The Effect of Indiana Code Section 22-9-1-16 on Employee Civil Rights

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Introduction

Violations of employee civil rights are fundamentally unfair. To protect employees and prevent discriminatory behavior, States have passed civil rights laws which affect every working citizen in the jurisdiction. Indiana's default procedure in civil rights cases is an administrative hearing conducted by the Indiana Civil Rights Commission (ICRC) and presided over by an administrative law judge (ALJ).[1] In some situations, an alternative procedure allows an injured party to avoid the administrative hearing and institute a civil suit.[2] If the ICRC has probable cause to believe that there was a civil rights violation,

> [a] respondent or a complainant may elect to have the claims that are the basis for a finding of probable cause decided in a civil action . . . . However, both the respondent and the complainant must agree in writing to have the claims decided in a court of law . . . . The election may not be made if the commission has begun a hearing on the record under this chapter with regard to a finding of probable cause.[3]

Deviation from the administrative process is uncommon because the Indiana Code requires written consent from both parties before the civil suit commences.[4] Nonetheless, in the unlikely event that a complainant obtains the respondent's consent, another provision of the Indiana Code mandates that the case be tried by a judge, not a jury.[5] Even if the employee wins the case, his damages are limited to "wages, salary, or commissions."[6] Furthermore, he cannot recover his attorney's fees.[7] Thus, the combined effect of these statutes unfairly biases state

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1. *See* M.C. Welding & Machining Co. v. Kotwa, 845 N.E.2d 188, 192 n.3 (Ind. Ct. App. 2006).
2. Ind. Code § 22-9-1-16 (2007).
3. *Id.*
4. *Id.* § 22-9-1-16(a).
5. *Id.* § 22-9-1-17(c).
6. *Id.* § 22-9-1-6(k)(A).
7. *See* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 n.3 (Ind. Ct. App. 1997), *overruled on other grounds by* 714 N.E.2d 623 (Ind. 1999). In a strongly-worded footnote, the court criticized the ICRC's "continued expenditure of public funds to . . . relitigate an established rule of law." *Id.* The court emphasized that the ICRC should "present its request to the legislature." *Id.*

civil rights proceedings against complainants.

This Note discusses the procedural weaknesses of Indiana's civil rights law and suggests modifications to Indiana's law based on the civil rights laws of Ohio, Illinois, Kentucky, and Michigan. Part I of this Note explains the employment-at-will doctrine and discusses how Indiana courts have limited its breadth. Part II examines the Indiana Civil Rights Law, specifically the portions that focus on employee's rights. Part III explores Title VII of the Civil Rights Act of 1964 (Title VII),[8] the federal civil rights law, and identifies why Title VII does not provide protection in all employment settings. Part IV surveys the civil rights laws of Ohio, Illinois, Kentucky, and Michigan to provide illustrations of other civil rights laws. Finally, Part V advocates for a change in Indiana's civil rights law to incorporate the strengths of the Illinois, Kentucky, Ohio, and Michigan approaches.

I. Employment Law in Indiana

Indiana adheres to the employment-at-will doctrine.[9] Under this doctrine, if an employment contract is not for a definite period then the employment is at will and is terminable by either party at any time, with or without cause.[10] In other words, the doctrine "permits both the employer and the employee to terminate the employment at any time for a 'good reason, bad reason, or no reason at all.'"[11] Despite the harshness of the doctrine, Indiana courts have been generally unwilling to adopt exceptions to mitigate its effect.[12]

However, if the employee was discharged because he exercised a statutorily-conferred right, then his discharge is considered retaliatory and the courts recognize an exception to the general rule.[13] Thus, the court permitted the plaintiff in *Frampton v. Central Indiana Gas Co.*[14] to bring a civil suit against her employer.[15] The plaintiff in *Frampton* injured her arm while at work.[16] When she filed a worker's compensation claim, her employer terminated her.[17] The plaintiff filed suit and the Indiana Supreme Court stated: "Retaliatory discharge . . . is a wrongful, unconscionable act and should be actionable in a court of

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8. 42 U.S.C. §§ 2000e to -e-17 (2006).

9. *See* Meyers v. Meyers, 861 N.E.2d 704, 706 (Ind. 2007); Wilson v. Chronicle Tribune, No. 27A05-0703-CV-122, 2007 WL 4107293, at *2 (Ind. Ct. App. Nov. 20, 2007).

10. *See* 12 Elizabeth Williams, Indiana Law Encyclopedia *Employment* § 31 (2006).

11. Montgomery v. Bd. of Trs. of Purdue Univ., 849 N.E.2d 1120, 1128 (Ind. 2006).

12. *See, e.g.*, *Meyers*, 861 N.E.2d at 707 (declining to expand the retaliatory discharge exception to the employment-at-will doctrine); *Montgomery*, 849 N.E.2d at 1128 (refusing to broaden the exception to employment-at-will doctrine based solely on "public policy" concerns).

13. *See* Frampton v. Cent. Ind. Gas Co., 297 N.E.2d 425, 428 (Ind. 1973).

14. 297 N.E.2d 425 (Ind. 1973).

15. *Id.* at 428.

16. *Id.* at 426.

17. *Id.*

law."[18] Although the court acknowledged the absence of other cases holding that retaliatory discharge was actionable, the court held,

> an employee who alleges he or she was retaliatorily discharged for filing a claim pursuant to the Indiana Workmen's Compensation Act . . . has stated a claim upon which relief can be granted [and w]e further hold that such a discharge would constitute an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages.[19]

The *Frampton* court then added that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general [employment-at-will] rule must be recognized."[20]

Although the *Frampton* court's broad language implied a softening of the employment-at-will doctrine, subsequent cases illustrate that *Frampton* provides a very limited exception.[21] For example, in *Montgomery v. Board of Trustees of Purdue University*,[22] the Indiana Supreme Court declined to recognize another exception to the employment-at-will doctrine when a plaintiff was terminated allegedly due to his age.[23] The court refused to draft an age exception to the employment-at-will doctrine and emphasized that "[g]eneral expressions of public policy do not support new exceptions to the employment-at-will doctrine. Moreover, the legislative history . . . does not support Montgomery's argument."[24]

Similarly, in *Lawson v. Haven Hubbard Homes, Inc.*,[25] the Indiana Court of Appeals declined to recognize an exception to the employment-at-will doctrine when an employee was terminated for filing an unemployment compensation claim.[26] The plaintiff in *Lawson* was injured when she fell down a flight of stairs at work.[27] Although she attempted to return to work, physical restrictions from her injury made it impossible.[28] She filed an unemployment compensation claim and her employer terminated her.[29] Lawson analogized *Frampton* and claimed

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18. *Id.* at 428.

19. *Id.*

20. *Id.*

21. *See* Meyers v. Meyers, 861 N.E.2d 704, 707 (Ind. 2007) (noting that "decisions during the [last] thirty years have made it plain that [*Frampton*] is quite a limited exception").

22. 849 N.E.2d 1120 (Ind. 2006).

23. *Id.* at 1128-31. The plaintiff in *Montgomery* was fired by Purdue University when he was fifty-seven or fifty-eight years old after he worked for the university for approximately 29 years. *Id.* at 1122. Montgomery did not have a statutorily conferred right to employment because the ICRL does not prohibit age discrimination. *Id.* at 1130.

24. *Id.* at 1128 (internal citation omitted).

25. 551 N.E.2d 855 (Ind. Ct. App. 1990).

26. *Id.* at 860.

27. *Id.* at 857.

28. *Id.*

29. *Id.*

that she was fired for exercising her statutory right to file for unemployment benefits.[30] She urged the court to expand the *Frampton* exception and apply the new version to her case.[31] However, the court distinguished *Frampton* and *McClanahan v. Remington Freight Lines*[32] and held that "fear of being discharged" would not have a "deleterious effect on the exercise of a statutory right."[33] According to the court, the employer's actions did not violate public policy.[34] Therefore, the court refused to recognize an exception to the employment-at-will doctrine.[35]

Finally, in *Morgan Drive Away, Inc. v. Brant*,[36] the Indiana Supreme Court declined to extend the *Frampton* doctrine when Brant was allegedly fired for filing a small claims action against Morgan Drive Away.[37] The court claimed that *Frampton* applied only to worker's compensation cases and subsequent courts had refused to extend *Frampton*'s scope.[38] Because employment-at-will was the state's policy, the court reasoned that any exceptions or revisions must come from the legislature, not the courts.[39] Together, *Frampton*, *Montgomery*, *Lawson*, and *Brant* indicate that in the absence of evidence of bad faith termination, in Indiana, an employee has limited recourse against his or her former employer.[40]

The only other exception to the employment-at-will doctrine that Indiana courts recognize is a narrow provision that permits an employee to sue when that employee is terminated for refusing to follow her employer's order to commit an illegal act.[41] Thus, in *McClanahan*,[42] the Indiana Supreme Court permitted a truck driver who refused to violate Illinois law by driving an overly heavy truck on the state's highways to sue his former employer.[43] The court reasoned that

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30. *Id.* at 859.

31. *Id.*

32. 517 N.E.2d 390 (Ind. 1988).

33. *Lawson*, 551 N.E.2d at 860.

34. *Id.*

35. *Id.*

36. 489 N.E.2d 933 (Ind. 1986).

37. *Id.* at 933-34.

