

DISABLING BURDEN: HOW THE DEFINITION OF DISABILITY UNDER THE ILLINOIS HUMAN RIGHTS ACT IS DOING A DISSERVICE TO VICTIMS OF EMPLOYMENT DISCRIMINATION AND PROPOSAL FOR RE-INTERPRETING THE *PRIMA FACIE* CASE OF DISABILITY DISCRIMINATION UNDER THE ACT

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INTRODUCTION

When the first laws banning discrimination against people with disabilities were enacted decades ago, there was great hope among people with disabilities and advocates for the disabled that a new era was beginning in which this historically marginalized class would finally become integrated into the social and economic life of the nation.¹ However, in recent years the euphoria has waned and much has been written about the lost promise of such laws, particularly with regards to employment discrimination.² Critics focusing on the federal Americans with Disabilities Act (ADA) have decried the lack of agreement amongst federal circuits and between certain courts and the EEOC with regard to key components of the ADA and contend that federal courts have interpreted terms of the law so narrowly as to deny its protections to most disabled Americans.³

While most of what is written about disability discrimination concerns the federal ADA, that law is actually a latecomer compared to most state anti-discrimination statutes.⁴ This paper will focus

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¹ See President George Bush Statement on ADA, reprinted in 1990 U.S.C.C.A.N. 601,602. For more discussion: Stephen Mikochik, *A Celebration of Equality: A Symposium Foreward*, 64 Temple L.R. 371 (1991).

² James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. 1 (2005) (discussion of stagnant employment rates 10 years post-ADA, employers incentives to avoid costs imposed by ADA), Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, (2004)(Need for social welfare programs to complement the ADA in order for people with disabilities to compete in the workforce).

³ Sharona Hoffman, *Corrective Justice and Title I of the ADA*, 52 Am. U. L. Rev. 1213 (2003) (discussion of studies showing low rate of plaintiffs prevailing in employment discrimination suits) Matthew Diller, *Judicial Backlash, the ADA and the Civil Rights Model*, 21 BERKELEY J OF EMP. & LAB. L. 19 (2000)(attributing court's pro-employer bias as resulting from misunderstanding or rejection of the civil rights model of the ADA) Stephan F. Befort and Holly Lindquist Thomas, *The ADA in Turmoil: Judicial Dissonance the Supreme Court's Response, and the Future of Disability*, 78 OR. L. REV. 27, 27-28 (1999).

⁴ Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L.

on Illinois state law, which first recognized the rights of disabled people to be free from discrimination in employment with adoption of the Illinois Constitution of 1970—two decades before the passage of the ADA.⁵ Like their federal counterparts, the Illinois appellate courts have narrowed the class of people protected by disability discrimination laws, and the appellate districts are not in agreement regarding the duties of employers under Illinois law.⁶ This paper will explore one particular point of conflict between certain appellate districts and between appellate courts and the administrative agencies charged with enforcing discrimination laws.

Within the state of Illinois, the Joint Rules of the Department of Human Rights and the Human Rights Commission (Joint Rules) require employers to make reasonable accommodation for employees with disabilities,⁷ and the Illinois Supreme Court has affirmed that employers must make individualized inquiry in determining whether a disabled person is capable of performing a particular job.⁸ However, the definition of “disability”⁹ within the Illinois Human Right Act (IHRA) only includes conditions “unrelated to the person's ability to perform the duties of a particular job.”¹⁰ Courts have struggled to reconcile the employee's burden to demonstrate that she is able to perform the duties of a job with the employer's burden to investigate and provide reasonable accommodations.¹¹ In this paper I take the position that: 1) a disabled person should be covered under the Illinois Human Rights Act (IHRA) when she can produce reasonable evidence that she is capable of performing a job and 2) when an employer refuses to consider a disabled person for a job without investigating whether that

REV. 597, 601 (2004); Flaccus, Janet A., *Handicap Discrimination Legislation: With Such Inadequate Coverage at the federal Level, Can State Legislation be of Any Help?* 40 *ARK. L. REV.* 317 (1986).

⁵ See *infra* Part I.

⁶ See *infra* Part II pp 12-15.

⁷ 56 Ill. Admin. Code 2500.40.

⁸ *Raintree Health Care Center v. Human Rights Comm'n.*, 173 Ill. 2d 469, 484 (1996). See *discussion infra* pg 12.

⁹ PA 95-668, effective Oct. 10, 2007 changed all references in the IHRA from “handicap” or “handicapped” to “disability” and “disabled.” However, the wording of the Illinois Constitution and that of the Joint Rules have not yet been changed. The terms “disability” and “disabled” will be used throughout this paper.

¹⁰ 775 ILCS 5/1-103(I)(1).

¹¹ See *infra* Part II pp 12-15.

person would be capable of performing the job with reasonable accommodations, the employer has violated the constitutional rights of the disabled applicant.

Part I will outline the constitutional basis for the IHRA and predecessor statutes, and discuss the “social model” of disability on which the laws are based. Part II will describe a *prima facie* case of employment discrimination based on disability, and discuss differing allocations of burden in the Administrative Code and cases from two appellate districts. Part III will propose a schema for reconciling the complainant's burden to show that she fits the statutory class with the employer's duty to investigate her individual capability to perform the job in question with reasonable accommodations.

