employer is subject to the Human Rights Act irrespective of the number of persons he employs. *Id.* § 2-101(B) (1). The Act also applies to employment agencies and labor organizations. *Id.* § 2-102(C). However, certain religious organizations are partially excluded from the Act's definition of an employer. *Id.* § 2-101(B) (2). See *infra* note 155 and accompanying text.

4. The term employment decision has been defined broadly under the Act. For example, decisions to "refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment" are within the scope of the Human Rights Act. ILL. REV. STAT. ch 68, § 2-102(A) (1981). Furthermore, analogous provisions regulate employment agencies and labor organizations. See *id.* § 2-102(B), (C).

5. *Id.* § 1-103(Q).

of the Illinois Constitution⁶ buttress the Human Rights Act by prohibiting various forms of discrimination. Several exceptions to the Act exist. For example, an employer will not violate the Act if an employer hires or selects employees because of: bona fide occupational qualifications;⁷ veteran's preference laws or regulations;⁸ merit and retirement systems⁹ or the results of professionally-developed ability tests provided these are not used as a subterfuge or do not have the effect of unlawful discrimination;¹⁰ or any other factor the Act does not prohibit.¹¹

Because the Human Rights Act has been effective little more than two years,¹² this Article will discuss the Act's major substantive provisions as

6. Five provisions of the 1970 Illinois Constitution are relevant to discrimination cases. Article I, § 1, the state's inherent and inalienable rights provision provides: "All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, courts are instituted among men, deriving their just powers from the consent of the governed." ILL. CONST. art. I, §1. Article I, § 2 sets forth the state's due process and equal protection clauses: "[N]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws." *Id.* § 2. The constitution also contains an equal rights amendment which provides: "[E]qual protection . . . shall not be denied or abridged on account of sex. . . ." *Id.* § 18. Furthermore, discrimination in employment on the basis of race, color, creed, national ancestry, sex, and physical or mental handicap expressly is prohibited. *Id.* § 19. Finally, the constitution guarantees religious freedom. *Id.* § 3.

7. ILL. REV. STAT. ch. 68, § 2-104(A) (1981). In *Schoneberg v. Grundy County Special Educ. Coop.*, 67 Ill App. 3d 899, 385 N.E.2d 351 (3d Dist. 1979), the court held that maleness is not a bona fide occupational qualification for the job of fourth grade teacher. This is the only Illinois decision to date considering the defense of a bona fide occupational qualification under the Act. See generally C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION §§ 2-4, at 137-49 (1980) (discussing definition and proof of a bona fide occupational qualification defense).

8. ILL. REV. STAT. ch. 68, § 2-104(B) (1981). See *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256 (1979) (Supreme Court held that a law preferring veterans for state civil service jobs did not violate the federal equal protection clause even though it tended to exclude women from such jobs).

9. ILL. REV. STAT. ch. 68, § 2-104(D) (1981).

10. ILL. REV. STAT. ch. 68, § 2-104(E) (1981). Presently, there is no Illinois case law on this point; however, the use of professionally developed ability tests to make employment decisions has been litigated extensively in the federal courts. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (general ability tests did not measure sufficiently qualifications for employment and the tests unfairly were directed to experienced white workers in violation of Title VII); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (Title VII prohibited an employer from requiring employees to take a general intelligence test and to have graduated from high school where the effect of such requirements was to disadvantage black applicants and where the requirements were not shown to predict job performance). See also Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.5 (1981) (procedures for using tests as criteria for job selection); B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 65-131 (1976 & Supp. 1979) (comprehensive examination of the use of scored tests in employment practices) [hereinafter cited as SCHLEI & GROSSMAN].

11. ILL. REV. STAT. ch. 68, § 2-104(A) (1981).

12. The substantive provisions of the Human Rights Act became fully effective July 1, 1980. ILL. REV. STAT. ch. 68, § 1-101 (1981).

they apply to each class of protected persons. It also will consider case law which was decided under the previous statutes, particularly to the extent that it remains applicable or elucidates the new Act, and assess trends or probable results under the Act. In addition, because the Illinois Constitution provides particular protections against employment discrimination for certain classes of individuals, this Article will examine relevant constitutional law. Finally, there exists several federal statutory¹³ and constitutional¹⁴ protections related to the field of employment discrimination. The Illinois courts have held that in the absence of controlling Illinois authority, the federal decisions, particularly in the area of fair employment and Title VII of the Civil Rights Act of 1964, are "relevant precedents and can serve as a useful guide."¹⁵ Accordingly, this Article will discuss the federal law of employment discrimination to the extent that it has been adopted or otherwise is relevant in understanding state law.

CONSTITUTIONAL AND STATUTORY OVERVIEW

Constitutional

Before the substantive provisions of Illinois employment discrimination law can be discussed, a general overview of the basic structure of an employment discrimination case should be considered. An employment discrimination case may be based on constitutional or statutory grounds. Fundamental differences exist between these two choices. In general, a constitutional challenge attacks a statute or some other form of state action,¹⁶ whereas a statutory challenge often attacks a private employer's actions.¹⁷ Because the Illinois courts

13. See Equal Pay Act, 29 U.S.C. § 206(d) (1976); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979); Vocational Rehabilitation Acts, 29 U.S.C. §§ 701-794 (1976 & Supp. III 1979); Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983, 1985 (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 to 2000e-3 (1976).

14. U.S. CONST. amend. XIV, § 1 provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

15. *Schoneberg v. Grundy County Special Educ. Coop.*, 67 Ill. App. 3d 899, 905, 385 N.E.2d 351, 357 (3d Dist. 1979). See also *Montgomery Ward & Co. v. Fair Employment Practices Comm'n*, 49 Ill. App. 3d 796, 805, 365 N.E.2d 535, 541 (1st Dist. 1977) (federal experience can "serve as a useful guide" when determining whether discrimination violates Illinois law); *City of Cairo v. Fair Employment Practices Comm'n*, 21 Ill. App. 3d 358, 363, 315 N.E.2d 344, 348 (1st Dist. 1974) (provisions of federal and Illinois law regarding racial discrimination are so nearly identical that federal decisions dealing with the issue are relevant).

16. Constitutional restraints generally apply only when state action is involved. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (a warehouseman's proposed sale of goods pursuant to a state law providing for a lien remedy was not state action because the law did not delegate the exclusive prerogative of the state sovereign to the merchant); *Aldridge v. Boys*, 98 Ill. App. 3d 803, 424 N.E.2d 886 (4th Dist. 1981) (collective bargaining agreement between agent of teachers at a state school and state department of personnel constituted sufficient state action). See generally Glennon & Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221.

17. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976); Human Rights Act, ILL. REV. STAT. ch. 68, § 2-102 (1981).

generally adopt the federal interpretation of constitutional and statutory cases,¹⁸ this discussion will be framed in the context of federal law.

The equal protection clause of the fourteenth amendment, the constitutional provision upon which employment discrimination challenges typically are based,¹⁹ does not prohibit the states or the federal government from creating employment classifications and treating persons differently on the basis of those classifications. Provided that no "suspect classification"²⁰ is created nor any "fundamental right"²¹ is infringed, the state has broad discretion to create any distinctions which serve legitimate governmental purposes and are rationally related to those purposes.²² The Illinois Supreme Court, when analyzing the state's actions,²³ has even held that in the absence of a fundamental right or suspect classification, the state need not articulate

18. For example, the Illinois court decided *Lavin v. Board of Educ.*, 22 Ill. App. 3d 555, 317 N.E.2d 717 (1st Dist. 1974), in light of *Board of Regents v. Roth*, 408 U.S. 564 (1972), which held that due process only applies when persons have been deprived of their fourteenth amendment rights. For additional examples, see *supra* note 15 and accompanying text.

19. Employment discrimination cases also arise under the due process clause. See, e.g., *United States v. Robel*, 389 U.S. 258 (1967) (suit maintained under due process clause of fifth amendment against employer who discriminated because of employee's communist beliefs); *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975) (due process clause of fifth amendment protects individual's right to hold private employment and remain free from unreasonable governmental interference); *Shaw v. Hospital Auth. of Cobb County*, 507 F.2d 625 (5th Cir. 1975) (podiatrist denied staff membership by hospital authority successfully maintained suit under due process clause).

20. See *Korematsu v. United States*, 323 U.S. 214 (1944) (classifications based upon race are suspect). In Illinois, classifications based upon race, gender, and alienage are suspect. See *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill. 2d 258, 335 N.E.2d 469 (1975) (alienage); *People v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (gender); *City of Cairo v. Fair Employment Practices Comm'n*, 21 Ill. App. 3d 358, 315 N.E.2d 344 (5th Dist. 1974) (race).

21. The right to employment is not a fundamental right. The United States Supreme Court has recognized the following fundamental rights under the equal protection clause: *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote); *Douglas v. California*, 372 U.S. 353 (1963) (access to the courts).

22. This analysis has been termed "minimal scrutiny." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-2, at 994-96 (1978) [hereinafter cited as TRIBE]. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (a statute which banned advertising on vehicles but which permitted an owner to advertise his business on his own vehicles did not violate the equal protection clause because the state contended the law would reduce accidents by eliminating distractions to motorists and pedestrians); *People v. Grammer*, 62 Ill. 2d 393, 342 N.E.2d 371 (1976) (a higher penalty for father-daughter incest than for mother-son incest held not violative of the federal equal protection clause because fathers can more readily coerce an incestuous relationship and such relationships may result in more severe consequences for a daughter).

23. See, e.g., *Hoffmann v. Clark*, 69 Ill. 2d 402, 372 N.E.2d 74 (1977) (statute which imposed additional taxes on farmland converted to other uses deemed a taxpaying classification rationally based on an effort to preserve farmland and open spaces); *Friedman & Rochester, Ltd. v. Walsh*, 67 Ill. 2d 413, 367 N.E.2d 1325 (1977) (classification which differentiated benefits for private and public annuitants and pensioners upheld because there was a reasonable and conceivable basis for the differentiation); *Spaulding v. Illinois Community College Bd.*, 64 Ill. 2d 449, 356 N.E.2d 339 (1976) (statute providing for a referendum when planning annexation of territory to an existing community college district, but not when creating a new district, did

the reasons justifying the state's exercise of its discretion.²⁴ If the courts can conceive of a reasonable set of facts that would sustain the legislative distinction, the distinction does not violate the Constitution.²⁵

The courts' analysis changes, however, when suspect classes or fundamental rights are involved. In such cases, the burden of proving the constitutionality of the state's action is far greater. First, for the infringement of a right to be justified the state must prove that the statute advances a compelling interest rather than merely a legitimate interest.²⁶ In addition, the means employed "must be the least restrictive available and must be necessary to achieve the desired end."²⁷ This two-prong test is known as "strict scrutiny."²⁸ It has been noted that in the federal courts "scrutiny that is 'strict' in theory [is] fatal in fact."²⁹ Because strict scrutiny is used in Illinois,³⁰ the Illinois courts do not defer to legislation or policy which creates distinctions based upon suspect classifications, and the courts routinely find such classifications unconstitutional under the equal protection clause.³¹

Equal protection claims generally fall into one of three categories. A plaintiff may argue, for example, that a particular statutory scheme 1) is facially discriminatory;³² 2) has a disproportionate impact;³³ or 3) is facially

not violate the equal protection clause because annexation and creation are substantially different procedures).

24. In *Hoffmann v. Clark*, 69 Ill.2d 402, 425, 372 N.E.2d 74, 85 (1977), the court recognized that the statute need not include the reasons for the classifications established under it.

25. *Cf. Zablocki v. Redhail*, 434 U.S. 374 (1978) (statute held unconstitutional when there were means available to the state to effectuate compliance with a divorced parent's support obligations without impinging upon the parents' right to marry). See generally *TRIBE, supra* note 22, § 16-6, at 1000-02.

26. See *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (compelling state interest test triggered by classifications which deny "food, shelter and other necessities of life"); *People v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (no compelling state interest for statute which permitted a seventeen-year-old male to be tried as an adult but prohibited the same treatment for a female, thus held as an unconstitutional classification based on sex); *Wheeler v. City of Rockford*, 69 Ill. App. 3d 220, 387 N.E.2d 358 (2d Dist. 1979) (ordinance regulating massage establishments which allowed massages to be given only by a person of the same sex held unconstitutional because not based on a compelling state interest).

27. *Helvey v. Rednour*, 86 Ill. App. 3d 154, 158-59, 408 N.E.2d 17, 21 (5th Dist. 1980). Similarly, the Supreme Court demands that rules promulgated by the government be "substantially related to the achievement of . . . [the] objectives" of the rules in question. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

28. See *Helvey v. Rednour*, 86 Ill. App. 3d at 158-59, 408 N.E.2d at 21.

29. Gunther, *The Supreme Court, 1971 Term—Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

30. See *supra* notes 26-28 and accompanying text.

31. See *People v. Grammer*, 62 Ill. 2d 393, 342 N.E.2d 371 (1976).

32. In *Strauder v. West Virginia*, 100 U.S. 303 (1880), a state statute which allowed only white males over 21 years of age to serve as jurors was held to be facially discriminatory and consequently violative of the equal protection clause.

33. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967) (Court invalidated a state constitutional provision prohibiting interference with a real property owner's right to dispose of his real estate because it permitted private racial discrimination in the housing market); *Anderson*

neutral but is enforced discriminatorily.³⁴ A disproportionate impact case involves state action that is neutral both in its terms and in its enforcement but results in a disproportionate impact on a suspect class. In a constitutional case based upon disproportionate impact, the plaintiff must prove that the statute is premised on a discriminatory purpose.³⁵ This type of discrimination is exceedingly difficult to prove because the plaintiff must establish that the act was intended to prejudice a particular group.³⁶

This test used in disproportionate impact cases was established in *Personnel Administrator of Massachusetts v. Feeney*.³⁷ In *Feeney*, the plaintiff argued that because ninety-eight percent of the Massachusetts veterans were male, a statute preferring veterans for civil service jobs so inevitably disadvantaged women that the adverse consequences were not "unintentional." The United States Supreme Court rejected this argument stating that "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of the consequences."³⁸ The Court then explained that purposeful discrimination consists of action "selected or reaffirmed . . . 'because of' not merely 'in spite of' its adverse effects upon an identifiable group."³⁹ The Court conceded that the ninety-eight percent to two percent male-female disparity was of such great magnitude that it could support an inference of discriminatory purpose. Nevertheless, the Court observed that the legislature had been motivated by a legitimate consideration—the employment of veterans—when it enacted the legislation. Therefore, the Court was satisfied that the statute had not been enacted because it would discriminate against women but in spite of that consequence.⁴⁰ The Court's analysis in *Feeney* should impart a rather clear impression of how difficult it is to prove purposeful discrimination in a constitutional equal protection claim.⁴¹

v. Martin, 375 U.S. 399 (1964) (Court invalidated election law requiring designation of candidate's race because the effect of the law was racial discrimination).

34. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (statute which required a permit for the construction of laundries in wooden buildings was found unconstitutional because operationally, all Chinese applicants were denied permits while all other applicants, except one, were granted licenses).

35. See *Washington v. Davis*, 426 U.S. 229 (1976). The *Washington* Court considered the constitutionality of a police department's entrance examination which blacks failed four times as often as whites. The Court imposed an intent requirement, noting that a disproportionate impact alone would not trigger strict scrutiny. Rather, the plaintiff must prove discriminatory purpose. *Id.* at 239-42. Subsequently, in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), the Court reaffirmed *Washington* and stated that a plaintiff need prove only that a discriminatory purpose was a motivating factor in the decision. Such a requirement shifts the burden of proof to the defendant to show that the same result would occur without this impermissible purpose. *Id.* at 264-68. See generally *Seller, The Impact of Intent on Equal Protection Jurisprudence*, 84 DICK. L. REV. 363 (1980).

36. See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1976).

37. 442 U.S. 256 (1976).

38. *Id.* at 279.

39. *Id.*

40. *Id.* at 279-81.

41. See generally Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 COLUM. L. REV. 1376 (1979).

Statutory

To understand the statutory basis upon which an Illinois plaintiff subjected to discrimination may proceed, a brief analysis of Title VII is warranted because the Illinois Human Rights Act is significantly similar to Title VII⁴² and the Illinois courts routinely consult and rely upon the federal law.⁴³ Under the federal statute,⁴⁴ plaintiffs may proceed under one or more of the following three theories of discrimination. First, if an employment practice is facially discriminatory, the plaintiff need prove only that the rule disadvantaged him or her to establish a prima facie case of unlawful discrimination under Title VII.⁴⁵ If plaintiff is unable to establish a prima facie case and the defendant is unable to prove that a business necessity,⁴⁶ a bona fide occupational qualification reasonably necessary for the performance of the job,⁴⁷ or some other statutory defense⁴⁸ justified the practice, the plaintiff will prevail.

42. Both acts prohibit discrimination on the basis of race, color, religion, sex, or national origin. Moreover, both statutes prohibit retaliation by the employer against an individual who exercises his statutorily created rights. See Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3 (1976) and Human Rights Act, ILL. REV. STAT. ch. 68, §§ 1-103(Q), 6-101 (1981). In addition, the Human Rights Act prohibits discrimination on the basis of marital status, age, handicap, or unfavorable discharge from the military. ILL. REV. STAT. ch. 68, § 1-103(Q) (1981). Other federal legislation prohibits age and handicap discrimination. See *supra* note 13.

Title VII provides a two-track procedure for discrimination cases. First, individuals, or persons acting on their behalf, may file charges of employment discrimination with the Equal Employment Opportunity Commission (EEOC). The EEOC then investigates the charge and determines whether reasonable cause exists to believe that the charge is true. 42 U.S.C. § 2000e-5(b) (1976). In the event that the parties to the dispute are unable to reach a conciliatory agreement, either the persons aggrieved, or the EEOC on their behalf, may bring a civil action in federal court. *Id.* § 2000e-5(f). Alternatively, the government has independent statutory authority to investigate and act on a charge that any person or group is engaged in a pattern and practice of discrimination prohibited under Title VII. *Id.* § 2000e-6(e). If a state or local government has perpetuated such a pattern and practice of discrimination, however, the attorney general is empowered to investigate and act on the charge. Exec. Order No. 12,068, 3 C.F.R. 204 (1978). Once the individual plaintiffs have followed Title VII's administrative obstacle course and the case is before a court, the court hears the case in a trial de novo. The EEOC's reasonable cause conclusion is not determinative of the issues in the case.

Unlike the procedure under Title VII which provides for a trial de novo in the district court, the Human Rights Act limits the judicial role to review of the Illinois Human Rights Commission's decisions. ILL. REV. STAT. ch. 68, § 8-111 (1981). For example, in *City of Chicago v. Illinois Fair Employment Practices Comm'n*, 87 Ill. App. 3d 597, 410 N.E.2d 136 (1st Dist. 1980), the court stated: "[T]he reviewing court must examine the record to determine whether the discrimination was proved by a preponderance of the evidence and whether applying that standard of proof the agency's decision is against the manifest weight of the evidence." *Id.* at 601, 410 N.E.2d at 140 (quoting *Board of Educ. v. Illinois Fair Employment Practices Comm'n*, 79 Ill. App. 3d 446, 451, 398 N.E.2d 619, 623 (2d Dist. 1979)).

43. See *supra* notes 15 & 18 and accompanying text.

44. See *supra* note 13.

45. See SCHLEI & GROSSMAN, *supra* note 10, at 1147-96.

46. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (a business necessity did not justify a requirement that all job applicants pass an intelligence test and have a high school diploma, as these requirements disadvantaged more black than white applicants).

47. The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976) provides:

Second, plaintiff may proceed on a theory of disparate treatment.⁴⁹ As the Supreme Court explained in *International Brotherhood of Teamsters v. United States*,⁵⁰ the disparate treatment consists of "the employer simply [treating] some people less favorably than others because of their race, color, religion, sex, or national origin."⁵¹ The United States Supreme Court initially articulated the burdens of proof required in a discriminatory treatment case under Title VII in *McDonnell Douglas Corp. v. Green*.⁵² The plaintiff must establish that: (1) he or she belongs to a racial minority, or is otherwise a member of a protected class; (2) he or she applied and was qualified for a job for which the employer was seeking applicants; (3) despite the qualifications, he or she was rejected; and (4) after complainant's rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.⁵³ If the plaintiff meets this burden, the defendant then must articulate some legitimate, non-discriminatory reason for the complainant's rejection. Unless the plaintiff thereafter is able to prove that the defendant's proffered reason was mere pretext, and that the act complained of was discriminatory under Title VII, the defendant will prevail.⁵⁴ The Court explained in *International*

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

See *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 267 (9th Cir. 1980) (airline's policy requiring commencement of leave upon pregnancy was justified by safety considerations); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976) (board of education's seniority system based upon concept of "last hired-first fired" does not constitute unlawful discrimination).

48. For example, exemptions exist for certain religious organizations and institutions of higher learning. 42 U.S.C. §§ 2000e-1, 2000e-2(e) (1976).

49. The phrase disparate treatment is synonymous with discriminatory treatment.

50. 431 U.S. 324 (1977).

51. *Id.* at 335 n.15.

52. 411 U.S. 792 (1973).

53. *Id.* at 802. The Court added: "[T]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

54. *Id.* at 804. In *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Court stated:

The nature of the burden that shifts to the defendant should be understood in

*Brotherhood of Teamsters*⁵⁵ that in a discriminatory treatment case, proof of discriminatory motive is critical.⁵⁶ The Illinois courts have adopted both the *McDonnell* and *International Brotherhood of Teamsters* mandates in disparate treatment cases.⁵⁷

Third, a plaintiff may proceed on an adverse impact theory.⁵⁸ In *Griggs v. Duke Power Company*,⁵⁹ the United States Supreme Court held that Title VII prohibits not merely purposeful discrimination but also employment practices which appear to be neutral but which operate to exclude a protected class and which cannot be shown to be related to job performance.⁶⁰ In

light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff

. . . [T]he [plaintiff's] prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors"

The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination. . . . The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . .

The plaintiff retains the burden of persuasion . . . that the proffered reason was not the true reason for the employment decision.

Id. at 253-56 (citations omitted).

The burden of proving pretext is generally onerous and difficult to satisfy in the case of a single plaintiff. Commentators have noted: "[S]ince there is virtually no employee for whom an employer cannot find a valid, objective reason for discharge, the employee will find it extremely difficult to show that the reason given was 'pretextual' unless the employee focuses on employment patterns broader than his individual case." SCHLEI & GROSSMAN, *supra* note 10, at 512. The Court in *McDonnell Douglas* outlined several types of evidence that might be relevant in a pretext case. This evidence includes facts concerning defendant's treatment of the plaintiff prior to the act complained of and defendant's general policy and record of dealing with other members of protected classes, including statistical evidence of any general pattern of discrimination. 411 U.S. 792, 804-05 (1977).

55. 431 U.S. 324 (1977).

56. *Id.* at 335 n.15. See *supra* note 54 and accompanying text.

57. See, e.g., *Alexander v. Illinois Fair Employment Practices Comm'n*, 83 Ill. App. 3d 388, 403 N.E.2d 1271 (4th Dist. 1980) (school board held to have refused improperly to renew contract of teacher who had filed a complaint with the commission); *Eastman Kodak Co. v. Fair Employment Practices Comm'n*, 83 Ill. App. 3d 215, 403 N.E.2d 1224 (2d Dist. 1980) (corporate employer has the burden of proving that its recruitment area was reasonable and in compliance with the Fair Employment Practices Act).

58. See SCHLEI & GROSSMAN, *supra* note 10, at 1158-97. Adverse impact, disproportionate impact, disparate impact, and differential impact are used synonymously to describe practices, which as a matter of empirical fact, operate to the disadvantage of protected classes. For example, consider the employment practice of hiring only persons weighing more than 150 pounds. Although the employment practice would be facially neutral, and the employer probably adopted the qualification for a nondiscriminatory reason, such a qualification probably operates to exclude women disproportionately from the employer's work force. Thus, the qualification may constitute adverse impact discrimination.

59. 401 U.S. 424 (1971).

60. *Id.* at 431. See, e.g., *Montgomery Ward & Co. v. Fair Employment Practices Comm'n*, 49 Ill. App. 3d 796, 365 N.E.2d 535 (1st Dist. 1977) (discharge of employee charged with theft and subsequent refusal to rehire him after acquittal found to be racially discriminatory);

other words, employment practices not shown to be a business necessity which have a disproportionate impact on a protected class may be unlawful. Additionally, *Griggs* stated that "good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds'. . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."⁶¹ Thus, unlike a constitutional challenge against a statute which results in a disproportionate impact,⁶² proof of discriminatory purpose is not required in a statutory case that proceeds on an adverse impact theory.

Accordingly, statistical proof is particularly important in establishing unlawful discrimination.⁶³ Under the adverse impact theory, the plaintiff must produce data comparing the success rates of the persons the employment practice allegedly disadvantaged with those of a control group. If the protected class is disadvantaged at a substantially higher rate⁶⁴ than the con-

Chicago-Allis Mfg. Corp. v. Fair Employment Practices Comm'n, 32 Ill. App. 3d 392, 336 N.E.2d 40 (1st Dist. 1975) (fact that black employee was fired after he engaged in a fight with his white supervisor on company premises was not basis for finding company guilty of racial discrimination).

