IOWA DISABILITY DISCRIMINATION IN EMPLOYMENT: AN OVERVIEW AND CRITIQUE

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I. Introduction

Disability employment discrimination became illegal in Iowa when the Iowa Civil Rights Act was amended in 1972.[1] Ten years passed before the Iowa Supreme Court decided its first disability discrimination suit.[2] *Foods Inc. v. Iowa Civil Rights Commission*[3] marked the birth of mandatory reasonable accommodation of disabilities by employers. In *Foods*, the court interpreted the requirement that a handicapped person's disability be "unrelated to such person's ability to engage in a particular occupation."[4] A literal interpretation of this requirement would mean the end of mandatory reasonable accommodation of disabilities by Iowa employers.[5] Accommodation by an employer is needed only if the employee's disability is related to the work, yet the literal words of the statute exclude from coverage those whose disability is related to the job.[6] The result would eliminate the need to ever accommodate.[7] The Iowa court rejected this reading, stating the provision requires the disability be unrelated to the person's ability to perform the job "in a reasonably competent and satisfactory manner."[8] This interpretation has been upheld at least three times.

During the five years following *Foods*, only three disability discrimination cases reached the Iowa appellate court. In the first two months of 1987,

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1. Iowa Code §§ 601A.1-.19 (1973).
2. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).
3. *Id.*
4. *Id.* at 165; *see* Iowa Code § 601A.2(11) (1973); *see also* Iowa Admin. Code r. 240-6.1 (1979).
5. Nichols, *Iowa's Law Prohibiting Disability Discrimination In Employment: An Overview*, 32 Drake L. Rev. 273, 329-30 (1982-1983).
6. *Id.*
7. *Id.*
8. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d at 167 (Iowa 1982).

the state supreme court handed down two of these cases.[9] In one of the two, *Frank v. American Freight Systems, Inc.*,[10] the Iowa Supreme Court discussed what constituted undue hardship. The court suggested the standard was the same as in religious discrimination suits: an accommodation poses an undue hardship if it imposes more than a *de minimis* cost or substantially impinges on the rights of co-employees.[11] Within six months the appellate court of Iowa decided two more disability discrimination cases.[12] In May 1987 the General Assembly passed substantial amendments to the Iowa Civil Rights Act.[13] Section 6 of this bill included an express requirement that employers accommodate the disabled, and a statement that reasonable accommodation may require more than a *de minimis* cost.[14] Governor Brandstad, however, vetoed the bill arguing it would cost jobs.[15] After three more disability cases were issued,[16] the General Assembly passed a bill specifically defining AIDS and related conditions as disabilities *and* striking the requirement that a disabled person's handicap be unrelated to their ability to engage in a particular occupation.[17]

II. General Conceptual Overview

A. *General Discrimination Concepts*

1. *Order and Allocation of Proof*

Texas Department of Community Affairs v. Burdine[18] establishes the order and allocation of proof in a typical case of discrimination against an individual. First, the plaintiff has the burden of proving the prima facie case by a preponderance of the evidence.[19] Second, if the prima facie case is shown, the burden shifts to the employer to *articulate* a legitimate nondiscriminatory reason for the employment action.[20] Third, the plaintiff then

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9. Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192 (Iowa 1987); Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987).

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

11. *Id.* at 803.

12. Brown v. Hy-Vee Food Stores, 407 N.W.2d 598 (Iowa 1987); Halsey v. Coca-Cola Bottling Co. of Mid-America, 410 N.W.2d 250 (Iowa 1987).

13. Report of the House Conference Committee on House File 500, filed May 8, 1987, 1987 House Journal 2197, 2198.

14. *Id.*

15. Veto Message of Governor Branstad Accompanying Veto of House File 500, page 1 (June 7, 1987).

16. Halsey v. Coca-Cola Bottling Co. of Mid-America, 410 N.W.2d 250 (Iowa 1987); Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432 (Iowa 1988); Mowrey v. Iowa Civil Rights Comm'n, 424 N.W.2d 764 (Iowa Ct. App. 1988).

17. Iowa Code § 601A.2(4) (1990) (H.F. 2344 approved May 12, 1988).

18. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

19. *Id.* at 255; Linn Coop. v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981).

20. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 255; Linn Coop. v. Quigley,

may prove the articulated reason is a mere pretext for discrimination.[21]

A plaintiff establishes a prima facie case in a failure-to-hire claim if he proves: (1) he is a member of a protected class; (2) he applied and qualified for a position which the employer sought applicants; (3) he was rejected, despite his qualifications; and (4) the employer continued to seek applications from people with the same qualifications as the plaintiff.[22] In a termination suit the elements are: (1) he is a member of a protected class; (2) he was qualified for the job from which he was discharged; (3) despite his qualifications he was terminated; and (4) after the termination the employer hired a person not in the plaintiff's protected class or retained persons with comparable or lesser qualifications not in the same protected group.[23] Statistical evidence may be sufficient to establish a prima facie case.[24] When direct evidence of discriminatory intent is presented, the *Burdine* analysis does not apply.[25] Instead, the procedure is to: (1) note the presence of the direct evidence; (2) if the evidence is sufficiently probative, make a finding that the challenged practice discriminates against the plaintiff because of the prohibited basis; (3) consider any affirmative defenses; and (4) conclude whether illegal discrimination has occurred.[26] If the employer contends, as an affirmative defense, that it also had legitimate motives for its action, the case is a "mixed motive" case.[27]

Burdine governs " 'pretext' cases—[those in which] the employer's stated reason for the employment decision is false."[28] This is in contrast to " 'mixed motive' cases—those in which both legitimate and illegitimate considerations played a part in the employment decision."[29] The key to a mixed motive case is that the employer had at least two motives, one legal and one illegal, for his adverse employment action *both which were in existence at the time the decision was made.*[30] In these cases the order and allocation of proof is that the employee must initially establish by a preponderance that a

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305 N.W.2d at 733.

21. Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 255-56; Linn Coop. v. Quigley, 305 N.W.2d at 733.

22. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (Court lists elements necessary to establish case for racial discrimination).

23. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986) (quoting Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293, 296 (Iowa 1982)) (disability discrimination alleged but not proved).

24. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 522 (Iowa 1990).

25. Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985); Landals v. George A. Rolfes Co., 454 N.W.2d 891, 893 (Iowa 1990).

26. Trans World Airlines, Inc. v. Thurston, 469 U.S. at 121-22.

27. Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989).

28. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 517 (Iowa 1990).

29. *Id.*

30.. EEOC, POLICY GUIDE ON RECENT DEVELOPMENTS IN DISPARATE TREATMENT THEORY, Part III at 8-9; 401 Fair Empl. Prac. Manual (BNA) 6915, 6921-22 (March 7, 1991).

discriminatory motive played a part in the employment decision.[31] The employer must then prove by a preponderance that it would have made the same decision even if it had not taken the discriminatory reason into account.[32] The employer's burden is an affirmative defense.

The United States Supreme Court stated:

> proving 'that the same decision would have been justified . . . is not the same as proving that the same decision would have been made.' An employer may not, in other words, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision.[33]

The employer may be found liable yet avoid certain remedies if it can prove information discovered *after the decision* would have resulted in the same decision. For example, if a bus company refuses to consider a woman's application for bus driver because of her sex, the company will be liable for discrimination. If, however, the company also discovers she is blind, the company will be free to prove she would not have been hired, even had it not discriminated. If so, then she "would have" earned nothing even in the absence of discrimination and hence is due no back pay. The bus company would have to show this defense by clear and convincing evidence.[34]

2. *Disparate Treatment and Disparate Impact*

There are two types of illegal discrimination: disparate treatment and disparate impact. Disparate treatment occurs when "'[t]he employer simply treats some people less favorably than others because of their [protected characteristic].' "[35] Proof of intent is required in these cases.[36] The key to the disparate treatment claim is showing the employer's reason for the action is a mere pretext for discrimination. This is done by "persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the proffered explanation is unworthy of

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31. *Id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989)) (this is according to the plurality; Justice O'Connor would require a showing that the illegal factor played a "substantial" role in the employment decision).

32. *Id.*; Price Waterhouse v. Hopkins, 490 U.S. at 250.

33. Price Waterhouse v. Hopkins, 490 U.S at 252 (citations omitted).

34. *Id.* (discussing use of clear and convincing standard when liability has been established); King v. Trans World Airlines, 738 F.2d 255 (8th Cir. 1984); Patterson v. Greenwood School Dist., 696 F.2d 293 (4th Cir. 1982); Ostroff v. Employment Exch. Inc., 683 F.2d 302 (9th Cir. 1982); *see also* East Texas Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 404 n.9 (1977) ("Even assuming *arguendo* that the company's failure even to consider the applications was discriminatory, the company was entitled to prove at trial that the respondents had not been injured because they were not qualified and would not have been hired in any event.").

35. Iowa Civil Rights Comm'n v. Woodbury County Community Action Agency, 304 N.W.2d 443, 448 (Iowa Ct. App. 1981) (quoting International Bhd. of Teamsters, 431 U.S. 324, 335 (1977)).

36. *Id.* at 452.

credence."[37]

A disparate impact situation " 'involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one [protected] group than another and cannot be justified by business necessity.' "[38] The policy or practice addressed in disparate impact cases refers to "the employer's standard operating procedure—the regular rather than the unusual practice."[39] Therefore disparate impact cases are usually proved by statistics showing an employment practice had a significantly higher impact on one protected group than on another.

3. *Bona Fide Occupational Qualification and Business Necessity*

After the plaintiff proves the employment action was motivated by the plaintiff's membership in a protected class, the employer can still prevail if it can prove the decision was justified by a bona fide occupational qualification ("BFOQ").[40] The employer proves a BFOQ by showing "all or substantially all of the excluded group will be unable safely and efficiently to perform the essential duties of the job, or that it is impracticable to deal with those persons on an individualized basis."[41] The BFOQ exception is strictly and narrowly construed.[42]

Similarly, when one shows an employment policy or practice has a legally significant disparate impact, the employer can still prevail. Before June 1989, the employer had to justify his practice by proving it was justified by "business necessity."[43] The employer had to show the policy had a manifest relationship to the employment, that is, it was job-related or reasonably necessary to the normal operation of the particular business.[44]

On June 5, 1989 the United States Supreme Court substantially altered the business necessity defense. In *Wards Cove Packing Co. v. Atonio*,[45] the

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37. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981)).

38. Iowa Civil Rights Comm'n v. Woodbury County Community Action, 304 N.W.2d at 448 (quoting International Bhd. of Teamsters v. United States, 431 U.S. at 335 (1977)).

39. *Id.* at 448-49.

40. Under federal law there is no BFOQ as to race.

41. 45B AM. JUR. 2D *Job Discrimination* § 2019 (1986) (footnotes omitted).

42. IOWA ADMIN. CODE r. 161-8.47 (1988); Polk County Juvenile Home v. Iowa Civil Rights Comm'n, 322 N.W.2d 913, 917 (Iowa Ct. App. 1982); Dothard v. Rawlingson, 433 U.S. 321, 334 (1977).

43. Albermade Paper Co. v. Moody, 422 U.S. 405, 425 (1975); 45B AM. JUR. 2D *Job Discrimination* § 2020 (1986).

44. 45B AM. JUR. 2D *Job Discrimination* § 2020 (1986).

45. Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989). The majority and the Bush administration believe *Wards Cove* effected no change. Hardly anyone else believes this, including four members of the Supreme Court, Wards Cove Packing Co. v. Atonio, 490 U.S. at 662 (Stevens, J., dissenting) ("sojourn into judicial activism"); most commentators, *e.g.*, Murphy, *Supreme Court Review*, 5 Lab. Law. 679, 681 (1989) ("drastically changed the rules"); *Review Of Supreme Court Term, Labor and Employment Law*, 58 U.S.L.W. 3065, 3066 ("significantly

Court changed the burden of proof and the amount of proof necessary to overcome the defense. After the plaintiff proves disparate impact,[46] the defendant need only produce evidence of business justification—the defendant need *not* prove the justification.[47] A challenged practice of an employer is not required to "be 'essential' or 'indispensable' to the employer's business" to provide justification.[48] The practice need only "serve, in a significant way, the legitimate employment goals of the employer."[49]

Even if the practice is justified, the employee will still prevail if he proves an alternative policy exists which will serve the business purpose and will have a lesser impact on the protected group.[50] Generally, a business necessity defense is not available in a disparate treatment case.[51] After the decision in *Wards Cove*, it is even more inappropriate to use this broader defense in cases involving intentional discrimination.

B. *General Disability Concepts*

1. *The Federal Statutes*

Until the Americans with Disabilities Act of 1990[52] ("ADA") becomes

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increased the burden upon employees alleging job bias"); and the Supreme Court of Iowa. Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 518 (Iowa 1990) ("*Wards* significantly affects all three stages of proof.").

46. *Wards Cove* also altered the proof necessary to show impact in certain cases. Because *Wards Cove*-type impact cases are rare in handicap discrimination this change will not be addressed. The reader should note this portion of the *Wards Cove* change was discussed and adopted with some modification by the Iowa Supreme Court in Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 519 (Iowa 1990).

47. Wards Cove Packing Co. v. Atonio, 490 U.S. at 659; Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 519 (Iowa 1990). Although the Iowa court discussed the changed business necessity defense in *Hy-Vee*, a business necessity was not articulated. *Id.* Hence the Iowa court's excellent discussion of the change is technically *dicta*. There is still room to argue the federal change should not be incorporated in the state act.

48. Wards Cove Packing Co. v. Atonio, 490 U.S. at 659; Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 519 (Iowa 1990).

49. Wards Cove Packing Co. v. Atonio, 490 U.S. at 659; Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 519 (Iowa 1990).

50. Wards Cove Packing Co. v. Atonio, 490 U.S. at 659; Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d at 519); 45B AM. JUR. 2D *Job Discrimination* § 2024 (1986) (pre-*Wards Cove* law).

51. Auto Workers v. Johnson Controls, 59 U.S.L.W. 4211 (U.S. March 20, 1991).

52. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990). Title I of the Americans with Disabilities Act ("ADA") takes effect on July 26, 1992. *Id.* at § 108. From that date until July 26, 1994, the ADA will prohibit disability discrimination by employers of twenty-five or more employees. *Id.* at § 105(A). After July 26, 1994, the ADA will cover the same employees as Title VII. *Id.* The ADA provides the same remedies as Title VII: back pay, costs, and attorney's fees. *Id.* at § 107(a), § 505. Even with the ADA in effect the Iowa Act remains theoretically useful for its broader jurisdiction (four or more employees), and more complete remedies. Under Iowa law distress damages are recoverable after showing discrimination caused the distress. Hy-Vee Food Stores, Inc. v. Iowa Civil Rights Comm'n, 453 N.W.2d at

effective, the primary federal disability antidiscrimination statute is the Vocational Rehabilitation Act of 1973 ("Rehabilitation Act").[53] Title V of the Rehabilitation Act covers employment of individuals with handicaps. Section 501 mandates nondiscrimination and affirmative action by federal agencies.[54] Section 503 provides federal contractors shall not discriminate in employing the disabled and shall take affirmative action to employ individuals with handicaps.[55] Finally, section 504 prohibits discrimination by any program receiving federal financial assistance.[56]

Under section 505, federal employees can bring actions under section 501 in the same manner they bring Title VII suits in the Equal Employment Opportunity Commission ("EEOC").[57] A violation of section 503 can be addressed only by filing a complaint with the Department of Labor ("DOL").[58] No circuit court currently recognizes a private right of action under section 503.[59] Section 505 also makes the remedies and procedures of Title VI of the Civil Rights Act of 1964 available in claims brought under section 504.[60] The Supreme Court has recognized a private right of action under section 504.[61] Exhaustion of administrative remedies under section 504 is generally not required.[62]

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526 (Iowa 1990).

53. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 701-796 (1988)).

