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## STATE CONSTITUTIONAL RIGHT TO DAMAGES FOR PRIVATE DISCRIMINATION IN EMPLOYMENT —WALINSKI V. MORRISON & MORRISON

In 1970, the Sixth Illinois Constitutional Convention proposed a series of constitutional provisions that prohibited discrimination against minorities and women.<sup>1</sup> Article one, section 17 of the ratified constitution is a provision specifically prohibiting state and private discrimination in employment and the sale or lease of property on the basis of race, color, religion, sex, or national origin.<sup>2</sup> Until recently, the cases which considered section 17 in their decisions mentioned it incidentally<sup>3</sup> or as only one of several reasons for the decision.<sup>4</sup> A recent appellate court decision, *Walinski v. Morrison &*

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1. The provisions included a broadly worded due process and equal protection clause: ILL. CONST. art. I, § 2. Also included was a specific prohibition against sex discrimination by the state, its local units of government and school districts: ILL. CONST. art. I, § 18. See generally Turkington, *Equal Protection of the Laws in Illinois*, 25 DEPAUL L. REV. 385 (1976).

2. Section 17 states:

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

ILL. CONST. art. I, § 17.

3. See *Brunsfeld v. Bd. of Educ. of Chicago*, 54 Ill. App.3d 119, 125, 369 N.E.2d 283, 287 (1st Dist. 1977); *FEPC v. Rush Presbyterian-St. Luke's Medical Center*, 41 Ill. App.3d 712, 714, 354 N.E.2d 596, 598 (1st Dist. 1976).

4. The most important decision in this regard is *Davis v. Attic Club*, 56 Ill. App.3d 58, 371 N.E.2d 903 (1st Dist. 1977), in which the court held that private clubs were exempted from section 17. The court relied heavily on the Liquor Control Act, ILL. REV. STAT. ch. 43, §§ 95.24, 133 (1977), for the exemption. The *Davis* court held that since the statute in question did not forbid discrimination in membership, but only in service or facilities, women could be barred from the clubs at luncheon. The court pointed out that the drafters of section 17 did not intend the provision to apply to voluntary associations. 56 Ill. App.3d at 69, 371 N.E.2d at 911. "And the fact that a private club gets some kind of permit from the State or municipality does not make it *ipso facto* a public enterprise or undertaking...." 56 Ill. App.3d at 65, 371 N.E.2d at 909.

The plaintiffs contended that refusal to sell liquor at luncheon to women was a violation of section 17's prohibition of discrimination in the sale of property. While the *Davis* court agreed that section 17 applies to personal as well as real property, it held that private clubs were exempt from section 17 based on the intent of the drafters of section 17 to exclude voluntary associations from the provision. 56 Ill. App.3d at 70, 371 N.E.2d at 912. One writer has suggested that the court's duty under section 17 is merely to decide if express exemptions to section 17, passed prospectively by the General Assembly, are reasonable. The court did not need to attempt to find implied exemptions in legislation that had been passed before section 17 was ratified. See Gertz, *The Unrealized Expectations of Article I, Section 17*, 11 J. MAR. J. PRAC. & PROC. 283, 313 (1978). See also *Ranquist v. Stackler*, 55 Ill. App.3d 545, 554-55, 370 N.E.2d 1198, 1205-06 (1st Dist. 1977) (relying mainly on the Real Estate Brokers and Salesmen

*Morrison*,<sup>5</sup> relied exclusively on section 17. The court in *Walinski* held that a private right to seek compensatory and punitive damages exists under section 17.<sup>6</sup> The court's decision was based primarily on the legislative intent of the drafters of section 17 as shown by the constitutional debates.

This Note will examine the *Walinski* court's rationale for acknowledging a right to a trial for damages. The Note will then discuss why the damages remedy under section 17 is preferable to many of the other discrimination remedies now in existence. The limits of this remedy will also be examined. Finally, the Note will analyze some of the many questions left unanswered by *Walinski*.

#### DECISION OF THE COURT

In *Walinski*, the petitioner was a college senior seeking a part-time, general office position with the accounting firm of Morrison & Morrison. The respondent's employee, Joan Richards, allegedly "wantonly refused the plaintiff an opportunity to be considered for the job by voluntarily admitting that she was looking for a male employee."<sup>7</sup> The plaintiff claimed employment discrimination on the basis of sex under section 17 and asked the court for \$1000 in actual damages, \$4000 in punitive damages, and court costs. In lieu of an answer, the defendant moved for dismissal, alleging failure to state a claim which would warrant the relief prayed for because of the petitioner's

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Licence Act, ILL. REV. STAT. ch. 114½, § 115(e) (1975) (current version ILL. REV. STAT. ch. 111, § 5732 (1977)).

5. 60 Ill. App.3d 616, 377 N.E.2d 242 (1st Dist. 1978).

6. The prohibition of discrimination in the sale or rental of property is also a part of section 17. In *United States General, Inc. v. City of Joliet*, 432 F.Supp. 346 (N.D. Ill. 1977), the court mentioned section 17, but declined to decide the case solely on this state law issue. The case was dismissed when the court found that the developer lacked standing to sue on behalf of possible minority purchasers of real estate for the city's refusal to grant building permits allegedly in violation of the Fair Housing Act of 1968, 42 U.S.C. §§ 3604, 3617 (1970). In *Ranquist v. Stackler*, *supra* note 4, a real estate agent had his license suspended for deliberately discouraging a white purchaser from certain areas for racial reasons. Although the decision relied mainly on the Real Estate Brokers and Salesmen Licence Act, ILL. REV. STAT. ch. 114½, § 115(e) (1975) (current version at ILL. REV. STAT. ch. 11, § 5732 (1977)), section 17 was mentioned as authority for the decision. Yet even in these recent cases, there is no reliance on section 17 as a primary authority. In *Brunsfeld*, the court upheld the Chicago School Board's requirement that contractors who received public contracts must maintain acceptable affirmative action programs. While *Brunsfeld* mentions section 17 as one ground for the decision, it relies mainly on the Fair Employment Practices Act, ILL. REV. STAT. ch. 48, § 854 (1973), and the Act to Prohibit Discrimination and Intimidation on Account of Race, Creed, Color, Sex or National Origin in Employment under Contracts for Public Buildings or Public Works, ILL. REV. STAT. ch. 29, § 17 (1973), (current version at ILL. REV. STAT. ch. 29 § 17 (1977)).

7. 60 Ill. App.3d at 618, 377 N.E.2d at 243.

reliance on section 17 for the remedy of damages.<sup>8</sup> The trial court granted the dismissal, but the appellate court reversed and remanded for trial.<sup>9</sup>

The appellate court was forced to address the fact that section 17 did not expressly provide money damages as a remedy for employment discrimination. In construing section 17, the court decided to adhere to the intent of the drafters by consulting the relevant debates of the constitutional convention.<sup>10</sup> These debates revealed that the drafters of section 17 intended to create an enforceable right to money damages for employment discrimination through a trial:

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8. *Id.* at 618, 377 N.E.2d at 243-44.

9. In addition, the defendant alleged failure to plead proximate cause and particular damages in the cause of action. The appellate court found that there were sufficient factual allegations of discrimination to state a cause of action under the liberal Illinois pleading statute. See the Illinois Civil Practice Act, ILL. REV. STAT. ch. 110, § 4 (1977), stating that, "This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties." See *Fleshner v. Copeland*, 13 Ill.2d 72, 77, 147 N.E.2d 329, 332 (1958), construing the Act as removing the barriers of the old formal pleading system. In regard to pleading, Illinois courts have held that the essential test of a complaint is that it inform the defendant of a valid claim over which the court has jurisdiction. See also *Fanning v. Lemay*, 78 Ill. App.2d 166, 222 N.E.2d 815 (5th Dist. 1966), *rev'd* 38 Ill.2d 209, 230 N.E.2d 182 (1967); *Irving v. Rodriguez*, 27 Ill. App.2d 75, 169 N.E.2d 145 (2d Dist. 1960); *Hall v. Gruesen*, 22 Ill. App.2d 465, 161 N.E.2d 345 (1st Dist. 1959).

In the case relied upon by the *Walinski* court, *Louis v. Barenfanger*, 81 Ill. App.2d 104, 226 N.E.2d 85 (5th Dist. 1966), *aff'd*, 39 Ill.2d 445, 236 N.E.2d 724 (1968), *cert. den.*, 393 U.S. 935 (1968), the Illinois courts reached their most liberal position stating that "unless it clearly appears that no set of facts can be proved under the pleadings, which will entitle the plaintiff to recover," a claim should not be dismissed. 81 Ill. App.2d at 110, 226 N.E.2d at 88.