61. 401 U.S. at 432 (emphasis added).

62. See *supra* notes 35-41 and accompanying text.

63. In cases of disparate treatment, statistical evidence may be probative of the discriminatory motive which plaintiff must prove. The Court in *Castaneda v. Partid*, 430 U.S. 482 (1977) explained: "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident, and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process." *Id.* at 494 n.13. Moreover, in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), the Court supported this conclusion stating:

[W]e know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer . . . based his decision on an impermissible consideration such as race.

Id. at 577.

64. *Griggs* did not define the quantum of disparity required to establish a prima facie case and this question remains unanswered. The *Griggs* Court gave deference to the EEOC's Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (1981), which define adverse impact as "[a] selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate." 401 U.S. 424, 433-34 (1971). The EEOC, however, promulgated exceptions to this general rule. For example, the rule is not applicable "where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group." 29 C.F.R. § 1607.4(D) (1981).

It is also unclear what constitutes the proper source of statistics (i.e., general population data, the employer's work force, the relevant geographic area or work force from which a statistical sample may be drawn, and the proper time span from which the sample may be drawn). Accumulating statistical proof of discrimination is the subject of numerous treatises and articles. See D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (1980 & Supp.

trol group, the plaintiff has made a prima facie case. Once plaintiff has established a sufficient disparate impact, the burden of proof shifts to the defendant either to rebut the plaintiff's statistical case or to prove that the Act authorizes the practices complained of or makes them otherwise defensible.⁶⁵

Having provided a general overview of employment discrimination law, the remainder of this Article will discuss the law applicable to each class of persons protected from unlawful employment discrimination under the Illinois Constitution and the Human Rights Act.

RACE, NATIONAL ORIGIN, AND ALIENAGE

In Illinois, a variety of constitutional and statutory provisions prohibit employment discrimination based on race, national origin, or alienage. The Illinois courts regularly state that classifications based upon race, national origin, and alienage are suspect classifications under the state constitution.⁶⁶ Because statutes or acts premised on these classifications must withstand a strict judicial scrutiny, they are seldom able to survive.⁶⁷

A recent case involving alienage is illustrative of this strict judicial review. In *People ex rel. Kenneth Holland v. Bleigh Construction Company*,⁶⁸ the Illinois Supreme Court invalidated a state statute which favored resident citizens over resident aliens for employment on public works projects. The

1981); F. MORRIS, CURRENT TRENDS IN THE USE (AND MISUSE) OF STATISTICS IN EMPLOYMENT DISCRIMINATION LITIGATION (2d ed. 1978); SCHLEI & GROSSMAN, *supra* note 10, at 65-184.

65. Perhaps the clearest statement of the defendant's burden in an adverse impact case is found in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). In considering whether the use of a standardized test as an employee selection device was racially discriminatory, the Court stated:

"[T]he burden of showing that any given requirement has . . . a manifest relationship to the employment in question" [is on defendant]. This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. If an employer does then meet the burden of proving that its tests are "job related," it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in "efficient and trustworthy workmanship."

Id. at 425 (citations omitted).

66. See *supra* note 6 and accompanying text for the constitutional provisions concerning discrimination. See also *Illinois Hous. Dev. Auth. v. Van Meter*, 82 Ill. 2d 116, 119, 412 N.E.2d 151, 152 (1980) (although race, alienage, and national origin are suspect classifications, wealth based classifications are not suspect); *People ex rel. Holland v. Bleigh Constr. Co.*, 61 Ill. 2d 258, 263, 335 N.E.2d 469, 473 (1975) (aliens as a class constitute a "discrete and insular" minority); *People v. Ellis*, 57 Ill. 2d 127, 131-32, 311 N.E.2d 98, 100 (1974) (in Illinois, race, national ancestry are suspect classifications).

67. See J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 535 (1978 & Supp. 1979) (since 1945, no classification based on race or national origin has been upheld when there was any possibility that it would burden racial minorities). See also *supra* text accompanying notes 24-29.

68. 61 Ill. 2d 258, 335 N.E.2d 469 (1975).

court determined that the state's interest—"the desire . . . that its funds be used to help those of its citizens who have paid taxes for at least a year, to find employment"—was not compelling.⁶⁹ Similarly, distinctions based upon race or national origin are equally unconvincing and it is unlikely that such distinctions would withstand strict scrutiny.

Article I, section 17 of the Illinois Constitution also expressly prohibits an employer from discriminating on the basis of race or national ancestry. Unlike the equal protection or due process clauses, section 17 governs an employer's actions regardless of whether state action is involved.⁷⁰ In this regard, the reach of the Illinois Constitution is far greater than is generally the case with the United States Constitution, which requires state action.⁷¹

Similarly, the Human Rights Act prohibits race or national origin discrimination.⁷² To date, there has been no case law interpreting this provision of the Act. Prior to the enactment of the Human Rights Act, however, Illinois courts applied the theories of discrimination recognized by the federal courts under Title VII.⁷³ Because of the similarity between the Human Rights Act and Title VII there is no reason to believe that the state courts will give the Act an interpretation different from previous state statutes or different from the federal courts' interpretation of Title VII.

69. *Id.* at 262, 335 N.E.2d at 473. The court relied upon United States Supreme Court precedent stating that: "[t]he holding of [Graham v. Richardson, 403 U.S. 365 (1971)] and [Sugarman v. Dougall, 413 U.S. 634 (1973)] is that a classification based on citizenship is suspect and subject to close judicial scrutiny, and that the State has the burden of showing that the statute is narrowly drawn to achieve compelling State interest." 61 Ill.2d at 267, 335 N.E.2d at 475.

Actually, the United States Supreme Court has not always strictly scrutinized classifications based upon alienage. In *Ambach v. Norwick*, 441 U.S. 68 (1979), the Court decided that a state could deny employment as elementary and secondary school teachers to aliens who refused to seek naturalization. Citing *Sugarman* and *Foley v. Connelie*, 435 U.S. 291 (1978), the Court in *Ambach* clearly stated that there is an exception to the general rule that classifications based on alienage are suspect. The exception applies to alien participation in governmental functions. "[S]ome state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons (aliens) who have not become part of the process of self-government." 441 U.S. at 73-74. The Court concluded that "school teachers may be regarded as performing a task 'that go[es] to the heart of representative government' . . . inculcating fundamental values necessary to the maintenance of a democratic political system. . . ." *Id.* at 75-76 (citation omitted). As a result of *Foley* and *Ambach*, if the challenged statute or act concerns a governmental function, classifications based on alienage will be subjected to minimal scrutiny. See *supra* text accompanying notes 20-25.

70. See VII SIXTH ILLINOIS CONSTITUTIONAL CONVENTION RECORD OF PROCEEDINGS 1592-93 (1969-70). The Convention delegates recognized that the constitution's prohibition against discrimination by private persons as well as by the state was "a departure from [the] historic and traditional position." *Id.* at 1592. The Convention adopted this position because it was of the opinion that merely prohibiting governmental discrimination "wouldn't really accomplish a job that we feel has to be accomplished." *Id.*

71. See *supra* note 16 and accompanying text.

72. ILL. REV. STAT. ch. 68, § 1-103(Q) (1981).

73. See *supra* notes 15 & 18.

Thus, the three methods of proving discrimination cases under Title VII also appear to exist under the Human Rights Act.⁷⁴

Specifically, there is likely to be considerable litigation challenging employment practices which are neutral on their face but which disproportionately result in disadvantage to racial or ethnic minorities. For example, the first United States Supreme Court case involving Title VII involved an employer's requirement that employees have a high school diploma and a minimum score on a standardized test.⁷⁵ Both requirements disqualified more prospective black applicants than white applicants. The Court held that if the employer fails to meet "the burden of showing that any given requirement . . . [has] a manifest relationship to the employment in question," an employment practice shown to have an adverse impact violates Title VII.⁷⁶ Employment practices which often have raised the issue of discriminatory impact involving race or national origin under Title VII include height and weight requirements,⁷⁷ experience prerequisites,⁷⁸ and arrest⁷⁹ or conviction records.⁸⁰

It is important to note that although the Human Rights Act significantly does not change state law concerning discrimination based on race or national origin, it does deviate from the Illinois Constitution in one important respect. The Human Rights Act does not make discrimination on the basis of alienage unlawful.⁸¹ Although employees who are aliens are protected in

74. See *supra* notes 42-64 and accompanying text.

75. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

76. *Id.* at 432.

77. In *League of United Latin Am. Citizens v. City of Santa Ana*, 12 Fair Empl. Prac. Cas. (BNA) 651 (C.D. Cal. 1976), a prima facie case of discrimination was established because height and weight requirements for firefighters and policemen resulted in disparate impact on Mexican-Americans.

78. See, e.g., *Equal Employment Opportunity Comm'n v. International Union of Operating Eng'rs, Locals 14 & 15*, 553 F.2d 251 (2d Cir. 1977) (requirement of 200 days experience for an operator's license held not justifiably job related to overcome prima facie case of discrimination); *Afro Am. Patrolmens League v. Duck*, 503 F.2d 294 (6th Cir. 1974) (equal protection clause violated when arbitrary service requirement for promotions was used to enhance past discrimination practices).

79. See, e.g., *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970) (employer enjoined from inquiring into applicant's prior arrests when that practice had the effect of discriminating against blacks), *aff'd*, 472 F.2d 631 (9th Cir. 1972). The Human Rights Act expressly prohibits an employer from inquiring whether a job applicant has ever been arrested. ILL. REV. STAT. ch. 68, § 2-103 (1981). In *Cook County Police and Corrections Merit Bd. v. Illinois Fair Employment Practices Comm'n*, 59 Ill. App. 3d 305, 376 N.E.2d 11 (1st Dist. 1978), a case involving an application for a corrections officer position, the court observed that an "arrest record alone does not indicate guilt or disrespect." *Id.* at 309, 376 N.E.2d at 14. The court noted that there is an important distinction between an arrest and conviction. That is, "[a]n applicant's conviction record may be considered as a factor in determining suitability for a position, but it is not a basis for summary rejection." *Id.* at 310, 376 N.E.2d at 14-15.

80. In *Green v. Missouri Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975), the court held that a railroad's absolute policy of refusing employment to persons convicted of crimes discriminated against blacks and could not be justified under the business necessity defense.

81. Although the Illinois Human Rights Act secures for individuals freedom from various

general under the Act from "unlawful discrimination" as the Act defines that term,⁸² they are not protected from discrimination based solely on their lack of citizenship.⁸³ Effective July 1, 1982, however, Illinois state agencies are required to include in their affirmative action status reports details on the national origin of their employees and specific goals and methods for increasing the numbers of alien employees.⁸⁴

GENDER

Both the Human Rights Act⁸⁵ and the Illinois Constitution⁸⁶ make employment discrimination on the basis of sex unlawful. In contrast to the federal Constitution, which does not expressly forbid discrimination on the basis of gender, article I, section 18 of the Illinois Constitution prohibits the deprivation or abridgement of equal protection on the basis of sex.⁸⁷ Further, article I, section 17 specifically prohibits both public and private employers from engaging in sex discrimination in "hiring and promotion practices."⁸⁸ The Illinois Supreme Court, unlike the federal courts,⁸⁹ has held that distinctions based upon sex are suspect and must withstand strict scrutiny.⁹⁰ As a result, the state courts do not defer to legislation which

types of discrimination, *see supra* note 1, there is no mention of discrimination based on alienage in the Act. *See* ILL. REV. STAT. ch. 68, §§ 1-101 to 9-102 (1981).

82. Unlawful discrimination is defined under the Act as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, handicap or unfavorable discharge from the military service. . . ." ILL. REV. STAT. ch. 68, § 1-102(Q) (1981).

83. Neither Title VII nor the Illinois Human Rights Act expressly proscribes discrimination based upon alienage. Analogizing Title VII case law to interpret the Human Rights Act, discrimination based upon lack of citizenship is not violative of Title VII. *See* *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (Title VII is not violated when an employer refuses to hire a person because he is not a United States citizen).

84. Act of Dec. 6, 1979, Pub. Act. No. 82-709, 1981 Ill. Legis. Serv. 3427 (West) (to be codified at ILL. REV. STAT. ch. 68, § 2-105).

85. ILL. REV. STAT. ch. 68, § 1-103(Q) (1981).

86. ILL. CONST. art. I, §§ 17, 18.

87. ILL. CONST. art. I, § 18 provides: "[T]he equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."

88. *Id.* § 17.

89. *See* *Craig v. Boren*, 429 U.S. 190 (1976) (classifications based on gender must serve important governmental objectives and be substantially related to the achievement of those objectives); *TRIBE*, *supra* note 22, §§ 16-28 to 16-31, at 1074-92.