54. *Id.* at § 501, 87 Stat. at 390 (codified at 29 U.S.C. § 791 (1988)).

55. *Id.* at § 503, 87 Stat. at 393 (codified at 29 U.S.C. § 793 (1988)).

56. *Id.* at § 504, 87 Stat. 394 (codified at 29 U.S.C. § 794 (1988)).

57. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 505, 92 Stat. 2955, 2982 (1978) (codified at 29 U.S.C. § 794a (1988)).

58. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503, 87 Stat. 355, 393-94 (1973) (codified at 29 U.S.C. § 793 (1988)).

59. Handicap Requirements Handbook, Federal Programs Advisory Service, 770:3 (1988); SCHLEI & GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, Chapter 8, part 1(B)(3) (1983 & 1989 Supp.) (cases cited cover second, third, fifth, sixth, seventh, eighth, ninth, and tenth circuits).

60. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 505, 92 Stat. 2955, 2982 (1978) (codified at 29 U.S.C. § 794 (1988)).

61. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 637 (1984).

62. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982); Camenisch v. University of Tex., 616 F.2d 127 (5th Cir. 1980); Adashuvas v. Negley, 626 F.2d 600 (7th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3d Cir. 1979); 45B AM. JUR. 2D, *Job Discrimination*, § 2147 n.89 (1986). In an unreported decision the District Court for the Southern District of Iowa ruled that filing with the Iowa Civil Rights Commission was required before one could bring a section 504 claim. Petersen v. Gentry, 28 Fair Empl. Prac. Cas. (BNA) 273, 275 (S.D. Iowa 1981). While this decision is pre-*Miener* the court anticipated the *Miener* holding on exhaustion but still found filing with the Iowa Civil Rights Commission to be necessary. A section 504 plaintiff should therefore always file with the Commission, get an administrative release, and join the state suit with his federal action. Finally, the opinion in *Petersen* suggests that even if the filing period is passed, the plaintiff can file with the Commission, get a "no jurisdiction" finding, and thereby exhaust his administrative remedies. *Id.* at 275 n.3.

In *Miener v. Missouri*, the Eighth Circuit ruled damages and all other necessary and appropriate remedies were available under section 504.[63] Despite that holding, one district in the Eighth Circuit ruled neither distress damages nor punitive damages were available under section 504.[64] The basis of this ruling was that *Miener* was not an employment case, and section 504 should be interpreted as having the same remedial scope as Title VII.[65] The United States Supreme Court has ruled back pay is definitely available under section 504, at least when the discrimination is of the disparate treatment type.[66] Section 505 allows attorney fees to be recovered for any proceeding to enforce or charge a violation of sections 501, 503, or 504.[67]

Unlike Title VI of the 1964 Act, section 504 covers employment discrimination in programs that receive federal aid with a primary objective other than the promotion of employment.[68] The Civil Rights Restoration Act of 1987 amended section 504 to expand the definition of "program or activity" receiving federal funding.[69] This amendment was intended to overturn the "program specific" interpretation of *Grove City College v. Bell*[70] and replace it with an "institution-wide" interpretation.

2. *Substantial Handicap*

A handicapped person is an individual with an impairment that substantially limits one or more life activities, has a record of such an impairment, or is regarded as having such an impairment.[71] The definition of a disabled person is broken down into three parts: (1) the person must have an impairment; (2) the impairment must substantially limit some activity; and (3) the activity substantially limited must be a major life activity.[72]

An "impairment" can be either physical or mental.[73] A physical impairment is any physiological disorder affecting one or more enumerated bodily systems.[74] A mental impairment includes any mental or psychological disor-

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63. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982).

64. Bradford v. Iron County, C-4 School Dist., 36 Fair Empl. Prac. Cas. (BNA) 1296 (E.D. Mo. 1984), *cited in* Martin v. Cardinal Glennon Memorial Hosp. For Children, 599 F. Supp. 284, 284 (E.D. Mo. 1984).

65. *Id.* at 1302.

66. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630-31 (1984).

67. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 505, 92 Stat. 2955, 2982 (1978) (codified at 29 U.S.C. § 794a (1988)).

68. Consolidated Rail Corp. v. Darrone, 465 U.S. at 635.

69. 29 U.S.C. § 794(b) (1988).

70. Grove City College v. Bell, 465 U.S. 555 (1984).

71. IOWA ADMIN. CODE r. 161-8.26(1) (1988); 29 U.S.C. § 706(8)(B) (1988); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 3(2), 104 Stat. 327, 329-30 (1990).

72. 28 C.F.R. § 41.31(a) (1990).

73. IOWA ADMIN. CODE r. 161-8.26(2) (1988).

74. *Id.*

der.[75] An impairment does not include "transitory illnesses which have no permanent effect on the person's health."[76]

The term "substantially limited" is *not* defined under sections 501 or 504 of the Vocational Rehabilitation Act of 1973, the Americans with Disabilities Act, or the Iowa Civil Rights Act. The DOL interprets it to mean the person is "likely to experience difficulty in securing, retaining, or advancing in employment."[77] When determining if the employee is "substantially limited," the DOL conclusively presumes the requirements of the defendant-employer are the requirements used generally by employers in the field.[78] However, the Department of Labor's interpretation applies to section 503 only.

A "major life activity" includes caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, working, etc.[79] The term "having a record of such an impairment" means having a history of, or having been classified or misclassified as having, a substantially limiting impairment.[80] The United States Supreme Court found a woman who had been hospitalized with tuberculosis had a record of a substantially limiting impairment.[81]

An individual is "regarded as having such an impairment" if he: (1) "[h]as a physical or mental impairment that does not substantially limit major life activities but is perceived as [imposing] a limitation;" (2) has an impairment that is substantially limiting because of the attitudes of others; or (3) has no impairment but is treated by an employer as having such an impairment.[82] An employer does not regard an employee as disabled simply by finding the employee is incapable of performing a particular job.[83]

3. *Reasonable Accommodation and Undue Hardship*

An employer must reasonably accommodate the known physical or mental limitations of an otherwise qualified handicapped employee, unless the employer can show the accommodation would impose an undue hardship.[84] An otherwise qualified individual is a person who can perform the

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75. 28 C.F.R. § 41.31(b) (1990); IOWA ADMIN. CODE r. 161-8.26(2) (1988).
76. Stevens v. Stubbs, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983).
77. 41 C.F.R. § 60-741.2 (1990).
78. *E.g.*, E.E. Black Ltd. v. Marshall, 497 F. Supp. 1088, 1100-01 (D. Haw. 1980); OFCCP v. Southern Pac. Trans. Co., 79 OFCCP Fed. Cont. Compl. Man. (CCH) ¶ 10A, IV Handicap Requirements Handbook, case 1021 (Nov. 19, 1982). For copies of OFCCP administrative decisions write United States Department of Labor, Administrative Law Judges, Library, 1111 20th Street, N.W., Wash., D.C. 20037.
79. 28 C.F.R. § 41.31(a)(2) (1990); IOWA ADMIN. CODE r. 161-8.26(3) (1988).
80. 28 C.F.R. § 41.31(b)(3) (1990); IOWA ADMIN. CODE r. 161-8.26(4) (1988).
81. School Bd. v. Arline, 480 U.S. 273 (1987).
82. 28 C.F.R. § 41.31(b)(4) (1990); IOWA ADMIN. CODE r. 161-8.26(5) (1988).
83. Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986).
84. 45 C.F.R. § 84.12(d) (1990); IOWA ADMIN. CODE r. 161-8.27(b) (1988).

essential function of the job with reasonable accommodation. Therefore, an employer is not required to eliminate an essential job function as an accommodation.[85] Similarly, if an employee can no longer perform his essential job functions, the employer is not required to reassign him.[86]

An accommodation is not "reasonable" if the employer can prove it would impose an undue hardship.[87] In considering whether an undue hardship is imposed, a number of factors are considered: (1) the overall size of the employer's business; (2) the number and type of facilities; (3) the number of employees; (4) the type of operation; and (5) the nature and cost of the accommodation.[88] Thus, it may be an undue hardship to exempt a disabled employee from lifting in a two-person store; however, such exemption was required in a seven-person store.[89]

4. *Defenses*

The two basic defenses discussed in part A of this division still apply in the context of handicaps.[90] If an employee claims disparate impact discrimination, the employer can raise the defense of business necessity. If the employee claims disparate treatment, the BFOQ is an appropriate affirmative defense. In Iowa, physical or mental disability requirements set by federal or state statute or regulation constitute a BFOQ if the statute or regulation is meant to regulate an activity that is an essential job function.[91]

In addition to these defenses, an employer charged with disability discrimination can escape liability by proving the employee cannot perform essential job functions without posing a reasonable probability of substantial harm to himself or others.[92] This defense differs from the others in its par-

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85. Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985).

86. School Bd. v. Arline, 480 U.S. at 289 n.19.

87. 45 C.F.R. § 84.12(a) (1990).

88. 45 C.F.R. § 84.12(c) (1990); IOWA ADMIN. CODE r. 161-8.27(6)(b) (1988).

89. Iowa Beer & Liquor Control Dep't v. Iowa Civil Rights Comm'n, 337 N.W.2d 896, 900 (Iowa Ct. App. 1983).

90. *See supra* notes 40-51 and accompanying text.

91. IOWA ADMIN. CODE r. 161-8.32(3) (1988); *cf.* Hollinrake v. Monroe County, 433 N.W.2d 696 (Iowa 1988) (administrative rule cannot be challenged using section 601A.6 of the Iowa Civil Rights Act).

92. Mantolette v. Bolger, 767 F.2d 1416 (9th Cir. 1985); Kelley v. Bechtel Power Corp., 633 F. Supp. 927 (S.D. Fla. 1986); United States Dep't of Labor v. Texas Indus., Inc., 47 Fair Empl. Prac. Cas. (BNA) 7 (Office of Federal Contract Compliance Programs, June 7, 1988); Sterling Transit Co. v. Fair Employment Practices Comm'n, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981); Rozanski v. A.P.A. Transp., 512 A.2d 335 (Me. 1986); Lewis v. Remmele Eng'g, Inc., 314 N.W.2d 1 (Minn. 1981); Panetteri v. C.Y. Hill Refrigeration, 388 A.2d 630 (N.J. Super. Ct. App. Div. 1978); Pacific Motor Trucking Co. v. Bureau of Labor & Indus., 64 Or. App. 361, 668 P.2d 446 (1983); Rose v. Hanna Mining Co., 616 P.2d 1229 (Wash. 1980); Bucyrus-Erie Co. v. Department of Indus., 280 N.W.2d 142 (Wis. 1979); Davidson v. Shoney's Big Boy Restaurant, 380 S.E.2d 232 (W. Va. 1989); *see also* Case Note, *Civil Rights*—Frank v. American Freight Sys., Inc., 37 DRAKE L. REV. 559, 563 n.52 (1987-1988).

ticularity. The business necessity and BFOQ defenses are usually used to defend the generalized rule. A BFOQ is used only when the employer seeks to prove he is justified in discriminating against an entire class based on a protected characteristic.[93] In contrast, the reasonable-probability-of-substantial-harm defense is based on the individual's work and health history, and is rarely established by medical reports alone.[94] However, if the risk of harm can be made acceptable through reasonable accommodation, the defense will fail.[95]

5. *Order and Allocation of Proof*

In most disability cases, there is direct evidence the employer considered the handicap when making the decision. In such cases it is error to use the *McDonnell Douglas* and *Burdine*[96] tests in the analysis.[97] Considerable disagreement exists over the details of the order of proof in disability cases.[98] The employer bears the burden of proving the suggested accommodations pose an "undue hardship" in religious accommodation cases.[99] The question of whether an action was taken with an intent to discriminate based on disability is also determined under the standard *Burdine* analysis.[100]

If disparate impact is claimed, the business necessity method of proof would be used. The employer would also have the ability to prove a BFOQ (in a treatment case) or the reasonable probability of substantial harm. After the employer proves there was reasonable probability of substantial harm, the plaintiff could produce evidence that accommodation would make

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93. 45A AM. JUR. 2D *Job Discrimination* § 165 (1986).

94. Mantolette v. Bolger, 767 F.2d 1416 (9th Cir. 1985).

95. *Id.*

96. McDonnell Douglas v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).

97. TWA v. Thurston, 469 U.S. 111 (1985).

98. A suggested order and allocation of proof based on principles laid down in case law is: (a) Plaintiff proves (if necessary) discriminatory intent via *Burdine* and *Price Waterhouse*; (b) plaintiff articulates suggested accommodations and presents evidence the accommodation can be performed; (c) defendant can then prove the suggested accommodation would impose an undue hardship. *See* Sisson v. Helms, 751 F.2d 991 (9th Cir. 1985); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) (employer must reasonably accommodate, without undue hardship on employer's business, an employee's religious practices).

99. IOWA ADMIN. CODE r. 161-8.27(6) (1988); 42 U.S.C. § 2000(e)(j) (1988) (undue hardship burden on employer in religious accommodation cases); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 102(b)(5)(A), 104 Stat. 327, 332 (1990) ("unless such covered entity can demonstrate"); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) (employer must reasonably accommodate, without undue hardship on employer's business, an employee's religious practices).

100. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 157 (Iowa 1986). This Article does not discuss *Trobaugh* because the court held the employer laid off the employee for economic reasons, rather than disability.

the risk acceptable. The employer could then prove the accommodation would impose an undue hardship.

III. The Iowa Disability Discrimination in Employment Cases

A. Foods, Inc. v. Iowa Civil Rights Commission[101]

This case involved a complainant who was an epileptic cafeteria worker.[102] The complainant spent most of her time washing dishes, bussing tables, and setting tables.[103] She occasionally served food at a steam table, and, rarely, worked at the grill.[104] After suffering a seizure at work the complainant was fired.[105]

The most significant legal issue in the case was the interpretation of the "unrelated to ability to engage in particular occupation" defense.[106] The employer argued the language meant that if the complainant's epilepsy was *in any way* related to her ability to perform the job, then she was not covered by the Act.[107] Because this reading is inconsistent with the requirement that an employer reasonably accommodate an employee, it "would effectively defeat the remedial purpose of chapter 601A;"[108] therefore, the court rejected this literal interpretation. Instead, the court ruled a person is removed from coverage only when the disability is related to the person's ability to perform the job "in a reasonably competent and satisfactory manner."[109] The court's decision was the first judicial recognition that the Iowa Civil Rights Act *requires* accommodation of disabled employees.

The other significant issue in *Foods* involved a "reasonable probability of substantial harm" type of defense.[110] The district court ruled complainant's seizure disorder "posed a substantial danger" to the complainant, her co-workers, and the customers.[111] The district court concluded the employer had sustained its burden of showing a bona fide occupational qualification.[112] The Iowa Supreme Court reversed because the employer could have alleviated this risk by restricting the complainant's job duties.[113] If the substantial harm can be avoided by reasonable accommodation, the existence of a substantial risk will not constitute a defense.

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101. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).
102. *Id.* at 164.
103. *Id.* at 168.
104. *Id.*
105. *Id.* at 164.
106. *Id.* at 166.
107. *Id.* at 167.
108. *Id.*
109. *Id.*
110. *Id.* at 167-68.
111. *Id.*
112. *Id.*
113. *Id.* at 169.

From an analytical standpoint, *Foods* remains one of the court's best cases. In holding reasonable accommodation of the disabled is required to avoid discrimination, the court recognized that handicap discrimination is categorically different from all other types of discrimination, except possibly religious discrimination. At the same time, the court unfortunately used the bona fide occupational qualification defense to analyze a "risk of harm" type of defense. While harmless in *Foods*, the analysis created confusion in later cases.