PART I

The Constitutional Convention of 1970

Illinois laws have promised people with disabilities protection from discrimination in the workplace since the adoption of the current constitution in 1970 which states in Article I §19 that “All persons with a physical or mental handicap shall be free from discrimination...unrelated to ability in the hiring and promotion practices of any employer.”¹² Section 19 was intended to prohibit the widespread employer practice of refusing to consider disabled applicants for open positions, and to require employers to investigate the capabilities of a given applicant for the job in question. Furthermore, it was intended to create civil rights for disabled citizens which parallel the rights afforded to other protected classes such as race, sex, and national origin.

Socio-political Context of the Sixth Illinois Constitutional Convention

Around the time of the adoption of the Illinois Constitution of 1970, higher numbers of people with disabilities were enrolling in colleges and universities, and, building off the experience of other civil rights movements, they advocated for full participation in society.¹³ On a national scale, these

¹² Ill. Const. Art. I §19.

¹³ Richard K. Scotch, Politics and Policy in the History of the Disability Rights Movement, 67 MILBANK QUARTERLY,

activists rejected the segregated and economically limited lifestyles which had for long been the lot of the disabled, set up Centers for Independent Living, and fought for access to careers.¹⁴ One of the key institutions which fostered the disability rights movement is less than a hundred miles from the Illinois Capitol where the Constitution was adopted; the University of Illinois at Urbana-Champaign.¹⁵ Students with disabilities have been politically active there since at least 1949, when disabled veterans studying under the GI Bill protested the planned closure of an education center for people with disabilities.¹⁶ In the decade leading up to the adoption of the Illinois Constitution, the University of Illinois had been actively working to dispel “negative, stereotypical attitudes and beliefs about persons with disabilities” and had developed national standards for architectural accessibility.¹⁷ The ideals of integration and accommodation of persons with disabilities were thus spreading in Illinois even before the disability rights movement gained national momentum.

Despite the presence of a high number of college-educated persons with disabilities, however, it was still difficult for disabled people to find work in Illinois.¹⁸ By the time of the Constitutional Convention, a new generation of disabled veterans were returning from the war in Vietnam, and there was concern among the convention delegates that these young veterans had great difficulty finding employment despite their ability and desire to work.¹⁹ Convention delegates told anecdotes of physically disabled college graduates denied teaching positions,²⁰ people with speech impediments

SUPPLEMENT 2 (PART 2), 380, 387-89. (1989) Hereafter: Scotch, History of the Disability Rights Movement.

¹⁴ *Id.* at 388.

¹⁵ *A Campus Handicap?* Newsweek, Aug. 8 1977, pg 58 (describing the University as an acknowledged leader in accessibility).

¹⁶ *An oasis in a land of inaccessibility;Pioneering U. of I. program for disabled turns 50* CHICAGO SUN-TIMES APRIL 12, 1998, pg. 20 (crediting University program for pioneering concepts later incorporated into ADA) *History of Disability Services at the University of Illinois* (accessed at www.disability.uiuc.edu/page.php?id=10 on 03/07/08).

¹⁷ *University of Illinois at Urbana-Champaign Disability Firsts* (accessed at www.disability.uiuc.edu/page.php?id=11 on 03/07/08).

¹⁸ *Record of Proceedings, Sixth Illinois Constitutional Convention*, Verbatim Transcript of August 6, 1970, 3678-3686 (Published by Illinois State Bar Association) (hereinafter *Record of Proceedings*).

¹⁹ *Record of Proceedings*, August 6, 1970, 3679-3680 (statement by Del. Leahy).

²⁰ *Id.* 3680, (statement by Del. Tomei,).

unable to find jobs²¹ or isolated and passed over for advancement.²²

The Social Model of Disability

Activists for disability rights wanted to change the nation's perspective on disability, espousing that a disability is not solely an impairment internal to the disabled person, but rather a product of that person's interaction with others and with a constructed environment, created by such factors as “physical characteristics built into the environment, cultural attitudes, and institutionalized roles.”²³ This “social model” of disability represented a break from the “medical model” which prevailed in the first half of the 20th Century, under which a person with a disability was seen primarily as someone with an illness to be cured, or, if incurable, to be put on the public dole.²⁴

Within the State of Illinois, the social model of disability was gaining traction at the time of the Constitutional Convention. The Governor's Committee on Employment of the Handicapped sent a report to convention delegates entitled *The Problem of Imposed Handicap*, which stated that

With respect to employment decisions individuals may have handicaps of two distinctly different origins. One kind of handicap is that inherent in the individual's physical, mental, emotional, educational, and social makeup. The other is imposed by society through lack of understanding or lack of information. Of the two kinds of handicap, that imposed on the individual by society is in most cases more disabling and fundamentally more crippling than that which arises out of the individual's makeup.²⁵

Among the delegates to the convention, the social model seems to have been accepted as an accurate model of disability. Several delegates told anecdotes of persons willing and able to work yet unemployed due to prejudice or inflexible hiring rules.²⁶ Others spoke of the waste of human and

²¹ *Id.* 3679-3680, (statement by Del. Leahy).

²² *Id.* 3684, (statement by Del. Foster).

²³ Richard K. Scotch, Models of Disability and the Americans with Disabilities Act, 21 BERKELEY J. EMP. AND LAB. L. 213, 214 (2000).

²⁴ James Leonard, The Equality Trap: How Reliance on Traditional Civil Rights Concepts has Rendered Title I of the ADA Ineffective, 56 CASE W. RES. 1,3 (2005).

²⁵ *Record of Proceedings*, Aug. 6, 1970, 3681 (quoted in statement by Del. Anderson).