10. The court relied on *People ex rel. McDavid v. Barrett*, 370 Ill. 478, 480, 19 N.E.2d 356, 358 (1939), for the holding that the intent of the drafters should be the guide in construing any constitutional provision. *McDavid* held that in seeking such an intent, the courts should consider (1) the language used, (2) the object to be attained, or (3) the evil to be remedied. Courts should not apply so strict a construction as to exclude the provision's real object or intent.

The Illinois Supreme Court has a strikingly good record for following the intent of the drafters of the 1970 Illinois Constitution, as far as that intent can be determined. See Lousin, *Constitutional Intent: The Illinois Supreme Court's Use of the Record in Interpreting the 1970 Constitution*, 8 J. MAR. J. PRAC. & PROC. 189, 190 (1974-75). According to the above named article, of the thirty-three cases decided under the constitution analyzed by Ms. Lousin, the Illinois Supreme Court alluded to the history of the drafting in twenty-seven, or in 81.8% of the cases.

Of course, the intent of the drafters is not always easy to determine. It is often determined by the use of the external or unofficial record of the constitutional debates. For examples of the external record see G. BRADEN & R. COHN, *THE ILLINOIS CONSTITUTION: AN ANNOTATED AND COMPARATIVE ANALYSIS* (1969) (an analysis of the 1870 and 1920 Illinois Constitutions for use by the members of the 1969-70 Illinois Constitutional Convention); R. HELMAN & W. WHALEN, *Constitutional Commentary*, ILL. ANN. STAT. Const. art. I, § 17 (Smith-Hurd). Ms. Lousin reports that ten of the the thirty-three cases analyzed in 1975 cited external sources.

The primary record of the proceedings, however, was the seven volume *RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION* (1972), published by the Secretary of State. Of the thirty-three cases Ms. Lousin studied, the Illinois Supreme Court had mentioned the reports of six different committees in nineteen separate opinions. For a collection of cases mentioning this "intrinsic" record, see Lousin, *supra* at 202 n.45.

After he brings his lawsuit he has to put a dollar value on this constitutional right; and then he has to convince a jury that this dollar value is fair, because the defendant would be entitled to have the amount of damages determined by a jury, and also, if it is way out of the ballpark, the court has the right to reduce it.<sup>11</sup>

The debates indicated an intent to permit the courts to fashion the particulars of this remedy on a case-by-case basis.<sup>12</sup> Thus, the *Walinski* court

11. RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION *Verbatim Transcripts*, vol. III at 1593 (1972) [hereinafter cited as *Verbatim Transcripts*].

12. The delegates' concern that the second part of section 17, referring to the self-executing nature of the provision, was an attempt to usurp legislative power is evidence that they knew and accepted section 17 as self-executing. The following debate occurred:

MR. CONNOR: I'm interested in the expression, "These rights shall be enforceable without action by the General Assembly." No other provision of the bill of rights contains those words. Is that because—I have heard that this is because this was an attempt to override the nonaction of the Illinois legislature, is that true?

MR. WILSON: Well, I don't know anything about that. We didn't talk about the Illinois legislature in our committee; but these words are in there for the express purpose of avoiding any contention that (1) this is a hortatory kind of statement or (2) that it is a right which does not come into play or into being or does not become effective until action is taken by the General Assembly.

MR. CONNOR: But this is the only provision of the bill of rights that contains that specific language?

MR. WILSON: Off the top of my head, I believe that's right.

MR. CONNOR: So the implication either is that the others are hortatory or that you didn't require—or see the need to demand specific self-enforcement? . . .

. . . MR. WILSON: This is a new right. It—as I pointed out—is a departure from what has been historic and what has been traditional, and it was the judgment of the committee that these words were necessary to make it perfectly clear. I don't think anybody is under any illusion that the provisions in the constitution on free speech and free assembly and freedom of worship are hortatory. You are raising a highly theoretical point there that I don't think even would bother lawyers or courts.

*Verbatim Transcripts*, *supra* note 11, vol. III at 1596. The drafters made the following statement about the court's duty to fashion the remedy on a case-by-case basis:

MR. S. JOHNSON: Delegate Wilson, I'd like to ask you two or three questions about this self-enacting provision. Exactly how would that work? Supposing—supposing I had a grievance against someone and no remedy was found in statute law; how would I file a charge and what would happen after that?

MR. WILSON: Well, if we are right—and I think we are right about this, Mr. Johnson—that this provision does create a right and the legislature has not set up any procedure, the courts are not powerless to find a remedy and to establish a remedy. This is what courts are doing all the time. You know there is no statutory definition, for example, of due process of law. The courts are—decide what is due process of law, and they decide this; and this has been the genius, of course, of the English common law. They decide this on a case-by-case basis, and so it would be here. In the absence of action by the legislature, the courts would decide on a case-by-case basis whether or not there has been discrimination within the purview of this statute—of this constitutional provision.

*Verbatim Transcripts*, *supra* note 11, vol. III at 1597.

The *Walinski* court also inferred the right to damages under section 17 through the case of *McConnel v. Kibbe*, 33 Ill. 175 (1864), which held that the law infers a right to damages from

reasoned that the drafters of section 17 intended the provision to apply to fact situations like Ms. Walinski's since it was an alleged case of sex discrimination in the hiring practices of a private employer.

The defendant asked the court to limit the damages sought by drawing an analogy between section 17 and another anti-discrimination statute, the Age Discrimination Act.<sup>13</sup> The defendant cited *Teale v. Sears, Roebuck & Company*<sup>14</sup> in which the Supreme Court of Illinois held that civil actions for damages were not permitted under the Act's penalty clause, which limited the penalty to a \$100 fine. The *Walinski* court dismissed the comparison between *Teale* and *Walinski* stating that the drafters did not insert a penalty clause into section 17 as they did into the Age Discrimination Act.<sup>15</sup> The *Walinski* court concluded that the drafters intended section 17 to be self-executing.<sup>16</sup> Since there was no evidence of any restrictive intent by the drafters, the court held that money damages in an unspecified amount were available without enabling legislation by the General Assembly. The case was therefore remanded for trial on the merits.

#### THE BASIS FOR IMPLYING A PUNITIVE DAMAGES REMEDY UNDER SECTION 17

From the drafters' general intent to grant money damages, the *Walinski* court found a right not only to actual damages but also to punitive damages.

every infringement of a right. In a suit to obtain nominal damages for a disturbance to property caused by the defendant, the *McConnel* court held that for an injured property right, nominal damages may be recorded. *Id.* at 179. But the receipt of nominal damages does not bar a later suit for actual damages arising from continuing damage to the property. *McConnel* derived this right to damages from the common law. *See Sampson v. Hoddinott*, 107 Rev. R. 809 (C.B.N.S. 1857); *Fay v. Prentice*, 68 Rev. R. 823 (C.B. 1845).

13. ILL. REV. STAT. ch. 48, §§ 884, 887 (1977), states:

It is an unlawful employment practice...to refuse to hire, to discharge, or otherwise to discriminate against an individual...because of such individual's age... Any person who wilfully fails...to comply with this Act shall be guilty of a petty offense and fined not less than \$50 nor more than \$100 for each such offense.

14. 66 Ill.2d 1, 359 N.E.2d 473 (1976).

15. 60 Ill. App.3d at 620, 377 N.E.2d at 245.

16. Self-executing constitutional provisions are complete in themselves and become operative without enabling legislation. *See State ex rel. Russell v. Bliss*, 156 Ohio St. 147, 101 N.E.2d 289 (1951).

Although the drafters acknowledged that the provision was self-executing (*see generally* the debates cited note 12 *supra*), the Committee was concerned that the provision might not be interpreted and applied as self-executing. The Committee pointed out: "There is reason to doubt that this type of provision creates any independent right or remedy against discrimination." RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION *Committee Proposals*, vol. VI at 71 (1972) [hereinafter cited as *Committee Proposals*]. New York had a similar provision prohibiting private discrimination and it was found that the provision was not effective until implemented by legislation because "the civil rights protected by the clause in question were those already denominated as such in the Constitution itself, in the Civil Rights Law or in other statutes." *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 531, 87 N.E.2d 541, 548 (1949). This case shows that the courts are cautious in implying a remedy where other

The source of the court's power to do this under section 17 actually rests with the legislative intent that the remedies be fashioned by the courts initially.<sup>17</sup> The drafters maintained that what constitutes discrimination under section 17 should be decided on a case-by-case basis.<sup>18</sup>

It is not unusual for Illinois courts to develop a remedy based on case-by-case analysis. Illinois courts have held that an employer can be liable for punitive damages for the tortious act of an employee if the employer had full knowledge of the act and ratified it.<sup>19</sup> Illinois courts have also implied a right to punitive damages for violation of the Illinois Civil Rights Act,<sup>20</sup> although the Act mentions only a fixed fine as the penalty.<sup>21</sup> These cases either grant punitive damages without discussion,<sup>22</sup> or allow punitive damages as a punishment for the wantonness of the exclusion.<sup>23</sup> Thus, there is

provisions cover the same violations. Illinois has another constitutional provision that provides equal protection of the laws to all persons. See ILL. CONST. art I, § 2. The *Walinski* decision is important because it avoids the *Dorsey* result and acknowledges that the drafters of section 17 intended the remedy to be self-executing.