90. *See* *People v. Grammer*, 62 Ill. 2d 393, 342 N.E.2d 371 (1976) (a classification based on sex must withstand strict judicial scrutiny under the 1970 Illinois Constitution); *People v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974) (classifications based on sex are suspect and must be founded on a compelling state purpose).

Despite these decisions and the specific constitutional ban on sex discrimination, the court in *Petrie v. Illinois High School Ass'n*, 75 Ill. App. 3d 980, 394 N.E.2d 855 (4th Dist. 1979), found that a public school's girls-only volleyball team was constitutionally permissible although the school did not sponsor a boys' volleyball team. The *Petrie* court purported to follow *Ellis*, which held that classifications based on gender must survive strict scrutiny, but nevertheless

creates gender-based distinctions. Rather, sex-based classifications generally are found unconstitutional. Strict scrutiny of gender-based classifications is consistent with the explicit language of the constitution and its history. The delegates to the constitutional convention introduced section 18 to ensure that Illinois courts would apply strict scrutiny as opposed to the federal courts' standard of an intermediate level of scrutiny when examining sex-based classifications.⁹¹

The Human Rights Act also prohibits discrimination on the basis of sex which the Act defines as "the status of being male or female."⁹² Thus, it is clear that employment practices which treat either men or women differently are unlawful⁹³ unless a statutory defense is available.⁹⁴ Further, employment

proceeded to apply a much less exacting standard to the challenged program classification. *Id.* at 989, 394 N.E.2d at 862. The *Petrie* decision is not reconcilable with *Ellis*. *Id.* at 994-96, 394 N.E.2d at 865-67 (Craven, J., dissenting). Since *Ellis*, the Illinois Supreme Court has not further elucidated the meaning of strict scrutiny as applied to gender classifications. However, the court restated the *Ellis* rule in *Illinois Bell Tel. Co. v. Fair Employment Practices Comm'n*, 81 Ill. 2d 136, 143, 407 N.E.2d 539, 542 (1980).

It should be noted that article I, § 2 of the Illinois Constitution, which states that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws," also provides protection from gender-based discrimination. Under this constitutional provision, however, gender-based classifications are not strictly scrutinized. Rather, a classification analyzed under § 2 will be upheld if it bears a rational relationship to a legitimate purpose that the classification is designed to serve. *People v. Grammer*, 62 Ill. 2d 393, 400, 342 N.E.2d 371, 375 (1976).

91. Some of the delegates to the constitutional convention who opposed the inclusion of § 18 argued that art. I, § 2 adequately prohibited sex discrimination. Proponents of § 18, however, were cognizant of the varying standards of review the federal courts use to evaluate state classifications under the equal protection clause. Therefore, they introduced and urged the passage of § 18 to ensure that gender-based classifications would be strictly scrutinized. V SIXTH CONSTITUTIONAL CONVENTION RECORD OF PROCEEDINGS 3669-77 (1969-70). The Illinois Supreme Court has often repeated that the court's primary objective when interpreting the constitution is to give effect to the intent of the framers. *See People ex rel. Keenan v. McGuane*, 13 Ill. 2d 520, 532, 50 N.E.2d 168, 175 (1958). Therefore, the judicial adoption of strict scrutiny in both constitutional and statutorily based gender discrimination cases is appropriate.

92. ILL. REV. STAT. ch. 68, § 1-103(Q) (1981).

93. In *City of Chicago v. Illinois Fair Employment Practices Comm'n*, 87 Ill. App. 3d 597, 410 N.E.2d 136 (1st Dist. 1980), a sex-segregated job classification system for custodians which resulted in lower wages paid to women was held to constitute sex discrimination in violation of the Fair Employment Practices Act, 1961 Ill. Laws 1845, *repealed by* Illinois Human Rights Act, Pub. Act. No. 81-1216, § 10-108, 1979 Ill. Laws 4854. *See supra* note 2 and accompanying text.

94. Title VII recognizes that sex may be a bona fide occupational qualification reasonably necessary to the normal operation of a particular enterprise. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c) (1976). *See* Uniform Guidelines of Employee Selection Procedures, 29 C.F.R. § 1604.2 (1981) (EEOC rules for determining whether a defense of bona fide occupational qualification may be invoked). *See also* *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (Title VII held to prohibit application of height and weight requirements for correctional officers when such requirements were not bona fide occupational qualifications). Although the Human Rights Act does not expressly provide that sex may be a bona fide occupational qualification, it does provide for a general bona fide occupational qualification defense. ILL. REV. STAT. ch. 68, § 2-104(A) (1981). Therefore, using federal case law, Illinois practitioners might argue in appropriate cases that sex is a bona fide occupational qualification.

practices which have a disproportionate impact upon women, such as lifting requirements or minimum height and weight requirements, are unlawful unless justified.⁹⁵ Because both the Illinois Construction and the Human Rights Act so clearly prohibit discrimination based upon the "status of being male or female," gender discrimination cases concerning sex qua sex have not been problematic. The same is not true of cases alleging discrimination on the basis of a characteristic possessed solely by members of one sex, such as discrimination on the basis of pregnancy. It appears that under Illinois law, discrimination against pregnant women is not considered gender-based discrimination.⁹⁶ A discussion of federal law will aid in understanding the Illinois law.

In *Geduldig v. Aiello*,⁹⁷ the United States Supreme Court considered a California state disability insurance program which provided different coverage for pregnancy-related disabilities than for other disabilities.⁹⁸ Under the United States Constitution, discrimination on the basis of sex is prohibited absent proof that the gender-based distinctions serve important governmental objectives and are substantially related to achievement of those objectives.⁹⁹ The Court, finding no distinction based on gender in the disability insurance program, explained:

[t]he lack of identity between the excluded disability and gender . . . becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.¹⁰⁰

Having refused to recognize distinctions based upon pregnancy as "involving discrimination based on gender," the Court held the California program constitutional.¹⁰¹ Subsequently, the Illinois Supreme Court twice has cited

95. For example, in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court held that height and weight requirements were not job related because such requirements bear an insufficient relationship to strength, the characteristic essential to efficient performance as a correctional officer.

96. See *infra* notes 102-14 and accompanying text.

97. 417 U.S. 484 (1974).

98. Originally, the California statute defined disability to exclude all pregnancy-related benefits. Prior to the Supreme Court decision in *Geduldig*, however, a state court, following the district court's opinion, held that the state plan did not preclude payment of benefits for disability due to complications arising from pregnancy. The agency administering the state's disability plan acquiesced in the decision. See *Rentzer v. California Unemployment Ins. Appeals Bd.*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973). Therefore, the narrow issue before the Supreme Court in *Geduldig* was whether the state plan's failure to provide benefits for normal pregnancies violated the Constitution.

99. See *supra* note 89 and accompanying text.

100. 417 U.S. 484, 496 (1974).

101. *Id.* at 497. Using a very deferential level of scrutiny, the Court decided that the state plan's distinction between pregnancy and other state insured disabilities served a "legitimate [state] interest in maintaining the self-supporting nature of its insurance program," and "distributing the available resources in such a way as to keep benefit payments at an adequate

approvingly to *Geduldig*.¹⁰² Although neither case held that pregnancy-based discrimination was not gender based, it appears clear that this will be the Illinois Supreme Court's conclusion if called upon to decide this issue under the Illinois Constitution.¹⁰³

Similarly, Illinois courts likely would hold that pregnancy-based discrimination is not gender-based discrimination under the Human Rights Act. An examination of federal law will justify this conclusion. In *General Electric Co. v. Gilbert*,¹⁰⁴ the United States Supreme Court considered whether the exclusion of pregnancy-related disabilities from an employer's disability plan constituted unlawful sex discrimination. Because *Gilbert* involved a private employer, the action arose under Title VII. Under the Act, it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals' . . . sex"¹⁰⁵ The Act did not, at that time, define "sex." Relying upon its reasoning in *Geduldig*, the Court again concluded that pregnancy-based discrimination was not gender-based discrimination and hence the challenged disability plan did not violate Title VII.¹⁰⁶

Gilbert was particularly troublesome because the Court already had held in *Griggs* that regardless of intent, an employment practice could be

level for the disabilities that are covered, rather than to cover all disabilities inadequately." *Id.* at 496.

102. See *Illinois Bell Tel. Co. v. Fair Employment Practices Comm'n*, 81 Ill. 2d 136, 407 N.E.2d 539 (1980); *Winks v. Board of Educ.*, 78 Ill. 2d 128, 398 N.E.2d 823 (1979).

103. In *Winks v. Board of Educ.*, 78 Ill. 2d 128, 398 N.E.2d 823 (1979), the court upheld a sick leave benefits plan which failed to provide benefits for normal pregnancy. This case was decided on the narrow issue of statutory construction. The statute provided sick leave benefits for personal illness. The court observed that because normal pregnancy was not an illness, pregnant employees were not entitled to benefits under the statute. The court bolstered its opinion with reference to the statute's use, in other sections, of the term temporary incapacity. When this term was used elsewhere, the statute did not provide for leave. *Id.* at 136, 398 N.E.2d at 826. Although *Winks* was decided solely as a matter of statutory interpretation, the court observed that "[this case] does not involve an *equal protection* issue. That issue was resolved by the Supreme Court in *Geduldig v. Aiello*. . . ." *Id.* at 133, 398 N.E.2d at 825 (emphasis added).

Similarly, in *Illinois Bell Tel. Co. v. Fair Employment Practices Comm'n*, 81 Ill. 2d 136, 407 N.E.2d 539 (1980), the issue before the court was whether an employer's disability plan which did not provide benefits for normal pregnancy violated the Fair Employment Practices Act, 1961 Ill. Laws 1845, *repealed by* Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854. In considering the statutory issue, the court observed that it was appropriate to acknowledge the state constitution's prohibition of sex discrimination and the decision in *People v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974), subjecting gender-based classifications to strict scrutiny. The court then concluded that "[t]he constitutional prohibition of sex discrimination, however, does not require us to broaden the common meaning of pregnancy." 81 Ill. 2d 136, 143, 407 N.E.2d 539, 542 (1980). The court then proceeded to treat a distinction based on pregnancy as if it were not a distinction based on sex.

104. 429 U.S. 125 (1976).

105. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1976).

106. 429 U.S. 125, 134 (1976).

unlawful under Title VII if it resulted in discriminatory impact, and was not job related.¹⁰⁷ The *Griggs* Court had stated that "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."¹⁰⁸ It seemed entirely plausible, and to some a foregone conclusion, that if an employment decision burdened pregnancy, it necessarily had a discriminatory impact on women.¹⁰⁹ The *Gilbert* Court, however, concluded otherwise.

In *Illinois Bell Telephone Co. v. Fair Employment Practices Commission*,¹¹⁰ the Illinois Supreme Court stated that it "agree[d] with the decision in *Gilbert* insofar as it held that the statutory provisions relied upon were insufficient to support a finding of discrimination."¹¹¹ The court's dictum is significant in light of the legislative history of Title VII. When the Court interpreted Title VII in *Griggs*, Title VII did not contain any definition of sex or gender; therefore, the statute was arguably open to differing interpretation as to whether pregnancy discrimination equaled sex discrimination. Following the *Gilbert* decision, Congress amended Title VII to define pregnancy, childbirth, or related medical conditions as gender-based characteristics.¹¹² When the Illinois legislature enacted the Human Rights Act, however, it did not enact this broad federal definition. Rather, the Human Rights Act defines sex for the purposes of the Act as "the status of being male or female."¹¹³ Under the present language of the Human Rights Act, the approach of *Illinois Bell* appears to be correct in permitting pregnancy-based discrimination because discrimination on the basis of pregnancy is not synonymous with discrimination on the basis of "the status of being female."¹¹⁴

HANDICAP

Handicapped persons are provided both constitutional and statutory protection from employment discrimination in Illinois.¹¹⁵ The constitution prohibits any employer from discriminating against persons with physical or

107. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). See *supra* notes 59-61 and accompanying text.

108. 401 U.S. at 432.

109. See *General Elec. Co. v. Gilbert*, 429 U.S. 125, 160-62 (Stevens, J., dissenting).

110. 81 Ill. 2d 136, 407 N.E.2d 539 (1980).

111. *Id.* at 142-43, 407 N.E.2d at 541. In *Illinois Bell*, the Fair Employment Practices Commission argued that the Illinois statute prohibited the denial of disability benefits for uncomplicated pregnancies because the state legislation was patterned after Title VII. Title VII had been amended so that pregnancy, childbirth, and related medical conditions were defined as gender based characteristics. See *infra* note 112 and accompanying text. The court rejected this argument because the congressional amendment to Title VII postdated *Illinois Bell's* refusal to include pregnancy benefits in its benefits plan and this refusal was already pending before the court. 81 Ill. 2d at 142, 407 N.E.2d at 541.

112. Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) (1976).