The concept that failure to give reasonable accommodation constitutes discrimination can be difficult to explain. The fable of the fox and the stork provides a good explanation of the concept. According to this fable:

> [t]he fox asked the stork to lunch. The fox served soup in a shallow bowl and the stork was unable to get his long beak in the bowl. The stork returned the favor and asked the fox over for dinner. The stork served soup in a tall beaker which the fox was unable to drink from.

Each actor in this fable failed to consider the profound physical difference of his guest. Host and guest were treated the same. Yet the result, and indeed the intent, was discrimination based on physical difference.

B. Sommers v. Iowa Civil Rights Commission[114]

In this case the court was faced with a complainant who was fired because of a transsexual condition.[115] The complainant alleged employment discrimination claiming transsexualism was a disability under the Iowa Civil Rights Act.[116] The Commission concluded transsexualism was not within the scope of the Act and dismissed the case.[117] The complainant brought this appeal under the Iowa Administrative Procedures Act.[118]

"Disability" is defined by the Iowa Civil Rights Act as a physical or mental condition that constitutes a substantial handicap.[119] The statute, however, does not define "substantial handicap." The Iowa Civil Rights Commission promulgated rules defining this term. Under these provisions an *impairment* constitutes a substantial handicap when it substantially limits one or more major life activities. "A person has such a handicap in three circumstances: (1) if the person actually has [such an] impairment; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."[120] The rules also define the terms "physical impairment" and

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114. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470 (Iowa 1983).
115. *Id.* at 471.
116. *Id.*
117. *Id.* at 472.
118. *Id.*
119. IOWA CODE § 601A.2(4) (1991).
120. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d at 476 (quoting IOWA ADMIN. CODE r. 240-6.1(1) (1982) now found at IOWA ADMIN. CODE r. 161-8.26(1) (1988)).

"mental impairment."[121] Because a physical impairment requires an organic disorder of the body, and there was no claim that such a disorder was associated with transsexualism, the court found no actual physical impairment.[122] The mental impairment discussion, however, was more involved.

The mental conditions identified in the Commission rule "are inherently likely to have a limiting effect" on a major life activity.[123] In contrast, the court stated transsexualism has an adverse effect on major life activities only as a result of the attitudes of others.[124] Because the condition did not fall within the definition of impairment, the attitudes of others cannot transform the condition into an impairment.[125]

This raised the issue of perceived disability.[126] A person who is not actually disabled is still protected by the Iowa Civil Rights Act if others regard that person as having an impairment that constitutes a substantial handicap.[127] The court disposed of this issue by noting the Commission could reasonably conclude those with an adverse attitude towards transsexuals base this attitude on the belief transsexualism is undesirable rather than a belief transsexuals suffer from some sort of mental or physical impairment.[128] The court held transsexualism is not an impairment and society's adverse attitude does not mean a transsexual is perceived as having an impairment;[129] therefore, it upheld the Commission's dismissal of the charge.[130]

The analysis in *Sommers* is basically sound. Determining whether a person has a disability must start with the impairment because a disabled person is one that has an impairment. It also makes sense to require the limiting effect of a mental or physical condition to flow from the condition itself—not from others' reaction to it.

The court, however, continued to analyze the question of "substantial handicap" on a disability-wide basis. A court must determine whether an individual is "substantially handicapped" based solely on the condition of that individual. Likewise, whether a person is regarded as being "substantially handicapped" should be assessed from the perspective of those who perceive the complainant. What if Sommers' employer had stated he believed Sommers was mentally impaired, and the impairment would make Sommers unsuitable for any employment? Under those facts Sommers

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121. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d at 476.

122. *Id.*

123. *Id.* The Americans with Disabilities Act expressly excludes transsexualism from the definition of disability. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 511(B), 104 Stat. 327, 329-30 (1990).

124. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d at 476.

125. *Id.*

126. *Id.* at 477.

127. *Id.*

128. *Id.*

129. *Id.* at 476-77.

130. *Id.* at 477.

would be able to prove perceived disability. Assuming there was no investigation of this issue, the court should have remanded the case with instructions to investigate it.

C. Iowa Beer & Liquor Control v. Iowa Civil Rights Commission[131]

The complainant was a liquor store clerk whose heart condition prevented her from lifting objects over ten pounds.[132] Her duties included operating the cash register, dusting, bookkeeping, and light lifting.[133] The policies of the employer required all clerks to be able to do every task in the job description which included moderately heavy lifting.[134] Although the store manager knew of her condition, the complainant was fired when higher management became aware of it.[135]

The basic dispute before the Iowa Court of Appeals was whether the lifting requirement was a "bona fide occupational qualification."[136] If it was a BFOQ, then the discharge was based on the "nature of the occupation."[137]

The determination of a BFOQ was "inextricably linked to the reasonable accommodation issue."[138] In fact, the court seemed to be discussing the undue hardship issue. The evidence showed the store could operate efficiently with the complainant doing no lifting.[139] Although the court conceded this was not the most efficient arrangement, it also stated "the most efficient way might be to hire someone built like Samson with a brain like Einstein's."[140] Thus, "the civil rights act does not promote efficiency but rather asks for reasonable accommodation to the disabled."[141]

In discussing the reasonable accommodation issue the court clarified what would not constitute an "undue hardship." The court specifically rejected the argument that an accommodation may not impose more than a *de minimis* cost. "The standard for judging reasonable accommodation is not one of *de minimis* but of 'undue hardship.' "[142] The court then quoted a case in which the Washington Supreme Court rejected the *de minimis* argument.[143] The court also rejected the argument that the dissatisfaction of coemployees can constitute an undue hardship. Such a rule, stated the court,

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131. Iowa Beer & Liquor Control v. Iowa Civil Rights Comm'n, 337 N.W.2d 896 (Iowa Ct. App. 1983).
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.* at 897.
137. *Id.* at 898.
138. *Id.*
139. *Id.*
140. *Id.* at 899.
141. *Id.*
142. *Id.*
143. *Id.*

would eviscerate the prohibition against handicap discrimination in employment.[144]

Finally, the court addressed the employer's argument that employing a disabled person would have a disastrous effect on stores with only one or two employees. In this case the store had seven employees, and potential hardships faced by other stores were irrelevant.[145] The court stated disability cases are decided on a case-by-case basis, and "undue hardship" referred to "*present* undue hardship, as distinguished from anticipated or multiplied [undue] hardship."[146]

The court of appeals continued the practice followed in *Foods* of mixing BFOQ, business necessity, and undue hardship analyses. Strictly speaking, it is proper to discuss the "ability to perform all duties in job description" policy in terms of a BFOQ.[147] However, because accommodation is required, a BFOQ can be proved only if all accommodation would be unreasonable.[148] Therefore, little is gained by using a BFOQ rather than a reasonable accommodation/undue hardship analysis. A BFOQ would make sense only if the employer sought to establish a blanket rule.

Despite this flaw, the court displayed remarkable sensitivity to the policies underlying disability discrimination law. In particular, the court recognized society requires a business to forego a degree of profitability so it may profit from the efficient use of human resources.

D. Consolidated Freightways v. Cedar Rapids Civil Rights Commission[149]

The complainant in this case was a sales representative for three years for the respondent.[150] In the course of his job he was required to entertain customers, which included purchasing alcoholic drinks for them.[151] The complainant, however, was an alcoholic and experienced numerous problems as a result.[152] After several arrests he agreed to undergo treatment for alcoholism.[153] When he returned from treatment, his employer informed him that he had been replaced.[154]

The court's decision was fact specific. The major legal issue was whether alcoholism was a disability.[155] To determine it was, the court had to find

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144. *Id.* at 900.
145. *Id.*
146. *Id.* (citing Haring v. Blumenthal, 471 F. Supp. 1172, 1181-82 (D.C. 1979)).
147. *Id.* at 898.
148. *Id.* at 900.
149. Consolidated Freightways v. Cedar Rapids Civil Rights Comm'n, 366 N.W.2d 522 (Iowa 1985).
150. *Id.* at 525.
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 527.

alchoholism to be a physical or mental impairment with "an inherent propensity to limit one or more of the individual's major life activities independent of the perceptions of others."[156] To define "alcoholism" the court looked to dictionaries, the Code definition of "substance abuser," and expert testimony. These sources established that alcoholism involves a substantial impairment to the person's health or social and economic function.[157] Thus the court ruled alcoholism *could* be a disability.[158] The Act, however, would not protect abusers whose current use prevents proper job performance or constitutes a direct threat to the property or safety of others.[159]

The next issue was whether the complainant had proved he was an alcoholic.[160] In deciding sufficient proof existed, the court stated medical testimony is not essential to proving a complainant has a "disability"—lay experts will suffice.[161] The court held substantial evidence supported the findings of discrimination.[162]

This case summarized the employer's duty to accommodate and the meaning of "substantial handicap." It established little new law. Because of the four-member dissent, however, it can be viewed as a turning point in the court's thinking. The dissenters believed the termination was justified by poor job performance.[163] They pointed to evidence the claimant was disabled by alcoholism to support the conclusion he could not perform the job.[164]

The dissent provided the first glimpse of the "no win defense." It is based on the natural tension between proving a disability substantially limits major life activities and proving a complainant is still able to perform the job in a reasonably competent and satisfactory manner. In effect, "substantial handicap" is the minimum amount of disability required, and "undue hardship" describes the maximum amount of disability allowed. When these two meet, the complainant must show he is unable to perform the job in a satisfactory manner to prove he is disabled. This would be the "no win defense." By implying that the proof of disability necessarily shows an inability to do the job, the dissent in *Consolidated* took the first small steps toward a "no win defense" in Iowa.

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156. *Id.*

157. *Id.*

158. *Id.* at 528.

159. *Id.* at 527.

160. *Id.* at 528.

161. *Id.* at 529.

162. *Id.* at 534.

163. *Id.* at 536 (Carter, J., dissenting).

164. *Id.* (Carter, J., dissenting).

E. Frank v. American Freight Systems, Inc.[165]

The employer had a rule automatically disqualifying all applicants for truck driver positions who had undergone any back surgery.[166] Glen Frank sued for discriminatory refusal to hire in violation of the Act.[167] The employer appealed the adverse judgment of the district court.[168]

The initial issue facing the court was whether to analyze the employer's hiring rule under a disparate impact or a disparate treatment theory.[169] Because the actual purpose of the rule was to eliminate those with certain back conditions, the court used the disparate treatment analysis.[170]

The employer claimed it could apply its "bad back" rule on a blanket basis because of the nature of the occupation.[171] The court stated the various factors in disability cases are usually too diverse to permit a generalized application of such rules.[172] In the majority of cases "individualized consideration must be given to the job and the applicant's particular circumstances."[173] In certain cases, however, the job and the disability may be so incompatible as to support a blanket rule; for example, a rule prohibiting a blind bus driver.[174]

In evaluating the "bad back" rule the court analyzed the job requirements, the employee's condition, and the relation between back problems and truck driving generally. The job required moving cargo, which included boxes weighing up to 150 pounds.[175] Given this task and the employee's condition, the medical expert testified the probability of Mr. Frank suffering future "pain and disability" was "greater than fifty percent, possibly greater than seventy-five percent."[176] In addition, the court noted "that truck drivers have the highest incidence of back injuries."[177] Finally, the court applied the "business necessity" defense and determined the employer had shown an overriding, legitimate business purpose for the rule.[178]

After finding the rule to be justified, the opinion, nevertheless, proceeded to address reasonable accommodation. In this discussion, the court stated that "in the 'analogous' area of religious discrimination" it had held an accommodation is an undue hardship if it imposes more than a *de*

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165. Frank v. American Freight Sys., Inc., 398 N.W.2d 797 (Iowa 1987).
166. *Id.* at 798.
167. *Id.*
168. *Id.*
169. *Id.* at 800.
170. *Id.*
171. *Id.* at 801.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 801-02.
177. *Id.* at 802.
178. *Id.*

minimis cost or substantially impinges on the rights of co-employees.[179] The court then found any accommodation would impose an undue hardship.[180]

As in previous cases, the court confused the various defenses to disability discrimination. When a blanket rule is defended, either a BFOQ or a business necessity is the appropriate defense.[181] If the rule, as the one here, is overtly discriminatory, then a BFOQ must be shown.[182] In any case, examination of a generalized rule must focus on how that rule functions in general, not on its effect on the individual plaintiff.

The court's analysis in *Frank* ran contrary to these undoubted principles of law. First, the court applied a business necessity standard in a disparate treatment suit. Second, it spent the majority of its discussion on the particular plaintiff's condition. The *only* generalized evidence mentioned was that many truck drivers have back injuries, and this was a concern of the trucking industry.[183] Mr. Frank's back condition simply does not justify applying the "bad back" rule to *everyone* who has undergone back surgery. At most it justifies applying the rule to every person who has Mr. Frank's particular condition. Also, the evidence that truck drivers are particularly likely to injure their backs does not mean everyone who has had back surgery is more at risk. Without information concerning the class of individuals who have undergone back surgery, the generalized rule cannot be justified.

It is difficult to understand why the court chose to discuss reasonable accommodation in this case. If the employer proved it had properly excluded all those with prior back surgery, that should have been the end of the matter. Either the blanket rule was legal or it was illegal. The court's decision that the generalized rule was legal resulted in the conclusion that no one covered by the rule could be reasonably accommodated without imposing an undue hardship. This is why generalized rules are seldom used in disability suits.

It is unfortunate the court did not use the reasonable-probability-of-substantial-harm analysis. While this theory does not address generalized rules, it really was the basis for the employer's claim in this case. Basically, the employer argued that even if Mr. Frank can presently do the job, the fifty to seventy-five percent chance he will suffer further disability while on the job justified the failure to hire.[184] In fact, the reasonable-probability-of-substantial-harm defense was the essence behind the court's decision. The court ruled in favor of the employer because there was "a substantial likelihood that [Mr. Frank would] suffer symptoms in the future under the stress

179. *Id.* at 803.
180. *Id.*
181. *Id.*
182. *Id.* at 801.
183. *Id.* at 802.
184. *Id.* at 801-02.

of driving and lifting."[185] If the court had used the reasonable-probability-of-substantial-harm analysis, it could have properly asked whether reasonable accommodation might alleviate the risk of harm.

Finally, this was the first case in which the court suggested that *de miminis* is the standard for undue hardship in disability cases. However, this was done without mentioning the contrary holding of *Iowa Beer & Liquor Control*.[186] The difficulties with adopting such a standard are discussed below in part IV.

F. Cerro Gordo County Care Facility v. Iowa Civil Rights Commission[187]

An epileptic ward attendant at a county care facility brought this suit claiming failure to accommodate.[188] One of the attendant's duties was driving residents to and from various appointments.[189] After the attendant suffered his first seizure, his driver's license was suspended for six months.[190] Consequently, his "driving duties were taken over by other[s]."[191] When he suffered a second seizure, and hence another suspension, the employer offered to transfer him to a dietary and housekeeping position.[192] He accepted the transfer with no reduction in pay.[193]

Several months later, after visiting his doctor, the employee received a list of restrictions concerning his new position.[194] The employer, after learning of these restrictions, offered the employee a leave of absence or sick leave with pay until he was able to perform the job.[195] The employee took sick leave for three months, after which he got his license back and was rehired as a ward attendant.[196] He claimed the transfer and sick leave were unlawful discrimination.[197]

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185. *Id.* at 802. As one commentator has pointed out, the court's discussion of Mr. Frank's condition was still insufficiently individualized to meet the standards of the "safety defense". Note, *Civil Rights*, Frank v. American Freight Sys., Inc., 37 DRAKE L. REV. 559, 567 (1987-1988) ("[T]he rationale for the Iowa Supreme Court's decision is weak."). Though Mr. Frank apparently had a high chance of further injury there still remains, at least, the issue of how severe the injury is likely to be. In short, there was insufficient generalized evidence to support a general rule and insufficient particular medical evidence to support the safety defense.

186. *See supra* notes 131-48 and accompanying text.

187. Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192 (Iowa 1987).

188. *Id.* at 193.