38. *Id.* at 934 (citing Martin v. Platt, 386 N.E.2d 1026, 1028 (Ind. Ct. App. 1979) (denying claim of retaliatory discharge when employees claimed they were fired for reporting that their immediate superior had solicited and received illegal "kickbacks")); *see also* Campbell v. Eli Lilly & Co., 413 N.E.2d 1054, 1061 (Ind. Ct. App. 1980) (upholding trial court's determination that terminating an employee for charging his employer with violations of federal law did not fall under the *Frampton* exception because no statutory right or duty was implicated).

39. *Morgan Drive Away, Inc.*, 489 N.E.2d at 934.

40. *See* Meyers v. Meyers, 861 N.E.2d 704, 707 (Ind. 2007). The *Meyers* court emphasized that "'[r]evision or rejection of the [employment-at-will] doctrine is better left to the legislature.'" *Id.* (quoting *Morgan Drive Away, Inc.*, 489 N.E.2d at 934).

41. *See* McClanahan v. Remington Freight Lines, 517 N.E.2d 390, 393 (Ind. 1988).

42. *Id.* at 390.

43. *Id.* at 393.

refusing to allow the truck driver "any legal recourse . . . would encourage criminal conduct by both the employee and the employer."[44] However, this exception applies only when an employee is "terminated in retaliation for refusing to violate a legal obligation that carrie[s] penal consequences."[45] Because McClanahan would have been personally liable for violating Illinois law and subject to a fine, and because he would have been jointly and severally liable for any damage caused by his overweight vehicle, the Indiana Supreme Court permitted the suit.[46]

II. The Indiana Civil Rights Law

Enacted in 1971, the Indiana Civil Rights Law[47] (ICRL) makes equal opportunity employment a civil right.[48] Therefore, denying equal opportunity employment is an unlawful discriminatory practice.[49] Based on a statutory grant of authority, the ICRL[50] has the authority to investigate and, if necessary, adjudicate complaints of discriminatory behavior.[51]

A. Discrimination and the Indiana Civil Rights Law

There are two types of discriminatory behavior—disparate treatment and

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44. *Id.*

45. *Meyers*, 861 N.E.2d at 707. *See, e.g.*, McGarrity v. Berlin Metals, Inc., 774 N.E.2d 71, 78-79 (Ind. Ct. App. 2002) (allowing a cause of action when an employee was allegedly terminated for refusing to file a false tax return); Haas Carriage, Inc. v. Berna, 651 N.E.2d 284, 288-89 (Ind. Ct. App. 1995) (stating that a claim of retaliatory discharge was cognizable when an employee was fired after refusing to haul materials in what the police considered an unsafe manner); Call v. Scott Brass, 553 N.E.2d 1225, 1229 (Ind. Ct. App. 1990) (permitting a claim of retaliatory discharge when an employee was fired for missing work to comply with a jury summons).

46. *McClanahan*, 517 N.E.2d at 393.

47. IND. CODE §§ 22-9-1-1 to -18 (2007).

48. Indiana Code section 22-9-1-2(a) states,

> It is the public policy of the state to provide all of its citizens equal opportunity for education, employment, access to public conveniences and accommodations . . . and to eliminate segregation or separation based solely on race, religion, color, sex, disability, national origin or ancestry, since such segregation is an impediment to equal opportunity. Equal education and employment opportunities and equal access to and use of public accommodations and equal opportunity for acquisition of real property are hereby declared to be civil rights.

Id. § 22-9-1-2(a).

49. *See id.* § 22-9-1-2(b); *see also id.* § 22-9-1-3(*l*) (defining "Discriminatory practice"); 5 KARL OAKES, INDIANA LAW ENCYCLOPEDIA *Civil Rights* § 8 (2006). In the Indiana Law Encyclopedia, Oakes notes that "every discriminatory practice relating to employment must be considered unlawful, unless it is specifically exempted by the Indiana Civil Rights Law." *Id.*

50. IND. CODE § 22-9-1-4 (2007).

51. *Id.* § 22-9-1-6(e).

disparate impact.[52] In an employment context, disparate treatment occurs when an employer treats one individual or group of people less favorably.[53] In contrast, disparate impact occurs when a facially-neutral employment practice burdens one group more harshly than another.[54] In Indiana, disparate impact claims are actionable only if the employee is able to prove that the employer had a discriminatory motive and committed a discriminatory act.[55] For example, in *Indiana Bell Telephone Co. v. Boyd*, the court stated: "For such a claim to be cognizable . . . the motivation to so discriminate on the part of the supervisor must be shown."[56] Failure to show "intent to discriminate" renders the claim non-litigious.[57] Because it is often difficult to prove employer intent, disparate impact cases are somewhat more challenging to litigate and therefore are less common than disparate treatment claims.[58]

B. Overview of the Indiana Civil Rights Law

In *M.C. Welding & Machining Co. v. Kotwa*[59] the court summarized the procedure an individual must undertake to initiate and pursue a claim under the ICRL.[60] According to the court,

> claims arising under the Indiana Civil Rights Law . . . are presented by filing a complaint with the Indiana Civil Rights Commission, which investigates the complaint and determines if probable cause exists to believe that an illegal act of discrimination has occurred . . . . If probable cause exists, the case is heard by an administrative law judge . . . , who issues proposed findings of fact and conclusions . . . which are submitted to the ICRC . . . . The ICRC's final order is appealable to the Indiana

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52. *See* OAKES, *supra* note 49, § 8.

53. *See* Ali v. Greater Ft. Wayne Chamber of Commerce, 505 N.E.2d 141, 143 (Ind. Ct. App. 1987). In *Ali*, the court stated that disparate treatment "occurs when an employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. When this type of treatment is alleged, this Court has held that the motive behind it is highly significant and dispositive." *Id.* (citing Ind. Civil Rights Comm'n v. City of Muncie, 459 N.E.2d 411, 418 (Ind. Ct. App. 1984)).

54. *See* Ind. Bell Tel. Co. v. Boyd, 421 N.E.2d 660, 666 (Ind. Ct. App. 1981) (defining disparate impact discrimination as facially neutral employment practices "that in fact fall more harshly on one group than another and cannot be justified by business necessity").

55. *See id.* at 666-67.

56. *Id.* at 667.

57. *Id.*

58. *See* 14A C.J.S. *Civil Rights* § 239 (2006) (discussing the requirement that individuals demonstrate more than the fact that the employer's practice has a negative effect on the plaintiff because to prove adverse impact the plaintiff must show that the policy at issue was adopted because of its adverse effect on an individual or group); OAKES, *supra* note 49, § 8 (noting that proof of discriminatory motive is crucial).

59. 845 N.E.2d 188 (Ind. Ct. App. 2006).

60. *Id.* at 192 n.3.

Court of Appeals.[61]

Therefore, if an employee suffers discrimination through either disparate treatment or disparate impact and chooses to file a complaint, the ICRC is obligated to investigate.[62]

In order to conduct its investigation, the ICRC is expressly authorized to hold hearings, subpoena witnesses, and take testimony under oath.[63] If, after thorough investigation and an administrative hearing, the ICRC is convinced that an unlawful discriminatory practice occurred, the ICRC may order the violator to cease and desist from the unlawful discriminatory practice.[64] The ICRC may also require further action:

> (A) to restore [the employee's] losses incurred as a result of discriminatory treatment . . . ; however, this specific provision when applied to orders pertaining to employment shall include only wages, salary, or commissions;
> (B) to require the posting of notice setting forth the public policy of Indiana concerning civil rights and respondent's compliance with the policy in places of public accommodations;
> (C) to require proof of compliance to be filed by respondent at periodic intervals; and
> (D) to require a person who has been found to be in violation of this chapter and who is licensed by a state agency authorized to grant a license to show cause to the licensing agency why his license should not be revoked or suspended.[65]

Thus, when an employee alleges discriminatory treatment, the default remedy is an administrative proceeding conducted by the ICRC,[66] which means that the employee can receive the types of relief listed in section 22-9-1-6(k) of the Indiana Code.[67]

However, a subsequent provision of the Indiana Code allows a civil action

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61. *Id.*

62. IND. CODE § 22-9-1-6(e) (2007) ("The commission *shall* receive and investigate complaints alleging discriminatory practices . . . . All investigations of complaints shall be conducted by staff members of the civil rights commission or their agents." (emphasis added)).

63. *Id.* § 22-9-1-6(i).

64. *Id.* § 22-9-1-6(k).

65. *Id.* § 22-9-1-6(k)(A)-(D).

66. *Id.* § 22-9-1-18(a). The ICRL also provides an option for judicial review. Section 22-9-1-6(*l*) states, "Judicial review of a cease and desist order or other affirmative action as referred to in this chapter may be obtained." However, review must be sought within thirty days of the ICRC's decision. *Id.* § 22-9-1-6(*l*). Furthermore, the ICRL permits consent decrees and when signed by the parties and a majority of the commissioners, the consent decree has the same effect as a cease and desist order. *Id.* § 22-9-1-6(p).