113. ILL. REV. STAT. ch. 68, § 1-104(O) (1981).

114. See *supra* notes 104-06 and accompanying text.

115. See *supra* note 1 & 6 and accompanying text.

mental handicaps if the discrimination is based on a handicap which is unrelated to that person's ability to perform a particular job.¹¹⁶

A major problem concerning the constitutional protection prohibiting discrimination on the basis of handicap has arisen because of the constitution's failure to define the term handicap. An examination of the transcript of the constitutional convention reveals that the delegates to that convention were not clear as to the definition of handicap nor how broadly or narrowly it should be interpreted.¹¹⁷ As originally proposed to the convention, the constitutional provision governing handicap discrimination read: "[a]ll persons shall have the right to be free from discrimination on the basis of a physical or mental handicap in the hiring and promotion practices of any employer"¹¹⁸ Some convention delegates feared that the language of this proposal might be interpreted as prohibiting discrimination against handicapped persons regardless of their ability.¹¹⁹ Consequently, the language was revised and finally approved to read: "[a]ll persons with physical or mental handicaps shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer."¹²⁰

The lack of a definition is particularly troublesome when the alleged handicap, such as cancer or a heart condition, is not universally acknowledged to be a handicap. As a result, this ambiguity had produced a split among the Illinois appellate courts. In *Advocates for the Handicapped v. Sears, Roebuck and Co.*,¹²¹ the first appellate court to confront this issue searched the record of the constitutional convention, concluded that the convention delegates had simply not agreed on what the term handicap meant, and thereupon determined that it was obliged to utilize the ordinary and popular meaning of the term.¹²² The court adopted the dictionary definition of handicap: "a disadvantage that makes achievement unusually difficult, esp.: a physical disability that limits the capacity to work."¹²³ The court further decided that a determination of handicap depends upon whether the disability is "generally perceived as one which severely limits the individual in performing work related functions."¹²⁴ Based on this definition, the

116. ILL. CONST. art. I, § 19.

117. V SIXTH ILLINOIS CONSTITUTIONAL CONVENTION RECORD OF PROCEEDINGS 3678-89 (1970).

118. *Id.* at 3678.

119. *Id.* at 3678-80.

120. ILL. CONST. art. I, § 19.

121. 67 Ill. App. 3d 512, 385 N.E.2d 39 (1st Dist. 1978).

122. *Id.* at 515, 385 N.E.2d at 42.

123. *Id.* at 516, 385 N.E.2d at 43 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1027 (17th ed. 1976)).

124. 67 Ill. App. 3d at 517, 385 N.E.2d at 44. In reaching this conclusion, the court specifically rejected plaintiff's contention that "[i]f an employee's illness or defect makes it more difficult . . . to find work . . . then it certainly operates to make achievement unusually difficult [and that an employer's refusal to hire a person] . . . because of his illness is a classic example of how such illness operates as a handicap." *Id.* (quoting *Chicago, Milwaukee, St. Paul & Pac. R.R. v. Wisconsin*, 62 Wis. 2d 392, 215 N.W.2d 433 (1974)).

court concluded that the plaintiff, who had been denied employment because he had received a kidney transplant,¹²⁵ did not possess a disability "of the nature which falls within the commonly understood meaning of the term 'physical handicap.'" ¹²⁶

In contrast, the Fourth District Appellate Court of Illinois found cancer to be a handicap in *Lyons v. Heritage House Enterprises*.¹²⁷ The *Lyons* court adopted the definition of handicap contained in the Federal Rehabilitation Act of 1973 because it found the purpose of the state and federal statutes to be identical.¹²⁸ The federal Act defines a handicapped individual as one "who has a physical or mental impairment which substantially limits one or more of such person's major life activities, has a record of such impairment or is regarded as having such an impairment."¹²⁹

The Illinois Supreme Court granted review of *Lyons* to resolve the conflict between the lower courts. The supreme court reversed *Lyons* and held that although the plaintiff allegedly was terminated solely because of her cancer and the cancer did not affect her ability to perform her job, cancer was not deemed a handicap. Therefore, her termination did not violate the Illinois Constitution.¹³⁰

The Illinois Supreme Court defined handicap as "a class of physical and mental conditions which are generally believed to impose severe barriers upon the ability of an individual to perform major life functions."¹³¹ The

125. The plaintiff was refused employment because the employer believed his condition rendered him an unacceptable insurance risk under the employer's self insurance program. The employer did not contend that the plaintiff was unqualified or unable to perform the job for which he had applied. 67 Ill. App. 3d at 513, 385 N.E.2d at 41.

126. *Id.* at 518, 385 N.E.2d at 44. It is not clear whether the court decided that the plaintiff was not handicapped because his "only physical impairment . . . [was] that he [was] restricted from lifting heavy weights" or because the court believed kidney transplant recipients are not commonly perceived as being severely limited in terms of job performance. *Id.* Accord *Kubik v. CNA Fin. Corp.*, 96 Ill. App. 3d 715, 422 N.E.2d 1 (1st Dist. 1981) (court applied *Advocates* definition in holding that an employee who had lost his job after the removal of a malignant tumor was not within the handicap definition), *petition for leave to appeal denied*, No. 55,242 (March 30, 1982). In *Kubik*, the Court's decision appeared to be based upon its conclusion that the plaintiff was not disabled, rather than that his physical handicap was one not generally believed to impose severe barriers on one's ability to perform major life functions.

127. 92 Ill. App. 3d 668, 415 N.E.2d 1341 (4th Dist. 1981). In *Lyons*, the plaintiff alleged that she had been discharged shortly after having informed her employer that she had been diagnosed as having cancer of the uterus.

128. *Id.* at 673, 415 N.E.2d at 1345. In reaching its conclusion, the *Lyons* court did not distinguish the meaning of the term handicap for the purpose of a constitutional claim and its meaning for the purpose of a statutory claim. In fact, the *Lyons* court's conclusion is based entirely upon statutory construction and interpretation. Nevertheless, because the issue on appeal was whether the lower courts properly had dismissed a complaint alleging a violation of both the statute and the constitution, the decision by the court of appeals was based implicitly upon a constitutional construction.

129. Federal Rehabilitation Act of 1973, 29 U.S.C. § 706 (1976).

130. *Lyons v. Heritage House Enter.*, 89 Ill. 2d 163, 171, 432 N.E.2d 270, 274 (1981).

131. *Id.* at 168, 432 N.E.2d at 273 (quoting *Advocates for the Handicapped v. Sears, Roebuck & Co.*, 67 Ill. App. 3d 512, 516-17, 385 N.E.2d 39, 43 (1st Dist. 1978)).

court noted that the definition referred to "physical characteristics that impede normal everyday life, rather than to any medical condition or illness."¹³² When defining life activities, the court referred to state and federal guidelines.¹³³ The state guidelines define life activities to include "communication, self care, socialization, education, employment, transportation, and the like."¹³⁴ The United States Department of Health and Human Services defines life activities to include activities such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."¹³⁵ Because the plaintiff had not alleged that her cancer substantially hindered her "life activities" and because she had failed to allege that her employer "perceived her condition as causing such a hindrance," the court summarily concluded that she was not handicapped.¹³⁶

The problem with the Illinois Supreme Court's analysis in *Lyons* is three-fold. First, the court ignored the constitution's legislative history. Although it is true that no official committee reports exist and that the delegates never carefully determined the scope of the term "physical or mental handicap,"¹³⁷ this does not necessarily lead to the conclusion that the constitutional history fails to delineate who the delegates intended to protect under article I, section 19. In addition to such obvious handicaps as blindness and amputated limbs, delegates who spoke on behalf of the constitutional provision indicated that they believed impediments such as epilepsy and hemophilia were handicaps.¹³⁸ Nevertheless, the *Lyons* court was of the opinion that the "personal views" of the delegates who spoke on the issue were not to be given controlling weight.¹³⁹ This conclusion is an unobjectionable generalization; yet, the court disregarded this constitutional history and proceeded to create a distinction never even mentioned at the constitutional convention.

Further, to the extent that the court relied on case law from other jurisdictions in support of its distinction between physical conditions and medical conditions or illnesses, such reliance appears to be misplaced.¹⁴⁰ For

132. 89 Ill. 2d at 168, 432 N.E.2d at 274. In addition to defining handicap for the purpose of a constitutional claim, the court also interpreted the term handicap for the purposes of the Equal Opportunities for the Handicapped Act. However, because the Human Rights Act's definition of handicap has superseded the handicap Act's definition, the case is generally without precedential value when interpreting the Human Rights Act. See *infra* note 149-50 and accompanying text.

133. 89 Ill. 2d at 168-70, 432 N.E.2d at 274.

134. *Id.* at 170, 432 N.E.2d at 274.

135. 45 C.F.R. 84.3(j)(2)(iii) (1980).

136. 89 Ill. 2d at 170-71, 432 N.E.2d at 274.

137. See V SIXTH ILLINOIS CONSTITUTIONAL CONVENTION RECORD OF PROCEEDINGS 3678-85 (1970).

138. *Id.*

139. 89 Ill. 2d at 166, 432 N.E.2d at 272.

140. *Id.* at 168-69, 432 N.E.2d at 273. It is not clear what authority the court relied upon in creating the distinction between physical and medical conditions. The only support mentioned is the "ordinary understanding" of the terms involved and case law from other jurisdictions. *Id.*

example, the court cited *American National Insurance Co. v. State of California Fair Employment Practice Commission*¹⁴¹ in which the California court held that discrimination based on high blood pressure did not constitute unlawful discrimination on the basis of a physical handicap. Unlike the Illinois Constitution, the California statute not only defined the terms physical handicap¹⁴² and medical condition but also distinguished the two terms.¹⁴³ It was clear from these definitions that high blood pressure was a medical condition, and accordingly, the California case was properly decided. Because of the substantial difference between the constitutional language in Illinois and the California statutory language, the California opinion should have provided little if any assistance to the Illinois Supreme Court.

Second, the *Lyons* court was of the opinion that "not all abnormal physical conditions are handicaps. . . . [Some] cannot be considered a substantial limitation on activity."¹⁴⁴ The court held, in part, that the plaintiff was not handicapped because she had not alleged that her cancer substantially hindered her work or other "life activities."¹⁴⁵ Yet, if the plaintiff had alleged that her cancer hindered her work ability, she still would not have prevailed in a constitutional case. The constitution does not prohibit discrimination on the basis of diminished ability; rather it prohibits discrimination on the basis of those handicaps unrelated to ability. Further, the delegates did not distinguish severe or substantial handicaps from other types of handicaps. During the constitutional debate, the chief sponsor of the proposed constitutional language explained that the prohibitory language meant "you just can't deny a person [a job] because he walks in the door[with a handicap]. . . . If he cannot perform the job or does not have the ability, then you can deny the person [a job]."¹⁴⁶ The *Lyons* court, therefore, placed the handicapped in an untenable position. The Illinois Constitution protects the handicapped from employment discrimination to the extent that person can perform the job. The *Lyons* court, in contrast, only protected those persons who were substantially limited by the handicap.

A third troubling aspect of *Lyons* is the Illinois Supreme Court's conclusion that the plaintiff failed to allege that her employer perceived her condition

141. 170 Cal. Rptr. 887 (1981).

142. *Id.* at 888. The statute involved provided: " 'Physical handicap' includes impairment of sight, hearing, or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services." CAL. LAB. CODE § 1413 (West Supp. 1975), amended by CAL. GOV'T CODE § 12926 (West Supp. 1982).

143. A medical condition was defined statutorily as "any health impairment for which a person has been rehabilitated or cured." 170 Cal. Rptr. at 890. The *American National* court reasoned that a medical condition involves a lesser impairment of function than a handicap. Moreover, the handicapped person usually requires rehabilitation to attain employability. *Id.* at 888-89.

144. 89 Ill. 2d at 169, 432 N.E.2d at 273.

145. *Id.* at 170, 432 N.E.2d at 274.

146. V SIXTH ILLINOIS CONSTITUTIONAL CONVENTION RECORD OF PROCEEDINGS 3679 (1970).

as hindering major life functions. The lower court found that the allegations in the plaintiff's complaint supported the conclusion that the defendant considered plaintiff's physical condition to be a physical handicap and that this controlled the defendant's decision to terminate her.¹⁴⁷ Requiring a plaintiff to show that the employer believed the handicap hinders major life functions, in addition to requiring the plaintiff to show that the employer discriminated in a manner not related to job ability because of the handicap, places more of a burden upon the plaintiff than it appears the constitution's framers intended.¹⁴⁸

Unlike the constitution, the Human Rights Act provides a definition of handicap. The Act defines handicap as:

a determinable physical or mental characteristic of a person, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic . . . is unrelated to the person's ability to perform the duties of a particular job or position.¹⁴⁹

The present statutory definition is so clear and broad that it effectively supercedes the *Lyons* definition of handicap insofar as this case might have controlled the definition of handicap under the statute. The current statutory definition of handicap virtually is identical to the one contained in the Federal Rehabilitation Act of 1973.¹⁵⁰

To date, Illinois case law on the subject of handicap discrimination in employment has been confined to determining which physical and mental conditions are protected under the constitution or statute. Many more complex issues such as when and to what extent an employer must accommodate an employee's handicap have arisen under the federal laws and may be expected to eventually confront the Illinois courts.¹⁵¹

RELIGION

Although the Human Rights Act prohibits discrimination based on religion,¹⁵²

147. *Lyons v. Heritage House Enter.*, 92 Ill. App. 3d 668, 672-74, 415 N.E.2d 1341, 1345 (4th Dist. 1981).