189. *Id.* at 194.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

The principal legal issue was whether the employer had met its reasonable accommodation obligation.[198] The court noted the employer only needed to show the plaintiff had been accommodated.[199] The employee had to prove the accommodation was not sufficient.[200] The court then held the Commission rules did not mean that when an employee becomes disabled, the employer must attempt to retain that employee in the same job before attempting any other accommodation.[201] The court found it sufficient for the employer to offer the employee a leave or transfer that allowed the employee to receive full income.[202] The fact the employee preferred some other accommodation was not controlling.[203] The court held the employer had acted "reasonably" and thus a defense judgment was required.[204]

The court established some considerations affecting how much accommodation is required. These considerations include the employee's needs and desires and the economic and other realities facing the employer. The court stated the accommodation requirements under the Act are not as strong as the ones imposed by federal statutes requiring affirmative action.[205] "Rather, it is more similar to the duty of an employer to accommodate a religious preference of an employee."[206] While required religious accommodation cannot impose more than a *de minimis* cost, the court "did not intend to suggest that such a low standard of accommodation is sufficient in every circumstance."[207]

The result in this case was consistent with general disability principles. An employer is only required to make *a* reasonable accommodation, not necessarily the *best* reasonable accommodation.[208]

The court's discussion of federal law and religious accommodation is, however, problematic. Some federal laws require certain employers to take affirmative action to employ the disabled. These laws include sections 501 and 503 of the Rehabilitation Act,[209] as well as the Education of the Handicapped Act.[210] Other federal laws mandate nondiscrimination of the dis-

198. *Id.* at 196.
199. *Id.*
200. *Id.*
201. *Id.* at 197.
202. *Id.* at 197-98.
203. *Id.* at 198.
204. *Id.* at 197.
205. *Id.*
206. *Id.*
207. *Id.*
208. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 68 (1986) ("any reasonable accommodation by the employer is sufficient to meet its accommodation obligation").
209. Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 501, 503, 87 Stat. 355, 390 and 393 (1973) (codified at 29 U.S.C. §§ 791, 793 (1988)).
210. Education of the Handicapped Act, 20 U.S.C. §§ 1400-1485 (1988). Of course, the EHA is primarily concerned with education. It has been held to cover the employment of an Iowa school bus driver. Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D.

abled but do not require affirmative action.[211] Section 504 of the Rehabilitation Act is the most important of the nonaffirmative-action statutes.[212] Currently, this is the only section of the Rehabilitation Act that gives rise to an implied cause of action in the courts. It is correct that if affirmative action is required, a higher accommodation standard applies. In fact the Supreme Court of the United States has ruled section 504 has a lower accommodation standard than does section 503.[213] Moreover, it is clear the Iowa Act is directly analogous to section 504. Indeed, the federal case cited in *Cerro Gordo* held section 504 and the Iowa Act have the same accommodation standard.[214]

Yet, in *Cerro Gordo* the Iowa Supreme Court apparently believed the failure of the Iowa Act to require affirmative action meant all the federal laws were not persuasive, and the Iowa disability accommodation standard was most analogous to religious accommodation. It would be error to ignore federal section 504 cases on the basis that the Iowa disability accommodation standard is not as stringent as that contained in section 503. It is not clear whether this is what the court has done. Even so, the reference to a changing standard of accommodation is an enigma. If the standard is not *de minimis* in "every circumstance," then how must the circumstances change in order to change the standard? The opinion leaves this question unanswered.

G. Brown v. Hy-Vee Food Stores[215]

In this case the Iowa Supreme Court considered another claim by a truck driver with a back problem. The employee's doctor prescribed lifting restrictions. Later, the employee was fired because the company lacked work that would accommodate the restrictions.[216] The trial court dismissed the suit, finding the truck driver was not "disabled" within the meaning of the Act.[217]

The sole issue on appeal was whether the truck driver was disabled.[218]

Iowa 1984).

211. *E.g.*, Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970), as amended by Exec. Order No. 12,106, 44 Fed. Reg. 1053 (1978), *reprinted in* 42 U.S.C. §§ 2301-02 (1988) (civil service employees protected from discrimination based on disability).

212. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794 (1988)).

213. Southeastern Community College v. Davis, 442 U.S. 397 (1979); *cf.* School Bd. v. Arline, 480 U.S. 273, 288 n.17 (1987) (discussing accommodation under section 504).

214. Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984), *cited in* Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192, 197 (Iowa 1987).

215. Brown v. Hy-Vee Food Stores, 407 N.W.2d 598 (Iowa 1987).

216. *Id.* at 599.

217. *Id.*

218. *Id.*

After quoting the Iowa Civil Rights Commission rules defining who is covered, the opinion disposed of Brown's claim by noting that after his injury "Brown engaged in heavy lifting, coaching little league, and wood cutting."[219] In short, he was not substantially limited. The court also held the employer did not perceive Brown as disabled.[220] In fact, several agents of the employer believed Brown was just malingering to maximize his worker's compensation claim.[221] The district court's dismissal was thus affirmed.[222]

The court decided whether Brown was disabled by applying the rules to a particular fact pattern. One cannot quarrel with the conclusion based on the facts presented.

The court in dicta stated the "well-established limitation" on the accommodation duty was the *de minimis* standard.[223] This dicta indicated the court may have backed off from its limitation of the *de minimis* analysis expressed in *Cerro Gordo*.[224] Other dicta destined to be frequently quoted in briefs is the "small target dicta." The court wrote:

> Brown contends his physical impairment qualifies as serious enough to bring him within the ambit of the civil rights Act, but is not so serious as to place him beyond the need for reasonable accommodation by his employer. He has selected a small target, if indeed one exists at all.[225]

This statement is not self-explanatory. It could mean two things. First, it could mean it is difficult to be (1) covered by the Act and (2) accommodated without imposing an undue hardship. This interpretation is a virtual restatement of the "no win defense" (*i.e.*, if one is disabled, he or she cannot be accommodated). Second, it might mean it is difficult to be (1) "disabled" and (2) able to perform the job *without* accommodation. This second interpretation, while not as literal as the first, makes more sense given the facts in the case, the precedent, and the intent of the Act.

H. Halsey v. Coca-Cola Bottling Co. of Mid-America[226]

This case also involved an employee who was unable to drive. The job required the employee, a vending machine repairer, to travel to the broken machine and, if the machine could not be fixed on site, to transport the machine to and from the shop.[227] Due to poor vision the employee lost his

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219. Brown v. Hy-Vee Food Stores, 407 N.W.2d at 600.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* (citing Frank v. American Freight Sys., Inc., 398 N.W.2d 797, 803 (Iowa 1987); King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598, 604 (Iowa 1983)).

224. Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192, 196-98 (Iowa 1987).

225. Brown v. Hy-Vee Food Stores, 407 N.W.2d at 599.

226. Halsey v. Coca-Cola Bottling Co. of Mid-America, 410 N.W.2d 250 (Iowa 1987).

227. *Id.* at 251.

driver's license and as a result was fired.[228] The district court found in favor of the employer but the court of appeals reversed.[229] The Iowa Supreme Court granted further review.[230]

As a preliminary issue, the court again faced the argument that the language "unrelated to the ability to engage in a particular occupation" should be read literally.[231] The district court had ruled that because the plaintiff's disability was related to the job, he was not "disabled" under the Act.[232] The supreme court again rejected this reasoning, holding it was inconsistent with the duty to accommodate.[233]

The remaining issue was whether the employee could have been accommodated without imposing an undue hardship.[234] The employee suggested he could arrange for the required transportation at his own expense, in particular, his wife could do the required driving.[235] The court held that even assuming this was a reasonable accommodation, the employee was arranging for his own transportation only and it did not solve the problem of equipment transportation.[236] The court ruled it an undue hardship to have an employer's "valuable equipment . . . transported in vehicles driven by persons it does not select and over whom it exercises no control."[237] Because no other accommodation was reasonably available, the dismissal was affirmed.[238]

In *Halsey* the court did not make any new law. First, the court simply restated its decision in *Foods* rejecting the literal reading of "unrelated to the ability to engage in a particular occupation." The remainder of the decision involved a judgment call. Key to the disposition of the accommodation issue was that the case was tried in equity and hence review was *de novo*.

The court's decision regarding accommodation, however, is unconvincing. The supposed lack of control over plaintiff's driver is purely a legal construct. As a practical matter no employer controls his employees in the sense a puppeteer controls his puppets. An employer's control over his employees flows from the employer's ability to discipline his employees if they violate the rules or policies of the employer. Under the suggested arrangement the employer could still have fired Halsey if his driver had displeased the employer. For example, if Halsey had been late to work because of his driver, the employer could have disciplined Halsey. Because the driver got paid

228. *Id.* at 251-52.
229. *Id.* at 251.
230. *Id.*
231. *Id.* at 252.
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 253.
237. *Id.*
238. *Id.*

only if Halsey did, it seems the employer would enjoy no less actual, as opposed to legal, control over the driver as it did with any other driver. The court of appeals had the better argument.

The court's treatment of the undue hardship standard in *Halsey* is interesting. Unlike the decisions in *Brown* and *Frank*, the court in *Halsey* was properly presented with the undue hardship issue. This, in addition to the fact *Halsey* was heard *en banc*, gives particular weight to any exposition of what constitutes undue hardship. Unfortunately, and perhaps significantly, the court did not mention what standard it applied.

I. Mowrey v. Iowa Civil Rights Commission[239]

This was a consolidated appeal of three complainants who brought claims against the same employer.[240] A number of claims were made including two disability discrimination allegations.[241] The Commission dismissed the claims for "no probable cause."[242]

All the petitioners were women working as machine operators for Tension Envelope Corporation.[243] Two of the petitioners had tendonitis, one of whom also had carpal tunnel syndrome.[244] These two could not operate a fast-paced machine and were placed in special "restricted operator" positions which paid less than the regular "operator" positions.[245] The third petitioner, Rodish, was injured in a car accident. Her employer denied her light duty status when she returned to work. As a result, Rodish injured herself at work.[246] She was unable to do her job and later was removed from the seniority list.[247]

The first claim alleged the creation of the restricted operator position was illegal.[248] The second claim contended Rodish's removal from the seniority list constituted disability discrimination.[249] The district court upheld the Commission's finding of "no probable cause of discrimination."[250]

On the first claim the court of appeals determined the creation of the new classification, even with a reduction in pay, was still a reasonable accommodation.[251] The court recognized it was illegal to pay an employee less

239. Mowrey v. Iowa Civil Rights Comm'n, 424 N.W.2d 764 (Iowa Ct. App. 1988).
240. *Id.* at 765.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 768-69 (the denial of light duty status was not the subject of a timely charge).
247. *Id.* Radish was removed from seniority list two years after she left work. *Id.*
248. *Id.* at 765.
249. *Id.*
250. *Id.*
251. *Id.* at 768.

just because he had to be accommodated.[252] Here, however, the new position necessarily involved a reduction in the amount of work performed by the employee.[253] Under these circumstances the court found reduction in wage to be legal.[254] Any other approach would result in disabled employees receiving the same pay for less work.

On the second claim the court simply stated the company followed its collective bargaining agreement in removing Rodish from the seniority list.[255] The court held the action was not illegal.[256]

This opinion should not be read to mean a reduction in pay can accompany any job restructuring. Pay should be reduced only if the restructuring necessarily results in a significant reduction in the amount of work performed. Also, if an employer has several equally available accommodations and he chooses the one that results in a pay reduction, the plaintiff could argue the choice was intended to punish the plaintiff for needing accommodation. If intent were shown the action would be illegal.

The disposition of the second claim was abrupt. While it could be interpreted as permitting a collective bargaining agreement to violate the Act, such an interpretation would be clearly contrary to prior law.[257] The most likely basis for the ruling is that Rodish was not protected by the Act because she was unable to do the job even with accommodation. Thus, her name remained on the seniority list merely as a matter of the collective bargaining agreement.

Finally, as an alternative basis for its decision, the court read the requirement that a disability be "unrelated to such a person's ability to engage in a particular occupation" literally.[258] This interpretation was clearly wrong given the preceding case law.

J. Probasco v. Iowa Civil Rights Commission[259]

The complainant was employed as a clerical worker in a food store.[260] She developed a respiratory condition that prevented her working around intense chemical fumes, dust, or poor ventilation.[261] The food store released her, citing their inability to change her work environment.[262] The sole issue considered by the appellate court was whether the complainant's condition

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252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 769.
256. *Id.*
257. Franklin Mfg. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d 829, 833 (Iowa 1978).
258. Mowrey v. Iowa Civil Rights Comm'n, 424 N.W.2d at 767 (Iowa Ct. App. 1988).
259. Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432 (Iowa 1988).
260. *Id.* at 433.
261. *Id.* at 433-34.
262. *Id.* at 434.

was a substantial handicap.[263] Specifically, the store claimed the employee's impairment did not substantially limit any major life activities.[264]

The court focused its analysis on the meaning of the term "substantially limits." The rules of the Iowa Civil Rights Commission did not define this term.[265] One federal agency, however, had promulgated regulations defining "substantially limits."[266] These regulations, used by the court, define the term "substantially limits" as "the degree that the impairment affects employability."[267] This limitation, stated the court, was appropriate because the overriding purpose of the federal enabling legislation was the protection of employment opportunities.[268] The court then expressly incorporated these rules into Iowa law, emphasizing the similarity of purpose between the federal and state legislation.[269] Both were intended to protect the truly disabled and not those "whose disability was minor and whose relative severity of impairment was widely shared."[270]

The court stated that in determining the amount that employability is impaired, it will consider "the number and type of jobs from which the impaired individual is disqualified, the geographical area to which the individual has reasonable access, and the individual's job training, experience and expectations."[271] The impairment must affect more than the ability to perform a particular job.[272] Applying these principles to the facts, the court ruled the complainant was not disabled because she had never been denied employment for health reasons.[273]

Read literally the opinion in *Probasco* is a stunning misunderstanding of federal disability law. To understand this, more detail on the federal scheme is needed.[274] In 1973, Congress passed the Vocational Rehabilitation

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263. *Id.*
264. *Id.*
265. *Id.* at 435.
266. *Id.*
267. *Id.* at 436.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.* at 437.
274. In a very recent opinion the Iowa Supreme Court backed away from the "employability" standard of *Probasco*. In that case the district court found the employee, Stanley Deck, was not disabled. This ruling was reversed and the supreme court found the lower court's interpretation of *Probasco* was too broad. "We reject the implication from *Probasco* that one must be almost unemployable because of one's impairment to be considered disabled." Henkel Corp. v. Iowa Civil Rights Comm'n, No. 90-689 (Iowa June 19, 1991) (WESTLAW, State Library, Iowa File). In finding the employee to be disabled the court noted, "Unlike Probasco, Deck's mental condition was generally debilitating and would affect him regardless of the job he might hold." *Id.* This certainly suggests the court read *Probasco* as applying only when the employee claims he is "substantially limited" in the "major life activity" of "working." Though *Henkel* is unpublished at the time of printing, the court did state the opinion would be published. *Id.*

Act.[275] It deals primarily with programs under which individuals receive vocational training. Title V, sections 501 to 504, of this Act includes the federal disability antidiscrimination sections.[276]

As discussed earlier, section 503 covers federal contractors and requires affirmative action to employ the handicapped.[277] Under section 503, complaints are filed with the DOL.[278] The responsibility for issuing the government-wide regulations under section 503 is given to the Office of Federal Contract Compliance Policies ("OFCCP") of the DOL.[279]

Section 504 of the Rehabilitation Act mandates nondiscrimination by recipients of federal funds.[280] The section requires executive agencies to promulgate regulations governing those who receive funds from these agencies.[281] Executive Order 12,250[282] assigns the responsibility for coordinating the implementation of section 504 to the attorney general. Thus, the Department of Justice ("DOJ") is responsible for section 504 government-wide regulations; any other agency regulation must be consistent with the DOJ regulations. Prior to 1980 the Department of Health, Education, and Welfare ("HEW") had this role.