67. *Id.* § 22-9-1-6(k).

instead of an administrative proceeding.[68] According to this provision, the case can be decided by a civil action if both the complainant and the respondent consent in writing.[69] But the ICRL explicitly states that the "election [of a civil action] may not be made if the commission has begun a hearing on the record . . . with regard to a finding of probable cause."[70] Therefore, individuals who are unaware of the civil litigation option may begin pursing their administrative remedy. They will be precluded from seeking judicial relief if they subsequently change their minds and desire a civil trial.[71] Nevertheless, if both parties agree to forgo the administrative proceeding and rely on civil adjudication, section 22-9-1-17 governs and the complainant may file a civil action,[72] which will be tried by the court, "without benefit of a jury."[73] Thus, unless the complainant convinces the defendant to consent to civil litigation, the case proceeds through the administrative hearing process and is decided by an administrative law judge.

C. Shortcomings of Indiana's Statutory Procedure

Indiana's default for administrative procedures in lieu of civil adjudication is by no means exceptional.[74] However, the state's procedure appears biased against employees who want to litigate employment discrimination cases against their employers.

1. Unpublished Decisions.—By making administrative proceedings the default remedy, many employment discrimination decisions go unpublished. The only readily available decisions are those on which the Indiana Court of Appeals has ruled. This benefits employers because the administrative proceeding does not involve a public judgment that "might more easily lend itself to being used against the employer in future claims by other employees."[75]

Furthermore, when employment discrimination decisions go unpublished, the courts and the State miss an opportunity to develop Indiana's civil rights law. One author emphasizes this point stating, "The development of civil rights law depends in part on the public resolution of disputes."[76] Johnson claims that

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68. *Id.* § 22-9-1-16(a).

69. *Id.*

70. *Id.* § 22-9-1-16(b).

71. *See id.*

72. *Id.* § 22-9-1-16(a).

73. *Id.* § 22-9-1-17(c).

74. *See, e.g.*, 775 ILL. COMP. STAT. ANN. 5/7A-102 (West 2001 & Supp. 2008); KY. REV. STAT. ANN. § 344.210 (West 2006); OHIO REV. CODE ANN. § 4112.05(D) (West 2007 & Supp. 2008).

75. David B. Tukel, *To Arbitrate or Not to Arbitrate Discrimination Claims: That is Now the Question for Michigan Employers*, 79 MICH. B.J. 1206, 1207 (2000). Tukel also notes that employers generally prefer proceedings that are "faster, less formal, and less costly," which explains why arbitration has become so popular. *Id.*

76. Nicholas S. Johnson, Note, *Arbitration of Employer Violations of the West Virginia Human Rights Act: West Virginia Should Make Like Ants Marching and Continue Its Pursuit of*

published decisions serve two major functions in the development of the law:

> First, public resolution will specifically deter the individual employer-defendant because there is an incentive for an employer to maintain a favorable reputation. Second, public knowledge of a civil rights resolution will generally deter all employers from engaging in discriminatory actions in order to avoid being in disputes in the future.[77]

Although Johnson discusses unpublished decisions in the context of arbitration agreements, his reasoning and conclusion are also relevant in this context.

2. *Unavailability of Jury Trial.*—Although the ICRL provides individuals an opportunity to obtain a civil hearing, section 22-9-1-17(c) makes it clear that this hearing does not occur in front of a jury.[78] Instead, the statute provides for a judicial bench trial.[79] This too benefits the employer because it provides a more private forum for adjudication. Indeed, Tukel notes that many employers prefer private proceedings, conducted by experts, to full-scale jury trials.[80] This preference is based on the belief that avoiding a jury trial reduces damage awards.[81] However, an interesting article by David Benjamin Oppenheimer challenges the basis of this belief.[82]

Oppenheimer reviewed data from California employment law cases.[83] He determined that although juries found for plaintiffs 53% of the time,[84] when cases were separated into common law discharge cases and statutory employment

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Bliss, 108 W. VA. L. REV. 205, 216 (2005).

77. *Id.* (footnotes omitted).

78. IND. CODE § 22-9-1-17(c) (2007) (stating that "[a] civil action filed under this section must be tried by the court without benefit of a jury.").

79. *Id.*

80. *See* Tukel, *supra* note 75, at 1207. Tukel notes that

> [a]nother potential advantage of arbitration is that an arbitrator, who generally has experience in workplace disputes, will decide the issue rather than a jury that might be more influenced by sympathies than by legal arguments or evidence. In addition, arbitration offers a private setting, which may reduce concerns about pursuing, or defending against, sensitive claims such as those involving sexual harassment.

81. Jury trials allegedly yield higher settlements than either administrative proceedings or alternative dispute resolutions. *Development in the Law, Jury Determination of Punitive Damages*, 110 HARV. L. REV. 1513, 1517 (1987). This article asserts that the traditional reliance on the jury has been eroded and critics of the current system often argue that jurors are biased against wealthy or institutional defendants, possess an impulse to redistribute wealth, are incompetent or unable to comprehend the complexities of fixing the amount of a damage award, and are susceptible to influence so that they institute large damage awards. *Id.* at 1513-14.

82. *See generally* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003).

83. *Id.* at 514.

84. *Id.* at 516.

discrimination cases, the success rates varied.[85] Plaintiffs were less likely to prevail in statutory employment discrimination cases than they were in common law discharge cases.[86] When the statutory discrimination cases were further examined, Oppenheimer found that plaintiffs won 42.6% of the time when the case went before a jury.[87] However, when the case was decided in a bench trial, plaintiffs won only 22.2% of the time.[88] Another study cited by Oppenheimer and performed by the U.S. Department of Justice reports similar figures.[89] From a compilation of his most recent data, Oppenheimer concludes that there is a significant difference between jury trial and bench trial outcomes.[90] "Plaintiffs won 35% of the jury trials, but only 23% of the bench trials, with median awards in jury trials over twice the median awards in bench trials."[91] He claims that the only logical conclusion is that bias plays a major role in employment discrimination cases.[92] However, plaintiffs' low success rates before both judges and juries indicate that contrary to popular belief, juries are not "'far more sympathetic to plaintiffs than to defendants in employment discrimination cases.'"[93] Therefore, altering Indiana's law[94] to permit jury trials would not necessarily adversely impact employers.

Furthermore, jury trials are beneficial because they help the plaintiff "fully vindicate [his or] her rights and make strides in ensuring that . . . other employers . . . will not repeat the offenses."[95] Thus, despite the fact that a jury trial may be uncomfortable for the employee because his private affairs become public knowledge, allowing him access to the courts ensures full adjudication and vindication.[96]

3. *Damage Limitations.*—Perhaps the most alarming effect of the ICRL is that in employment discrimination cases, damages are limited to "wages, salary, or commissions."[97] Even though the ICRL appears to permit damage awards

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85. *Id.*

86. *Id.* Oppenheimer's results indicate that plaintiffs succeed in 59% of common law discharge cases but only 50% of employment discrimination cases. *Id.*

87. *Id.* at 522 (citing Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1582 (1989)).

88. *Id.* (citing Eisenberg, *supra* note 87, at 1582).

89. *Id.* at 523 (citing Civil Trials and Verdicts in Large Countries, 1996, Bureau of Justice Statistics Special Report NCJ 173426 (1999), *available at* http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc96.htm).

90. *Id.*

91. *Id.*

92. *Id.* at 553 (quoting Charles F. Thompson, Jr., *Juries Will Decide More Discrimination Cases: An Examination of* Reeves v. Sanderson Plumbing Products, Inc., 26 VT. L. REV. 1, 1-2 (2001)).

93. *Id.* (quoting Thompson, *supra* note 92, at 1-2).

94. *See* IND. CODE § 22-9-1-17 (2007).

95. Johnson, *supra*, note 76, at 218.

96. *See id.* at 230.

97. IND. CODE § 22-9-1-6(k)(A) (2007).

necessary to redress the plaintiff's "losses incurred as a result of discriminatory treatment,"[98] this language is not as inclusive as it seems.

Although the ICRL provides other remedies such as posting notice of Indiana's civil rights law, requiring proof of compliance with the law, and requiring a state-licensed violator to show cause why his or her license should not be revoked or suspended, none of these remedies directly compensate the injured plaintiff.[99] Furthermore, the ICRL does not provide for damages due to pain and suffering, mental anguish, or emotional distress, nor does it allow for punitive damages or account for economic non-wage losses.[100] The Indiana Court of Appeals emphasized this point in *Indiana Civil Rights Commission v. Union Township Trustee*,[101] when the court plainly stated that "'[c]ompensatory and punitive damages are *not* available under the Indiana Civil Rights Act.'"[102] As a result, the ICRL damage limitations benefit employer-defendants and adversely impact employee-plaintiffs.

4. Attorney's Fees.—Finally, the ICRL does not allow the prevailing party to recover his or her attorney's fees.[103] Indeed, in a strongly-worded footnote the

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98. *Id.*

99. *See id.* § 22-9-1-6(k) (discussing the various types of relief available to compensate an injured plaintiff). Section 22-9-1-6(k)(A) provides for damages, which in employment cases, are limited to "wages, salary, or commissions." *Id.* § 22-9-1-6(k)(A). Section 22-9-1-6(k)(B) requires "the posting of notice setting forth the public policy of Indiana concerning civil rights and respondent's compliance with the policy in places of public accommodations." *Id.* § 22-9-1-6(k)(B). Section 22-9-1-6(k)(C) requires that the defendant file periodic reports of compliance, and section 22-9-1-6(k)(D) permits the ICRC to suspend or revoke the license of an entity licensed by the State. *Id.* § 22-9-1-6(k)(C)-(D).