17. See note 12 *supra*.

18. The drafters said the following about enforcement under section 17:

They decide this on a case-by-case basis, and so it would be here. In the absence of action by the legislature, the courts would decide on a case-by-case basis whether or not there has been discrimination. . . .

*Verbatim Transcripts, supra* note 11, vol. III at 1597. See generally C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 3.26 (1972).

19. See *Mackin v. Blythe*, 35 Ill. App. 216, 221 (1st Dist. 1889) (recognizing this principle but not finding the proper facts for recovery to be present in the case). Ratification has been defined to mean "some overt act or declaration having reference to the act ratified, susceptible of positive proof; . . . ill will on the part of appellant toward appellee, however manifested, except by some act or expression having direct reference to the particular trespass committed. . . , does not tend to prove a ratification. . . ." *Arasmith v. Temple*, 11 Ill. App. 39, 56 (2d Dist. 1882) (but rejecting the notion that an employer can be held for punitive damages for merely subsequently ratifying the act of an employee). But see *Thames Steamboat Co. v. Housatonic*, 24 Conn. 40 (1855) (holding that an employer may be held directly liable for trespass only if the tortious act is ordered by the employer, while an employer's liability for an action on the case may arise from torts committed within the employee's authority); *Tuller v. Voght*, 13 Ill. 278 (1851) (the employer must order the employee to be directly liable). In common law actions, the employer was not liable unless the employee was acting within the line of employment with the employer. *Chicago City Ry. Co. v. Mogk*, 44 Ill. App. 17 (1st Dist. 1892).

20. ILL. REV. STAT. ch. 38, §§ 13-1 to 13-4 (1977).

21. *Id.* § 13-3(b). See also *Chicago & Nw. Ry. Co. v. Williams*, 55 Ill. 185, 190, 8 Am. Rep. 641, 645 (1870) (wanton exclusion from a railcar allowed the plaintiff to collect for indignity, vexation and disgrace); *Fanning v. Brandl*, 178 Ill. App. 224, 227 (1st Dist. 1913) (damages for humiliation in an assault and battery case were sustained); *Johnson v. Lamm*, 156 Ill. App. 287, 291 (1st Dist. 1910) (sustaining damages for humiliation in an assault and battery case); *Chicago & Alton Ry. Co. v. Tracey*, 109 Ill. App. 563 (4th Dist. 1903) (pain and suffering were compensated for in an assault on a passenger by a railroad watchman).

22. See *Fanning v. Brandl*, 178 Ill. App. 224, 227 (1st Dist. 1913); *Johnson v. Lamm*, 156 Ill. App. 287, 291 (1st Dist. 1910); *Chicago & Alton Ry. Co. v. Tracey*, 109 Ill. App. 563 (4th Dist. 1903).

23. See *Chicago & Nw. Ry. Co. v. Williams*, 55 Ill. 185, 190, 8 Am. Rep. 641, 645 (1870).

ample precedent in Illinois, both through common law and statutory construction, for implying punitive damages under section 17.

While the *Walinski* court never made the comparison between the remedy fashioned for section 17 and remedies now available under the primary federal civil rights statute, such a comparison lends support to its decision to permit actual and punitive damages under section 17. Although some courts have found that compensatory damages are available under Title VII,<sup>24</sup> most hold that compensatory damages are outside the scope of Title VII remedies.<sup>25</sup>

Although it has been commonly held that punitive damages are not available in Title VII actions,<sup>26</sup> several legal writers have argued that such a rem-

24. Title VII relief is limited to equitable remedies which can include backpay awards for economic harm. See The Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(Supp. V 1975). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975). One court held that compensatory damages are available under Title VII when an equitable remedy like reinstatement is useless, as in the case of a disabled plaintiff. *Humphrey v. Southwestern Portland Cement Co.*, 369 F. Supp. 832, 842-43 (W.D. Tex. 1973), *rev'd on other grounds*, 488 F.2d 691 (5th Cir. 1974). The court in *Rosen v. Public Service Electric and Gas Co.*, 477 F.2d 90, 95-96 (3d Cir. 1973), granted increased pension benefits to make male recipients equal to females. It has been argued that *Rosen* is merely an extension of the equitable backpay remedy allowed by Title VII and is therefore not an award of true compensatory damages under Title VII. See *Presseisen v. Swarthmore College*, 71 F.R.D. 34, 45-46 n.12 (E.D. Pa. 1976).

25. Most courts have denied compensatory damages under Title VII, holding that such damages do not fall into the equitable remedies permitted by the Act. See *Crouch v. United Press International*, 10 Empl. Prac. Dec. 5706 (S.D.N.Y. 1975); *Jiron v. Sperry Rand Corp.*, 423 F. Supp. 155, 167 (D. Utah 1975); *Howard v. Lockheed-Georgia Co.*, 372 F. Supp. 854, 856 (N.D.Ga. 1974); *Waters v. Heublein, Inc.*, 8 Empl. Prac. Dec. 5308 (N.D.Cal. 1974); *Attkisson v. Bridgeport Brass Co.*, 5 Empl. Prac. Dec. 7482 (S.D.Ind. 1972).

Of course, backpay compensatory damages are awarded regularly, although they are termed an "equitable" remedy by the courts. See *Curtis v. Loether*, 415 U.S. 189, 197 (1974); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969). See also *Patterson v. American Tobacco Co.*, 9 Empl. Prac. Dec. 6781 (E.D.Va. 1974) (awarding backpay and an adjustment in pension and profit sharing benefits), *aff'd in part, remanded*, 535 F.2d 257 (4th Cir. 1976); *Peters v. Missouri-Pacific R.R. Co.*, 3 Empl. Prac. Dec. 6927 (E.D.Tex. 1971) (granting backpay, reinstatement and interest under Title VII), *aff'd*, 483 F.2d 490 (5th Cir. 1973), *cert. denied*, 414 U.S. 1002 (1973). For collected cases on backpay awards see 1 EML. PRAC. GUIDE (CCH) ¶ 2625.

Courts have also awarded back pension and profit sharing damages. See *Chastang v. Flynn & Emrich Co.*, 365 F. Supp. 957, 969 (D. Md. 1973) (allowing recovery of a vested interest in a pension fund), *aff'd in part*, 541 F.2d 1040 (4th Cir. 1976); *Patterson v. American Tobacco Co.*, *Id.* (awarding pension and profit sharing benefits); *Rosen v. Public Service Electric and Gas Co.*, note 25 *supra* (granting retirement benefits under Title VII).

26. Most courts that have considered whether to grant punitive damages under Title VII have refused to grant them. See *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 308-10 (6th Cir. 1975), *vacated and remanded*, 431 U.S. 951 (1977); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1368-71 (S.D.N.Y. 1975); *Loo v. Gerarge*, 374 F. Supp. 1338, 1341-42 (D. Haw. 1974); *Howard v. Lockheed-Georgia Co.*, 372 F. Supp. 854, 855-56 (N.D.Ga. 1974); *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829, 835-38 (N.D.Cal. 1973). Three salient reasons for denying punitive damages under Title VII can be given:

- 1) the legislative history of § 2000e-5(g) shows the intent of Congress not to include punitive damages as a remedy;



edy should be implied under Title VII.<sup>27</sup> As a punitive remedy it would provide increased incentive for the employer to comply with the law.<sup>28</sup> Such a remedy would also provide an incentive for employees to bring suits for the possible punitive damages awards.<sup>29</sup> Another reason suggested is that punitive damages provide compensation for the intangible injuries not covered in a suit allowing only actual damages.<sup>30</sup> Another strong argument for permitting punitive damages in section 17 suits is that they are not generally

2) § 2000e-5(g) is modeled after the National Labor Relations Act, 29 U.S.C. § 160

(b) and (c), which does not allow exemplary damages; and

3) Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c), expressly provides for damages as a remedy, whereas Title VII does not.

*Loo v. Gerarge, id.* at 1342 n.7. Thus, the purpose of Title VII is "primarily as a tool to ensure that opportunities for employment were in fact equal: it was not described as a punitive measure against those who frustrated equal employment." *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. at 837.

But see *Claiborne v. Illinois Cent. R.R.*, 401 F. Supp. 1022, 1027 (E.D. La. 1975) (granting \$50,000 in punitive damages under Title VII); *Holodnak v. Avco Corp.*, 381 F. Supp. 191, 206 (D. Conn. 1974) (granting \$10,000 in punitive damages); *Stamps v. Detroit Edison Co.*, 365 F. Supp. 87, 124 (E.D. Mich. 1973) (granting \$4,250,000 in punitive damages), *rev'd sub nom*, *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 309 (6th Cir. 1975) (holding the award of punitive damages improper), *vacated and remanded*, 431 U.S. 951 (1977).