The Rehabilitation Act originally defined "handicapped individual" as only those whose disability limited their employability and who could be expected to benefit from vocational rehabilitation.[283] The obvious reason for this definition was there would be no reason to allow a person to benefit from *vocational* rehabilitation funds if the person is not handicapped in his *vocational* activities. The "miscellaneous" provisions contained in Title V were apparently overlooked.

In 1974, however, the Rehabilitation Act was amended to provide the employability definition does *not* apply to Title V.[284] For the purposes of Title V, a handicapped individual is a person who "has a physical or mental impairment which substantially limits one or more of such person's major life activities."[285] According to one commentator this amendment was a di-

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275. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (1973) (codified at 29 U.S.C. §§ 702-796 (1988)).

276. Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 501-504, 87 Stat. 355, 390-94 (1973) (codified at 29 U.S.C. §§ 791-794 (1988)).

277. *Id.*; *see supra* note 55 and accompanying text.

278. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 503, 87 Stat. 355, 393 (1973) (codified at 29 U.S.C. § 793 (1988)).

279. *Id.*

280. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 355, 394 (1973) (codified at 29 U.S.C. § 794 (1988)).

281. *Id.*

282. 45 Fed. Reg. 72,995 (1980).

283. Rehabilitation Act of 1973, Pub. L. No. 93-112, § 7, 87 Stat. 355, (1973) (codified at 29 U.S.C. § 706(8) (1988)).

284. Amendments to the Rehabilitation Act of 1973, Pub. L. No. 93-516, 88 Stat. 1617 (1974).

285. *Id.* at § 111, 88 Stat. at 1619 (codified 29 U.S.C. § 706(8) (1988)).

rect response to the OFCCP regulation.[286] The Joint Conference Report stated: "The new definition applies to Section 503, as well as Section 504, in order to avoid limiting the affirmative action obligation of a Federal contractor to only that class of persons who are eligible for vocational rehabilitation services [(i.e. those covered under the employability standard)]."[287] With regard to section 504, Congress said: "Section 504 was enacted to prevent discrimination against all handicapped individuals, regardless of their need for, or ability to benefit from vocational rehabilitation services, in relation to Federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided programs."[288]

The United States Supreme Court discussed this amended definition in *School Board v. Arline*.[289] According to the Court, Congress expanded the definition because the employability definition "while appropriate for the vocational rehabilitation provision in Titles I and III of the Act, was too narrow to deal with the range of discriminatory practices" covered in Title V.[290] In *Arline* the Court addressed the issue whether a woman who had tuberculosis was disabled under section 504.[291] The Court looked to her history of impairment and asked whether the historical impairment had been "substantially limiting."[292] It found substantial limitation to be obvious because the employee was hospitalized by her illness.[293] The Court did not mention how long she spent in the hospital nor what effect the illness may have had on her employability.

In *Probasco* the federal regulations defining "substantially limits" were both promulgated by the DOL. One of the regulations was promulgated by the OFCCP as a government-wide section 503 regulation;[294] the other was the DOL's agency-specific section 504 regulation.[295]

Incorporating section 503 into Iowa law is erroneous for two reasons. First, Congress expressly provided the employability limitation did not apply to Title V.[296] The plain meaning of this wording for the purpose of Title V is that "individual with handicaps" should not be limited to those whose impairment substantially limits employability.[297] This is how the Supreme

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286. B. SCHLIE & P. GROSSMAN, EMPLOYMENT DISCRIMINATION, 262 (2d ed. 1983).

287. S. Rep. No. 1297, 93rd Cong., 2d Sess. 4, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 6373, 6389.

288. *Id.* at 6388.

289. School Bd. v. Arline, 480 U.S. 273 (1987).

290. *Id.* at 278 n.3.

291. *Id.* at 275.

292. *Id.* at 281.

293. *Id.*

294. 41 C.F.R. § 60-741.1 (1987).

295. 29 C.F.R. § 32.1 (1987).

296. 29 U.S.C. § 706(B) (1988).

297. Even the OFCCP has recognized the tension between the statute and the rule. OFCCP v. Shuford Mills, Inc., 80 OFCCP Fed. Cont. Compl. Man. (CCH) ¶ 30, IV Handicap Requirements Handbook, case 1005 (May 26, 1981).

Court of the United States interpreted the bill.[298] To the extent the OFCCP regulations are inconsistent with the intent of Congress, they do not represent federal law.

Second, these regulations apply only to section 503, which has a higher accommodation standard than section 504 and the Iowa Act.[299] A policy argument exists that when a high degree of accommodation is imposed, a closer relationship between the employment and the disability may be required. Also a greater degree of accommodation means the disabled person is less likely to need an accommodation that imposes an undue hardship. For example, a person whose disability substantially limits employability may not be protected by section 504 because he cannot be reasonably accommodated. This person could still be protected by section 503 due to the higher accommodation standard. Thus, while a narrow employability definition *may* be justified for affirmative action statutes, it is not warranted in nondiscrimination provisions like section 504 and the Iowa Act.

Incorporating the DOL section 504 regulation is also in error. First, like the section 503 regulation, the DOL section 504 rule is inconsistent with the statute. Second, the agency, given the government-wide authority to issue rules under section 504, has no such limitation.[300] Finally, the regulations of Health and Human Services, given special status by the United States Supreme Court,[301] contain no such limitation.

The "employability" standard apparently adopted in *Probasco* represents a complete misuse of federal law. In fact, even the DOL interprets its rule more broadly than the *Probasco* decision. Under the DOL interpretation, "[i]n evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same or similar jobs would use the same requirement or screening process."[302] If the court in *Probasco* had used this rule, the employee in that case would have been statutorily disabled.

In addition, the standard suggested by the court in *Probasco* could have disastrous effects on the protection afforded the disabled. These are discussed in detail in part IV. In brief, requiring a person's impairment substantially limit his ability to get a job, and at the same time not requiring the employer to provide any accommodation involving more than a *de minimis* cost, is very close to making the "no win defense" part of Iowa law.

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298. School Bd. v. Arline, 480 U.S. 273, 278 n.3 (1987).

299. Southeastern Community College v. Davis, 422 U.S. 397 (1979); Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130 (S.D. Iowa 1984).

300. 28 C.F.R. § 41.1 (1987).

301. *See* School Bd. v. Arline, 480 U.S. 273 (1987).

302. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980); OFCCP v. Southern Pac. Transp. Co., 79 OFCCP Fed. Cont. Compl. Man. (CCH) ¶ 10A, IV Handicap Requirements Handbook, case 1021 (Nov. 19, 1982).

K. Davenport v. City of Des Moines[303]

The plaintiff was employed as a guard for the city when he suffered a work-related injury.[304] As a result he was prone to blackouts.[305] He lost his driver's license after a blackout caused an accident, and the city then fired him.[306] He was advised he could apply for other jobs with the city, but he would be treated the same as any other applicant.[307] After the plaintiff got his license back he was told he could apply for his old job but would be treated as any other applicant.[308] Plaintiff alleged he was not reasonably accommodated.[309]

The district court ruled the city had met its duty to accommodate.[310] One of the plaintiff's essential job duties was driving, and the plaintiff could not drive.[311] The court also found the city could not offer a transfer due to the civil service laws and the union contract.[312] Because the district court found the plaintiff had been accommodated, the supreme court could reverse only if the failure to make reasonable accommodation was established as a matter of law.[313] This was not done, and the dismissal was affirmed.[314]

While the result in this case was consistent with general disability principles, the court arrived at that result in a puzzling manner. The court treated this as a *Cerro Gordo* type of case—a claim by the employer that it had already reasonably accommodated the employee. Yet all the employer did was fire the plaintiff and refuse to allow him to reapply for his old job until he got his license back. Allowing the plaintiff to apply for other jobs the same as anyone else was not special accommodation. The city did not accommodate the disabled just by taking their applications. Indeed, any other action, such as stating "the handicapped need not apply," would probably have been illegal.

A simpler analysis would focus on the plaintiff's inability to perform essential job functions. If an employee is unable to perform an essential job function *even* with reasonable accommodation, the disability is related to the ability to perform the job in a reasonably satisfactory and competent manner. Such an employee, under *Foods*, is not covered and need not be accommodated. Thus, federal courts do not require an employer to transfer

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303. Davenport v. City of Des Moines, 430 N.W.2d 405 (Iowa 1988).
304. *Id.* at 406.
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 407.
310. *Id.* at 407-08.
311. *Id.* at 407.
312. *Id.* at 408.
313. *Id.*
314. *Id.*

the employee to another position.[315]

Finally, the court quoted dicta in *Brown* requiring undue hardship.[316] It is not clear what role this standard played in the court's analysis. Nevertheless, the statement supports the contention that the Iowa court will use the religious accommodation standard in disability cases.

L. Fogel v. Board of Trustees of Iowa College[317]

The plaintiff was employed by Grinnell College as a receiving clerk and custodian in the food service department.[318] His duties included unloading trucks, handling food products, and custodial work.[319] The plaintiff, in December 1984, discovered he had head lice.[320] During the same period, he suffered from back pain that restricted his ability to work.[321]

In mid-January 1985, after mid-semester break, Mr. Fogel reported to work, but his supervisor told him he could not return to work without a medical release.[322] The plaintiff obtained the release and returned to work the same day.[323] On January 28, 1985, Mr. Fogel was terminated for reporting to work with head lice—conduct his supervisor believed violated state health laws.[324] Fogel brought suit claiming, among other things, disability discrimination.[325]

The district court found no evidence Fogel was disabled and granted a motion for summary judgment.[326] The supreme court disposed of the disability issue very quickly. Fogel's work record and testimony contradicted his claim that a back problem limited any major life activity.[327]

Similar to the decision in *Brown*, *Fogel* presented a case in which the court applied Commission rules to a particular fact pattern. The court's discussion is so brief that an accurate assessment of the decision is not possible. What the court mentioned, however, is slightly disturbing. The decision was based, in part, on the fact Fogel was not "prevented" from doing his job.[328] The court also considered Fogel's failure to present medical evidence

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315. School Bd. v. Arline, 480 U.S. 273, 289 n.19 (1987); *but see* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(9)(B), 104 Stat. 327, 331 (1990) (listing reassignment to a vacant position as something reasonable accommodation "may include").

316. Davenport v. City of Des Moines, 430 N.W.2d at 408.

317. Fogel v. Bd. of Trustees of Iowa College, 446 N.W.2d 451 (Iowa 1989).

318. *Id.* at 452.

319. *Id.*

320. *Id.* at 452-53.

321. *Id.* at 453.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.* at 454.

328. *Id.*

of disability before his discharge, and his failure to actually state he was disabled.[329]

This Article discussed the problem with focusing on work history alone in section III, subsection J.[330] If the job is sufficiently taxing on the particular impairment, one may conclude from the ability to do the job that the impairment does not substantially impair any major activity. This may be a basis for the court's conclusion that Fogel was not "truly disabled."

The fact Fogel did not present medical evidence of disability prior to his discharge should have been held irrelevant. The question of disability is a matter of proof after the discharge. In certain cases the employee would naturally be expected to present medical evidence to his employer. One example is when the employee's disability interferes with his job and he seeks a medical excuse to obtain light duty. This failure to produce medical evidence would indicate none existed.

Finally, it is not uncommon for a disabled person to eschew the label "disabled." A disabled person may merely emphasize his abilities rather than his disabilities. The courts should not punish this conduct.

In addition to these positive indications of "no disability," the court in *Fogel* did not list activities that were restricted by the back injury—even on a temporary basis. If limitations were not in the record, summary judgment would have been proper regardless of the other considerations.

M. Hollinrake v. Iowa Law Enforcement Academy[331]

This opinion represents the second time the Iowa Supreme Court addressed this dispute. In *Hollinrake I*[332] the plaintiff brought suit under the Iowa Civil Rights Act.[333] The plaintiff was selected as a deputy sheriff of Monroe County.[334] After nine months of service he attended the Iowa Law Enforcement Academy, which trains and sets state-wide standards for law enforcement officers.[335] The Academy released him because his vision did not meet academy standards.[336]

The plaintiff sued the county and the Academy under the Iowa Civil Rights Act claiming disability discrimination in employment.[337] The jury found in the plaintiff's favor.[338] On appeal, the Iowa Supreme Court ruled

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329. *Id.*

330. *See supra* notes 259-302 and accompanying text.

331. Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d 598 (Iowa 1990).

332. Hollinrake v. Iowa Law Enforcement Academy, 433 N.W.2d 696 (Iowa 1988). *Hollinrake I* was not previously discussed because, though a civil rights action, its disposition hinged on principles of administrative law. Disability law played no role.

333. *Id.* at 697.

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

an administrative rule's validity could not be challenged under the Iowa Civil Rights Act; such a challenge must be brought under the Iowa Administrative Procedures Act.[339]

Hollinrake II was a similar challenge by the same plaintiff; however, this challenge was brought under the Iowa Administrative Procedures Act.[340] Hollinrake claimed the Academy's rule was arbitrary and capricious.[341] He argued a hearing should have been granted to allow for a waiver of the visual acuity requirements.[342] If he could show that he could perform the necessary tasks despite his poor vision, a waiver should be granted.[343] The court rejected his claim.[344]

Hollinrake also argued the rule violated the Iowa Civil Rights Act.[345] The Academy responded Hollinrake was not "disabled" and was not an "employee" of the Academy and hence could not claim employment discrimination.[346] The court ruled Hollinrake was not disabled.[347] Quoting from the decision in *Probasco*, the court set forth the factors affecting "[t]he degree to which an impairment substantially limits an individual's employment potential."[348] It then noted Hollinrake was only restricted from jobs requiring stringent visual acuity.[349] The court stated the plaintiff was limited only in this particular job but not limited in any significant way from obtaining other satisfactory employment.[350] The court concluded he was not "truly disabled" and found for the Academy.[351]

The court again reached the right conclusion via an unnecessarily strict interpretation. Given the facts in the case it was not necessary to discuss the issue of disability. First, the Academy's argument that rule making is not covered seems conclusive. The Iowa Civil Rights Act requires a broad definition of the terms "employer" and "employee."[352] Even so, the passage of an administrative professional or safety regulation does not make the agency the employer of all who are affected by the rule.[353] This is strongly suggested

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339. *Id.*
340. Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d 598, 600 (Iowa 1990).
341. *Id.* at 603.
342. *Id.*
343. *Id.*
344. *Id.* at 601-02.
345. *Id.* at 603.
346. *Id.* at 603-04.
347. *Id.* at 604.
348. *Id.* (quoting Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432, 436 (Iowa 1988)).
349. *Id.*
350. *Id.*
351. *Id.*
352. IOWA CODE § 601A(5)-(6) (1991).
353. *See* Jackson v. Maine, 544 A.2d 291 (Me. 1988) (even accepting a very broad definition of "employer," an agency regulating who may drive a bus is not considered an "employer" of a diabetic who was denied a license).

by the holding in *Hollinrake I.*

Second, the rules of the Commission suggest the insulation of administrative safety and professional regulations. One rule provides that "[p]hysical or mental disability requirements set by federal or state statute or regulat[ion] . . . shall be considered to be bona fide occupational qualifications where the requirements are necessarily related to the work which the employee must perform."[354] This rule accepts the validity of the regulation and only allows inquiry into whether the regulation necessarily applies to the job in question. If it does, compliance with the requirements of the regulation is a BFOQ.

Finally, the court could have disposed of the case on the issue of impairment. Many physical characteristics fall within a range of "normality." Agility and strength are good examples. If a person is not strong enough to be a football player, it does not mean the person has a physical impairment; the person could just be on the low end of the strength scale. Mr. Hollinrake's visual acuity—20/100 in one eye and 20/30 in the other[355]—could be similarly described.