148. See *supra* note 146 and accompanying text. See also S. REP. NO. 1297, 93rd Cong., 2d Sess. 64 (1973).

149. ILL. REV. STAT. ch. 68, § 1-103(I)(1) (1981).

150. See *supra* text accompanying notes 128-29. The federal legislative history reveals congressional thinking on why the definition must be so broad and inclusive. See S. REP. NO. 1296, 93rd Cong., 2d Sess. 49-58 (1973) (Congress distressed to discover that handicapped individuals most in need of services are usually the last to receive them).

151. Expected issues include: (1) whether an employer must accommodate an employee's handicap, and, if so, to what extent; (2) what constitutes a handicapped person who is otherwise qualified; and (3) what is the role of safety as a defense in handicap cases. See A. LARSON, EMPLOYMENT DISCRIMINATION (perm. rev. ed. 1981) [hereinafter cited as LARSON].

152. The Human Rights Act defines religion as "any belief protected by the free exercise clause of the first amendment to the U.S. Constitution." ILL. REV. STAT. ch. 68, § 1-103(N) (1981). The United States Supreme Court has defined religion quite expansively for the pur-

the establishment¹⁵³ and free exercise¹⁵⁴ clauses of both the federal and state constitutions severely limit the extent to which the state may legislate matters related to religion. In recognition of this, the Illinois legislature narrowed the scope of the Act's applicability. The Act's definition of an employer excludes any religious organization such as a parochial school.¹⁵⁵ Although a religious organization/employer is permitted to discriminate on the basis of religion, it is not permitted to discriminate on the basis of race, national origin, gender, or other protected classes.¹⁵⁶ Thus, the state partially has avoided involvement in the hiring and firing decisions of religious organizations, thereby avoiding conflicts that would arise under the free exercise clause of the state and federal constitutions.

There also is a limitation on the extent to which the Human Rights Act may force nonreligious-affiliated employers to accommodate employees' religious needs. This limitation prevents the state from forcing an employer to comply with employees' religious demands to such an extent that the state may be accused of contributing to the establishment of a religion. In *Olin v. Fair Employment Practices Commission*,¹⁵⁷ the Illinois Supreme Court relied upon a case which arose under Title VII, *Trans World Airlines*

poses of the free exercise clause. Religion includes, but is not limited to, theistic concepts or traditional religious beliefs. See *Torcasco v. Watkins*, 367 U.S. 488, 495 (1961). The Court has held that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God" of those persons with traditional religious beliefs is entitled to protection as a religious belief. *United States v. Seeger*, 380 U.S. 163, 176 (1965). Religious belief need not be commonly acceptable, logical, consistent, or comprehensible and the "guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1981). However, not all personal or philosophical beliefs rise to the level of religion. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). Mere personal or social beliefs are beyond constitutional protection. See *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 506-07 (4th Cir. 1974).

153. U.S. CONST. amend. I; ILL. CONST. art. I, § 3.

154. U.S. CONST. amend. I; ILL. CONST. art. I, § 3.

155. The Human Rights Act specifically excludes:

[A]ny religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.

ILL. REV. STAT. ch. 68 § 2-101(B)(2) (1981).

The Illinois statutory definition is considerably narrower when conduct or practices dictated or forbidden by a religious belief are involved. See Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1980).

156. Compare ILL. REV. STAT. ch. 68 § 2-101(B)(2) (1981) (religious organizations excluded from statutory definition of employer) with ILL. REV. STAT. ch. 68 § 1-103(Q) (1981) (identifying unlawful areas of discrimination outside employment content).

157. 67 Ill. 2d 466, 367 N.E.2d 1267 (1977). *Olin* was decided under the Fair Employment Practices Act, 1961 Ill. Laws 1845, repealed by Illinois Human Rights Act, Pub. Act No. 81-1216, § 10-108, 1979 Ill. Laws 4854.

v. *Hardison*,¹⁵⁸ to determine the extent to which an employer must accommodate an employee's religious needs to avoid discriminating on the basis of religion. In *Olin*, an employee's religious beliefs prohibited him from working on the Sabbath. The employee volunteered three arrangements which would have satisfied his religious needs. He offered to work at other times to compensate for his loss of work time, to obtain a substitute to work in his stead on the Sabbath, or to work merely four days each week. The employer rejected the first and third proposals because either would result in an insufficient number of laborers working. The second option also was rejected because it would have required the employer to pay the substitute employee a premium weekend wage unless plaintiff and another employee traded shifts. Furthermore, the union would not have consented to the second option because such a trade would violate the seniority provisions of the collective bargaining agreement.¹⁵⁹

The *Olin* court held that *Olin* could not have made an accommodation to the religious beliefs of one of its employees without undue hardship to its business. Nevertheless, in reversing the Fair Employment Practice Commission's decision that *Olin* reasonably could have accommodated the plaintiff, the *Olin* court unmistakably followed the *Hardison* rationale and cited the *Hardison* rule that more than a de minimis cost is an undue hardship.¹⁶⁰ In reaching its conclusion, the *Olin* court accepted the *Hardison* balancing of the plaintiff's interest in the free exercise of religious beliefs against the interests of co-employees, the interests of collective bargaining agreements, and the employer's interests.¹⁶¹ Because the plaintiff was unable to secure a voluntary replacement to work on the Sabbath,¹⁶² the employer could have accommodated the plaintiff's work preference only by subordinating the preferences of other employees. As between the only two alternatives for apportioning weekend work—a neutral system based on seniority or rotating shifts, or a system which paid explicit attention to the religious needs of employees—only the latter would fully satisfy the workers who had religious-based preferences. Satisfaction of the religious needs of some employees would require other employees with perhaps as equally strong nonreligious reasons for not working on the Sabbath to subordinate their interests to those employees with religious beliefs. Such subordination would

158. 432 U.S. 63 (1977). The facts in *Hardison* are strikingly similar to the facts in *Olin*. In *Hardison*, as in *Olin*, the employee whose religious beliefs precluded working on his Sabbath suggested three alternative work arrangements. Mr. *Hardison*'s offer to work a four day week was rejected by TWA because the plaintiff's department would have been left understaffed. *Id.* at 68. Mr. *Hardison* offered to trade jobs with another employee but the union refused to permit any such violation of the contract's seniority provisions. *Id.* at 78. Finally, Mr. *Hardison* suggested TWA simply could have assigned another person to perform his job on the Sabbath. TWA rejected this proposal because it would have required premium overtime pay for any such replacement. *Id.* at 76.

159. 67 Ill. 2d 466, 469-71, 367 N.W.2d 1267, 1268-69 (1977).

160. *Id.* at 479, 367 N.E.2d at 1273.

161. *Id.* at 476-78, 367 N.E.2d at 1272-73.

162. *Id.* at 479, 367 N.E.2d at 1272.

constitute unequal treatment on the basis of religion.¹⁶³ In short, any accommodation that would have subrogated the terms of a seniority system or have deprived co-employees of their contractual rights also would have subordinated the interests of employees without religious needs to those employees with such needs.¹⁶⁴

Olin also considered the cost of accommodation to the employer and the employee's statutory right not to be discriminated against because of religion. The *Olin* case could be criticized, as was *Hardison*, on the basis that the monetary cost of paying overtime for an employee's replacement is relatively miniscule for a large employer like the *Olin* Corporation.¹⁶⁵ Accordingly, critics could assert that *Olin* has misapplied its own rule that an employer only need bear a de minimis cost to accommodate religious needs of employees. Such criticism is misplaced for two reasons.

First, the term de minimis is not synonymous with anything less than a large amount. The term's legal definition is: de minimis non curat lex—the law does not care about trifles.¹⁶⁶ Accordingly, if something is de minimis, the law simply will not recognize it.¹⁶⁷ Only a legally insignificant accommodation by an employer for an employee's religious needs is necessary.¹⁶⁸

163. *Id.* *Trans World Airlines v. Hardison*, 432 U.S. 63, 80-81 (1977) (in dismissing plaintiff's complaint against defendant airline, the Court held that an accommodation of plaintiff's religious beliefs would result in discrimination against other employees through disruption of the seniority system and compelled schedule transfers).

164. *Id.* at 81-82. The *Hardison* Court characterized the seniority system as a "significant accommodation to the needs, both religious and secular, of all of [the] employees." *Id.* at 78. The Court characterized as fundamental the proposition that the nondiscrimination mandate of Title VII "does not require an employer and a union who have agreed on a seniority system to deprive senior employees of their seniority rights in order to accommodate a junior employee's religious practices." *Id.* at 83 n.14.

Bona fide seniority systems have been accorded particular protections by Title VII and courts interpreting the Act. *See United Air Lines v. Evans*, 431 U.S. 553, 559-60 (1977) (disparities due to bona fide seniority system allowed if these disparities were not the result of intentional discrimination); *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1972) (routine application of a bona fide seniority system held not unlawful under Title VII). *See also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1976) (it is permissible to apply different standards pursuant to a bona fide seniority or merit system).

165. *See Trans World Airlines v. Hardison*, 432 U.S. 63, 92 n.6 (1977) (Marshall, J., dissenting). *See also* LARSON, *supra* note 151, at § 92.24, *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 272-74 (1977).

166. *See* BLACK'S LAW DICTIONARY 388 (rev. 5th ed. 1979).

167. [T]he corollary of the maxim is that "de minimis," used by itself means something so small that the law simply does not take cognizance of it; in other words, for legal purposes, it does not exist at all. This is why the Supreme Court involved *de minimus* rather than some quantitative expression of smallness. . . . Any payment which, if denied, is large enough to be discrimination against [for example] H, would be if granted to H, large enough to be discrimination against J.

Larson, *supra* note 151, at § 92.24.

168. *See generally* LARSON, *supra* note 151, at § 92.00; Comment, *The Constitutionality of an Employer's Duty to Accommodate Religious Beliefs and Practices*, 56 CHI.-[KENT] L. REV. 635, 675 (1980).

Therefore, because the accommodation the employee sought in this case was sufficiently significant for the law to recognize, the court did not even reach the question of whether it was a relatively small amount.¹⁶⁹ In other words, once the accommodation requested is legally significant, the comparison between the cost of accommodation and the employer's ability to comply is irrelevant.¹⁷⁰

Second, the criticism fails to consider that if the Human Rights Act required more than de minimis accommodation for the religious beliefs of an employee, that accommodation could present serious constitutional problems. Unfortunately, the *Olin* and *Hardison* courts failed to articulate any constitutional arguments in support of their rule-accommodation. Consequently, these courts failed to provide insight as to why they were constitutionally required to construe the Human Rights Act and Title VII respectively necessitating only de minimis accommodation.

The constitutional dilemma arising from the mandate that an employer not discriminate on the basis of religion is that it may "establish" religion in violation of the Illinois and federal constitutions. The United States Supreme Court has established a three-prong test for determining violations of the establishment clause. First, to comply with the establishment clause, the legislation must have a secular purpose.¹⁷¹ The legislation in question also must have a primary effect that neither advances nor inhibits religion,¹⁷² and finally its administration must avoid excessive government entanglement with religion.¹⁷³ If a statutory provision fails to meet any one of the three prongs of the test, it is declared unconstitutional.¹⁷⁴

An application of this three-prong test to the instant problem indicates that a requirement that employers provide more than de minimis accommodation for employees' religious needs could violate the first prong of the establishment clause. Using the legislative history of the analogous provisions of Title VII, it could be argued that requiring more than de minimis accommodation provides protection for certain religions or religious beliefs and

169. 67 Ill. 2d 466, 475, 367 N.E.2d 1267, 1271.

170. Nevertheless, the EEOC has promulgated regulations which appear to reject the *Hardison* rule that only de minimis accommodations are necessary. These regulations suggest that a de minimis cost only may be determined by balancing the identifiable cost of accommodation against the size of the employer and the number of employees who the employer may need to accommodate. Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(e)(1) (1981).

171. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772-73 (1973); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1972).

172. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 745 (1976); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772-73 (1973).