100. *See id.* § 22-9-1-6(k)(B) (limiting the damages available in employment cases to "include only wages, salary, or commissions" and making no provision for pain and suffering, mental anguish, emotional distress, or punitive damages). Additionally, the statute makes no mention of economic non-wage losses; however, the language of section 22-9-1-6(k) seems to expressly bar compensation for such losses by limiting damages to "wages, salary, or commissions." *Id.*; *see also* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (holding that emotional distress and punitive damages are not available under the ICRL), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

101. 590 N.E.2d 1119 (Ind. Ct. App. 1992).

102. *Id.* at 1121 (quoting Fields v. Cummins Employees' Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) (emphasis added)); *accord* Ind. Civil Rights Comm'n v. Midwest Steel, 450 N.E.2d 130, 140 (Ind. Ct. App. 1983) ("The purpose of the limitation that 'orders pertaining to employment shall include only wages, salary or commissions,' is to prohibit an award of monetary damages for feelings of embarrassment or insult which may arise out of discriminatory acts . . . .").

103. Interestingly, the ICRL at one point permitted an award of attorney's fees to the prevailing party. IND. CODE § 22-9-1-14 (repealed 1995). However, this provision was short-lived and existed in the Indiana Code only from July 1994 to December 1995. *Id.*; *see* IND. CODE § 22-9.5-7-2 (2007) (fee-shifting provision in housing discrimination cases has not been extended to employment discrimination cases); *Adler*, 689 N.E.2d at 1279 (noting that the legislature has

Adler court criticized the ICRC for its "continued expenditure of public funds to . . . relitigate an established rule of law."[104] The court emphasized that the ICRC should lobby the legislature to change the law to avoid continued disregard of legal precedent.[105] Furthermore, as the *Adler* court noted, a fee-shifting provision has been proposed by the legislature but has never been adopted.[106] The absence of fee-shifting legislation may discourage litigation and detrimentally affect injured plaintiffs.[107] By refusing to permit fee-shifting the ICRL may also have the unintended consequence of inducing less-vigorous defenses as employers may gamble that an employee's administrative award will be less costly than defending the suit at trial.[108]

III. Federal Law: Title VII of the Civil Rights Act of 1964

Based on the limitations of the ICRL, many individuals who have experienced discriminatory treatment in the course of their employment invoke Title VII[109] and elect to litigate in federal court. Unfortunately, Title VII does not provide an adequate remedy for many plaintiffs.

A. Background

Title VII makes it illegal for an employer to discriminate against an individual based on "race, color, religion, sex, or national origin."[110] In 1991, Congress found that "additional remedies under [f]ederal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . and . . . legislation is necessary to provide additional protections against unlawful discrimination in employment," and amended Title VII.[111] The purpose of this legislation was to

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proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted).

104. *Adler*, 689 N.E.2d at 1279 n.3.

105. *Id.*

106. *Id.* at 1279 (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted).

107. *See* 1 Robert L. Rossi, Attorneys' Fees *Recovery of Attorneys' Fees by Plaintiff* § 10:20 (3d ed. 2008) (noting that "it is well-settled that a plaintiff who prevails in a civil rights action should ordinarily recover reasonable attorney's fees"). Rossi claims that attorneys' fee awards are necessary because they encourage individuals to "act as private attorneys" and vigorously litigate and defend their civil rights. *Id.* Thus, it would be reasonable to presume that failing to award attorneys' fees would chill civil rights litigation.

108. *See* Tukel, *supra* note 75, at 1207 (emphasizing that arbitration, an out-of-court proceeding, is favored by employers because it is faster, less expensive, and often produces smaller awards than those in civil litigation). Tukel's point as to arbitration versus civil litigation can be generalized to the choice between administrative proceedings and civil litigation as well.

109. 42 U.S.C. § 2000e to -e-17 (2006).

110. *Id.* § 2000e-2(a)(1).

111. Civil Rights Act of 1991, S. 1745, 102d Cong. § 2, 105 Stat. 1071 (1991).

> (1) provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace; . . .
>
> (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e [to e-17]); and
>
> (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.[112]

The amendments, codified in § 1981(a),[113] purported to expand damage provisions and increase the availability of jury trials.[114] Thus, as amended, Title VII allows either party to demand a jury trial whenever compensatory or punitive damages are sought.[115] Unfortunately, although the impetus underlying the amendment of Title VII was benign, in practice and effect, the 1991 amendments limited employees' ability to receive full compensation for injuries suffered due to intentional discrimination.

B. Damage Limitations

Although Title VII, as amended, permits plaintiffs to recover damages for harm suffered due to employment discrimination,[116] Jarod Gonzales notes,

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112. *Id.*

113. 42 U.S.C. § 1981a (2006).

114. *See id.* § 1981a(c). Specifically, the statute allows a party alleging unlawful intentional discrimination against an employer, and who cannot recover under 42 U.S.C. § 1981, to recover compensatory and punitive damages as provided by subsection (b) of the statute, as well as any relief authorized by section 706(g) of the Civil Rights Act of 1964. *Id.* § 1981a(a)(1). Section (b) of the statute provides that the

> complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id. § 1981a(b)(1). However, the damages awarded do not include "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." *Id.* § 1981a(b)(2). Part (b)(3) goes on to limit compensatory damages to "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses" based on the size of the employer (i.e. the number of employees). *Id.* § 1981a(b)(3).

115. *Id.* § 1981a(c).

116. *Id.* § 1981a(a)(1); *see also* Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116 (2007).

> Title VII of the Civil Rights Act of 1964 (Title VII) . . . places a cap on the amount of compensatory damages—emotional pain, suffering, and mental anguish—and punitive damages recoverable against an employer, under federal law, for any type of employment discrimination. At most, the aggrieved employee may recover a total of $300,000 for compensatory and punitive damages . . . . [However, e]ach individual state can choose to make discrimination in employment, based on whatever prohibited factors it so desires, a violation of state law and may provide a greater *or lesser* remedy for such a violation than federal law provides.[117]

As a result, in states that provide less compensation for employment discrimination than Title VII, plaintiffs will attempt to recover under Title VII. Unfortunately, as noted by Gonzales,[118] and emphasized by the U.S. Supreme Court in *Albemarle Paper Co. v. Moody*,[119] although "the purpose of Title VII [is] to make persons whole for injuries suffered on account of unlawful employment discrimination,"[120] Title VII has historically been interpreted as a prophylactic statute aimed at preventing discrimination.[121] Thus, the statute's damage provisions are limited and may not adequately compensate plaintiffs who have suffered extreme or egregious discrimination.

C. Limiting the Scope of Title VII

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees."[122] However, Title VII carves out exceptions to the definition of employer that limit the statute's scope. According to these exceptions, the "term does not include (1) the United States . . . or (2) a bona fide private membership club (other than a labor organization) . . . [and] persons having fewer than twenty-five employees (and their agents) shall not be considered employers."[123] Through its limited definition of "employer," Title VII effectively exempts numerous groups, including the government. Accordingly, employees of exempt organizations are unable to utilize Title VII and must instead rely on state statutory or common law to recover compensation for discrimination.

IV. Civil Rights Cases in Other Jurisdictions

To gauge how different Indiana's civil right's law is from other jurisdictions one must compare Indiana to surrounding states. This comparison also facilitates

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117. Gonzalez, *supra* note 116, at 116 (emphasis added).
118. *Id.*
119. 422 U.S. 405 (1975).
120. *Id.* at 418.
121. *Id.* at 417 (citing Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)).
122. 42 U.S.C. § 2000e(b) (2006).
123. *Id.*

revision of the Indiana statute because it illuminates provisions from other areas that have proven efficient and effective. In analyzing analogous statutes from Ohio, Illinois, Kentucky, and Michigan, Indiana lawmakers may gain a clear idea of where to begin when, or if, revision of the Indiana Code is undertaken.

A. Ohio

The Ohio Civil Rights Code sounds similar to the Indiana Code with respect to employment discrimination.[124] Ohio's default procedure is to resolve employment discrimination cases through an administrative proceeding.[125] After receiving notice of the charges of discriminatory conduct, the Ohio Civil Rights Commission (Commission) will attempt to resolve the issue through informal proceedings.[126] If the issue cannot be resolved informally, then the Commission "may initiate a preliminary investigation to determine whether it is probable that an unlawful discriminatory practice has been or is being engaged in."[127] After the investigation, if the Commission believes that unlawful discrimination has occurred, the Commission will again attempt to informally induce compliance.[128] However, if the Commission is unable to eliminate the discrimination, then it serves the offender with a complaint, which states the charges and provides notice of the Commission hearing.[129] An administrative hearing is conducted and if the Commission finds that the defendant engaged in discriminatory behavior, then the defendant is ordered to cease and desist.[130] The Commission may also pursue "any further affirmative or other action that will effectuate the purposes of this chapter."[131] Thus, Ohio's basic administrative procedure appears analogous to Indiana's procedure.

However, there is a major difference between the Ohio and Indiana civil rights statutes. Ohio Code section 4112.99[132] states, "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or *any other*

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124. *See* OHIO REV. CODE ANN. § 4112.02 (West 2007 & Supp. 2008) (noting what constitutes prohibited discriminatory conduct in Ohio).