²⁶ *Id.* 3681 (statement by Del. Anderson), 3679 (statement by Del. Leahy), 3680 (statement by Del. Tomei), 3683 (statement by Del. Knuppel), 3685 (statement by Del. Foster).

capital resources caused by underemployment of people with disabilities.²⁷

The Nature of Discrimination Prohibited

The proponents of what became §19 saw that discrimination against the disabled takes place very early on in the hiring process, that employers do not merely pass over disabled applicants in favor of those without disabilities, but they fail to consider disabled applicants outright. One sponsor of the amendment, Delegate Richard J. Daley, described the intended effect of §19 thus:

“Well, you just can't deny a person because he walks in the door because he has one arm...When you look at him, you can't say 'You can't have the job,' without discussing it with him. If he cannot perform the job, or does not have the ability, then you can deny the person. That's all.”²⁸

Others echoed the idea that there should be a right to not be discriminated against in employers' decision-making which is entirely separate from any sort of right to be hired.²⁹

This initial example by Delegate Daley illustrates just the sort of dialog prescribed by the current Joint Rules, and also reflects the underlying assumptions of the social model of disability. Once it is accepted that disability is a product of interaction between a physical or mental impairment and the work environment, it is clear that input from both the applicant and the employer is necessary to determine whether the applicant is capable of performing the job in question. To use Daley's example, a one-armed man seeking work on a manufacturing line may believe that he is capable of the job because he has mastered a great number of everyday tasks and chores which others typically use both arms to accomplish. The employer, who knows that his current employees all use two hands to operate the machinery on the line, may believe that the applicant is incapable of performing the job. Perhaps the applicant, well-used to working with one arm will have no problem mastering the machinery. Perhaps all that is required for him to use the machine is some sort of stool or apparatus

²⁷ *Id.* 3683 (statement by Del. Knuppel), 3687 (statement by Del. Bottino).

²⁸ *Id.* 3679 (statement by Del. Daley).

²⁹ *Id.* 3683 (statement by Del. Knuppel), 3685 (statement by Del. Foster), 3681 (statement by Del. Anderson).

which will allow him to brace the machine against his body. Perhaps, on the other hand, no reasonable accommodation exists which would allow the applicant to safely or effectively operate that particular machine. Only through dialog between the applicant and employer, and perhaps consultation with the Department of Rehabilitative Services or other expert in adaptive technology, will the parties find out whether or not the applicant is capable of performing the particular job.

The addition of the phrase “unrelated to ability” by co-sponsor Delegate Michael Madigan seems to have been made to reinforce that employers would be required to consider the capabilities of disabled applicants, but would not be required to hire any person who they determined could not do the job.³⁰ Prior to Madigan's amendment, several delegates had expressed concern that employers would be subject to lawsuit for hiring based on objective qualifications and abilities.³¹ That employers could refuse to hire based on ability is not the same as allowing them to pre-judge an applicant's ability to perform the job based on an apparent physical or mental impairment, however.

Equal Standing with Other Protected Classes

Delegates to the convention intended that disabled people be granted the same protection from discrimination as was being granted to other suspect classifications such as race, sex, and national origin.³² While proposals were made at various points in the convention to add a second paragraph specifying that rights of persons with disabilities were subject to legislative limitations,³³ or to submit §19 to voters separately from the body of the Bill of Rights,³⁴ ultimately the section was presented in the body of the Bill of Rights and with no special limitations other than the qualifying phrase

³⁰ *Id.* 3681 (statement by Del. Madigan).

³¹ *Id.* 3679 (statement by Del. Borek), 3680 (statement by Del. Hendren), 3683 (statement by Del. Lennon: “I wonder how an employer would defend if he didn't employ someone simply because they were stupid”).

³² *Id.* 3680 (statement by Del. Tomei), 3683 (statement by Del. Knuppel), 3685 (statement by Del. Foster), 3685, (statement by Del. Weisberg), 3694 (statement by Del. Leahy).

³³ *Id.* 3682-87.

³⁴ *Id.* 3678-3690, 3693-3696, 4263, 4269-4273.

“unrelated to ability.”³⁵

Implementation of the Constitutional Guarantee

Equal Employment for the Handicapped Act of 1971

The guarantee of §19 was implemented the next year by the Equal Opportunity for the Handicapped Act (EOHA), which more explicitly provided that:

³⁵ *Id.* 4273.

It is the policy of this State as set forth in Article I, Section 19 of the Illinois Constitution of 1970, to guarantee physically and mentally handicapped persons the fullest possible participation in the social and economic life of the State, to engage in remunerative employment, and to secure housing accommodations of their choice.³⁶

The act presumed that disabled persons were capable of work, and put the burden on employers to demonstrate “that the particular handicap prevents the performance of the employment involved”³⁷

Companion legislation created a civil rights division within the office of the Attorney General to investigate discrimination against persons with disabilities,³⁸ and made such discrimination a misdemeanor punishable by fines and imprisonment.³⁹

Because the EOHA was passed in the legislative session immediately following the adoption of the Illinois Constitution, and with the express purpose of implementing Article I, §19, it is strong evidence of how the people of Illinois and their elected lawmakers viewed the constitutional guarantee at the time it was adopted. At that time, the language “unrelated to ability” was not interpreted as placing a burden of proof on a disabled person; rather, the burden was placed on the employer to show that the disabled person fell outside the protection of the act. The criminalization of employment discrimination and creation of an office charged with enforcement of the law shows that the legislature meant for the constitutional guarantee to be taken seriously by employers. The policy statement of the act and the provision placing the burden on employers to prove that a particular disability made a person incapable of a particular job both indicate that people with disabilities were seen as capable and employable as a class, and that incapability was an exception. Essentially, the EOHA adopted the “social model” of disability which was espoused by leaders of the nascent disability rights movement in the late 1960s and early 1970s.