27. See Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. C.R.-C.L. L. REV. 325 (1974); Note, *Tort Remedies for Employment Discrimination under Title VII*, 54 VA. L. REV. 491 (1968); Comment, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259-69 (1970-71).

28. This argument may be specious under Title VII, since no showing of discriminatory intent is necessary, only a disparate impact. See *Nashville Gas Co. v. Satty*, 434 U.S. 136, 141 (1978); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). A different possibility exists under a constitutional provision, however, since the Court has ruled that intent to discriminate was necessary under the Fifth Amendment. See *Washington v. Davis*, 426 U.S. 229, 239 (1976). In *City of Cairo v. FEPC*, 21 Ill. App. 3d 358, 363, 315 N.E.2d 344, 348 (5th Dist. 1974), the Illinois court applied the *Griggs* impact test in a statutory action under the Fair Employment Practices Act. But Illinois courts may yet adopt the *Washington* intent test for actions under section 17, a constitutional provision. See also C. McCORMICK, *LAW OF DAMAGES* 275 (1935); Gertz, *The Unrealized Expectations of Article I, Section 17*, 11 J. MAR. J. PRAC. & PROC. 283, 305 n.114 (1978).

29. The possibility of punitive damages has been used in the past to increase the incentive to sue. See *Walker v. Sheldon*, 10 N.Y.2d 401, 404, 179 N.E.2d 497, 498, 233 N.Y.S.2d 488, 490 (1961). See also C. McCORMICK, *LAW OF DAMAGES* 276-77 (1935); Comment, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1259 (1971). The incentive to sue should be increased because the plaintiff often represents an entire class of similarly situated employees as a "private attorney general." See *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968).

30. One court has commented that:

while the statutory provisions [of Title VII] may serve to redress the pecuniary damage resulting from discrimination, they do not take a single step toward mending the psychological damage to both the party discriminated against and the others in the class he represents.

*Ethridge v. Rhodes*, 268 F. Supp. 83, 88 (S.D. Ohio 1967). While damages for psychological injury have been granted under the Age Discrimination in Employment Act of 1967, 29 U.S.C.

available under Title VII. In granting a trial to determine actual and punitive damages, the *Walinski* court fashioned a remedy for the state forum that has been generally unavailable in the federal forum.

#### COMPARISON OF THE WALINSKI REMEDY WITH OTHER AVAILABLE REMEDIES

The significance of the remedy granted in *Walinski* can be understood more fully by comparing it to some of the other possible remedies for discrimination, many of which are dissatisfying to plaintiffs in "refusal-to-hire" situations.<sup>31</sup> For example, the Illinois Civil Rights Act<sup>32</sup> prohibits race, religion, color, national ancestry or physical or mental handicap discrimination in specified places of public accommodation or amusement. The applicability of this Act is limited for a number of reasons. It does not reach general employment discrimination.<sup>33</sup> Further, it is usually construed narrowly, as in derogation of the common law.<sup>34</sup> Third, the Act does not (expressly or

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§§ 621-634 (1970) (*see* *Rogers v. Exxon Research and Eng. Co.*, 404 F. Supp. 324, 333 (D.N.J. 1975), *vacated and remanded*, 550 F.2d 834 (3d Cir. 1977) (striking damages for psychic distress), *cert. denied*, 434 U.S. 1022 (1978)), and for Humiliation in housing discrimination under The Civil Rights Act of 1968, 42 U.S.C. §§ 3604, 3612 and 1982 (1970) (*see* *Williams v. Matthews*, 499 F.2d 819, 829 (8th Cir. 1974), *cert. denied*, 419 U.S. 1021 (1974)), only one case has granted damages for psychic distress under the equitable remedies of Title VII (*see* *Humphrey v. Southwestern Portland Cement Co.*, note 24 *supra* at 835).

31. An exhaustive study of these remedies is beyond the scope of this Note. For an informative survey of the procedure for bringing a claim of employment discrimination in Illinois, under state and federal statutes, *see* 3 SHEPARD'S ILLINOIS LAW 303-318 (1977). For an in-depth study of federal discrimination procedure and a listing of the more frequent federal statutes that have been used to remedy employment discrimination, *see* 21 AM. JUR. TRIALS § 9 (1977). This treatise outlines some unusual methods to attack discrimination. *See, e.g.*, the Railway Labor Act of 1926, 45 U.S.C. §§ 151-188 (1970) (used in the landmark decision of *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944)). In *Steele*, the Court held that minority employees could maintain an action under the Act to enjoin provisions of a collective bargaining agreement between their union and an employer which discriminated against them, despite the lack of statutory authority for private action under the Act. The Court stated that in the absence of an effective administrative remedy the action could be maintained on the theory that the union's duty of fair representation had been breached by the agreement. *Id.* at 207.

32. ILL. REV. STAT. ch. 38, §§ 13-1 to 13-4 (1977).

33. *See* ILL. REV. STAT. ch. 38, § 13-2 (1977). Although the statute does not reach all employment situations, it does cover employment by an official in a work relief project. ILL. REV. STAT. ch. 38, § 13-2(c) (1977).

34. The Civil Rights Act was meant to be remedial and to grant persons rights and duties unknown at common law. *People ex rel. Clark v. McCurdie*, 75 Ill. App.2d 217, 219, 220 N.E.2d 318, 319 (4th Dist. 1966). Due to the new nature of the rights granted under this Act, it is likely that the Illinois courts will continue to construe the act narrowly, according to the doctrine of *ejusdem generis*. This doctrine states that "[w]hen there are general words following particular and specific words, the former must be confined to things of the same kind." J. SUTHERLAND, STATUTES and STATUTORY CONSTRUCTION § 268 (1891); BLACK'S LAW DICTIONARY 608 (rev. 4th ed. 1968). *See also* *People ex rel. Gaskill v. Forest Cemetery Co.*, 258 Ill. 36, 43, 101 N.E.219, 221 (1913) (holding that while it was a violation of the Act to charge a higher price for a gravesite because of race, it was not a violation to refuse to sell a gravesite altogether because of race); *Cecil v. Green*, 161 Ill. 265, 269, 43 N.E. 1105, 1106 (1896) (holding that a drugstore soda fountain is not the kind of accommodation included in the Act under the terms "restaurants and eating houses"); *Horn v. Illinois Cent. R. R. Co.*, 327 Ill. App. 498, 506,

impliedly) proscribe sex discrimination.<sup>35</sup> Finally, the Illinois Civil Rights Act allows only a limited statutory forfeiture to the successful plaintiff.<sup>36</sup>

A second remedy is administrative relief under the Illinois Fair Employment Practices Act.<sup>37</sup> This statute prohibits employment discrimination because of race, color, religion, sex, national origin, handicap, or military discharge.<sup>38</sup> The Illinois Fair Employment Practices Commission (FEPC) has

64 N.E.2d 574, 578 (1st Dist. 1946) (railroads have no duty to serve equally except as to passengers of the railroad); *Grace v. Moseley*, 112 Ill. App. 100, 102 (1st Dist. 1904) (only actively withholding service in the kinds of accommodations enumerated was a violation).

35. See ILL. REV. STAT. ch. 38, §§ 13-2(a)-(d) (1977). It appears as though sex is meant to be excluded, since it was not added when physical or mental handicaps were added as prohibited classifications by The Act of August 23, 1971, § 1, P.A. 77-1213 (1971) (current version at ILL. REV. STAT. ch. 38, § 13-2 (1977)).

36. See ILL. REV. STAT. ch. 38, § 13-3(a)-(d) (1977). The Act provides three types of relief for discrimination in places of public accommodation and amusement: (1) a criminal sanction that can bring a sentence of up to one year in prison, (2) a private suit by the aggrieved party which carries a fine of from \$100 to \$1000, and (3) an action to enjoin the discriminatory acts brought by the Attorney General or by any State's Attorney. There are also provisions for administrative hearings when state officials are involved.

37. ILL. REV. STAT. ch. 48, § 851-867 (1977).

38. *Id.* at § 851, Sex, however, was not added until 1971. See Act of August 27, 1971, § 1, 77-1342 (1971). Another provision of the Illinois Constitution specifically forbids sex discrimination by state agencies. See note 1 *supra*. A provision that reaches private sex discrimination in employment is necessary for several reasons. First, it is necessary because the United States Supreme Court has refused to apply strict scrutiny uniformly to sex-based classifications. Compare *Reed v. Reed*, 404 U.S. 71 (1971) with *Geduldig v. Aiello*, 417 U.S. 484 (1974). In *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973), Justices Powell, Burger and Blackmun deferred a decision as to whether sex would be considered a suspect classification until resolution of the Equal Rights Amendment.