125. *See id.* § 4112.05(A) ("The *commission* . . . shall prevent any person from engaging in unlawful discriminatory practices, provided that, before instituting the formal hearing . . . [the commission] shall attempt, by informal methods of conference, conciliation, and persuasion, to induce compliance with this chapter.") (emphasis added).

126. *Id.* § 4112.05(A).

127. *Id.* § 4112.05(B)(2).

128. *Id.* § 4112.05(B)(4).

129. *Id.* § 4112.05(B)(5).

130. *Id.* § 4112.05(G)(1).

131. *Id.* Remedies listed in this portion of the statute include, but are not limited to, "hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership, and requiring the respondent to report to the commission the manner of compliance." *Id.*

132. *Id.* § 4112.99 (West 2008).

appropriate relief."[133] This portion of the Ohio Code expressly permits civil litigation and also allows additional remedies, including front pay and punitive damages.[134] Quite significantly, unlike the Indiana statute, which contains a caveat limiting civil suits and is silent regarding punitive damages, the Ohio Code does not limit civil suits and expressly authorizes punitive damages.[135]

The cases interpreting section 4112.99 indicate that Ohio courts have faithfully applied the statute's mandate. For example, the court in *Elek v. Huntington National Bank*[136] recognized that a handicapped individual who was discriminatorily discharged by his employer could demand a civil trial to compensate for his injury.[137] The Ohio Supreme Court rejected the defendant's argument that section 4112.99 grants a jury trial only in specific circumstances, such as when a plaintiff suffers age, credit, or housing discrimination.[138] The *Elek* court relied on the "clear and unambiguous language of the statute"[139] and the fact that the statute "specifically states that the civil action is available to remedy any violation of [the civil rights code]."[140] Thus, the court held that the Ohio legislature did not intend to limit the availability of the civil action.[141] "Had the General Assembly meant to limit the availability of the civil action remedy . . . [the legislature] would have identified the section to which [section 4112.99] applied. . . ."[142] Because the legislature left the statute unbounded, "its language applies to any form of discrimination addressed [by the rest of the civil rights code]."[143] Although the court acknowledged that interpreting section 4112.99 to permit civil litigation in all situations may be redundant in some situations, "such a result is not fatal."[144] Finally, the court emphasized that section 4112.99 is a remedial statute and should "be liberally construed to promote its object (elimination of discrimination) and protect those to whom it is addressed (victims of discrimination)."[145]

However, even post-*Elek*, section 4112.99 does not apply when the

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133. *Id.* (emphasis added).

134. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999) (allowing punitive damages in cases brought under section 4112.99 as long as actual malice was shown); Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517 (Ohio Ct. App. 1995) (noting that front pay is permitted in cases involving race, age, sex, and handicap discrimination).

135. *Compare* IND. CODE §§ 22-9-1-16 to -17 (2007); *with* OHIO REV. CODE ANN. § 4112.99 (West 2008), *and Rice*, 704 N.E.2d at 1221 (permitting punitive damages).

136. 573 N.E.2d 1056 (Ohio 1991).

137. *Id.* at 1059.

138. *Id.* at 1057-58.

139. *Id.* at 1058.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

complainant first files suit with the Ohio Civil Rights Commission.[146] Nevertheless, Ohio courts continue to give the statute broad effect and in *Kramer v. Windsor Park Nursing Home, Inc.*,[147] the court held that section 4112.99 creates a private right of action distinct from the other remedies available under the civil rights law.[148] Thus, the court extended the statute's breadth.

Section 4112.99 has also increased the types of remedies available to plaintiffs suing under Ohio's civil rights law. The provision has been interpreted to allow front pay as a remedy[149] and to permit punitive damage awards as long as actual malice can be shown.[150] In *Berge v. Columbus Community Cable Access*,[151] the court stated, "Punitive damages may be awarded in actions brought pursuant to [section 4112.99]"[152] as long as actual malice is shown.[153] According to the Ohio Supreme Court, actual malice is "'(1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.'"[154] Furthermore, in *Sutherland v. Nationwide General Insurance Co.*,[155] the court indicated that even though the language of section 4112.99 does not expressly authorize a party to recover attorneys' fees, they are available in some cases.[156] For example, when the opposing party acted "in bad faith, vexatiously, wantonly, obdurately, or for oppressive reasons,"[157] or when punitive damages are warranted, then attorneys' fees are recoverable "even in the absence of statutory authorization."[158] Thus, in cases brought under section 4112.99 in which the court awards punitive damages, attorneys' fees are also recoverable.

A subsequent case, *Rice v. CertainTeed Corp.*,[159] reiterated Ohio's commitment to providing punitive damages to victims of employment

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146. *See* Kocak v. Cmty. Health Partners of Ohio, Inc., 400 F.3d 466, 472 (6th Cir. 2005) (filing suit with the Ohio Civil Rights Commission "generally precludes a subsequent suit under section 4112.99").

147. 943 F. Supp. 844 (S.D. Ohio 1996).

148. *Id.* at 856 (citing *Elek*, 573 N.E.2d at 1057). In *Elek*, the court noted that "plain reading of this section yields the unmistakable conclusion that a civil action is available to remedy any form of discrimination identified in [the Ohio Civil Rights Code]." *Elek*, 573 N.E.2d at 1057.

149. Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517 (Ohio Ct. App. 1995) (permitting front pay in cases involving race, age, sex, and handicap discrimination).

150. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999); Berge v. Columbus Cmty. Cable Access, 736 N.E.2d 517, 540-42 (Ohio Ct. App. 1999).

151. 736 N.E.2d 517 (Ohio Ct. App. 1999).

152. *Id.* at 540.

153. *Id.* at 542.

154. *Id.* (quoting Preston v. Murty, 512 N.E.2d 1174, 1176 (Ohio 1987)).

155. 657 N.E.2d 281 (Ohio Ct. App. 1995).

156. *Id.* at 283.

157. *Id.*

158. *Id.*

159. 704 N.E.2d 1217 (Ohio 1999).

discrimination. The *Rice* court emphasized that the Ohio civil rights statute should be broadly construed.[160] Therefore, it was reasonable to interpret the statute as permitting punitive damage awards.[161] The court went on to state that interpreting the statute as "also possess[ing] a deterrent component . . . [will not] render the statute penal in nature . . . . '[A] law is not penal merely because it imposes an extraordinary liability on a wrongdoer in favor of a person wronged, which is not limited to damages suffered by him.'"[162] Thus, the court held that "[h]aving a primary remedial purpose . . . does not constrain [the civil rights code's] deterrent aim . . . . [C]onstruing the word 'damages' as including only those damages that are compensatory would be inconsistent not only with the definition of the word but also with the purpose and intent of [section 4112.99]."[163] In contrast, Indiana does not permit punitive damages.[164] Thus, section 4112.99, which permits civil suits and provides a broader variety of remedies, makes Ohio's civil rights code seem less employer-centric than Indiana's.[165]

B. Illinois

As in other states, Illinois's civil rights statute bans discriminatory conduct in employment.[166] The Illinois Code divides the procedural portion of its civil rights statute into two sections. Article 7A addresses the majority of civil rights violations[167] and Article 7B is narrowly tailored to address housing discrimination.[168] Under Article 7A, after receiving a report from the employee alleging employment discrimination, the Illinois Department of Human Rights conducts an investigation.[169] If the department is convinced that the Illinois Code was violated, the department "notif[ies] the parties that the complainant [employee] has the right to either commence a civil action . . . or request that the Department of Human Rights file a complaint with the Human Rights

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160. *Id.* at 1220.

161. *Id.* at 1220-21.

162. *Id.* (quoting Cosgrove v. Williamsburg of Cincinnati Mgmt. Co., 638 N.E.2d 991, 997 (Ohio 1994) (Resnick, J., concurring)).

163. *Id.*

164. *See* Ind. Civil Rights Comm'n v. Union Twp. Tr., 590 N.E.2d 1119, 1121 (Ind. Ct. App. 1992) (quoting Fields v. Cummins Employees' Fed. Credit Union, 540 N.E.2d 631, 640 (Ind. Ct. App. 1989) for the proposition that "[c]ompensatory and punitive damages are not available under the Indiana Civil Rights Act").

165. *See* IND. CODE §§ 22-9-1-6(k), 22-9-1-16 (2007).

166. 775 ILL. COMP. STAT. ANN. 5/2-102(A) (West 2001 & Supp. 2008).

167. *See* 775 ILL. COMP. STAT. ANN. 5/7A-101 (West 2001) (indicating that the procedures of article 7A apply to discrimination in employment, education, public accommodations, and financial transactions).

168. *See id.* 5/7B-101 (stating that Article 7B applies only to housing discrimination cases).

169. *See* 775 ILL. COMP. STAT. ANN. 5/7A-102(C)(1) (West 2001 & Supp. 2008).