³⁶ PA 77-1211§1 (approved Aug. 23 1971).

³⁷ *Id.* §3.

³⁸ PA 77-1212 (approved Aug. 23, 1971).

³⁹ PA 77-1213 (approved Aug. 23, 1971).

The Illinois Human Rights Act of 1979

In 1979 all Illinois anti-discrimination laws, including those affecting persons with disabilities, were re-codified into the IHRA, criminal provisions were removed, and the Illinois Human Rights Commission was established to hear claims of discrimination.⁴⁰ The policy statement of the IHRA currently reads: “It is the policy of this State...[t]o secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her ...physical or mental disability...in connection with employment”⁴¹ Further, the IHRA declares it the policy of the state “[t]o promote the public health, welfare and safety by protecting the interest of all people in Illinois in maintaining personal dignity, in realizing their full productive capacities.”⁴² Also noteworthy is the inclusion of a stated policy “[t]o protect citizens of this State against unfounded charges.”⁴³

This policy statement differs a great deal from that of the original EOHA, as is to be expected where the scope of the later statute is so much broader than the earlier one, encompassing all forms of unlawful discrimination, not just that against persons with disabilities. However, elements of the EOHA are still present in the IHRA: the policy of the State still affirms the employability of people with disabilities. While the current statute does not explicitly allocate burden of demonstrating whether an employee or applicant is capable of performing a job, the language espousing a state interest in people “reaching their full productive capacities” indicates that the state policy remains that all people capable of working should find employment.

One striking difference in the new statute is the change in focus away from the benefit to the individual under the act, and towards the benefits to society as a whole. The IHRA takes an “all for one and one for all” approach towards unlawful discrimination; it is for the benefit of “all individuals

⁴⁰ PA 81-1216 (approved Dec. 6, 1979).

⁴¹ 775 ILCS 5/1-102(A).

⁴² 775 ILCS 5/1-102(E).

⁴³ 775 ILCS 5/1-102(H).

within Illinois” that the Act prohibits “discrimination against any individual [of a protected class].” Thus, under the IHRA, an employer who engages in discrimination has committed a wrong against society, not merely a wrong against any particular person who may have been the target of the discrimination.

PART II

Components of a *Prima Facie* Case of Discrimination Based on Disability

Employment discrimination claims are sometimes based on evidence of actual discriminatory intent; for example, where an employer makes an overtly discriminatory statement when terminating an employee. However, the majority of cases involve no evidence of discriminatory intent.⁴⁴ In analyzing such claims under the IHRA, the Illinois Supreme Court has adopted the three-part test set out in the federal case of *McDonnell-Douglas Corp. v. Green* for use in such cases.⁴⁵ Under this test, a complainant who establishes a *prima facie* case of discrimination by a preponderance of the evidence, thereby creates a rebuttable presumption of discriminatory conduct on the part of the employer.⁴⁶ The respondent may then rebut this presumption by articulating a non-discriminatory rationale for its decision.⁴⁷ Once a non-discriminatory rationale has been articulated, the complainant may still prevail by demonstrating by a preponderance of evidence that the articulated rationale is mere pretext for discriminatory conduct.⁴⁸

To demonstrate a *prima facie* case of discrimination on the basis of disability, a complainant must show (1) that she has a disability as defined under the IHRA, (2) she is otherwise qualified and the disability is unrelated to her ability to perform the job in question, and (3) that an adverse

⁴⁴ James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. 1, 18 (2005).

⁴⁵ *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Zadereka v. Human Rights Comm'n*, 131 Ill. 2d 172, 178-79 (1989).

⁴⁶ *Lake Point Tower, Ltd. v. Human Rights Comm'n*, 291 Ill. App. 3d 897, 902 (1st Dist., 1997).

⁴⁷ *Id.*

⁴⁸ *Id.*

employment action was taken against her because of that disability.⁴⁹ The first and second factors overlap to a large extent because “disability” under the IHRA only includes those conditions unrelated to the ability to perform a particular job.⁵⁰

Available Remedies under the IHRA

Under the IHRA, a number of equitable and legal remedies are available should a complainant prevail at public hearing.⁵¹ On the equitable side, an Administrative Law Judge may recommend that the Commission issue a cease and desist order against the respondent,⁵² require posting of public notice by the respondent,⁵³ order the hiring, promotion, or reinstatement of the complainant,⁵⁴ or require continuing compliance reports from the respondent.⁵⁵ Legal remedies include payment of actual damages for harm suffered by the complainant,⁵⁶ back pay for such period as complainant was wrongfully unemployed or undercompensated,⁵⁷ attorney's fees and related costs of litigation,⁵⁸ as well as such interest on these payment as is required to “make the complainant whole.”⁵⁹ These remedies are not dependent on the nature of the protected class to which complainant belongs, but rather apply to all cases of discrimination in employment.⁶⁰ The Appellate Court for the First District has recognized, in a case involving racial discrimination in hiring, that injunctive relief and attorney's fees are appropriate remedies even where no actual damages have been shown and where the complainant was

⁴⁹ *Dept. of Corrections v. Human Rights Comm'n*, 298 Ill. App. 3d 536, 540 (3rd Dist. 1998); *Caterpillar, Inc. v. Human Rights Comm'n*, 154 Ill. App. 3d 424, 428 (3rd Dist., 1987) see also *City of Belleville v. Human Rights Comm'n*, 167 Ill. App. 3d 834, 838 (5th Dist., 1988). The Appellate Court for the First District uses the same factors, but lists them in a different order, with causality being the second factor, and that the disability is unrelated to the job being the third factor. *Van Campen v. Int'l Business Machines Corp.*, 326 Ill. App. 3d 963, 971 (1st Dist 2001); *Harton v. City of Chicago Department of Public Works*, 301 Ill. App. 3d 378, 385-86 (1st Dist. 1998); *Lake Point Tower*, 291 Ill. App. 3d at 903.