Secondly, section 17 is necessary because it appears that certain sex classifications will be able to pass the Illinois Supreme Court's "strict scrutiny analysis." Prior to section 18, Illinois courts had not held sex classifications suspect. In *Jacobson v. Lenhart*, 30 Ill.2d 225, 195 N.E.2d 638 (1964), the court stated that "[i]t requires neither extended discussion nor citation of authority for the proposition that age and the differences existing between the sexes are proper bases for legislative classification. . . ." *Id.*, at 227, 195 N.E.2d at 640. After ratification of section 18, the court held that strict scrutiny analysis should be applied to sex classifications. See *Phelps v. Bing*, 58 Ill.2d 32, 35, 316 N.E.2d 775, 776 (1974) (construing the Marriage Act); *People v. Ellis*, 57 Ill.2d 127, 133, 311 N.E.2d 98, 101 (1974) (construing the Juvenile Act). In both cases, sex classifications disadvantageous to males were struck down.

But in *People v. Boyer*, 63 Ill.2d 433, 436, 349 N.E.2d 50, 51 (1976), the Illinois Supreme Court refused to decide whether strict scrutiny should be applied to the Illinois aggravated incest statute. ILL. REV. STAT. ch. 38, §§ 11-10, 11-11 (1973), which provided greater penalties for males than females. The court implied that if it applied the rational basis test or the strict scrutiny test the statute was compelled by a strong enough state interest to be upheld:

In like fashion, we need not and do not decide whether strict scrutiny *must* be applied here. It will suffice for us to hold that, in our view, the State has demonstrated an interest which justifies, under either standard, the classification at issue.

*Id.*, at 436, 349 N.E.2d at 51.

While admitting that damage occurs to victims of both sexes when incestuous relationships exist, the court held that the danger of pregnancy to the female justifies the higher sentence for males. *Id.*, at 436, 349 N.E.2d at 52. The above quotes suggest that the Illinois Supreme Court

the power to award compensatory damages to successful plaintiffs.<sup>39</sup> However, there are several disadvantages to state administrative action. For example, punitive damages and attorney's fees are not available under the Act.<sup>40</sup> Second, the 180 day time period for filing complaints under the Act results in a shorter statute of limitations period,<sup>41</sup> compared to the five year statute of limitations which will most likely be applicable to section 17.<sup>42</sup>

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will apply a strict scrutiny analysis in the case of sex classifications, however, a significant number of statutes may be found to have a compelling state interest. The ramifications of section 17 analysis are obvious: such as the danger that many private classifications will be found unobjectionable even under a strict scrutiny analysis. See also Linton, *Sex Discrimination under Article I, § 18 of the 1970 Illinois Constitution*, 66 ILL. B.J. 450 (1978).

39. See *School Dist. No. 175, St. Clair Cty. v. FEPC*, 57 Ill. App. 3d 979, 988, 373 N.E.2d 447, 453 (5th Dist. 1978); *A.P. Green Services Div. of Bigelow-Liptak Corp. v. FEPC*, 19 Ill. App. 3d 875, 883, 312 N.E.2d 314, 320 (1st Dist. 1974).

40. No punitive damages have yet been granted under the Act. Also, there are usually no attorney's fees granted in Illinois without express statutory authorization. See *Meyer v. Marshall*, 62 Ill.2d 435, 442, 343 N.E.2d 479, 483 (1976); *Ritter v. Ritter*, 381 Ill. 549, 553, 46 N.E.2d 41, 43 (1943); *City of Chicago v. FEPC*, 34 Ill. App.3d 114, 115, 339 N.E.2d 260, 261 (1st Dist. 1975), *aff'd*, 65 Ill.2d 108, 113, 357 N.E.2d 1154, 1156 (1976). Nor is there any Illinois common law principle allowing attorney's fees to be awarded as part of the costs or damages. See *Ritter v. Ritter*, *id.* at 552, 46 N.E.2d at 43; *People ex rel. Henderson v. Redfern*, 104 Ill. App.2d 132, 135, 243 N.E.2d 252, 254 (4th Dist. 1968). Illinois courts have even refused to award attorney's fees pursuant to a contractual agreement when the wording was not specific enough. See *Qazi v. Ismail*, 50 Ill. App.3d 271, 273, 364 N.E.2d 595, 597 (1st Dist. 1977); *Reese v. Chicago, Burlington and Quincy R.R. Co.*, 5 Ill. App.3d 450, 458, 283 N.E.2d 517, 522 (2d Dist. 1972), *aff'd*, 55 Ill.2d 356, 303 N.E.2d 382 (1973).

41. *Springfield-Sangamon County Reg. Plan Comm'n v. FEPC*, 71 Ill.2d 61, 68, 373 N.E.2d 1307, 1310 (1978). Under the provision in force when the complainant filed in *Springfield-Sangamon*, the complainant had 120 days from the date of the alleged unfair employment practice to file a charge with the FEPC. The FEPC then had 180 additional days to decide to issue and serve the respondent. *Id.* Under the present Act, the complainant has 180 days from the date of the alleged incident to file a charge with the FEPC. Then the FEPC has 120 days to convene a conference. After this 120 day period, the FEPC has another 180 days to either issue a complaint or dismiss the charge. Act to Amend §§ 8 and 8.01 of the Fair Employment Practices Act, § 1, P.A. 80-1452 (1978).

42. The Illinois Limitations Act, ILL. REV. STAT. ch. 83, § 16 (1977), states that a five year statute of limitations applies to actions on unwritten contracts, express or implied, arbitration awards, actions to recover damages done to property, suits to recover possession of property and to all civil actions not otherwise provided for. A federal district court for Illinois applied the five year statute in an action against a city for violation of § 1983 civil rights by conducting illegal intelligence gathering. See *ACLU v. City of Chicago*, 431 F. Supp. 25, 28 (N.D. Ill. 1976). The five year statute has been applied to a personal action for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). *Amen v. Crimmins*, 379 F. Supp. 777, 779 (N.D. Ill. 1974) (police officers made an arrest without probable cause and beat the plaintiff while he was in confinement); *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125, 128 (N.D. Ill. 1972) (blood transfusion was given to plaintiff's decedent, after doctors had been advised of decedent's religious convictions which precluded the transfusion). The statute has also been held to apply to federal actions under 42 U.S.C. § 1981 (1970), which provides that all persons shall have the same right to make and enforce contracts without regard to race. See *Waters v. Wisconsin Steel Works of Int'l Harv.*, 427 F.2d 476, 488 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970); *Contract Buyers League v. F & F Investment*, 300 F. Supp. 210, 222 (N.D. Ill. 1969), *aff'd*, 420 F.2d 1191 (7th Cir. 1970). In view of these authorities, it seems likely that Illinois courts will

Third, the Act only applies to employers who have fifteen or more employees working for twenty or more calendar weeks per year.<sup>43</sup> The Illinois Fair Employment Practice Act also allows an exemption for any religious corporation employing individuals in work capacities which are related to such corporation's activities.<sup>44</sup> Finally, the FEPC backlog precludes swift disposition of complaints. Over 1400 charges were docketed by the FEPC between July 1, 1974 and March 31, 1975. Yet in March 1975, only around 90 cases were acted upon.<sup>45</sup>

Federal administrative relief under the Civil Rights Act of 1964<sup>46</sup> is available as a third remedy. Under this Act, complaints filed with the Equal Employment Opportunity Commission (EEOC) are first referred to the appropriate state agency.<sup>47</sup> Only if the state refuses to act will the EEOC begin conciliation procedures. If the EEOC also decides not to act, the plaintiff receives a letter authorizing a private suit.<sup>48</sup> This procedure has several disadvantages. First, the EEOC cannot make its recommendations mandatory on any employer.<sup>49</sup> Second, the agency is also facing a crippling backlog<sup>50</sup> despite the new administration's introduction of streamlined complaint-processing procedures.<sup>51</sup> Third, like the Illinois FEPC, the

apply the five year statute to actions under section 17, since it is a civil action for which there is no alternative limitations provision.

43. ILL. REV. STAT. ch. 48, § 852(d)(i) (1977).

44. The Illinois Fair Employment Practice Act, ILL. REV. STAT. ch. 48, § 852(d)(ii) (1977). See also *FEPC v. Rush-Presbyterian St. Luke's Medical Center*, 41 Ill. App. 3d 712,354 N.E.2d 596 (1st Dist. 1976).

45. See Legislative Report ILLINOIS HOUSE COMM. ON EMPLOYMENT OF WOMEN AND MINORITY GROUPS in STATE GOVERNMENT 21 (1974), which stated that the total FEPC staff budgeted for Illinois in 1975 was 45 persons. Included in this staff were only two attorneys and three field investigators. Yet, 1436 charges had been docketed by the FEPC between July 1, 1974 and March 31, 1975. In March 1975, only around 90 cases were acted upon. See 3 FEPC LEGAL NEWS 1-2 (1975).