Commission."[170] The department also permits informal conciliation in lieu of an administrative or civil hearing.[171] However, if the complainant elects to pursue his administrative remedy then a formal administrative hearing is held before the Illinois Human Rights Commission (IHRC).[172] If the employee prevails before the IHRC then he is entitled to a variety of remedies,[173] which are not substantially different from the administrative remedies available in Indiana.[174] Additionally, the Illinois statute includes a remedy that is not available to an Indiana employee who pursues an administrative remedy—payment of attorney's fees.[175] Thus, unlike the Indiana civil rights statute, the Illinois statute explicitly provides for attorney's fees.[176]

Illinois courts have upheld ALJ-awarded attorneys' fees in employment discrimination cases. For example, in *Raintree Health Care Center v. Illinois Human Rights Commission* (*Raintree II*),[177] the court invoked the Illinois civil rights act and stated that "upon a finding of a civil rights violation, an ALJ may recommend and the [IHRC] may require that reasonable attorney fees be paid to the complainant for the cost of maintaining the action."[178] The court emphasized the discretionary nature of attorney's fee awards under the statute and gave the ALJ's determination a great deal of deference, stating, "As long as the ALJ is able to determine what amount would be a reasonable award of attorney fees . . . such a determination should not be disturbed on review."[179] Despite the discretionary nature of the award, Illinois courts require that demands for attorney's fees be reasonable.[180] But as long as the employee is able to prove that

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170. *Id.* 5/7A-102(D)(4) (West Supp. 2008).

171. *Id.* 5/7A-102(E).

172. *See id.* 5/8A-102(G).

173. *See id.* 5/8A-104 (West 2001). Remedies include: issuance of a cease and desist order, payment of actual damages, reinstatement, reporting compliance, and posting notices of compliance. *Id.*

174. *See* IND. CODE § 22-9-1-6(k) (2007) (listing available remedies).

175. *See* 775 ILL. COMP. STAT. ANN. 5/8A-104(G) (West 2001) (expressly permitting that payment "to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees incurred in maintaining this action . . . and in any judicial review and judicial enforcement proceedings").

176. *Compare id.* 5/8A-104, *with* IND. CODE § 22-9.5-7-2 (2007) (noting the fee-shifting provision in housing discrimination cases that has not been extended to employment discrimination cases), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

177. 672 N.E.2d 1136 (Ill. 1996).

178. *Id.* at 1147.

179. *Id.* at 1148.

180. Raintree Health Care Ctr. v. Ill. Human Rights Comm'n (*Raintree I*), 655 N.E.2d 944, 951 (Ill. App. Ct. 1995) ("[O]nly those attorney fees which are reasonable will be allowed, and the party requesting fees bears the burden of presenting sufficient evidence from which the trier of fact

she won a substantial portion of her case she is entitled to recover her attorney's fees in order to encourage similarly-situated plaintiffs to litigate their interests.[181]

A second difference between the Illinois Code and the Indiana Code is that the Illinois Civil Rights Act contains broad language that allows an injured plaintiff to recover more extensive damages[182] than are available in Indiana.[183] This makes the Illinois Civil Rights Act appear more employee-friendly. For example, in *Charles A. Stevens & Co. v. Human Rights Commission*,[184] the court upheld the IHRC's front pay award.[185]

Furthermore, in *ISS International Services Systems, Inc. v. Illinois Human Rights Commission*,[186] the court held that "[a]ctual damages include compensation for emotional harm and mental suffering."[187] Finally, in *Page v. City of Chicago*,[188] the court broadened the scope of the Illinois statute when it determined that the Illinois Human Rights Act does not prevent regulation of an employer with fewer than fifteen employees.[189] With respect to punitive damages, the *Page* court went on to note that the Act may be interpreted to allow provision of punitive damages where it is "highly appropriate and necessary."[190]

Thus, Illinois's civil rights law, which provides more extensive damage awards and allows the prevailing party to recoup his or her attorney's fees, is more similar to Kentucky's civil rights code than it is to Indiana's.[191]

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can render a decision as to their reasonableness.").

181. Brewington v. Dep't of Corr., 513 N.E.2d 1056, 1064-65 (Ill. App. Ct. 1987).

182. *See* ILL. COMP. STAT. ANN. 5/8A-104(J) (West 2001) (allowing "such action as may be necessary to make the individual complainant whole, including, but not limited to, awards of interest on the complainant's actual damages and backpay from the date of the civil rights violation").

183. *Compare id.*, *with* IND. CODE § 22-9-1-6(k)(A) (2007).

184. 554 N.E.2d 976 (Ill. App. Ct. 1990).

185. *Id.* at 981 ("[T]he Illinois Human Rights Act provides . . . that the Commission may provide for any relief to 'make the individual complainant whole.' Front pay is a remedy available to compensate an individual who had been wronged by an employer's violation. . . . Front pay may be appropriate, especially when the plaintiff has no reasonable prospect of obtaining comparable employment.") (citations omitted).

186. 651 N.E.2d 592 (Ill. App. Ct. 1995).

187. *Id.* at 598 (citing Vill. of Bellwood Bd. of Fire & Police Comm'rs v. Human Rights Comm'n, 541 N.E.2d 1248, 1258 (1989)).

188. 701 N.E.2d 218 (Ill. App. Ct. 1998).

189. *Id.* at 226.

190. *Id.* at 228.

191. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001), *and* KY. REV. STAT. ANN. § 344.450 (West 2006), *with* IND. CODE § 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

C. Kentucky

Much of Kentucky's civil rights statute is similar to Indiana's. Indeed, like Indiana, the Kentucky Code even contains a provision that prevents discrimination based on use of tobacco products.[192] As is common in civil rights statutes, Kentucky's default procedure is an administrative hearing conducted by the Kentucky Commission on Human Rights (KCHR).[193] As in other jurisdictions,[194] prior to conducting a formal administrative hearing, the KCHR usually attempts to resolve the discriminatory practice through mediation or conciliation.[195] However, conciliation is neither mandatory nor guaranteed and informal resolution can halt at any time.[196]

If conciliation is unsuccessful the case moves through administrative proceedings.[197] If the KCHR determines that discrimination has occurred, it is entitled to "take affirmative action [to remedy the discrimination]."[198] The Kentucky statute lists the available remedies,[199] and they are not significantly different from the administrative remedies available in Indiana.[200]

However, unlike Indiana, the Kentucky Code indicates that administrative damages may include "compensation for humiliation and embarrassment, and . . . for other costs actually incurred by the complainant as a direct result of an unlawful practice."[201] This portion of the Kentucky Code withstood

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192. *Compare* IND. CODE § 22-5-4-1 (2007), *with* KY. REV. STAT. ANN. § 344.040(1) (West 2006). The comparable Indiana Code provision is codified in section 22-5-4-1 and states that an employer may not

> (1) require, as a condition of employment, an employee or prospective employee to refrain from using; or
> (2) discriminate against an employee with respect to:
> (A) the employee's compensation and benefits; or
> (B) terms and conditions of employment;
> based on the employee's use of;
> tobacco products outside the course of the employee's or prospective employee's employment.

IND. CODE § 22-5-4-1(a) (2007). However, section 22-5-4-1(b) does permit employers to provide financial incentives "intended to reduce tobacco use." *Id.* § 22-5-4-1(b). Indiana employers who violate section 22-5-4-1 are amenable to civil litigation. *Id.* § 22-5-4-2.

193. KY. REV. STAT. ANN. § 344.210(4) (West 2006).

194. *See, e.g.*, OHIO REV. CODE ANN. § 4112.05(B)(4) (West 2007 & Supp. 2008).

195. KY. REV. STAT. ANN. § 344.200(4) (West 2006).

196. *See id.* § 344.200(4)-(6).

197. *Id.* § 344.210(1).

198. *Id.* § 344.230(2).

199. *See id.* § 344.230(3) (listing the available remedies which include reinstatement, posting notices, reporting compliance to the Commission, and paying the plaintiff damages resulting from the unlawful practice).

200. *See* IND. CODE § 22-9-1-6(k) (2007).

201. KY. REV. STAT. ANN. § 344.230(3)(h) (West 2006). *Contra* IND. CODE § 22-9-1-6(k)(A)

constitutional challenge in *Kentucky Commission on Human Rights v. Fraser.*[202] In *Fraser*, the court held that there was "nothing unconstitutional in the administrative award of damages under [section 344.230(3)] where due process procedural rights have been protected, where prohibited conduct has been well defined by the governing statute, and where judicial review is available."[203] The court went on to state that "no specific monetary ceiling for the award of damages for humiliation and embarrassment is constitutionally required"[204] because "[h]umiliation and embarrassment are . . . not easily quantified"[205] and imposing a "specific limit could itself be arbitrary."[206] Furthermore, the court noted, "Humiliation and embarrassment lie at the core of the evil which the Kentucky Civil Rights Act was designed to eradicate. If victims are to be fairly compensated for these injuries, the factfinder must be free to assess reasonable damages."[207] Thus, Kentucky's Code is distinguishable from Indiana's because Indiana does not permit damages for emotional distress.[208]

Another difference between the Kentucky and Indiana Codes is that Kentucky permits the KCHR to publicize its orders by notifying the parties, as well as "any other public officers and persons that the commission deems proper."[209] Thus, the KCHR has discretion to inform other individuals of the respondent's discriminatory behavior.

Although these differences are interesting, perhaps the most significant difference between the Kentucky and Indiana civil rights statutes is that Kentucky permits civil litigation and awards attorney's fees that result from the litigation.[210] Section 344.450 of the Kentucky Code states:

> Any person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together

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(2007) (limiting the damages available in employment cases to "include only wages, salary, or commissions" and making no provision for pain and suffering, mental anguish, emotional distress, or punitive damages).