⁵⁰ *Supra*, note 3. See also *Harton*, 301 Ill. App. 3d at 386.

⁵¹ 775 ILCS 5/8A-104.

⁵² 775 ILCS 5/8A-104(A).

⁵³ 775 ILCS 5/8A-104(I).

⁵⁴ 775 ILCS 5/8A-104(C).

⁵⁵ 775 ILCS 5/8A-104(H).

⁵⁶ 775 ILCS 5/8A-104(B).

⁵⁷ 775 ILCS 5/8A-104(C).

⁵⁸ 775 ILCS 5/8A-104(G).

⁵⁹ 775 ILCS 5/8A-104(J).

⁶⁰ 775 ILCS 5/8A-104.

not qualified for the job in question.⁶¹

⁶¹ *Board of Education v. Cady*, 369 Ill. App. 3d 486, 498 (1st Dist 2006).

Duty of Employers to Investigate Individual Capabilities

As detailed in Part I, the sponsors of §19 at the Constitutional Convention intended to create dialog between employers and applicants with disabilities.⁶² In *Raintree Health Care Center v. Human Rights Comm'n.*, the Illinois Supreme Court reconfirmed the need for such dialog, holding that an employer must make an individualized determination of whether a particular employee with a disability could safely perform the job in question.⁶³ The court found that the employer in that case should have spoken with doctors or consulted medical literature regarding risk of HIV transmission by an HIV-positive employee before discharging the him.⁶⁴ In reaching this holding, the court cited favorably to cases from Illinois Appellate Courts which had found that categorical bars restricting the hiring of amputees for certain jobs were unlawful discrimination because eligibility for employment should be based on individual capacity rather than generalizations about a particular class.⁶⁵ While *Raintree* did not involve a request for reasonable accommodation, it is hard to imagine how an employer could make an individualized determination of whether a given employee could safely perform the job in question without inquiring into such accommodations.

Duty to Investigate Reasonable Accommodations

The Joint Rules Regarding Reasonable Accommodation

Although the IHRA itself makes no reference to reasonable accommodation of an employee's disabilities, §2500.20 of the Joint Rules clarifying the definition of disability states that in determining whether a disability is unrelated to a person's work abilities “[r]easonable accommodation of a person's physical or mental limitations must be explored...to determine whether the condition prevents

⁶² See *supra* Part I text accompanying note 28.

⁶³ 173 Ill. 2d at 484.

⁶⁴ *Id.* at 484.

⁶⁵ *Id.* at 481-482 (citing *Board of Trustees of the University of Illinois v. Human Rights Comm'n.*, 138 Ill. App. 3d 71 (1985) and *Melvin v. City of West Frankfort*, 93 Ill. App. 3d 425 (1981)).

acceptable or safe performance of the activities necessary for the job.”⁶⁶ Furthermore, §2500.40 of the Joint Rules states that “Employers ... must make reasonable accommodation of the known physical or mental limitations of otherwise qualified handicapped applicants or employees, unless the employer ... can demonstrate that such accommodation would be prohibitively expensive or would unduly disrupt the ordinary conduct of business.”⁶⁷ Section 2500.40 also outlines the allocation of burden between the employer and employee when a statutory disability requires accommodation. The disabled employee must document their disability, initiate a request for accommodation, and cooperate with the employer in “determining the possible or feasible accommodations.”⁶⁸ The burden then shifts to the employer: “Once [disabled] individual has initiated a request for accommodation, or if a potential accommodation is obvious in the circumstances, it is the duty of the employer...to provide the necessary accommodation.”⁶⁹

Appellate Courts' Interpretation of the Duty to Investigate Reasonable Accommodation

The Third District applied these Joint Rules in *Dept. of Corrections v. Human Rights Comm'n*, finding that the employer had a duty to investigate reasonable accommodations, and that that duty was not limited only to evaluating specific accommodations proposed by the employee.⁷⁰ In that case, the court found that where a prison guard could no longer accurately shoot a shotgun with her dominant arm due to a shoulder injury, an appropriate accommodation would have been to train her to shoot with her non-dominant arm.⁷¹ The court faulted the employer for making “very little effort to identify an appropriate and reasonable accommodation,” because the relevant supervisors did not engage in dialog with the employee or her lawyer about possible accommodations.⁷² The court further noted that other

⁶⁶ 56 Ill. Admin. Code 2500.20(d)(2).

⁶⁷ 56 Ill. Admin. Code 2500.40(a).

⁶⁸ 56 Ill. Admin. Code 2500.40(c).

⁶⁹ 56 Ill. Admin. Code 2500.40(d).

⁷⁰ *Dept. of Corrections* 298 Ill. App. 3d at 541.