Nevertheless, the court again addressed the question of whether the plaintiff was disabled as defined by the Act.[356] It is not clear from the case what major life activity Hollinrake claimed was substantially limited: vision or working. In either event, the court discussed whether Hollinrake was substantially limited in his employability.[357] Incredibly, the court described Hollinrake's disqualification by the Academy as a limit only in obtaining this "particular job."[358] In fact, the Academy regulated the entire "law enforcement officer" profession.[359]

Mr. Hollinrake was disqualified from his chosen profession because of his visual acuity. This fact and the court's use of terms like "wide range of other available jobs"[360] suggest the court will require the employee be substantially limited in his ability to obtain employment generally—not just in his chosen field.[361] If this is the case, the Iowa court is again taking a more restrictive view of the DOL rules than the DOL does. In *E.E. Black v. Marshall*[362] the court affirmed the DOL interpretation stating:

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354. IOWA ADMIN. CODE r. 161-8.32(3) (1988).

355. Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d 598, 601 (Iowa 1990).

356. *Id.* at 603-04.

357. *Id.*

358. *Id.* at 604.

359. IOWA CODE § 80B.3(3) (1991) (broad definition of "law enforcement officer"); IOWA CODE § 80B.11 (1991) (granting Iowa Law Enforcement Agency ("ILEA") authority to set minimum standard of physical fitness for "law enforcement officers").

360. Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d at 604.

361. Such a reading is less viable since the decision in Henkel Corp. v. Iowa Civil Rights Comm'n, No. 90-689 (Iowa June 19, 1991) (WESTLAW, State library, Iowa file).

362. E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Haw. 1980); *see also* Forrisi v. Bowen, 794 F.2d 931, 934-35 (4th Cir. 1986) ("the type of employment involved").

> The Court believes that this [general employment] definition [suggested by the employer] drastically reduces the coverage of the Act, and undercuts the purposes for which the Act was intended. A person, for example, who has obtained a graduate degree in chemistry, and is then turned down for a chemist's job because of an impairment is not likely to be heartened by the news that he can still be a streetcar conductor, an attorney, or a forest ranger.[363]

Finally, to the extent the court was applying the *Probasco* definition of the term "substantially limits," as opposed to discussing the "major life activity" of "working," the errors of *Probasco* were present in *Hollinrake II*.

N. Annear v. State[364]

In *Annear I*[365] the plaintiff appealed the trial court's dismissal of an employment discrimination claim.[366] The supreme court reversed the dismissal and remanded for further proceedings.[367]

At trial the plaintiff alleged his termination and later failure to be hired was due to disability discrimination.[368] After going on long-term disability leave for a back injury, the plaintiff presented the State with a physician's release to work.[369] His employer informed him that he could be listed on the merit list for his former position but "he had to compete with [all] other applicants for [his old] position on an equal opportunity basis."[370] He was also informed his old position could not be immediately filled due to lack of funds.[371] In a bifurcated trial the jury found for the plaintiff on the statute of limitations issue but against him on the merits.[372] The court considered plaintiff's appeal of the judgment in *Annear II*.[373]

The court faced several challenges to jury instructions and evidentiary rulings.[374] First, the court ruled that evidence concerning what a state employee thought of reasonable accommodation was properly excluded because reasonable accommodation was not an issue.[375] The plaintiff alleged he needed no accommodation.[376]

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363. E.E. Black, Ltd. v. Marshall, 497 F. Supp. at 1099.
364. Annear v. State, 454 N.W.2d 869 (Iowa 1990).
365. Annear v. State, 419 N.W.2d 377 (Iowa 1988).
366. *Id.* at 378. The district court dismissed the claim holding the action was untimely. *Id.*
367. *Id.* at 380.
368. Annear v. State, 454 N.W.2d at 871.
369. *Id.*
370. *Id.*
371. *Id.*
372. *Id.*
373. *Id.*
374. *Id.* at 873-75.
375. *Id.* at 873.
376. *Id.*

The court also approved the use of the usual order and allocation of proof for trying the issue of illegal intent in handicap discrimination cases.[377] This had been done in the *Trobaugh* case.[378]

Finally, the court addressed the plaintiff's claim that a "perceived disability" instruction should have been given.[379] The plaintiff alleged he was not disabled, but he was "perceived" as being disabled.[380] Specifically, citing to Iowa Civil Rights Commission rule 8.26(5)(c), the plaintiff claimed, though he had no impairment, he was perceived as having one that constitutes a "disability."[381] The rules include as "impaired" one who "[h]as none of the impairments defined . . . but [who] is perceived as having such an impairment."[382]

The court identified the issue as "whether, if the State did not hire plaintiff because it believed he was physically unable to do the work and was wrong in that assessment, this error of judgment would constitute an unlawful discrimination in hiring."[383] The court answered in the negative.[384] The rule at issue could only make sense in "situations involving a categorical organic disorder of the body."[385] The concept that an unimpaired person may still be disabled if perceived as impaired could "not be extended to differences of opinion over the degree of recovery from a disabling injury."[386] Because the plaintiff had no impairment and no right to an instruction on the perception of impairment, the court found no error.[387]

The most significant legal issue of this case is the perception-of-impairment question. The holding that perception of impairment cannot encompass "differences of opinion over the degree of recovery from a disabling injury" seems relatively clear.[388] The reasoning, however, is not.

The major problem of interpretation is the court's statement that the rule can only have affect in "situations involving a categorical organic disorder of the body."[389] This statement is a contradiction. The civil rights rule

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377. *Id.* at 874.

378. Trobaugh v. Hy-Vee Food Stores, Inc., 392 N.W.2d 154, 156 (Iowa 1986).

379. Annear v. State, 454 N.W.2d at 875.

380. *Id.* at 874.

381. *Id.* at 875.

382. IOWA ADMIN. CODE r. 161-8.26 (1988). Not every impairment is a disability. Only impairments that substantially limit a major life activity constitute a disability.

383. Annear v. State, 454 N.W.2d at 875. This statement of the issue should be understood as only asking whether such a misjudgment creates a perception of disability. It does not mean an employer may irrationally misjudge the abilities of the disabled without consequences. Stereotyping "disabled" as "unable" is precisely the sort of wrong the court decried in *Probasco*.

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

at issue only applies if the plaintiff has no impairment. Yet, "impairment" is defined in terms of a "disorder or condition."[390] The ordinary meaning of "disorder" falls within the idea of an "impairment." Thus, the application of the rule and the existence of a "disorder" (categorical, organic, or otherwise) are mutually exclusive.

This contradiction can be resolved if "situations involving" means the defendant must perceive the plaintiff as having a "categorical organic disorder" rather than the plaintiff must have a "categorical organic disorder." Unfortunately the phrase "categorical organic disorder" is not readily understood in this context and no case, rule, or statute refers to the phrase.[391] The logical meaning of "organic" is "inherent," and the logical meaning of "categorical" is "absolute" or "unchanging." However, saying the civil rights rule applies only to "inherent unchanging disorders" seems to be a repetition not an explanation of the "degree of recovery" exclusion recited by the court.

Just as the stated reasons for the "degree of recovery" exclusion are not clear so too the possible logic supporting the exclusion is not easily discovered. No one would ever suggest the source of a disabling condition has any bearing on the amount of the disability. A veteran who has lost his legs in a war can walk no better than a person who was born without legs. Similarly, it makes no sense to conclude that a person who has recovered from an injury is always, and of necessity, perceived as less disabled than a person who has never had any impairment.

The most plausible interpretation of the court's ruling is that a completely recovered and unimpaired person is not "disabled" just because his employer believes the person has not *yet* recovered. Under this reading the employer believes the employee is recovering but has not recovered enough to do the job. Thus, there is no perception of permanent or long-term disability, but merely a "difference of opinion" over the speed of recovery. Of course, if the employee has an impairment, he need not use rule 8.26(5)(c) and can avoid the whole issue.[392]

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390. IOWA ADMIN. CODE r. 161-8.26(2) (1988).

391. The court in *Annear II* cites *Sommers v. Iowa Civil Rights Comm'n.* Annear v. State, 454 N.W.2d at 875. *Sommers* states "a physical impairment relates to an organic disorder of the body." Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 476 (Iowa 1983). The court ruled out transsexualism as a physical impairment because "no claim [was] made that a transsexual has an abnormal or unhealthy body." *Id.* Thus, "organic" in *Sommers* is used only in discussing an "actual" impairment and in that sentence "organic" appears to mean "of a living organism" or possibly "of a bodily organ" though the later seems unlikely. This discussion in *Sommers* was not meant to dispose of the perception-of-impairment subrule. That subrule was handled merely by noting that any adverse societal attitudes toward transsexuals may well arise from a belief that transsexualism is undesirable rather than a belief that transsexuals suffer from any sort of impairment. *Id.*

392. Reference to the facts in *Annear* will not give any guidance. The State denied perception of impairment played any role in its decisions. Thus the discussion of the perception issues occurred in a factual vacuum, or as the court put it, "we are considering a proposed

O. Smith v. ADM Feed Corp.[393]

This case also involved a truck driver with a back injury.[394] The plaintiff, Smith, drove a hopper-bottom truck for the ADM Feed Corporation.[395] The truck was designed so it could be loaded and unloaded without heavy lifting or stooping.[396] Occasionally Smith drove other trucks and worked in the defendant's feed mill and warehouse.[397]

In 1986, Smith had lumbar surgery to correct a work-related injury.[398] He was released to perform work that did not require heavy lifting, repetitive bending, or repetitive stooping.[399] Later the employer refused to rehire him claiming Smith did not have a release to perform the type of work he had been doing prior to the injury.[400] Smith brought suit claiming disability discrimination.[401] The district court dismissed the case holding the defendant could not reasonably accommodate Smith without incurring an undue hardship.[402] The issue before the supreme court was whether Smith could have been reasonably accommodated without imposing an undue hardship. The court emphasized that at least twenty percent and perhaps as much as forty percent of Smith's duties involved lifting heavy objects and stooping.[403] The employees in the mill also rotated jobs to avoid monotony and attendant injuries from carelessness.[404] The court assessed the undue hardship issue using the *de minimis* standard suggested in *Frank*.[405] Even using the twenty percent figure the court found substantial evidence the disability would have necessitated other employees cover for Smith or the employer hire part-time help.[406] Thus "in light of the . . . variety of duties which the truck drivers were required to perform in this small business and [Smith's] physical restriction"[407] the district court correctly ruled Smith could not perform the job without imposing an undue hardship.[408]

This opinion again mixes the various analytical stages of a disability

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alternative scenario to an allegedly pretextuous reason for not hiring plaintiff." Annear v. State, 454 N.W.2d at 875.

393. Smith v. ADM Feed Corp., 456 N.W.2d 378 (Iowa 1990).
394. *Id.* at 380.
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.* at 385.
404. *Id.*
405. *Id.* at 386 (citing Frank v. American Freight Sys., Inc., 398 N.W.2d 797, 803 (Iowa 1987)).
406. *Id.* at 385.
407. *Id.* at 385-86.
408. *Id.* at 386.

case. The court begins with the familiar statement that a plaintiff must show a prima facie case and that an employer can then rebut the prima facie case. Of course, the prima facie case of employment discrimination is used to raise an inference an employer discriminated on the alleged prohibited basis. An employer can rebut this inference "with evidence of a legitimate non-discriminatory reason for the challenged action."[409] For example, an employer may deny illegal intent and introduce evidence in support of the denial.[410] This court, however, stated the employer may "rebut this evidence under the 'nature of the occupation' exception."[411] The "nature of the occupation" defense is, however, an affirmative defense similar to the federal BFOQ and business necessity defenses.[412] As such the "nature of the occupation" defense is not a denial of discriminatory intent but is a legal justification for the discrimination.

After describing an affirmative defense as a "rebuttal" of the issue of intent the court ruled that the "defendant established its nature of the occupation defense."[413] Then the court stated the employer "[was] still required to reasonably accommodate [plaintiff's] disability, unless it would be an undue hardship to do so."[414] The court apparently intended to analyze the case as one in which the employee claims the employer discriminated by failing to accommodate him and the employer answers this claim by proving the accommodation would impose an undue hardship.

Ordinarily, analysis of the reasonableness of accommodation begins with a discussion of the employee's essential job duties and whether the employee can perform those duties with accommodation.[415] In *Smith*, there is no discussion of that issue. The court also failed to discuss which job duties were and were not beyond Smith's abilities. Such information is useful in assessing whether any of the lifting duties could have been switched with nonlifting duties of other employees without imposing an undue hardship. Assuming that twenty to forty percent of Smith's duties were lifting duties and operating the hopper-bottom truck was the only available nonlifting duty, isolation from lifting would have required hiring part-time help. Hir-

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409. *Id.* at 385.

410. *See* text accompanying note 21.

411. Smith v. ADM Feed Corp., 456 N.W.2d at 385.

412. *E.g.*, Cedar Rapids Community School Dist. v. Parr, 227 N.W.2d 486, 492 (Iowa 1975). The "nature of the occupation" language is applicable to all cases not just disability and indeed this defense was in the statute when "disability" was added as a protected class. IOWA CODE ANN. § 601A.6(1) (West 1989) (historical note).

413. Smith v. ADM Feed Corp., 456 N.W.2d at 386.

414. *Id.* (citing Frank v. American Freight Sys., Inc., 398 N.W.2d 797, 802 (Iowa 1987); Foods, Inc., v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 168 (Iowa 1982); IOWA ADMIN. CODE r. 161-8.27(6)(c), -8.28 (1988)).

415. *E.g.*, Jasany v. United States Postal Serv., 755 F.2d 1244 (6th Cir. 1985) (discussing essential job duties); 28 C.F.R. § 41.32 ("qualified" means able to perform essential job functions with reasonable accommodation); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(8), 104 Stat. 327, 331 (1990) (same).

ing two people to do one job is beyond any reasonable accommodation duty. This was the first case since *Frank* in 1987 to recite the *de minimis* standard when the question of undue hardship was actually before the court. The court, for perhaps the first time, actually stated it was applying the *de minimis* standard.[416]

P. Kingsley v. Woodbury County Civil Service Commission[417]

Robert Kingsley had been a deputy sheriff for thirteen years.[418] He became permanently disabled and was unable to perform his duties without reasonable accommodation.[419] His discharge by the sheriff was upheld by the Woodbury County Civil Service Commission based on the civil service provision governing "physical unfitness for the position held."[420] Kingsley filed an appeal in district court pursuant to the civil service statute, Iowa Code section 341A.12.[421] Under this section a dismissal is upheld if "the order of removal . . . [was] made in good faith and for good cause."[422] Kingsley alleged the discharge was not for good cause because his employer had made no attempt to accommodate him.[423] The district court upheld the dismissal because the suit was not brought under the Iowa Civil Rights Act and the civil service statute in question did not cover disability discrimination.[424]

On appeal Kingsley argued the trial court failed to harmonize the civil service statute and the Iowa Civil Rights Act.[425] He asserted that reconciling the statutes required reading an accommodation duty into the civil service statute.[426] The supreme court recognized the sheriff's department was covered by the Iowa Civil Rights Act and consequently was required to accommodate the disabled.[427] Yet the court also noted "the exclusive remedy for complainants asserting a discriminatory act lies with the procedure provided in chapter 601A."[428] The Civil Rights Act does not cover actions brought under the civil service appeal procedure of chapter 341A.[429]

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416. Smith v. ADM Feed Corp., 456 N.W.2d at 386 ("We agree with the trial court that this would be more than a *de minimis* cost to defendant.").

417. Kingsley v. Woodbury County Civil Serv. Comm'n, 459 N.W.2d 265 (Iowa 1990). Due to its recency a sugnificant disability opinion issued after *Kingsley* is not discussed in the text. For a discussion of this important case *see supra* note 274.

418. *Id.* at 265.