46. 42 U.S.C. §§ 1981-2000h-6 (1976). The Act is framed to prevent discrimination in employment on the basis of race, color, sex, religion or national origin. It permits private persons to institute an action in a federal court to terminate the discrimination. 42 U.S.C. § 2000e-5(f)(1) (1976). However, the aggrieved party must first submit the complaint to the Equal Employment Opportunity Commission (EEOC), see 42 U.S.C. § 2000e-5(b) (1976).

47. See 42 U.S.C. § 2000e-5(d) (1976).

48. See 42 U.S.C. § 2000e-5(f)(1) (1976).

49. See 42 U.S.C. § 2000e-5(b) (1976).

50. The EEOC had a backlog of 98,000 charges outstanding on June 30, 1974. This number increased to 106,700 charges outstanding on June 30, 1975; 114,200 on September 30, 1976; and stood at 130,000 on April 30, 1977. See THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT-1977, UNITED STATES COMMISSION ON CIVIL RIGHTS 211 (1977).

51. *Id.* at 212-16. See also 1 EQUAL EMPLOYMENT COMPLIANCE UPDATE 1 (1977).

52. Under Title VII employment discrimination actions, the employer must also employ fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. 42 U.S.C. § 2000e(b) (1976). See cases cited in 1 EMPL. PRAC. GUIDE (CCH) ¶ 306. While the statute does not require that the twenty work weeks be consecutively completed, it does allow a shrewd employer to avail itself of the exemption by employing part-time help in such a way that there are never more than fifteen employees for more than twenty weeks. However, reducing the workforce to below the required minimum

EEOC is restricted to certain statutory limitations such as the number of employees and the length of their employment.<sup>52</sup> Finally, Title VII relief has been generally limited to injunction and backpay.<sup>53</sup> Although Title VII is a valuable form of relief for many employment discrimination situations, it may be less useful than a simple state damages remedy that can provide actual and punitive damages.

The qualifying standards under section 17 are easier to satisfy than under most of the other remedial statutes. Although no decision has determined the statute of limitations for a section 17 action, it will probably be five years.<sup>54</sup> There is no minimum number of employees required as yet, although the committee proposal envisioned a possible exemption for employers operating places of employment so small that the employer-employee relationships are highly personal in nature.<sup>55</sup> While no exemptions from section 17 have been passed by the legislature since ratification, an Illinois court in *Davis v. Attic Club*<sup>56</sup> found an exemption for private clubs. The *Davis* court reasoned that the non-discriminatory provisions of the Liquor Control Act,<sup>57</sup> which was passed in 1949, justified the exemption. It has been argued that the *Davis* court misguidedly presumed that the intent of the section 17 drafters was to permit exemptions on a retroactive basis.<sup>58</sup>

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does not defeat Title VII coverage once it has been established. See *Slack v. Havens*, 8 Empl. Prac. Dec. 5215 (S.D. Cal. 1973).

In Title VII cases, employers are not covered by the Act unless they engage in operations affecting interstate commerce. 42 U.S.C. § 2000e(b) (1976). See 1 EMPL. PRAC. GUIDE (CCH) ¶ 303. The breadth of the terms "affecting commerce" has been held to embrace "not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but which in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance v. NLRB*, 322 U.S. 643, 648 (1944). See also cases cited in 1 EMPL. PRAC. GUIDE (CCH) ¶ 303.

53. See notes 24-30 and accompanying text *supra*. However, federal courts have permitted claimants to seek punitive damages in several recent cases. See *Waters v. Heublein*, 8 Empl. Prac. Dec. 5803 (N.D. Cal. 1974) (holding that punitive damages could be recovered if the plaintiff proved that the defendants acted with the necessary malice); *Dessenberg v. American Metal Forming Co.*, 6 Fed. Empl. Prac. Cas. 159, 161 (N.D. Ohio 1973) (denying a motion to strike a punitive damages claim); *Tooles v. Kellogg Co.*, 336 F. Supp. 14, 18 (D.C. Neb. 1972) (refusing to dismiss a punitive damages claim); *Tidwell v. American Oil Co.*, 2 Fair Empl. Prac. Cas. 1121, 1123 (D.C. Utah 1970) (refusing to dismiss punitive damages claim, although dismissing the compensatory damages claim). Yet in only three cases have punitive damages been awarded under Title VII. See note 27 *supra*.

54. See note 42 *supra*.

55. *Committee Proposals*, *supra* note 16, vol. VI at 68-69 (1972).

56. 56 Ill. App.3d 58, 371 N.E.2d 903 (1st Dist. 1977). For further discussion of *Davis*, see note 4 *supra* and note 58 *infra*.

57. ILL. REV. STAT. ch. 43, § 94-209 (1977).

58. See *Gertz, The Unrealized Expectations of Article I, Section 17*, 11 J. MAR. J. PRAC. & PROC. 283, 313 (1978). Mr. Gertz believes that the intent of the drafters was to permit exemptions on a prospective basis only, through legislation passed after 1970. Gertz says the provision for exemptions was never meant to be applied to legislation already in existence before section 17 was ratified. The court, however, relied on the principle that "[a]ll laws, ordinances, regulations and rules of court not contrary to, or inconsistent with, the provisions of this Constitution

QUESTIONS LEFT UNANSWERED BY WALINSKI

The *Walinski* court has left many questions unanswered. First, the court was not compelled to discuss what the proper elements of proof should be in a section 17 suit.<sup>59</sup> While such analysis was not necessary to *Walinski*, it should have assisted the trial court which will hear Ms. Walinski's damages claim. The court should have drawn an analogy with a Title VII action<sup>60</sup> since this standard could be adapted to section 17 actions with no difficulty.<sup>61</sup>

In Title VII actions, the plaintiff must make a *prima facie* case of discrimination by showing that a qualified member of the suspect classification has been treated differently than other applicants.<sup>62</sup> The burden then shifts to

shall remain in force . . . ILL. CONST. (transition schedule) § 9. The court also relied on the statement of Delegate Wilson at the debates saying, ". . . the job of a bill of rights always is a job of balancing and trying to evaluate competing interests . . . The right of truly private clubs to provide housing for their own members only would be . . . a reasonable exemption." Davis v. Attic Club, 56 Ill. App.3d at 69-70, 371 N.E.2d at 911-12 (1st Dist. 1977). However, the comment mentions only housing in private clubs as possibly exempt. The court is acting more independently when it includes membership, access and sale of property as exempt from section 17.

59. See note 9 *supra*.

60. See *City of Cairo v. FEPC*, 21 Ill. App. 3d 358, 363, 315 N.E.2d 344, 348 (5th Dist. 1974) (stating that in the absence of state cases dealing with the issue, federal decisions on discrimination in employment are relevant and helpful precedents, although not controlling).

61. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the proper elements were explained as shifting burdens of proof. The Court in *McDonnell Douglas* defined the following burdens of proof for discrimination actions under Title VII:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a *prima facie* case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applications from persons of complainant's qualifications . . . .

The burden then must shift to the employer to articulate some legitimate, non-discriminatory reason for the employee's rejection . . . .

On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired . . . .

Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.

*Id.* at 802, 804-05.

62. The procedure in *McDonnell Douglas* can be used as an alternative to *Griggs* when no disparate impact can be shown. Two plaintiffs did just this in *Furnco Constr. Co. v. Waters*, 46 U.S.L.W. 4966, 4967-68 (1978). *cert. granted* 98 S. Ct. 632 (1978). Plaintiffs charged *Furnco* with discriminatory hiring practices, despite its hiring of several black bricklayers. The appellate court apparently believed that once the *McDonnell Douglas prima facie* case had been made,

the employer to show that the disparate treatment was non-discriminatory. Additionally, the plaintiff receives a last chance to rebut the employer's evidence and to show that the facially neutral classification is in fact invidious discrimination. There is reason to believe that Illinois courts will adopt the Title VII elements of proof for section 17 because they have already found these guidelines helpful in cases brought under the Illinois Fair Employment Practice Act.<sup>63</sup>

The *Walinski* court did not discuss the defenses to a section 17 suit. While not essential to this decision, such a discussion also would have been of great assistance in the trial. In Title VII actions, the defendant can plead affirmatively that the plaintiff lacked a Bona Fide Occupational Qualification (BFOQ).<sup>64</sup> Essentially, this means that the only exemption to a Title VII

any non-discriminatory statistics the employer could show would be irrelevant. *Id.* at 4970. The *Furnco* Court reversed and remanded, directing the trial court to allow the case to proceed through the other two *McDonnell Douglas* steps: (a) allowing the employer to show some legitimate non-discriminatory reason for the practice and, (b) allowing the employee to show that this reason is merely a pretext for discrimination. The *Furnco* Court held that the *prima facie* case merely raises the inference of discrimination. See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