⁷¹ *Id.*

⁷² *Id.* at 542.

employees had in fact been trained to use their non-dominant shooting arms in the past, so the accommodation should have been apparent to the employer.⁷³

In the same year, the First District read the duty to investigate accommodations narrowly in *Harton v. City of Chicago Dept. of Public Works*.⁷⁴ In that case, the court found that where in fact no reasonable accommodation would have rendered the blind complainant capable of performing the job in question, which involved a significant amount of map-reading and reading handwritten correspondence, the employer was under no obligation to investigate accommodations.⁷⁵ The rationale for this holding was that since her blindness was related to her ability to perform the duties of the position, the disability was not covered by the IHRA.⁷⁶

The court in *Harton* went so far as to declare that the Joint rules were unenforceable to the extent they might be interpreted as creating such a duty.⁷⁷ “Once the Commission found that Harton could not have performed the duties of the principal clerk even with accommodation, it lacked power under the Act to award any relief,” the court held, vacating the Administrative Law Judge's order and remanding the case with instructions to dismiss the complaint.⁷⁸

The case is particularly disheartening for persons with disabilities, because Harton herself was in many ways a model complainant: an educated and qualified worker with a history of improving her skills and direct evidence that she was not considered for a promotion solely due to her impairment. At her initial position with the Department of Public Works, she went from being “ignored by her coworkers” to being “integrated into the social fabric of the office,” and increased her productivity substantially thanks to a new supervisor implementing such minor accommodations as having the general announcements read aloud to her and supplying her with an old manual typewriter so that she

⁷³ *Id.*

⁷⁴ *Harton*, 301 Ill. App. 3d 378.

⁷⁵ *Id.* at 390.

⁷⁶ *Id.*

⁷⁷ *Id.* at 391.

⁷⁸ *Id.* at 392.

could take messages for others in the office.⁷⁹ Harton also earned a college degree while working full-time at that job.⁸⁰ When she applied for a promotion, the respondent employer had placed her on a list of qualified applicants for the position in question.⁸¹ Her interviewer, however, “told her ‘you never get’ reasonable accommodations” and “because of her blindness, he never considered hiring her,” nor did he make any investigation at all into reasonable accommodations which might have allowed Harton to perform the duties of the position.⁸² While the administrative law judge did ultimately find that Harton would not have been capable of performing the job in question, the holding came only after a special evidentiary hearing on the topic of accommodations which included testimony from expert witnesses for both parties.⁸³

In holding that the complaint should be dismissed, the First District outlined a system under which the liability of the employer for failing to investigate accommodations for persons with disabilities depends not on the actions of the employer, nor on its motivation for those actions, but rather on what the result of the foregone investigation might have been.⁸⁴ Specifically, “Failure to [investigate] might well expose an employer to liability under the [IHRA] if it is subsequently determined that a reasonable accommodation would have enabled the applicant to perform the job despite her disability.”⁸⁵ While the court in *Harton* inexplicably made no reference to *Raintree*, a controlling case from two years earlier, the holding seems to conflict with *Raintree*'s prohibition on an employer's “overly cautious decision after an insufficiently thorough investigation.”⁸⁶

Post-*Harton* state of the law

Following *Harton*, no other district has cited to the case, although the First District has done so

⁷⁹ *Harton and City of Chicago Department of Public Works*, ALS No. 4808, 1993 ILHUM Lexis 142, 12-13.

⁸⁰ *Id.* at 2.

⁸¹ *Harton*, 301 Ill. App. 3d at 381.

⁸² *Id.* at 383.

⁸³ *Id.* at 382-382.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Raintree*, 173 Ill. 2d at 483.

on multiple occasions.⁸⁷ The Commission has cited to the case in some recommended orders and decisions, most notably in *Myers-Ford and Champion, Int'l.*, which involved a complainant whose back injury precluded her from performing the bending and lifting duties of her old job.⁸⁸ In that case, the Commission reconciled *Harton* with *Raintree* by holding that the employer's duty to perform an individualized investigation “arises only if and when it is presented with evidence by the employee that she can, in fact, perform the job in question.”⁸⁹ Under *Myers-Ford*, no duty to investigate would arise where the employee was clearly incapable of the job at issue.⁹⁰

While the analysis in *Myers-Ford* is logical and gives a clear rule to follow in most failure-to-accommodate cases, liability for the failure to investigate is still treated as dependent ultimately on whether the claimant is found to be capable of performing the job in question. In fact, the holding appears to create a duty (arising when employer is presented with evidence of capability), but no liability for breach of that duty where the disabled person is found to be incapable of performing the job duties. At first glance, this follows the common formulation for many torts, where the plaintiff must show duty, breach, and harm in order to prevail, and failure to investigate accommodations could arguably be viewed as a form of negligence in hiring. However, this formulation is inapt for discrimination cases under the IHRA. The IHRA recognizes that an independent harm to society arises from acts of discrimination, so that there is a cognizable harm from an employer's breach of the duty to investigate capabilities and accommodations regardless of any actual damages incurred by the complainant as a result of that breach.⁹¹

⁸⁷ *Van Campen*, 326 Ill. App. 3d 963 *passim*; *Wilhelm v. Human Rights Comm'n*, 324 Ill. App. 3d 793, 800 (1st Dist 2001); *Gilchrist v. Human Rights Comm'n*, 312 Ill. App. 3d 597, 601 (2000).

⁸⁸ *Myers-Ford and Champion, Int'l.* ALS No 9628, 2000 ILHUM Lexis 131, 5-7.

⁸⁹ *Id.* (Disposition of Final Order).

⁹⁰ *Id.* at 14.

⁹¹ *See supra* Part I, text accompanying note 43 to end of section.