419. *Id.* at 266.

420. *Id.* (citing IOWA CODE § 341A.11 (1989)).

421. *Id.*

422. *Id.* (citing IOWA CODE § 341A.12 (1989)).

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.*

The court found no conflict between the statutes.[430] Section 341A.11 authorizes dismissal for "physical unfitness for the position held."[431] The usual meaning of "unfitness" does not include the idea of accommodation.[432] Further section 341A.18 prohibits discrimination on a number of grounds but not on the basis of disability.[433] This omission, the court believed, was deliberate and due to the nature of the law enforcement profession.[434] "The public depends on the ability of deputies to respond swiftly in an emergency, for their own safety and for the safety of others. . . . [Thus] it was not unreasonable for the legislature to omit physical disability from the civil rights protection afforded deputies."[435] This omission did not conflict with chapter 601A; it conformed with the "nature of the occupation" exception in the Iowa Civil Rights Act. The court's "reconciliation" of the two statutes gave chapter 341A more controlling affect than was necessary.

In the claim preclusion context, the court has recognized the legislature often sets up two separate remedies for the same injury. Under such a "common scheme of remedies" the statutory standards for granting relief are often materially different. For precisely this reason, "[a]bsent a special consideration, a determination arising solely under one statute should not be automatically binding when a similar question arises under another statute."[436] In *Kingsley* the easiest way to reconcile the two statutes is to recognize they form a "common scheme of remedies;" that is, chapter 341A governs the remedies and procedures set forth in chapter 341A and chapter 601A governs the remedies and procedures of chapter 601A. Therefore, Kingsley would lose for failure to bring a claim under chapter 601A. This interpretation shows equal respect for both statutes.

In contrast, the idea a disability could never be accommodated for *any* deputy in *any* county—regardless of the size of the county, the nature of the disability, or the degree of accommodation needed—is beyond the scope of the "nature of the occupation" defense. Even in its broadest form the "nature of the occupation" in disability law refers to a particular category of disability.[437] Indeed the omission of "physical disability from the civil rights protection" means those who need no accommodation can be discriminated against. Those whose condition is controlled, suppressed, or cured and have only a history of a disability, may nevertheless be discriminated against by a sheriff. This is antithetical to the protection usually given the disabled by civil rights statutes.

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430. *Id.*
431. IOWA CODE § 341A.11 (1991).
432. Kingsley v. Woodbury County Civil Serv. Comm'n, 459 N.W.2d at 266-67.
433. *Id.* at 266.
434. *Id.* at 267.
435. *Id.*
436. *In re* Kjos, 346 N.W.2d 25, 29 (Iowa 1984).
437. Frank v. American Freight Sys., Inc., 398 N.W.2d 797, 801 (Iowa 1987).

What else is left out of chapter 341A? Clearly, an employer may not fire a person for filing a civil rights complaint.[438] Yet the antidiscrimination provisions of chapter 341A do not mention retaliation for filing a complaint with the Iowa Civil Rights Commission. Are sheriffs now free to retaliate against deputies for exercising rights under the civil rights law? If not, why does the civil service statute reign as to disability but not retaliation? If the "common scheme of remedies" idea is used to explain this difference then perhaps it was the best explanation for the disability difference.

Similar problems arise in other areas of employment governed by civil service statutes. Most state-level employees are governed by the merit provisions of chapter 19A. This chapter allows disqualification of those "who fail to comply with reasonable requirements such as physical condition."[439] The merit nondiscrimination provision is identical to the provision at issue in *Kingsley*.[440] The Iowa Civil Rights Act expressly includes the State of Iowa in the definition of "employer."[441] It seems unlikely the General Assembly gave with one hand what it chose to take away with the other. A more baffling fact is employees under the merit system would actually have less civil rights protection than they did outside the system. Chapter 19A.18 does not intend to supersede the protection of chapter 601A. This interpretation is bolstered by the statement in chapter 19B that "[a]n individual shall not be denied equal access to state employment opportunities because of race, creed, color, religion, national origin, sex, age, or physical or mental disability."[442] Chapter 19A *must* be reconciled with chapters 19B and 601A using the "common scheme of remedies" rationale. Because the civil rights protections of chapter 19A do not express a legislative intent to allow disability discrimination in the merit system, the identical civil rights protection of chapter 341A does not, as *Kingsley* suggests, necessarily evidence such an intent.

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438. IOWA CODE § 601A.11 (1991).

439. IOWA CODE § 19A.9(6) (1991).

440. *Compare* Iowa Code § 19A.18 (1991) (first unnumbered paragraph) *with* Iowa Code § 341A.18 (1991) (first unnumbered paragraph). Section 19A.18 was passed in 1967. When chapter 341A was added in 1973, section 341A.18 was virtually identical to section 19A.18 (though section 19A.18 has had minor changes only the last of the eight paragraphs has any significant variation). Thus it appears that section 341A.18 is patterned after section 19A.18 and the omission of "disability" in section 341A.18 is a direct result of the omission of "disability" in section 19A.18. Of course, section 19A.18 was passed before the Federal Rehabilitation Act and before the Iowa Civil Rights Act protected disability. The omission of "disability" in section 341A.18 is most likely an accident and not part of a deliberate legislative scheme. Finally note Iowa Code section 400.17 governing police and firefighters has a similar civil rights provision that postdates both.

441. IOWA CODE § 601A.2(6) (1991).

442. IOWA CODE § 19B.2 (1991). The section in the next sentence says the policy of the State is to correct deficiencies in the state employment system through affirmative action measures. *Id.* This supports an argument that after chapter 19B enactment the state has an increased accommodation duty.

IV. Some Issues Under the Iowa Act

A. *Reasonable Accommodation*

In Iowa courts, the reasonable accommodation issue focuses on the undue hardship standard. The Iowa Supreme Court first discussed undue hardship in a religious discrimination case. Citing the United States Supreme Court precedent, the court held an undue hardship occurs when the accommodation forces a compromise of the employment entitlements of other employees or requires the employer to incur more than a *de minimis* cost.[443] The remaining appellate cases discuss undue hardship in disability suits. In *Iowa Beer & Liquor Control*,[444] the court of appeals ruled, "[t]he standard for judging reasonable accommodation is not one of de minimis but of 'undue hardship.' "[445] Hence the undue hardship standard was clearly not the same in disability and religious accommodation.

The next undue hardship case was *Frank*.[446] This was the first of two cases in which the supreme court actually believed undue hardship was in issue when it articulated a standard. In stating the standard, the court did not actually state it was applying the *de minimis* standard, but rather stated *de minimis* was the standard in the "analogous" area of religious accommodation.[447] One month after the decision in *Frank* the court decided *Cerro Gordo*.[448] There the court distinguished federal disability statutes on the basis they required affirmative action.[449] Based on this distinction, the court stated the duty to accommodate the disabled in Iowa "[was] more similar to the duty of an employer to accommodate a religious preference of an employee."[450] The court, however, went on to state it did not intend to suggest this low standard of accommodation would be sufficient in every circumstance.[451]

The next pronouncement on the subject occurred in *Brown*[452]—a case in which "substantial handicap" was the sole issue. Hence, the statement in *Brown* that *de minimis* was a "well-established limitation on the amount of accommodation that can be demanded of an employer"[453] was pure dicta. In

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443. King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598, 602 (Iowa 1983).

444. Iowa Beer & Liquor Control v. Iowa Civil Rights Comm'n, 337 N.W.2d 896 (Iowa Ct. App. 1983).

445. *Id.* at 899.

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

447. *Id.* at 803.

448. Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192 (Iowa 1987).

449. *Id.* at 197. To the extent the court meant to distinguish all federal disability statutes *including* section 504, it is clearly in error. Section 504, by its terms, requires only nondiscrimination—not affirmative action.

450. *Id.*

451. *Id.*

452. Brown v. Hy-Vee Food Stores, Inc., 407 N.W.2d 598 (Iowa 1987).

453. *Id.* at 599.

the next case reciting the standard, *Davenport v. City of Des Moines*, the sole issue on appeal was whether the plaintiff could establish he had not been accommodated by his employer.[454] Therefore, it was again dicta when the court decided to "take note" of the *de minimis* standard for undue hardship in that case.[455]

Finally, in *Smith v. ADM Feed Corp.*,[456] the court uses the *de minimis* standard to conclude accommodation would impose an undue hardship. A powerful argument exists that the undue hardship standard in disability cases is now the same as in religious discrimination suits. However, the court's retreat from *de minimis* in *Cerro Gordo* and the holding in *Iowa Beer & Liquor Control* challenge this argument. Because the question of what standard applies has never been squarely presented, and because the ruling in *Iowa Beer & Liquor Control* has never been overruled, a weak precedent-based argument that *de minimis* is not the standard still exists.

Outside of Iowa there is little precedent on point. One federal court, relying on the legislative history of section 501, has rejected the *de minimis* standard in a section 501 suit.[457] The Washington Supreme Court rejected the *de minimis* standard due to the differences between religious and disability discrimination suits.[458] The Michigan Court of Appeals also rejected the *de minimis* standard.[459] The only other cases known to the author are federal district court cases decided under section 501.

The ADA defines undue hardship as "an action requiring significant difficulty or expense."[460] This definition is assessed in light of certain factors, including the nature and cost of the accommodation, the type of operation, and the overall resources of the business.[461] Title III of the ADA confirms this definition means more than *de minimis*. The title discusses a concept called "readily achievable," which means "easily accomplishable and able to be carried out without much difficulty or expense," and is assessed in light of the same factors.[462] If the ADA had intended to use a *de minimis* standard in Title I it would have used "readily achievable" and not "undue hardship."

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454. Davenport v. City of Des Moines, 430 N.W.2d 405, 408 (Iowa 1988).

455. *Id.*

456. Smith v. ADM Feed Corp., 456 N.W.2d 378, 386 (Iowa 1990).

457. Prewitt v. United States Postal Serv., 662 F.2d 292, 308 n.22 (5th Cir. 1981).

458. Holland v. Boeing Co., 90 Wash.2d 384, ____, 583 P.2d 621, 624 (1978).

459. Wardlow v. Great Lakes Express Co., 128 Mich. App. 54, ___, 339 N.W.2d 670, 676 (1983). Due to the similarity of the Iowa and Michigan statutes, the Michigan Court of Appeals relied heavily on the Iowa decision in *Foods* in finding a duty to accommodate in the first place.

460. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(10)(A), 104 Stat. 327, 331 (1990).

461. *Id.* at § 101(10)(A)-(B), 104 Stat. at 331. Similar factors are listed in the Iowa Civil Rights Commission rules. IOWA ADMIN. CODE r. 161-8.27(6)(b) (1988).

462. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 301(9), 104 Stat. 327, 354 (1990).

Policy considerations weigh heavily against the *de minimis* standard in disability suits. First, the concerns that caused the United States Supreme Court to adopt this standard in *Hardison*[463] do not apply in disability suits. In *Hardison* it was argued the plaintiff had to be allowed to work a four-day week to avoid working on his Sabbath.[464] The Court rejected this argument because, "[l]ike abandonment of the seniority system, to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion."[465] The Court was not willing to "construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[466]

To favor one religious belief means, by definition, people are being discriminated against because they do not have a particular religious belief. This is religious discrimination. Because the failure to accommodate can also result in religious discrimination, the *de minimis* standard is the compromise. This reasoning is completely inapplicable to disability suits. Favoring a person because he has a disability means people are being "discriminated against" because of their failure to have that disability. Failure to have a particular disability is not, however, a legally protected class. To not have a particular religious belief is itself a religious belief, but failing to have a particular disability is not itself a disability.

The second policy concern is the distinction between religious beliefs and physical or mental disabilities. Beliefs are inherently more flexible than disabilities. Hence, disabilities will frequently require more than a *de minimis* cost. In the handicap context "the *de minimis* cost defense would effectively overshadow every other factor in the equation."[467] Finally, to the extent the decision in *Hardison* was premised on first amendment concerns, it clearly does not apply in a disability case.

Even assuming *de minimis* was the standard prior to 1988, there is still a good argument the AIDS amendment has changed it. As discussed in the Introduction, in May 1987 the Iowa legislature passed an amendment to chapter 601A to provide *de minimis* would not be the standard. The bill was vetoed. Later, however, the legislature passed and the governor signed the AIDS amendment.[468] The AIDS amendment not only added AIDS and related conditions to the definition of disability, it also deleted the language that a disability be "*unrelated to such person's ability to engage in a par-*

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463. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

464. *Id.* at 68.

465. *Id.* at 84.

466. *Id.* at 85.

467. Nichols, *Iowa's Law Prohibiting Disability Discrimination In Employment: An Overview*, 32 DRAKE L. REV. 273, 383 (1982-1983).

468. 1988 Iowa Acts 457.

ticular occupation" from that definition.[469] This language was the statutory source for the undue hardship defense.

Under *Foods* if the disability is related to the person's ability to perform the job in a reasonably competent and satisfactory manner, then an accommodation which would be required to enable the person to do the job would impose an undue hardship.[470] The undue hardship defense in Iowa is technically a defense that the employee cannot perform the job in a reasonably competent and satisfactory manner. The "nature of the occupation" defense in section 601A.6(1)(a) is not specific to disability because it was present before disability was added to the statute; instead it is the source of the BFOQ and business necessity defenses applicable to all the cases.[471] The General Assembly deleted the statutory source for the undue hardship defense. Given the supreme court cases preceding the amendment and the legislature's attempt to reject *de minimis* the year before, one can forcefully argue this amendment was intended to expand the accommodation duty beyond a *de minimis* standard.

B. *Substantial Handicap*

The major issue concerning "substantial handicap" is whether the court meant what it said in *Probasco*. The court stated an impairment must substantially limit employability to constitute a substantial handicap.[472] The erroneous legal basis for this rule was emphasized in the *Probasco* discussion in Part III above.[473] In addition, this rule would have unfortunate and even devastating effects.

The *Probasco* rule will exclude from coverage individuals with "obvious" disabilities but whose chosen line of work is not affected, for example, a concert violinist who cannot walk or an epileptic office worker whose medication kept him seizure free for fifteen years. Even if his employer was simply afraid of epileptics and fired him, the rule in *Probasco* would not protect the employee. By excluding employees whose impairment limits a major life activity other than employment, the court is protecting irrational employers—that is, employers who discriminate out of ignorance and superstition and not out of a "good faith" business concern.[474]

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469. *Compare* IOWA CODE § 601A.2(11) (1987) *with* IOWA CODE § 601A.2(4) (1991).

470. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162, 167-68 (Iowa 1982).

471. *E.g.*, Iowa Dep't of Social Serv. v. Merit Dep't, 261 N.W.2d 161, 163-64 (Iowa 1977).

472. Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432, 436 (Iowa 1988).

473. *See supra* notes 259-302, and accompanying text.

474. This concern alone explains why even the Department of Labor interprets its own, probably invalid, rule more favorably to the plaintiff than the Iowa court. *See*, E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980) ("If such an approach were allowable, an employer discriminating against a qualified handicapped individual would be rewarded if his reason for rejecting the applicant were ridiculous enough."); OFCCP v. Southern Pac. Transp. Co., 79 OFCCP Fed. Cont. Compl. Man. (CCH) ¶ 10A, IV Handicap Requirements Handbook, case 1021 (Nov. 19, 1982) (expounding *E. E. Black* definition of "substantially limits"); *see*

A worse effect would be to create a "no win defense" in Iowa. If both the "*Probasco* rule" and the "*de minimis*" standard are the law in Iowa, the disabled will be stripped of virtually all protection. On one hand, *Probasco* requires a disabled person be substantially limited in obtaining employment in his chosen field. On the other hand, a disabled person must be able to be accommodated so he can do the job but without imposing more than a *de minimis* cost on the employer. Under these circumstances the floor of "substantial handicap" and the ceiling of "undue hardship" nearly meet—with the disabled being caught in the middle.