173. *Meeck v. Pittenger*, 421 U.S. 349, 358 (1975); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772-73 (1973); *Waltz v. Tax Comm'n*, 397 U.S. 664, 668 (1970).

174. See, e.g., *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (tax relief program benefitting parents of non-public school children found to have the primary effect of aiding religion because 80% of the benefitted class were parents of parochial school children). See also *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

practices.¹⁷⁵ The United States Supreme Court has found a violation of the first amendment when religious beliefs are aided at the expense of nonreligious beliefs or preferences.¹⁷⁶ Title VII's protection arguably serves a nonsecular purpose in violation of the first amendment. Nevertheless, some courts have suggested that because Title VII (and by analogy the Human Rights Act) has as a basis the secular purpose of prohibiting employment discrimination generally, a secular purpose is served.¹⁷⁷ It appears that if a court can identify a secular purpose served by the statute, the existence of a nonsecular purpose will not suffice to invalidate it.¹⁷⁸

It also is arguable that the effect of the Human Rights Act's prohibition against religious discrimination generally will be to promote religion in

175. It may be argued that Title VII, insofar as it prohibits discrimination on the basis of religion, was enacted to advance certain specific religions. Consider, for example, the remarks Senator Jennings Randolph made when he introduced the amendment to Title VII addressing religious accommodation.

I am sure that my colleagues are well aware that there are several religious bodies—we could call them religious sects; denominational in nature—not large in membership but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that observance of the day of worship, the day of the Sabbath, be other than on Sunday. . . . There are approximately 750,000 men and women who are Orthodox Jews in the U.S. work force who fall in this category of persons I am discussing. There are an additional 425,000 men and women in the work force who are Seventh-day Adventists. . . . [T]here has been a partial refusal at times on the part of employers to hire or continue in employment employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention. . . .

118 CONG. REC. 705 (1972).

176. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), the Court stated: "We repeat and . . . reaffirm that neither a State nor the Federal Government can constitutionally . . . pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* at 495 (footnotes omitted).

177. The district court in *Trans World Airlines v. Hardison*, 375 F. Supp. 877 (W.D. Mo. 1974), *aff'd*, 527 F.2d 33 (8th Cir. 1975), *rev'd on other grounds*, 432 U.S. 63 (1977), concluded that Title VII had a secular purpose because it merely ensures that a person will not be "discharged from his job merely because of his religion." *Id.* at 888. It also has been argued that since Title VII does not provide "direct or financial support" to religious organizations, the statute does not have a primary effect of advancing religion. *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 271 n.47 (1977).

178. See, e.g., *Gallagher v. Crown Kasher Super Mkt., Inc.*, 366 U.S. 617 (1961) (Court rejected challenge to Massachusetts Sunday closing law brought by Orthodox Jews); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Court rejected challenge to Pennsylvania Sunday closing law brought by Orthodox Jew clothing store owners); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Court upheld conviction of department store employees for selling goods prohibited by Maryland Sunday closing law intended to provide uniform day of rest). See also, TRIBE, *supra* note 22, § 14-9, at 839-46.

violation of the second prong of the establishment clause test. As the court observed in *Gavin v. People's Natural Gas Co.*:¹⁷⁹

It is clear from reviewing the cases that individuals of certain religious beliefs have been benefitting under [Title VII]. . . . Parenthetically, we would note that this may be because members of certain sects are more knowledgeable of the law, or for any number of reasons. Eventually, the protection of the act may spread to many others. However, it can only spread to individuals who characterize their beliefs or convictions as "religious". If one were an avid sports fan, one could not use that enthusiasm, however intense, to require an accommodation to one's desire to attend a sports event.

Indeed, in a case like *Olin*, a work assignment system which prefers those with religious needs over those without religious concerns advances religion by rewarding those with religious beliefs.

Finally, the excessive entanglement prohibited by the Constitution can take at least two forms: governmental involvement in ecclesiastical affairs¹⁸⁰ or excessive governmental surveillance of religious institutions or personnel.¹⁸¹ Such entanglement would not be present in *Olin* because the employer was not a religious organization. Although in the *Olin* situation no violation of the third prong occurred, any requirement that an employer provide more than de minimis accommodations for employees' religious needs arguably violates the first and second prongs of the establishment clause test.

In addition to the scheduling cases such as *Olin*, religious discrimination also may be alleged in cases involving union membership and dues,¹⁸² flag

179. 464 F. Supp. 622, 629-30 (W.D. Pa. 1979), *vacated and remanded on procedural grounds*, 613 F.2d 482 (3d Cir. 1980).

180. In *McClure v. Salvation Army*, 460 F.2d 552 (5th Cir. 1972), *cert. denied*, 409 U.S. 896 (1972), the court refused to enforce Title VII's prohibition against sex-based discrimination when the employee's duties were connected with the religious activities of a religious organization. The court stated:

We find that the application of the provisions of Title VII to the employment relationship existing between The Salvation Army and Mrs. McClure, a church and its minister, would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment.

Id. at 560.

181. *See, e.g.,* *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973) (state subsidies to parochial schools for building maintenance and repair held an impermissible administrative entanglement); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (providing reimbursement for parochial school teacher prepared testing held an excessive entanglement); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (salary supplements to teachers an administrative entanglement because they required continuing surveillance into functioning of parochial school).

182. *Compare* *Yott v. North Am. Rockwell Corp.*, 602 F.2d 904 (9th Cir. 1979) (employee must attempt to accommodate his religious beliefs to employer's flexible dues requirement) *with* *Burns v. Southern Pac. Transp. Co.*, 589 F.2d 403 (9th Cir. 1978) (employer must show good faith in requiring payment of union dues when the payment of dues is contrary to an employee's religious beliefs), *cert. denied*, 439 U.S. 1072 (1979) *and* *McDaniel v. Essex Int'l, Inc.*,

raising,¹⁸³ clothing preferences,¹⁸⁴ services or tasks relating to objectionable acts,¹⁸⁵ and personal appearance.¹⁸⁶ Following *Olin*, it appears that an employee's religious beliefs need not be accommodated if such accommodation would accord other employees less preferential treatment or if the terms of a bona fide seniority system would be affected. In the absence of either of these factors, employers may have to incur de minimis costs to accommodate employees' religious beliefs.¹⁸⁷ Examples of accommodation that would be appropriate include permitting voluntary substitutes and swaps, flexible scheduling which would provide employees with a choice of times during which they would not work, and systems permitting lateral transfers and a change of job assignments.¹⁸⁸

AGE

Age-based distinctions are neither expressly prohibited by the Illinois Constitution nor suspect under the state or federal equal protection clauses.¹⁸⁹ Consequently, employment policies or statutes based on age will be subject to minimal scrutiny, and thus, upheld provided they are rationally related to a legitimate public purpose.¹⁹⁰ The Human Rights Act, however, prohibits employment discrimination on the basis of age.¹⁹¹ Unlike the

571 F.2d 338 (6th Cir. 1978) (when requiring dues employer must make reasonable attempt to accommodate employee's religious beliefs).

183. In *Gavin v. Peoples Nat'l Gas Co.*, 464 F. Supp. 622 (D.C. Pa. 1979), *vacated and remanded on procedural grounds*, 673 F.2d 482 (3d Cir. 1980), the court recognized that requiring an employer to accommodate an employee's religious disbelief in flag raising unconstitutionally entangles the court with religion.

184. *See, e.g.*, 4 Fair Empl. Prac. Cas. (BNA) 23 (1971) (Title VII violated when employer refused to allow employee to wear the traditional garb characteristic of her Black Muslim faith); 3 Fair Empl. Prac. Cas. (BNA) 172 (1970) (hospital's refusal to allow nurse to wear head covering in accordance with her religious beliefs violated Title VII).

185. *See, e.g.*, *Watkins v. Mercy Medical Center*, 323 F.2d 959 (4th Cir. 1975) (termination of employment due to belief that hospitals should perform abortions found unconstitutional).

186. *See, e.g.*, *Geller v. Secretary of Defense*, 423 F. Supp. 16 (D.D.C. 1976) (air force rule which required a Jewish chaplain to remove his beard found unconstitutional).

187. Some accommodations, for example, permitting persons to wear certain clothing or head coverings do not require any employer expenditures. It has been argued, however, that "there may be the equivalent of a cost [if] unorthodox garb or hairstyle is perceived as damaging the employer's business." LARSON, *supra* note 151, at § 92.41.

188. *See* Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2(d) (1981).

189. *See supra* notes 6 & 21.

190. *See, e.g.*, *Vance v. Bradley*, 440 U.S. 93 (1979) (a forced retirement rule that was rationally related to the valid public purpose of favoring younger officers who may be more efficient and more capable of withstanding physical strain than older officers upheld); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (a rule requiring police officers to retire at age 50 upheld because it was found rationally related to the legitimate goal of ensuring that police officers be physically prepared to meet the rigors of police work); *Tavern Owners Ass'n v. County of Lake*, 52 Ill. App. 3d 542, 547, 367 N.E.2d 748, 752 (2d Dist. 1977) (statute which prohibited persons under the age of 21 from working as bartenders was upheld because rationally related to the goal of liquor control).

191. ILL. REV. STAT. ch. 68, §§ 1-103(Q), 2-102(A) (1981).

previous Illinois statute governing age discrimination which did not define a protected class,¹⁹² the Human Rights Act provides that persons forty years old, but not yet seventy years old, are protected.¹⁹³ Consistent with the former act, the present statute exempts from its general prohibitions certain executive employees¹⁹⁴ and merit and retirement systems "provided such system or its administration is not used as a subterfuge for or does not have the effect of unlawful discrimination."¹⁹⁵

Only one case interprets the age provisions of the Human Rights Act,¹⁹⁶ and judicial interpretation of the statute predating this Act also is sparse.¹⁹⁷ In *Board of Trustees v. Human Rights Commission*,¹⁹⁸ the Illinois Supreme Court held that the compulsory retirement of three tenured professors at the age of sixty-five violated the Human Rights Act. Although compulsory retirement was not expressly within the Act's definition of civil rights violations, the court determined that involuntary retirement on the basis of age prior to the age of seventy could violate the Act.¹⁹⁹ The court next considered whether the retirement system at issue was protected under section 2-104(E)(1). This provision states that it is not unlawful to apply "different terms, conditions or privileges of employment pursuant to a merit or retirement system provided that such system or its administration is not used as subterfuge for or does not have the effect of unlawful discrimination."²⁰⁰

192. Fair Employment Practices Act, 1961 Ill. Laws 1845, *repealed by* Illinois Human Rights Act, Pub. Act. No. 81-1216, § 10-108, 1979 Ill. Laws 4854. Section 881, the legislative declaration of this former Act, indicated that the class of persons the legislature intended to protect was workers over 45 years of age. However, because the statute did not define age and failed to state any age beyond which it was applicable, at least one court looked to the federal law and other states' fair employment practices acts to ascertain the class that the legislature intended to protect. *See Kennedy v. Community Unit School Dist. No. 7*, 23 Ill. App. 3d 382, 319 N.E.2d 243 (4th Dist. 1974) (court concluded that the 45-65 age group appeared to be the protected class).

193. ILL. REV. STAT. ch. 68, § 1-103(A) (1981).

194. *Id.* § 2-104(E)(2).

195. *Id.* § 2-104(E)(1).

196. *See Board of Trustees v. Human Rights Comm'n*, 88 Ill. 2d 22, 429 N.E.2d 1207 (1981). *See infra* text accompanying notes 198-203.

197. *See Teale v. Sears, Roebuck & Co.*, 66 Ill. 2d 1, 359 N.E.2d 473 (1976) (no right to a civil action for damages under the prior statutory scheme); *Kennedy v. Community School Dist. No. 7*, 23 Ill. App. 3d 382, 319 N.E.2d 243 (4th Dist. 1974) (compulsory state retirement system found not to be a subterfuge to evade the Fair Employment Practices Act).

198. 88 Ill. 2d 22, 429 N.E.2d 1207 (1981).

199. *Id.* at 29, 429 N.E.2d at 1211. In reaching this decision, the court noted that "[a] remedial legislation the Act should be construed liberally to effect its purpose." *Id.* at 26, 429 N.E.2d at 1209. The court further observed that the Human Rights Act contains a provision expressly exempting the compulsory retirement of certain high-ranking executives at the age of 65. *Id.* *See* ILL. REV. STAT. ch. 68, § 2-104(E)(2) (1981). If compulsory retirement had not been considered a potential civil rights violation, that exemption would not have been necessary. 88 Ill. 2d at 27-28, 429 N.E.2d at 1210.