PART III

The *Harton/Myers-Ford* interpretation of the IHRA goes against the policy of the State of Illinois to the extent it precludes employer liability for refusal to consider disabled applicants for hiring or promotion. When an appellate court next has reason to consider the issue, the following interpretation should be adopted: Where a complainant with a disability produces evidence that the disability is unrelated to her ability to perform the job in question, she is covered under the IHRA. An employer thus has a duty to investigate an employee or applicant's capabilities, including any reasonable accommodations except in cases where the disability is so clearly related to work ability that no evidence could be produced to the contrary. Should an employer breach this duty, actual damages and/or back pay shall be awarded to a complainant who can prove by preponderance of the evidence that her disability is unrelated to the job. Should an employer breach this duty towards a complainant who cannot prove that her disability is unrelated to the job, damages should be limited to costs and fees, plus appropriate injunctions.

The Allocation of Burden as Under Harton/Myers-Ford Creates Incentives which are Contrary to Constitutional Guarantee of Freedom from Discrimination

As detailed in Part II, it is the policy of the State of Illinois to encourage employment of persons with disabilities, which is seen as good for society as a whole as well as for the personal and economic well-being of people with disabilities. The court in *Harton* acknowledged that absolving employers of any burden to investigate accommodations for an employee absent proof of that employee's ability to perform the job could be a disincentive to investigate such accommodations.⁹² Yet, the court found itself “bound by the clear language of the Act” which does not allow relief “absent a predicate civil rights violation”⁹³ In so holding, the court interpreted the language “unrelated to ability” which is

⁹² *Harton*, 301 Ill App 3d at 391.

⁹³ *Id.*

found in both §19 and in the IHRA to mean that a disabled person had no right to be considered for a job unless proven capable of doing that job. However, as discussed above, this language was added to §19 at the Constitutional Convention in order to clarify that employers would not be required to *hire* a person who could not perform the job; it was not intended to allow employers to pre-judge disabled applicants' abilities and short-circuit the dialog envisioned between employer and applicant.⁹⁴

Let us assume three possible categories of disabled complainants, for the purpose of analysis. Category I consists of people with impairments which are clearly unrelated to their abilities to perform the jobs they seek, but who may be subject to adverse employment actions based on prejudice, stigma, or ignorance. The HIV-positive worker in *Raintree* would be an example of this category. Category II consists of people with impairments which are questionably related to the job they seek, but for which reasonable accommodations may exist. The blind office worker in *Harton* would be an example. Category III consists of people whose impairments are clearly related to the job they seek, for which accommodations would be unreasonable. The factory worker in *Myers-Ford* whose medical examination showed that she could no longer perform such key parts of her job as lifting, bending, and twisting would be an example.

Given the policy goals of §19 and the IHRA to eradicate employment discrimination, foster the “full productive capacities” of citizens, and guard against unfounded lawsuits, the law should encourage complainants in categories I and II to bring claims, and discourage complainants in category III except in egregious cases. For category I complainants, no rational basis exists for the refusal to consider them for employment, and successful complaints should serve to gain capable citizens employment and reduce discrimination. In the case of category II complainants, who may be capable of performing the job they seek, the possibility of successful claims will encourage employers to investigate applicants' capabilities rather than pre-judging them. In the case of category III

⁹⁴ See *supra* Part I text accompanying notes 30-32

complainants, on the other hand claims should be discouraged because the investigation of accommodations would be not only unsuccessful, but futile.

A system which predicates any and all recovery on the complainant's objective ability to perform the job in question, as per the holding in *Harton*, will give the desired results with regard to both categories I and III in cases where a discrimination claim is based on an employer's failure to investigate accommodations. However, the system is weighted too heavily toward guarding against unfounded charges and not enough towards eradicating discrimination and achieving full productive capacities, and therefore does not serve the policies of the state with regards to category II complainants.

Assume that in each case, the employer clearly took adverse action against the complainant based on disability without first investigating the her capabilities and reasonable accommodations. The following results would obtain under the *Harton/Myers-Ford* allocation of burden:

Complainants in category I will be able to show that their disabilities are unrelated to the job and will be protected under the act. Should they be able to show themselves otherwise qualified, they will have satisfied the *prima facie* case of discrimination. These complainants should prevail at a public hearing, attain their full productive capacities, and strike a blow against discrimination.

Complainants in category III will be unable to prove themselves capable of performing the job, will not be protected under the act, and would not prevail at a hearing, should their claim even survive a motion for summary decision. Knowing that such a claim will fail, potential category III complainants are unlikely to bring a claim, thus employers gain protection from unfounded charges.

Complainants in category II are the hard cases, however, and the *Harton/Myers-Ford* system serves them poorly. A typical case of this sort may involve many detailed factual inquiries into just what the the essential functions of the job were, what sort of adaptive technologies were available, how effective they were and how expensive they were, and how much adjustment of methodology or

scheduling would be reasonable. As in *Harton*, experts may be called on each side. Neither side knows whether the disability is unrelated to the job, and thus whether the complainant is covered under the IHRA, until all the evidence has been presented.

Unlike in the case of a category III complainant, denying liability and recovery for a category II complainant will not serve the policy of protecting employers from unfounded charges. Where the complainant can present credible evidence that the disability is unrelated to her ability to perform, the charges could hardly be termed “unfounded,” regardless of the ultimate disposition.