The decisions following *McDonnell Douglas* applied the above formula. One court found that where a company had no black accountants at entry level positions it had not met its burden of showing some non-discriminatory reason for the unusual statistics. *Gates v. Georgia-Pacific Corp.*, 492 F.2d 292, 296 n.5 (9th Cir. 1974). In *Jurinko v. Wiegand Co.*, 331 F. Supp. 1184, 1187 (W.D.Pa. 1971), modified and *aff'd*, 477 F.2d 1038 (3d Cir. 1973), vacated, 414 U.S. 970 (1973), the employer failed in his burden of proof when statistics showed a larger proportion of men were hired than qualified women. Facially neutral statistics were discovered to be inaccurate in *Rogers v. International Paper Co.*, 510 F.2d 1340, 1348 (8th Cir. 1975), vacated, 423 U.S. 809 (1975). Neutral statistics failed to vindicate an employer when the court discovered that the favorable numbers was not aligned with the actual number of minority workers in the local work force. See *Jones v. Tri-County Elec. Coop, Inc.*, 512 F.2d 1, 2 (5th Cir. 1975).

63. See *FEPC v. Hohe*, 53 Ill. App.3d. 724, 728, 368 N.E.2d 709, 712 (1st Dist. 1977) (accepting the *McDonnell Douglas* standard); *Springfield-Sangamon Cty. Reg. Plan. Comm'n v. FEPC*, 45 Ill. App. 3d 116, 126-27, 359 N.E.2d 174, 181-82 (4th Dist. 1976) (accepting *McDonnell Douglas*), *aff'd in part, rev'd in part*, 71 Ill.2d 61, 373 N.E.2d 1307 (1978); *City of Cairo v. FEPC*, 21 Ill. App.3d at 363, 315 N.E.2d at 348. (stating that federal standards are helpful); *A.P. Green Servs. Div. of Bigelow-Liptak Corp. v. FEPC*, 19 Ill. App.3d 875, 880-81, 312 N.E.2d 314, 318 (1st Dist. 1974) (accepting the *McDonnell Douglas* standard).

64. See The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e)(1) (1976), which states:

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

Of course, the meaning of a Bona Fide Occupational Qualification has been left to case law for interpretation. See note 65 *infra*. The BFOQ exemption is a narrow one. The employer must have "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [of the suspect class] would be unable to perform . . . efficiently . . . ." *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969) (this particular case rejected a looser standard that allowed the employer to take "generally recognized physical capabilities and physical limitations of the sexes" into account.) See *Bowe v. Colgate-Palmolive Co.*, 272 F. Supp. 332, 365 (S.D.Ind. 1967)).



action is a business necessity, not a "business convenience."<sup>65</sup> Other defenses available under Title VII include a lack of general qualifications or a failure to apply.<sup>66</sup> Just as in Title VII suits, lack of intent and customer preference<sup>67</sup> should not be defenses to a section 17 suit, and neither should

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65. *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971). Two possible limits of the BFOQ defense were considered by the Court in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), and a narrowly construed BFOQ exception was favored by the court. *Id.* at 334. Yet the Court in *Dothard* permitted the finding of a valid BFOQ defense where a female applied for a guard job at an all-male prison. The dissent expressed the hope that the opinion would be limited to the particular prisons involved, saying the opinion "was impelled by the shockingly inhuman conditions in Alabama prisons." *Id.* at 347. Although the result was contradictory, the *Dothard* opinion indicated that stereotyped perceptions of women's characteristics are impermissible criteria for creating a BFOQ defense.

66. The defendant can plead that the statute is inapplicable. In general, this means that the employer did not have the minimum number of employees or that the employer is not engaged in interstate commerce. See 1 EMPL. PRAC. GUIDE (CCH) ¶ 301-303.

The defense of failure to apply has been upheld in several cases where the employer maintained that the plaintiff never applied for the promotion or transfer. See *Smith v. South Cent. Bell Tel. & Tel. Co.*, 518 F.2d 68 (6th Cir. 1975); *Stebbins v. State Farm Mut. Auto. Ins. Co.*, 5 Empl. Prac. Dec. 6744 (4th Cir. 1972); *Nelms v. Ampex Corp.*, 8 Empl. Prac. Dec. 5124 (M.D. Ala. 1974); *Brown v. General Elec. Co.*, 5 Empl. Prac. Dec. 6646 (M.D. Tenn. 1972), *aff'd*, 487 F.2d 910 (6th Cir. 1973).

In one case the employer showed that its rejection of plaintiff's job application was not done for suspect reasons by showing evidence of a history of affirmative action. The employer had hired other qualified female applicants for managerial and professional positions. See *Park v. Firestone Tire and Rubber Co.*, 8 Empl. Prac. Dec. 6063 (N.D. Ohio 1974); See also cases collected at 1 EMPL. PRAC. GUIDE (CCH) ¶ 2515.

Another employer successfully stated that a test of the driving skill of an aged plaintiff would require that the employer risk the lives of the passengers. See *Hodgson v. Greyhound Lines Inc.*, 499 F.2d 859, 865 (7th Cir. 1974), *cert. denied sub nom*, *Brennan v. Greyhound Lines Inc.*, 419 U.S. 1122 (1975).

The defense that the plaintiff simply lacked qualifications for the job is to be distinguished from the BFOQ defense that the plaintiff is unqualified solely because of his or her sex. Lack of qualifications has been a successful defense. See *Patmon v. Van Dorn Co.*, 498 F.2d 544, 546 (6th Cir. 1974) (plaintiff's refusal to cooperate with employment testing barred his suit for discrimination); *Brennan v. Reynolds & Co.*, 367 F. Supp. 440, 441 (N.D. Ill. 1973) (upholding the firing of an employee for tardiness); *Handy v. Stupp Corp.*, 5 Empl. Prac. Dec. 8031 (M.D. La. 1972) (belligerent behavior during a job application barred plaintiff's subsequent suit).

67. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), established that no intent to discriminate is necessary under Title VII suits. All that need be shown is discriminatory impact. *Id.* at 429-30. Several further developments have occurred since *Griggs*. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court considered a complaint involving a discriminatory employment test brought in the District of Columbia under the Fifth Amendment. The Court decided that the statutory "no intent" test did not apply in the case of a constitutional provision. *Id.* at 238-39. Instead the Court held that a "purpose to discriminate" was required to establish discrimination under the Fifth Amendment. *Id.* at 239. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court stated that the company's exclusion of pregnancy from its insurance plan was not a simple pretext for discrimination because there was no showing that the exclusion was gender-based. *Id.* at 136-37. But in *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court refused to support the employer's withholding of pregnancy benefits when the employer also imposed additional burdens on the woman because of her pregnancy leave. *Id.* at 139. The potential

failure to apply or lack of prosecution.<sup>68</sup> Clearly, some of the procedural exceptions, such as the statute of limitations or a rejection based on non-prohibited classifications, must be accepted as defenses in section 17 actions. But whether the courts will accept the BFOQ defense, or wait for the General Assembly to define one, is an open question.

In addition to the defenses which courts may recognize to section 17, the Illinois General Assembly may formulate reasonable exemptions to section 17. The drafters placed the power with the legislature for creating exemptions that do not destroy the effectiveness of the provision.<sup>69</sup> The drafters also proposed what they considered to be examples of reasonable exemptions which might be incorporated into section 17, although none of these exemptions has as yet been adopted by the General Assembly.<sup>70</sup>

effect of *Washington* may be that Illinois courts will require some showing of intent to prove discrimination under section 17, a constitutional provision.

Customer preference for one sex over another is not a valid criteria for hiring or promoting one sex only. See *Diaz v. Pan American Airways*, at note 63 *supra*. See also EEOC Guidelines, 29 C.F.R. § 1604.2 (iii) (1977) and cases cited in 1 EMPL. PRAC. GUIDE (CCH) ¶ 435.

68. Failure to apply has been held an invalid defense where the plaintiff can show that the discriminatory policy caused him or her not to apply. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 363-64 (1977); *EEOC v. United Air Lines*, 560 F.2d 224, 231 (7th Cir. 1977); *Hairston v. McLean Trucking Co.*, 520 F.2d 226, 231 (4th Cir. 1975); *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 451 (5th Cir. 1973).

Failure to prosecute is not always a successful defense. In one case, the court permitted the legal aid attorney to make the excuse of case overload to the defense of lack of prosecution. See *Vina v. Hub Electric Co.*, 480 F.2d 1139, 1140-41 (7th Cir. 1973).