200. 88 Ill. 2d at 29, 429 N.E.2d at 1211. The court's holding in *Board of Trustees* appears to have rejected the approach of the Court of Appeals for the Fourth District in *Kennedy v. Community School Dist. No. 7*, 23 Ill. App. 3d 382, 319 N.E.2d 243 (4th Dist. 1974). In *Kennedy*,

The court first rejected the defendant's contention that retirement itself is a condition of employment and that retirement age is a term of any retirement system. "It is not in the terms of the retirement system—the retirement age, for example—that the complainants are treated differently than others. Everyone must retire at the same age. The discrimination is in the retirement itself."²⁰¹ Second, the employer's contention was tantamount to an assertion that all existing retirement systems are exempt from complying with the Act. The court, however, previously had rejected this contention.²⁰² Finally, the court addressed the final phrase of section 2-104(E)(1) which only exempts a merit or retirement system which does "not have the effect of unlawful discrimination." The court had no difficulty in deciding that a system which mandated retirement solely on the basis of age had the effect of unlawful age discrimination.²⁰³

The Illinois Supreme Court's discussion of permissible age distinctions

the court considered whether a school board's involuntary retirement of a 65 year-old teacher under a state retirement system was a subterfuge prohibited under the statute. Nevertheless, the court did not appear to scrutinize the retirement system. It merely observed that the state had "for many years . . . provided a system for teachers' annuity and pension," that the system had "general application to teachers throughout the state," and that the plaintiff "has long qualified under the benefits of such annuity and pension system." *Id.* at 386, 319 N.E.2d at 247. The *Kennedy* court concluded that the state retirement system was not a subterfuge to evade the statute and, accordingly, that the plaintiff's involuntary retirement did not violate the Act. *Id.* at 386, 319 N.E.2d at 247.

To determine whether the system is a subterfuge for, or has the effect of, discrimination, *Board of Trustees* indicates that a retirement system should be scrutinized more carefully than the analysis in *Kennedy* suggests. In support of this approach, the court referred to *United Airlines v. McMann*, 434 U.S. 192 (1972), where the United States Supreme Court held that a retirement plan which had been instituted in good faith prior to the passage of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1976), could not be a subterfuge to avoid the purposes of the Act. The Illinois Supreme Court noted that the *McMann* Court was construing different statutory language than that of the federal Act, and implied that this justified the difference in results. Although the statutory language construed in the two cases was not identical, their differences do not explain the different results obtained.

Specifically, the federal Act provides that it is not unlawful for an employer "to observe the terms of a bona fide . . . system . . . such as a retirement . . . plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual. . . ." *Id.* at § 621(b). Shortly after *McMann* was decided, Congress amended the Act. The legislative history to this amendment clearly demonstrates that Congress did not intend to exempt retirement or pension systems merely because they antedated the Act. See CONGRESSIONAL REPORT ON THE 1978 AMENDMENTS TO THE AGE DISCRIMINATION IN EMPLOYMENT ACT, H.R. REP. NO. 950, 95th Cong., 2d Sess. 8 (1978). *Cf.* *Thompson v. Chrysler Corp.*, 569 F.2d 989 (6th Cir. 1978) (retirement plan held not a subterfuge for age discrimination where pension policy followed retirement); *Minton v. Whirlpool Corp.*, 569 F.2d 1012 (7th Cir. 1978) (discharge upheld because no finding of subterfuge in retirement plan); *Hannan v. Chrysler Motors Corp.*, 443 F. Supp. 802 (E.D. Mich. 1978) (bona fide retirement plan held to be used in discriminatory manner when age was the only factor used in determining whether a person was retired rather than laid off subject to recall).

201. 88 Ill. 2d 22, 30, 429 N.E.2d 1207, 1211 (1981).

202. See *supra* note 199.

203. 88 Ill. 2d at 35, 429 N.E.2d at 1214.

provides insight into how the court may decide future cases. The court appears to have created a balancing test to determine whether age differentials in employer plans violate the Act. If the plan's discriminatory feature also serves the purpose of assisting the older worker, it may be permissible. The court provided the examples of provisions requiring greater contributions to the pension fund from older workers and provisions providing different benefits to employees based on age.²⁰⁴ Using these examples as a basis for its discussion, the court said that

the focus in assessing whether a different standard is permitted . . . is on the effects the system will have with the different standard incorporated into it. . . . So long as . . . their *overall impact* do[es] not turn the system into one which favors or disfavors employees on the basis of age or any other unlawful discrimination, the system does not run afoul. . . .²⁰⁵

The court then observed that differential pension contributions and health insurance coverage based on age were "not only fair and rational, but also necessary to prevent the employer's obligation to hire without regard to age from being undermined by the exorbitant cost of hiring older people."²⁰⁶ In contrast, the problem with compulsory retirement is that it is "neither necessary nor fair" and "has the effect so dramatic and arbitrary that it must be considered unlawful discrimination."²⁰⁷

Because of this lack of precedent interpreting the Illinois law, practitioners must look to the substantive provisions of the Federal Age Discrimination in Employment Act²⁰⁸ and Title VII²⁰⁹ which are similar to the provisions of the Illinois Act. Federal case law indicates that the order and allocation of burdens of proof delineated in *McDonnell Douglas Corp. v. Green*²¹⁰ and *Texas Department of Community Affairs v. Burdine*,²¹¹ both Title VII cases, are applicable in federal age discrimination cases.²¹² It generally has been held that a plaintiff need not prove discrimination in favor of persons outside the protected class to succeed in an age discrimination case.²¹³ For example, a sixty-five-year-old person who is replaced by a

204. *Id.* at 33-34, 429 N.E.2d at 1213.

205. *Id.* at 33, 429 N.E.2d at 1213.

206. *Id.* at 34, 429 N.E.2d at 1213.

207. *Id.* at 34, 429 N.E.2d at 1214. The court's determination that compulsory retirement was not necessary was based partially upon the fact that many divisions of the state college and university system operated without the requirement. *Id.*

208. 29 U.S.C. §§ 621-634 (1976 & Supp. III 1979).

209. 42 U.S.C. § 2000e (1976) (Equal Employment Opportunities).

210. 411 U.S. 792 (1973). See *supra* notes 52-57 and accompanying text.

211. 450 U.S. 248 (1981). See *supra* note 54 and accompanying text.

212. See *Smith v. Farah Mfg. Co.*, 650 F.2d 64 (5th Cir. 1981) (the evidentiary burden is on the employer to rebut the prima facie case of discrimination by a preponderance of the evidence); *Rodriguez v. Taylor*, 569 F.2d 1231 (3d Cir. 1977) (burden on defendant to show non-discriminatory motive).

213. In *McCorstim v. U.S. Steel Corp.*, 621 F.2d 749 (5th Cir. 1980), the court held that replacement of a discharged employee by a person from a nonprotected class was not a re-

forty-five-year-old person has just as strong a case when the replacement is less than forty years old and hence not a member of the protected class.²¹⁴

It is not clear whether a disparate impact theory of unlawful age discrimination is available under the federal Act. Unlike Title VII, the Federal Age Discrimination in Employment Act expressly permits distinctions based upon "reasonable factors other than age."²¹⁵ This provision may permit facially-neutral factors to have a disproportionate impact on older persons. For example, physical qualifications or decisions based upon cost²¹⁶ to the employer might be found lawful under the federal Act. Nevertheless, federal cases under the age Act have invalidated employment practices which were proven to have a disparate impact and were not shown to be job related.²¹⁷ Thus, if these federal decisions are followed in the Illinois courts, any requirement which results in a disproportionate impact on the aged must be job related to be valid.

The federal law, similar to the Illinois Human Rights Act, permits age discrimination where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.²¹⁸ In *Dothard v. Rawlinson*,²¹⁹ a Title VII case, the court explained that the bona fide occupational qualification defense is "extremely narrow."²²⁰ An employment practice which excludes all members of a protected class—for example, a prohibition of women from occupying certain positions as prison guards—is valid "only when the *essence* of the business operation would be undermined" by an alternative rule²²¹ and when there exists a

quirement for a prima facie case of age discrimination. See also Age Discrimination in Employment, 29 C.F.R. § 860.91 (1981) (prohibits discrimination within the 40-65 age bracket; therefore, if two individuals within this group apply for a single job, employment decision must be made on non-age based factors).

214. See LARSON, *supra* note 151, at § 98.53.

215. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(f)(1) (1976) (permits qualifications based on age if reasonably necessary to normal business operations).

216. Cost-based employer decisions may have a more negative impact on older, more highly paid workers. See 46 Fed. Reg. 47,727 (1981) (a differentiation based on the average cost of employing older employees as a group is unlawful except with respect to certain employee benefit plans) (to be codified at 29 C.F.R. § 1625.7(f)). See generally LARSON, *supra* note 151, at § 100.25; Note, *The Cost of Growing Old: Business Necessity and the Age Discrimination in Employment Act*, 88 YALE L.J. 565 (1979).

217. See *Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Laugensen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975). Recently promulgated EEOC regulations assert that to be upheld under the Act, employment criteria which have a disparate impact on members of the protected age group must be justified as business necessities. 46 Fed. Reg. 47,727 (1981) (to be codified at 29 C.F.R. § 1625.7(d)).

218. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1976). The corresponding provision in Illinois is the Human Rights Act, ILL. REV. STAT. ch. 68, § 2-104(A) (1981).

219. 433 U.S. 321 (1977).

220. *Id.* at 334. See also Age Discrimination in Employment, 29 C.F.R. § 1604.2 (1981) (exception permitting bona fide occupational qualifications based on age shall be interpreted narrowly).

221. 433 U.S. at 333 (emphasis in original) (quoting *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (femaleness was not a bona fide occupational qualification for

“factual basis for believing that all or substantially all [class members] . . . would be unable to perform safely and efficiently the duties of the job involved.”²²²

The United States Supreme Court has not defined the parameters of the bona fide occupational qualification for the purposes of the federal age Act. Although several circuits have addressed the issue,²²³ these decisions evidence disagreement as to whether the defense is as narrowly interpreted under the age Act as it is under Title VII.²²⁴ For example, in *Hodgson v. Greyhound Lines*,²²⁵ the Court of Appeals for the Seventh Circuit determined that an employer need not demonstrate a factual basis for believing that “all or substantially all” persons over the age of thirty-five would be unable to drive safely and efficiently to justify the maximum hiring age requirement as a bona fide occupational qualification. Rejecting the standard of Title VII and circuits which had adopted this standard in age Act cases, the *Greyhound* court determined that when the safety of others is at issue, age limitations may be a bona fide occupational qualification if the employer has a reasonable basis in fact for believing that the elimination of its maximum hiring age will increase the likelihood of risk to other persons.²²⁶

the job of flight cabin attendant), *cert. denied*, 404 U.S. 950 (1971)). See also *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (6th Cir. 1969) (maleness was not a bona fide occupational qualification for the job of switchman).

222. 433 U.S. at 333 (1977).

223. See, e.g., *Arritt v. Grisell*, 567 F.2d 1267 (4th Cir. 1977) (employer must prove that occupational qualification is reasonably necessary to his business and that there exists a reasonable basis for believing that those within the age classification could not perform their tasks, or that it would be unduly burdensome to individually scrutinize those within the age group); *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.) (finding that age constitutes a bona fide occupational qualification must be based on evidence relating to age factors of the specific occupation in which plaintiff was engaged, not on age factors of the general population), *cert. denied*, 434 U.S. 966 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (defendant's occupational qualification upheld because plaintiff failed to show that defendant could make individual determination as to job safety and efficiency of persons within the age classification); *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974) (because of bus company's duty to assure passenger safety, bus company need only demonstrate a minimal increase in the risk of harm without the age classification in order to prove a bona fide occupational qualification), *cert. denied sub nom. Brennan v. Greyhound Lines*, 419 U.S. 1122 (1975).

224. Compare *Hodgson v. Greyhound Lines*, 499 F.2d 859 (7th Cir. 1974) (proof that among the general population the human body deteriorates after age 35 brought maximum hiring age policy within the bona fide occupational qualification exception for the position of intercity bus driver) with *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir. 1977) (some evidence showing that test pilots aged more slowly than members of the general population was found inadequate to sustain pilot's termination due to age when age was claimed to be a bona fide occupational qualification).

225. 499 F.2d 859 (7th Cir. 1974).

226. *Id.* at 863. Practitioners in the area of employment discrimination also should be aware of the retaliatory discharge cause of action. In *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the court recognized a case of action for retaliatory discharge when the

CONCLUSION

Comparatively, the law of employment discrimination in Illinois is substantially less developed than federal law. The full contours of both constitutional and statutory protections remain largely unexplored. The state laws nevertheless provide employees and job applicants with a considerable arsenal of rights which may often be vindicated at considerably less expense than resort to the federal system typically involves.

action for which the employee was terminated was an exercise of a statutory right even in the absence of a statutorily provided remedy for employer interference with that right. *See generally* Grove & Garry, *Employment-at-Will in Illinois: Implications and Anticipations for the Practitioner*, 31 DEPAUL L. REV. 359 (1982).