Furthermore, by putting a burden of proof on the complainant to demonstrate by a preponderance of the evidence that her impairment is unrelated to the ability to perform the job in question, the *Harton* system assumes that the knowledge required for such proof is available to the complainant. This allocation of burden is a rejection of the social model of disabilities on which Article I, § 19 of the Illinois Constitution is based, because it assumes that the disability is entirely due to the complainant's impairment, rather than being a product of both the impairment and the work environment.

Finally, by reducing the chances that an employer will suffer any sort of liability for failing to investigate the capabilities of employees or applicants with disabilities, the law creates incentives which contrary to the public policies underlying the IHRA. Disabled job applicants who have even the slightest doubt about their ability to perform a job—doubt which may stem from incomplete knowledge of the specific work environment—are discouraged from filing claims under the IHRA due to uncertainty about whether they fall within the protected class. On the other hand, employers are encouraged to forgo any effort at investigation of abilities and accommodations and gamble on the employee either: 1.) not filing suit for fear of losing, or 2.) failing to prove her capability and thus having her complaint dismissed. This outcome is contrary to the policies of preventing discrimination and helping citizens reach their full productive capacity.

Alternate Proposed Allocation of Burden Better Serves the Policies of the IHRA

Under my proposal, which places only a burden of production on a complainant for her to be covered by the IHRA, cases involving complainants in categories I and III should remain the same as under the *Harton/Myers-Ford* analysis. Complainants in category I, who would be covered even under the stricter *Harton/Myers-Ford* analysis will still be covered. Complainants in category III, on the other hand, will be unable to produce credible evidence that they were capable of performing the job in question, and would thus still not be covered.

For complainants in category II, however, results would change in favor of the complainant under my proposal. Such complainants will be able to produce evidence which might convince a reasonable trier of fact that they were capable of performing the job in question, and would thus be covered under the IHRA. For example, under my proposal Harton would likely have been covered under the IHRA, because she would have met a burden of production. The evidence she produced at public hearing—which included objective qualification for the job, satisfactory performance in a similar job for the same employer, and expert testimony regarding technology which could assist her—could convince a reasonable trier of fact that she was capable of performing the job.

This does not mean that a category II complainant will necessarily prevail at trial. She will still need to prove that an adverse employment action was taken, and that the action was due to her disability in order to even make a *prima facie* case of discrimination, at which point the employer may rebut the presumption of discrimination by articulating a non-discriminatory rationale for the adverse action.⁹⁵ However, a prospective complainant will have more certainty regarding her chances of prevailing at trial because she will be able to evaluate whether she fits within the protected class based on information within her own control. The policy of protecting employers from unfounded lawsuits will still be adequately served under this proposal by limiting remedies as described below.

⁹⁵ See *supra*, Part II for discussion of *prima facie* case .

Where liability attaches from the breach of duty to investigate regardless of the ultimate finding as to complainant's job capabilities, employers have a greater incentive to investigate the capabilities of employees or applicants with disabilities on their own independently from any legal proceedings. Encouraging such investigation on the part of employers serves the stated policies of the IHRA, because through such investigation employers may come to appreciate the capabilities of persons with disabilities and employ them in greater numbers, thereby allowing more Illinoisans to reach their "full productive capacities." At the least, refusal to consider disabled applicants, which is a harm in its own right, will be reduced, and the personal dignity of disabled people increased.

Remedies for Complainants not Eligible for Hiring or Job Reinstatement

Where a complainant is adjudged to be incapable of performing the job in question neither reinstatement nor back pay would be an appropriate remedy, and in many cases actual damages will also not be provable. However, given the IHRA's stated policy of protecting society as a whole from the scourge of discrimination, where a complainant can show that an adverse employment action was taken based solely on that person's impairment with no investigation into that person's actual capabilities, recovery of attorney's fees and appropriate injunctive relief should be allowed. Where an employer has violated the civil rights of an employee or applicant, that employer should be enjoined from repeating that wrong, regardless of whether the victim of discrimination suffered any actual damages. Similarly, where a harm has been done to society as a whole, and an individual incurs legal expenses to litigate the harm, those expenses should be recoverable.

This is how other civil rights violations are treated under both Illinois and federal law; the enforcement provisions of the 1991 Civil Rights Act specify that declaratory relief, injunctive relief, attorney's fees, and litigation costs may all be awarded in cases involving intentional discrimination,

even where the complainant would not have been hired regardless of discrimination⁹⁶ The First District has adopted that standard in Illinois as well, some years after the *Harton* case.⁹⁷

Such a system of recovery applied to disability discrimination cases would further all policy goals of the IHRA better than the *Harton* standard of dismissing complaints upon a finding that no reasonable accommodation would have rendered the complainant capable of performing the job. As discussed above, §19 of the Illinois Constitution was intended to require that employers give disabled applicants fair consideration in hiring, engaging in dialog to determine their capabilities. Thus a complainant who brings to light an employer's violation of this policy should not bear the cost of exposing the discrimination. At the same time, limiting recovery to costs and appropriate injunctions such as cease-and-desist orders avoids awarding a windfall to the complainant and limits the financial incentive for complainants with marginal claims. Thereby the policy of protecting employers from unfounded charges is still served.

Conclusion

By placing a heavy burden of proof on complainants in employment claims based on disability, the Appellate Court for the First District has broken the IHRA away from its constitutional foundation. The policies of the State of Illinois would be better served by an interpretation which gave IHRA protection to disabled complainants who could produce credible evidence which might convince a trier of fact of their work capabilities.

⁹⁶ 42 USCS § 2000e-2(g)(b).

⁹⁷ *Cady*, 369 Ill. App. 3d at 498.