69. See ILL. CONST. art. I, § 17, note 2 *supra*.

70. The Bill of Rights Committee defined "reasonableness" under section 17 and gave several examples of reasonable exemptions:

[I]t is obviously proper for a congregation to utilize a religious test in employing a minister. Similarly, few would approve an anti-discrimination provision that absolutely prohibited the kind of indirect discrimination involved in providing housing exclusively to the aged members of certain religious or ethnic organizations, or women's groups. Persons might also be permitted some discrimination in employment or rental relationships that are on so small a scale and under circumstances so intimate that they are of a highly personal nature . . . . In addition the State will still be able to utilize some of the forbidden classifications in a reasonable exercise of the police power, such as by legislation designed to protect women against the demonstrated hazards of certain kinds of employment . . . . The Committee omitted any reference to discrimination in voluntary associations or in private education because it concluded that this subject was not proper for a constitutional provision . . . .

*Committee Proposals, supra* note 16, vol. VI at 68-70 (1972).

The Committee omitted reference to public education, discrimination against the handicapped and religion. The Committee felt that these classes had either been covered by other language (i.e., the word "creed" includes religion) or were contained in other legislation. *Id.* at 70. See *The White Cane Law*, ILL. REV. STAT. ch. 23, § 3365 (1976), which articulates a state policy of active solicitation of the handicapped for state employment. The language allowing the General Assembly to pass "protective" legislation for women in the form of reasonable exemptions shows that the legislature was unwilling to go all the way to total equality between the sexes in employment. What is more disturbing is that the courts have independently begun to

A further question left open by *Walinski* is whether equitable relief is available under section 17. Although the drafters intended that the courts fashion appropriate remedies, neither punitive damages nor injunctive relief were specifically mentioned. Illinois courts could circumvent the intent of the drafters to grant jury trials for damages<sup>71</sup> by including such a legal claim for damages in an equitable bench trial for an injunction. Pursuant to Illinois Supreme Court Rule 135(b),<sup>72</sup> a court sitting in equity can resolve legal issues such as damages without a jury if such matters are incidental to the equitable claim.<sup>73</sup> This should be a warning to practitioners to plead damages claims separately from equitable claims if a jury for damages is desired.

### CONCLUSION

The impact of *Walinski* will undoubtedly be to increase the number of section 17 suits brought against employment discrimination. In view of the difficulty of obtaining review before the Illinois Fair Employment Practices Commission<sup>74</sup> and the unavailability of punitive damages under state administrative action,<sup>75</sup> section 17 appears very attractive as an alternative in Illinois.<sup>76</sup> The decision to allow damages under section 17 is an important one for victims of employment discrimination.<sup>77</sup> Considering the increasing

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find reasonable exemptions to section 17. See *Davis v. Attic Club*, 56 Ill. App.3d 58, 371 N.E.2d 903 (1st Dist. 1977) (finding an exemption to section 17 for all private clubs pursuant to the non-discriminatory provisions of the Liquor Control Act passed in 1949).

71. See note 11 *supra*.

72. ILL. REV. STAT. ch. 110A, § 135(b) (1977).

73. In *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, 2 Ill. App.2d 543, 556, 120 N.E.2d 362, 369 (1st Dist. 1954), the defendants did not make an effort to separate their claim for an injunction from their claim for money damages. The appellate court did not allow the defendants to raise the fact that *both* these issues, rather than only the equitable issue, were referred to a master of equity court.

74. See note 45 *supra*.

75. See note 40 *supra*.

76. The *Walinski* decision must be considered in light of the recent decision in *Davis v. Attic Club*, 56 Ill. App.3d 58, 371 N.E.2d 903 (1st Dist. 1977). If the appellate court of Illinois is willing to find exemptions from section 17 in legislation passed before ratification, any number of prospective exemptions may be found. Certainly, *Davis* should be reversed by the Illinois Supreme Court. While it may be reasonable for courts to recognize affirmative defenses to section 17, as has been suggested, any exemptions to section 17 should have been passed by the legislature after the provisions had been ratified. See note 58 *supra* for the views of Mr. Gertz, who espouses the view that exemptions to section 17 can only be prospective exemptions.

77. The decision in *Cohen v. Illinois Inst. of Technology*, 384 F.Supp. 202 (N.D. Ill. 1974), *aff'd*, 524 F.2d 818 (7th Cir. 1975), is a good example of the loopholes that existed in the employment discrimination laws only three years ago. In *Cohen*, the plaintiff alleged discrimination in defendant university's promotion, tenure and salary practices. The trial court dismissed the Title VII claim because at the time Title VII exempted educational institutions. 524 F.2d at 822 n.4. See Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964). The exemption has since been deleted by section 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103-04 (codified at 42 U.S.C. § 2000e-1 (Supp. II 1972)). The *Cohen* action was filed before the deletion. See 524 F.2d at 822 n.4. The deletion

percentage of women in the work force and the historical tradition of women receiving less pay than men for jobs requiring equal skill,<sup>78</sup> it is impermissible to allow sex discrimination in employment to continue. Section 17 fills a gap left by statutes and prior case law and expresses a public policy against employment discrimination.

*Walinski* fashioned a new remedy in the area of employment discrimination. The court made it clear that the plaintiff *may* seek compensatory damages. It has created a punitive damages remedy which is generally unavailable under Title VII actions.<sup>79</sup> Further, the right in *Walinski* will apply to sex discrimination as well as to race discrimination,<sup>80</sup> and to private action.<sup>81</sup> The remedy granted in *Walinski* has made section 17 a most attrac-

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was held not to apply retroactively. *Weise v. Syracuse Univ.*, 522 F.2d 397, 410-11 (2d Cir. 1975). The trial court also dismissed claims under 42 U.S.C. §§ 1983, 1985(3) (1970), because the plaintiff was unable to show the required state action. *See Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972) (holding state action required in § 1983 actions); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972) (holding state action required in § 1985(3) actions).

The plaintiff also made a claim under article one, section 17 of the Illinois Constitution. This claim was never considered because there was no longer an independent ground for federal jurisdiction. *Id.* at 830. Federal courts have discretion to dismiss pendant state claims when all federal claims have been dismissed. *See C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS* 64-65 (2d ed. 1970). The plaintiff was forced to appeal solely on the issue of whether the school was sufficiently subsidized by the state to establish state action. The appellate court found no state action and regretfully dismissed all of the plaintiff's claims. 524 F.2d at 827. So even though there had been a finding of probable discrimination by the Department of Health, Education and Welfare in 1971, the plaintiff went without remedy, 524 F.2d at 822. This case clearly illustrates the weakness of employment discrimination laws before section 17.

78. *See M. BLAXALL & B. REAGEN, WOMEN AND THE WORKPLACE* 7 (1976), which states that as of October 30, 1974, there were 33 million women working in the civilian work force, representing 37% of the total labor force. Yet the median income for female college graduates was only \$5,551 in 1974, as opposed to \$8,617 for men in the same occupations. According to the Legislative Report of the ILLINOIS HOUSE COMMITTEE ON EMPLOYMENT OF WOMEN AND MINORITY GROUPS IN STATE GOVERNMENT 6 (1974), some 62.3% of all women employed by the state of Illinois in 1973 received salaries under \$8,000, while only 20% of the men were in that salary range. Of the employees in Illinois government in 1974 earning \$16,000 or more, only 16.9% were women.

79. *See note 26 supra.*

80. To invoke 42 U.S.C. § 1981 (1976), for example, one must allege discrimination on the basis of race. *See Agnew v. Compton*, 239 F.2d 226, 230 (9th Cir. 1956), *cert. denied*, 353 U.S. 959 (1957); *Tramble v. Converter's Ink Co.*, 343 F. Supp. 1350, 1353 (N.D. Ill. 1972). It has been expressly held that sex discrimination is not remedied by § 1981. *See Abshire v. Chicago and E. Ill. R.R. Co.*, 352 F.Supp. 601, 605 (N.D. Ill. 1972); *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 638-39 (N.D. Cal. 1972). Also, § 1981 does not cover religious discrimination. *See Schetter v. Heim*, 300 F. Supp. 1070, 1073 (E.D. Wis. 1969). Attempts have been made to argue that an implied legislative intent to include sex and alienage exists in § 1981. *See Guerra v. Manchester Term. Corp.*, 498 F.2d 641, 653 (5th Cir. 1974) (successful as to aliens); *League of Academic Women v. Regents of Univ. of Cal.*, *supra* at 638 (unsuccessful as to sex); Comment, *Implying Punitive Damages in Employment Discrimination Cases*, 9 HARV. C.R.-C.L. L. REV. 325, 346 n.139 (1974).

81. For an action to be maintained under 42 U.S.C. §§ 1983 and 1985 (1970) there must be state action. *See note 77 supra.*

tive form of action against employment discrimination and should be the first provision considered by any attorney attacking employment discrimination in Illinois.

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