This result is illustrated by the court's discussion of prior job applications in *Probasco* and *Frank*. Part of the justification for finding Mr. Frank too disabled to be protected was trucking firms were concerned about drivers with back problems, which was "apparent from the fact that Frank had been turned down on approximately thirty job applications."[475] In *Probasco* the court found the complainant was not impaired enough because "she had never been denied employment on the basis of her health."[476]

These effects, in addition to the poor legal basis for *Probasco*, almost prohibit a literal reading of the case. The decision in *Probasco* should be read narrowly to mean when an employee claims his limited major life activity is employment, he must prove he is limited to his chosen field of endeavor generally, not just in one job. In short, "*one particular job for one particular employer* cannot be a 'major life activity.' "[477] In *Probasco* one of the complainant's arguments was that she was disabled because her condition substantially limited her major life activity of "working."[478] It is unclear in *Hollinrake II* whether "working" or "seeing" was the claimed limited major life activity.[479] In every federal case cited in *Probasco* the claimed limited life activity appeared to be "working."[480] *Probasco* could be read as applying only when the "major life activity" claimed to be limited is "working."[481] This construction would avoid the unfortunate results of a literal meaning. It would also be consistent with the spirit of the decision, which was to protect the "truly disabled."

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supra note 302, and accompanying text.

475. Frank v. American Freight Sys., Inc., 398 N.W.2d 797, 802 (Iowa 1987).

476. Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d at 437.

477. *Id.* at 436 (quoting Salt Lake City Corp. v. Confer, 674 P.2d 632, 636 (Utah 1983)) (emphasis in original).

478. *See* Appellee's Reply Brief at 14, Probasco v. Iowa Civil Rights Comm'n, 420 N.W.2d 432 (Iowa 1988) (No. 86-1852).

479. Hollinrake v. Iowa Law Enforcement Academy, 452 N.W.2d 598 (Iowa 1990).

480. *See* Forrisi v. Bowen, 794 F.2d 931, 934 (4th Cir. 1986); Jasany v. United States Postal Serv., 755 F.2d 1244, 1249 n.3 (6th Cir. 1985); E. E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1100 (D. Haw. 1980).

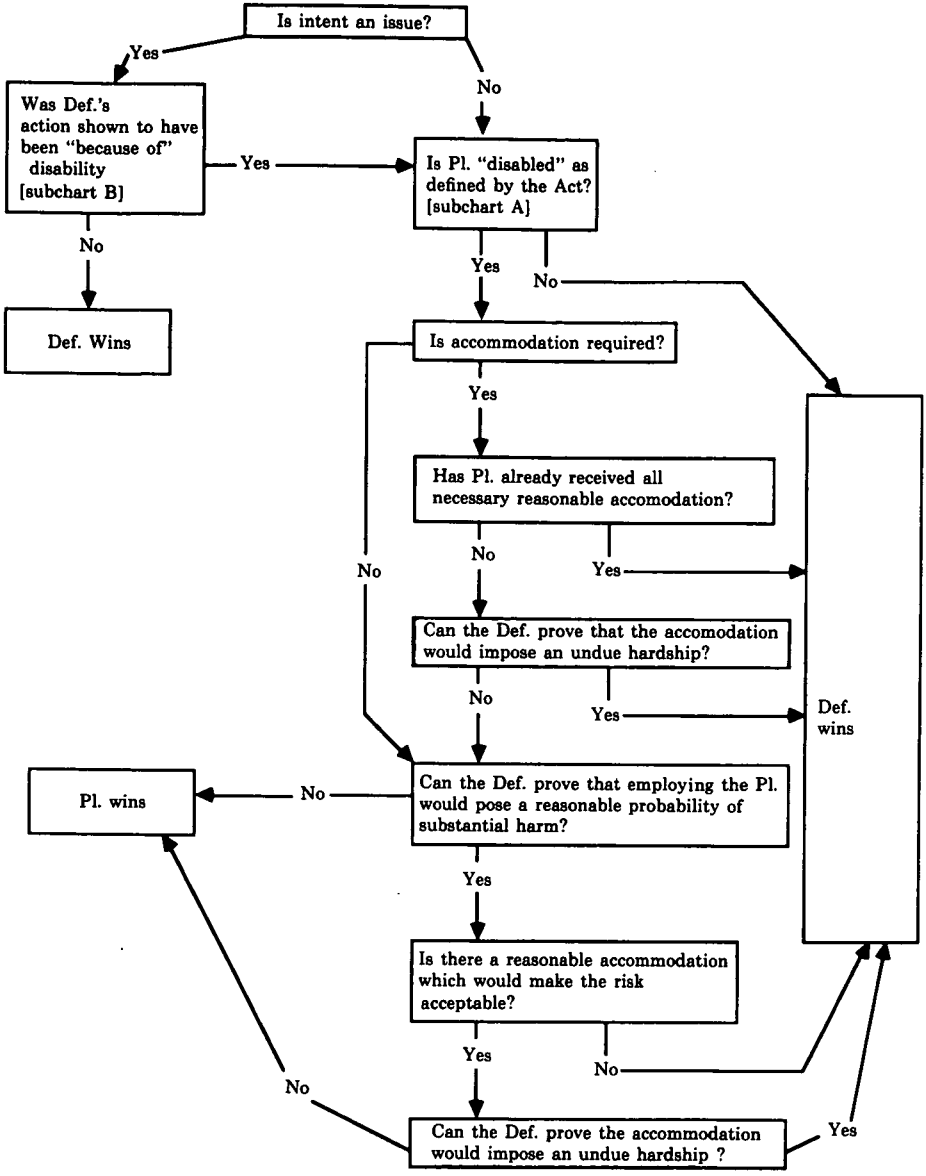
481. Recent case law suggests the court may now read *Probasco* just this way. *See supra* note 274.

V. Practice Aids

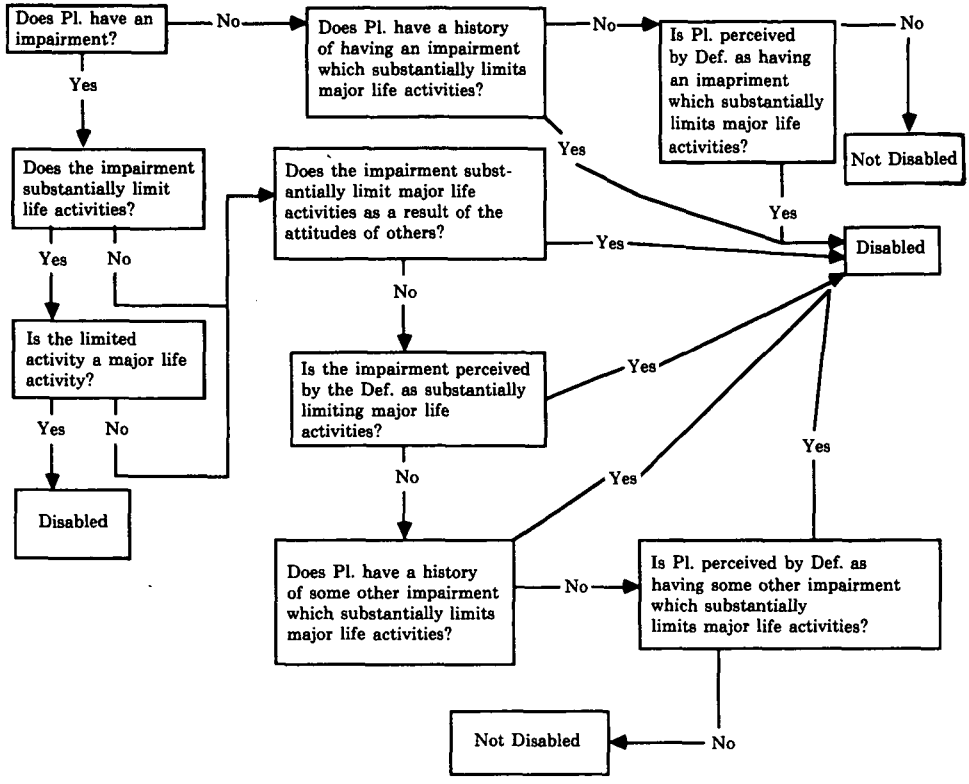
A. *Analyzing a Disability Suit*

While employment discrimination suits generally are complex, disability discrimination cases are even more so. The following charts were devised by the author as an aid to analysis. Not all possible situations are taken into account. For example, impact suits and bona fide occupational qualifications are not covered because these claims involve blanket rules that seldom apply in disability suits. The typical individual different treatment case can, however, be analyzed using these charts.

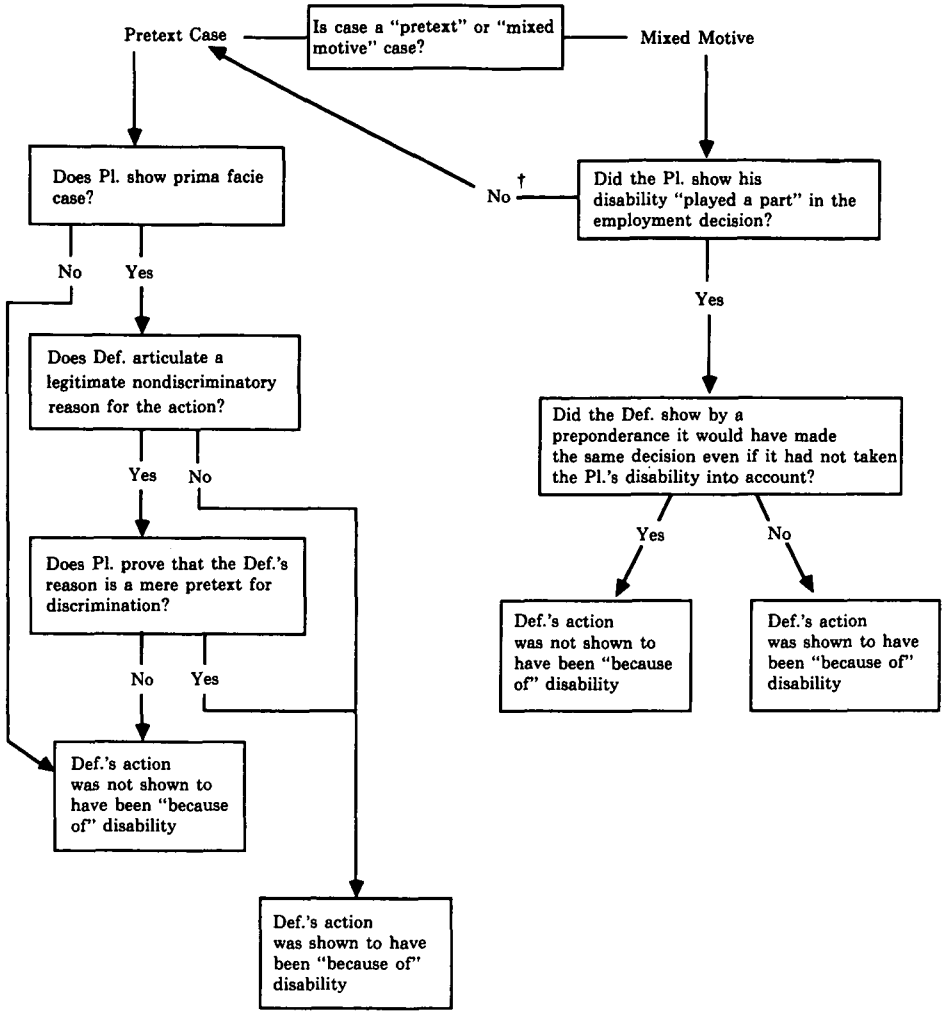
Analyzing A Disability Suit



Subchart A - Analyzing The Issue Of "Disability"



Subchart B - Analyzing the Issue of "Intent"



† This conection is based on footnote 12 of the plurality in *Price Waterhouse*. The Court says, "If the plaintiff fails to satisfy the factfinder that it is more likely than not that a forbidden characteristic played a part in the employment decision then she may prevail only if she proves, following *Burdine*, that the employers stated reason for its decision is pretextual."

B. *Strategy*

1. *Plaintiff's Case*

A plaintiff should take a disability suit to federal court. Federal jurisdiction is currently invoked by federal employment (section 501), federal contracts (section 503), and receipt of federal funds (section 504). Only section 504 will actually get a plaintiff into district court. Section 501 is enforced in the same manner as federal employees proceed under Title VII. Section 503 complaints are handled by the Department of Labor. After July 26, 1992, the Americans with Disabilities Act will make the remedies and procedures of Title VII available if the employer has twenty-five or more employees.[482]

If it is necessary to stay in state court, one should stress the similarity between the Iowa Act and section 504.[483] In addition, the Iowa Civil Rights Commission has promulgated rules similar to many federal rules, especially the DOJ.[484] These rules have the force and effect of law until *specifically* overturned and thus can be very useful. A copy can be obtained by calling or writing the Iowa Civil Rights Commission in Des Moines.[485] If the defendant should raise the *de minimis* standard, one should be certain to present the issue of what is the "undue hardship" standard to the court. When presenting the issue one should cite to *Iowa Beer & Liquor Control*[486] and *Cerro Gordo*.[487] If the case involves an action occurring after July 1988, one can make the "AIDS amendment" argument detailed in part IV.[488] If a state employer is involved, the accommodation duty may be increased by Iowa Code section 19B.2, requiring affirmative action by state agencies.[489]

Finally, the plaintiff can make tactical use of the "perceived as disabled" case. An employee is covered by the Act if his employer perceives him to be disabled. In a typical "undue hardship" case the employer's agents will emphasize the plaintiff could not do generally the type of employment involved. In the right kind of case when the disability does not have a particularly serious effect on the ability to do the job, a plaintiff can establish he was perceived as disabled. The plaintiff would then present the

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482. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 101(5), 140 Stat. 327, 330 (1990).

483. This similarity was recognized in Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1138 (S.D. Iowa 1984). *See supra* notes 213-14, and accompanying text.

484. IOWA ADMIN. CODE r. 161-8.26 through 8.32 (1988).

485. Iowa Civil Rights Commission, c/o Grimes State Office Building, 211 E. Maple, 2nd floor, Des Moines, Iowa 50319; 515-281-4121; 1-800-457-4416.

486. Iowa Beer & Liquor Control v. Iowa Civil Rights Comm'n, 337 N.W.2d 896, 899 (Iowa Ct. App. 1983).

487. Cerro Gordo County Care Facility v. Iowa Civil Rights Comm'n, 401 N.W.2d 192, 197 (Iowa 1987).

488. *See supra* notes 468-69, and accompanying text.

489. IOWA CODE § 19B.2 (1991).

facts that tend to minimize the seriousness of the impairment. In this sort of case, the plaintiff can make the employer walk the line between admitting it perceived the plaintiff as disabled and admitting accommodation would not pose an undue hardship.

2. *Defendant's Case*

The defendant's best course is to exploit the natural tension between the plaintiff's need to be impaired enough as to be disabled but not so impaired as to be beyond the need for accommodation. Therefore, the defendant should contest both the issue of "substantial handicap" and "undue hardship." In doing so the defendant should urge the *de minimis* standard and should insist *Probasco* be read literally to require the plaintiff be substantially limited in his employability. Moreover, the defendant must be very careful in making stipulations. A number of cases in the Iowa Civil Rights Commission case reports exist in which an unwary defendant has stipulated a complainant was "disabled" within the meaning of the Act when the court probably would not have so found.

VI. Conclusion

In 1982 Iowa became a leader in state disability discrimination when the Iowa Supreme Court decided *Foods*. Iowa courts have decided many disability discrimination suits in recent years. In those cases the courts have made some statements that can be construed in a way which would kill practically all disability suits under the Iowa Act. Hopefully, the court will clarify those cases in a manner that restores Iowa's status as a leader in the area.