202. 625 S.W.2d 852 (Ky. 1981).

203. *Id.* at 855.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* IND. CODE § 22-9-1-6(k)(A) (2007) (limiting the damages available in employment cases to "include only wages, salary, or commissions" and making no provision for pain and suffering, mental anguish, emotional distress, or punitive damages).

209. KY. REV. STAT. ANN. § 344.230(2) (West 2006).

210. *Compare id.* § 344.450, *with* IND. CODE §§ 22-9-1-6(k)(A), 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

> with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter.[211]

Thus, this provision makes Kentucky's statute more like the Michigan and Illinois Codes than the Indiana Code.[212] Kentucky's procedure provides "alternative sources of relief, one administrative and one judicial."[213] The dual procedures benefit plaintiffs because they provide more extensive procedural protection.[214]

For example, the court in *Meyers v. Chapman Printing Co.*[215] held that "[t]he Kentucky Civil Rights Act creates a jural right as well as a right to redress by administrative procedure. To the extent it creates a jural right both plaintiff and defendant are entitled to a trial by jury."[216] The court justified its holding by noting that the purpose of the Kentucky statute was to give individuals who do not wish to proceed before the KCHR "'an opportunity in circuit court to have the fullest range of remedies allowable.' This, of course, includes trial by jury."[217] In a subsequent case, *Palmer v. International Ass'n of Machinists & Aerospace Workers*,[218] the court confirmed the existence of dual procedures and held that section 344.450 provided a civil cause of action "in addition to any other remedies contained in the chapter."[219]

However, section 344.450 has not been expanded to the point that all employment discrimination issues are tried by a jury.[220] Kentucky courts have determined that some issues, including whether reinstatement and front pay are available remedies under section 344.450, are not appropriate for the jury and should be decided by the court.[221] Thus, in *Brooks v. Lexington-Fayette Urban County Housing Authority*[222] the court indicated that reinstatement "appears to fall within the trial court's power to 'enjoin further violations' under [section]

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211. KY. REV. STAT. ANN. § 344.450 (West 2006).

212. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104(G) (West 2001), *and* KY. REV. STAT. ANN. § 344.450 (West 2006), *and* MICH. COMP. LAWS ANN. § 37.2802 (West 2001), *with* IND. CODE § 22-9.5-7-2 (2007), *and Adler*, 689 N.E.2d at 1279 (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted).

213. Meyers v. Chapman Printing Co., 840 S.W.2d 814, 820 (Ky. 1992).

214. *See, e.g.*, McNeal v. Armour & Co., 660 S.W.2d 957, 959 (Ky. Ct. App. 1983).

215. 840 S.W.2d 814 (Ky. 1992).

216. *Id.* at 820.

217. *Id.* (quoting Canamore v. Tube Turns Div. of Chemetron Corp., 676 S.W.2d 800, 804 (Ky. Ct. App. 1984)).

218. 882 S.W.2d 117 (Ky. 1994).

219. *Id.* at 120.

220. *See* Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 806 (Ky. 2004).

221. *See id.*

222. 132 S.W.3d 790 (Ky. 2004).

344.450."[223] Therefore, "the decision whether to order reinstatement is an issue for the trial court and not the jury."[224] Even though the plaintiff in *Brooks* was entitled to a jury trial, section 344.450 was limited and not all of the issues were decided by the jury.[225] The *Brooks* court also explicitly indicated that section 344.450 does not permit punitive damages.[226]

D. Michigan

The Michigan Civil Rights Act is more commonly known as the Elliott-Larsen Civil Rights Act.[227] Like surrounding states, the Act outlaws employment discrimination.[228] The investigatory procedure used in Michigan is also similar to surrounding states, and the default means of dispute resolution is an administrative hearing that commences when an allegation of discrimination is filed with the department of civil rights.[229]

After the allegation is thoroughly investigated, if the department is convinced that unlawful discrimination has occurred, the department files charges with the civil rights commission.[230] The commission then conducts a hearing.[231] If the petitioner is successful, the statute permits the commission to deliver "[a] copy of the order . . . to the respondent, the claimant, the attorney general, and to other public officers and persons as the commission deems proper."[232] Thus, similar to Kentucky, which permits its civil rights commission to publicize the result of administrative hearings, Michigan's statute gives the commission the discretion to inform individuals about the hearing's outcome.[233]

The statute goes on to detail what relief is available if unlawful discrimination occurred.[234] All of the administrative remedies are similar to those available in surrounding states.[235] However, Michigan also provides

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223. *Id.* at 806.

224. *Id.*

225. *Id.*

226. *Id.* at 808 (citing Ky. Dep't of Corr. v. McCullough, 123 S.W.3d 130, 138-39 (Ky. 2003)).

227. MICH. COMP. LAWS ANN. § 37.2101 (West 2001).

228. *See id.* § 37.2202(1) (listing the types of prohibited conduct); *see also* 775 ILL. COMP. STAT. ANN. 5/2-102(A) (West 2001 & Supp. 2008); IND. CODE § 22-9-1-2(a)&(b) (2007); KY. REV. STAT. ANN. § 344.040 (West 2006); OHIO REV. CODE ANN. § 4112.02 (West 2007 & Supp. 2008).

229. *See* MICH. COMP. LAWS ANN. § 37.2602(c) (West 2001).

230. *Id.* § 37.2605(1).

231. *Id.*

232. *Id.*

233. *Compare* KY. REV. STAT. ANN. § 344.230(2) (West 2006), *with* MICH. COMP. LAWS ANN. § 37.2605(1) (West 2001).

234. MICH. COMP. LAWS ANN. § 37.2605(2) (West 2001). Relief includes hiring, reinstatement, and posting notices and reporting compliance to the civil rights commission. *Id.*

235. *See* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001); IND. CODE § 22-9-1-6(k) (2007); KY. REV. STAT. ANN. § 344.230(3) (West 2006); OHIO REV. CODE ANN. § 4112.05(G)(1) (West

additional remedies, which make its civil rights code unique.[236] The statute indicates the availability of remedies including:

> (i) Payment to the complainant of damages for an injury or loss caused by a violation of this act, including a reasonable attorney's fee[; and]
>
> Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees.[237]

In *Department of Civil Rights v. Horizon Tube Fabricating, Inc.*,[238] the Michigan Court of Appeals interpreted the statute and held that an award of attorney fees was reasonable and was not an abuse of discretion.[239] Thus, the appellate court upheld the trial court's judgment as to the attorney fees.[240] The *Horizon Tube* court also noted that awards of interest on backpay were allowed in some situations.[241] The court based this determination on statutory language authorizing the civil rights commission to award "other relief that [it] deems appropriate."[242] Therefore, a Michigan employee can request interest on backpay, and if the civil rights commission deems it appropriate, the commission can grant the request.[243]

Similarly, in *King v. General Motors Corp.*,[244] the court held that although "the decision to grant or deny an award of attorney fees . . . is within the discretion of the trial court,"[245] the legislative intent of the civil rights act indicated that attorney's fees should be granted:

> [A]ttorney fee awards are intended to encourage persons deprived of their civil rights to seek legal redress as well as to ensure victims of employment discrimination access to the courts . . . . A second purpose in allowing attorney fee recovery under the Elliott-Larsen Civil Rights

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2007).

236. *See* MICH. COMP. LAWS ANN. § 37.2605(2)(i)&(j) (West 2001).

237. *Id.* Sections 37.2605(2)(h) and (k) provide additional remedies for individuals who suffer housing discrimination. *Id.* § 37.2605(2)(h)&(k). For example, section 37.2605(2)(k) indicates that a civil fine is a possible remedy "for a violation of [section 33.2501] of this act." *Id.* § 37.2605(2)(k). The amount of the fine is to be "directly related to the cost to the state for enforcing this statute [and is] not to exceed: $10,000.00 for the first violation . . . $25,000.00 for the second violation within a 5-year period . . . [or] $50,000.00 for 2 or more violations within a 7-year period." *Id.* § 37.2605(2)(k)(i)-(iii).

238. 385 N.W.2d 685 (Mich. Ct. App. 1986).

239. *Id.* at 688-89.

240. *Id.*

241. *Id.* at 689-90.

242. MICH. COMP. LAWS ANN. § 37.2605(2)(*l*) (West 2001).

243. *Horizon Tube Fabricating, Inc.*, 385 N.W.2d at 690.

244. 356 N.W.2d 626 (Mich. Ct. App. 1984).

245. *Id.* at 629.

> Act is to obtain compliance with the goals of the act and thereby deter discrimination in the work force.[246]

In Michigan, as in Kentucky, an administrative remedy is not a plaintiff's sole remedy.[247] According to section 37.2801,

> (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both[; and]
>
> (2) An action commenced pursuant to [this subsection] may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.[248]

Thus, unlike Indiana, Michigan permits civil litigation.[249] This portion of the statute has been interpreted to allow not just civil trials, but civil jury trials. Indeed, the *King* court emphasized this point when it stated that although "the Elliott-Larsen Civil Rights Act is silent on the right to a trial by jury, we find that jury trials are a litigant's right under the act."[250] Thus, *King* indicates that Michigan's civil rights laws are similar to Kentucky's and unlike Indiana's.[251]

As a result of the civil trial provision contained in section 37.2801, injured Michigan employees often recover sizable damage awards.[252] Furthermore, section 37.2801 permits plaintiffs to recover for mental anguish or emotional distress.[253] For example, in *Slayton v. Michigan Host, Inc.*,[254] the court determined that the plaintiff, who was fired after she sued her employer because he forced her to wear a revealing uniform, had a cause of action under section 37.2801.[255] The court emphasized that

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246. *Id.* (citations omitted).

247. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001).

248. MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001).

249. *Compare id.* § 37.2801, *with* IND. CODE § 22-9-1-16 (2007) (permitting an election of civil litigation only in narrow circumstances).

250. *King*, 356 N.W.2d at 629.

251. *See id. Compare* KY. REV. STAT. ANN. § 344.450 (West 2006), *and* MICH. COMP. LAWS ANN. § 37.2801 (West 2001), *with* IND. CODE §§ 22-9-1-16, 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

252. *See, e.g.*, Lilley v. BTM Corp., 958 F.2d 746, 754 (6th Cir. 1992) (damage award of $350,000 not excessive).

253. *See, e.g.*, *Lilley*, 958 F.2d at 754 (citing Slayton v. Mich. Host, 332 N.W.2d 498, 500-01 (Mich. Ct. App. 1983)); Moody v. Pepsi-Cola Metro. Bottling Co., 915 F.2d 201, 209-11 (6th Cir. 1990).

254. 332 N.W.2d 498 (Mich. Ct. App. 1983).

255. *Id.* at 501.

> a victim of discrimination may bring a civil suit to recover for damages for any humiliation, embarrassment, outrage, disappointment, and other forms of mental anguish which flow from the discrimination injury . . . . These types of injuries are the kind that the Elliott-Larsen Civil Rights Act was designed to protect against and to hold otherwise would undercut the legislative scheme to remedy discriminatory wrongs.[256]

Because the plaintiff in *Slayton* had suffered mental anguish from the sexual discrimination, she was entitled to recover damages.[257] However, unlike Ohio,[258] Michigan does not allow punitive damage awards in employment discrimination cases.[259] This was made explicit when the *King* court stated, "[W]e find error in the instructions to the jury allowing . . . exemplary damages. . . . We thus vacate the exemplary damages award."[260]

V. Recommendations for Indiana

Comparing Indiana's civil rights law to those of Kentucky, Ohio, Michigan, and Illinois indicates that Indiana's protections fall short of those in surrounding states. Indiana should amend its civil rights law to ensure that employees who suffer unlawful discrimination are thoroughly compensated. The most effective and efficient way to update Indiana's law is to draw inspiration from the civil rights laws of surrounding states. Although Indiana should not wholly adopt the civil rights laws of Michigan, Kentucky, Ohio, or Illinois, looking to these states' laws for guidance is prudent.

A. Permit Civil Suits Without Requiring Consent from Both Parties

Section 22-9-1-16 of the Indiana Code differs from that of any surrounding state. By allowing civil litigation only when both the complainant and the respondent consent, Indiana makes it nearly impossible for individuals to have their cases adjudicated by a judge in a courtroom. To abrogate this problem Indiana should look to the Kentucky, Ohio, and Michigan civil rights laws, all of which permit civil trials.[261] Ohio's Code states, "Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief."[262] However, similar to Indiana's Code, this provision does not apply if

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256. *Id.* at 500-01.

257. *Id.* at 501.

258. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999) (allowing punitive damages in cases brought under section 4112.99 as long as actual malice was shown).

259. *See* King v. Gen. Motors Corp., 356 N.W.2d 626, 628 (Mich. Ct. App. 1984).

260. *Id.* (citing Veselenak v. Smith, 327 N.W.2d 261, 262 (Mich. 1982)); *accord* Dep't of Civil Rights *ex rel.* Johnson v. Silver Dollar Café, 499 N.W.2d 409, 410 (Mich. Ct. App. 1993) (per curiam).

261. *See* Ky. Rev. Stat. Ann. § 344.450 (West 2006); Mich. Comp. Laws Ann. § 37.2801(1)-(2) (West 2001); Ohio Rev. Code Ann. § 4112.99 (West 2007).

262. Ohio Rev. Code Ann. § 4112.99 (West 2007).

an individual first files suit with the Ohio Civil Rights Commission.[263] Therefore, individuals who are not aware that civil litigation is an option may be unable to obtain a trial if they initially pursue an administrative remedy. Nevertheless, Ohio's provision is preferable to Indiana's provision because Ohio expressly permits civil litigation and makes the right to a civil trial distinct from the other available remedies.[264]

Kentucky's approach is similar to Ohio's because Kentucky expressly permits civil litigation.[265] Furthermore, Kentucky provides complainants more options and more remedies than Indiana because the Kentucky Code has been construed as providing a civil cause of action in addition to other remedies.[266] Because Kentucky's Code explicitly states that civil litigation is available along with other remedies,[267] the state's statute seems more complainant-friendly than Ohio's statute.

Finally, as in Kentucky and Ohio, Michigan's statute provides for civil trials.[268] However, Michigan's statutory language[269] is not as clear as Kentucky's. Therefore, based on the clarity and scope of the code provision, Indiana should adopt Kentucky's statutory language[270] and interpretation[271] and allow civil trials in addition to other remedies.

B. Permit Jury Trials

Indiana is also an outlier with respect to jury trials. Indeed, section 22-9-1-17 of the Indiana Code explicitly states that a "civil action filed under [section 22-9-1-17] must be tried by the court without benefit of a jury."[272] Thus, Indiana is distinguishable from Kentucky, Ohio, and Michigan, which all allow discrimination cases to be tried, at least to some extent, by a jury.[273]

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263. *See* IND. CODE § 22-9-1-16(b) (2007); Kocak v. Cmty. Health Partners of Ohio, Inc., 2005 FED App. 0127P, 400 F.3d 466, 472 (6th Cir.).

264. *See* Kramer v. Windsor Park Nursing Home, Inc., 943 F. Supp. 844, 856 (S.D. Ohio 1996) (emphasizing that section 4112.99 creates a private right of action "separate and distinct from those remedies available in other sections" of the civil rights statute).

265. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); OHIO REV. CODE ANN. § 4112.99 (West 2007).

266. *See* Palmer v. Int'l Ass'n of Machinists & Aerospace Workers, 882 S.W.2d 117, 120 (Ky. 1994) (section 344.450 provides a civil cause of action "in addition to any other remedies contained in the chapter").

267. *See id.*

268. *See* MICH. COMP. LAWS ANN. § 37.2801(1)-(2) (West 2001).

269. *See id.*

270. *See* KY. REV. STAT. ANN. § 344.450 (West 2006)

271. *See Palmer*, 882 S.W.2d at 120.

272. IND. CODE § 22-9-1-17(c) (2007).

273. *See* Meyers v. Chapman Printing Co. Inc., 840 S.W.2d 814, 819-20 (Ky. 1992); King v. Gen. Motors Corp., 356 N.W.2d 626, 629 (Mich. Ct. App. 1984); Taylor v. Nat'l Group of Cos., 605 N.E.2d 45, 46 (Ohio 1992).

Kentucky case law indicates that "[t]he Kentucky Civil Rights Act creates a jural right as well as a right to redress by administrative procedure. To the extent it creates a jural right both plaintiff and defendant are entitled to a trial by jury."[274] Thus, although the Kentucky statute never explicitly states that jury trials are available, the *Meyers* court emphasized that the purpose of the statute was to give individuals a full range of remedies.[275] However, in recent years Kentucky courts have limited the application of this decision and restricted the right to a jury trial by designating some issues for judicial resolution.[276]

Although Ohio permits jury trials in some employment discrimination cases, the determination is made on a case-by-case basis. For example, the court in *Taylor v. National Group of Companies*,[277] permitted the plaintiff in a sex discrimination case to demand a jury trial.[278] In contrast, in *Hoops v. United Telephone Co.*,[279] an age discrimination case, the court declined the plaintiff's jury request.[280] Because Ohio's stance on the right to jury trial is somewhat unclear, Indiana should look elsewhere for guidance when revising this portion of its civil rights law.

Michigan's statute is preferable to Ohio's because in Michigan, administrative remedies are not the sole compensation for the injured plaintiff[281] and civil litigation is permitted.[282] Furthermore, the court in *King v. General Motors Corp.* indicated that although "the Elliott-Larsen Civil Rights Act is silent on the right to a trial by jury, . . . jury trials are a litigant's right under the act."[283] Thus, *King* illustrates that Michigan's laws are similar to Kentucky's laws.[284]

By permitting jury trials, Kentucky and Michigan allow complainants an opportunity to present their claims to a jury of their peers, which provides a

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274. *Meyers*, 840 S.W.2d at 820.

275. *See id.*

276. *See* Brooks v. Lexington-Fayette Urban County Hous. Auth., 132 S.W.3d 790, 806 (Ky. 2004) (holding that since reinstatement and availability of front pay are equitable remedies, they are issues resolved by the court, not the jury).

277. 605 N.E.2d 45 (Ohio 1992).

278. *Id.* at 46.

279. Hoops v. United Tel. Co., 553 N.E.2d 252 (Ohio 1990).

280. *Id.* at 256-57 (denying the right to jury trial because the right did not exist at common law).

281. *See* MICH. COMP. LAWS ANN. § 37.2801(1)&(2) (West 2001) ("A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both [and a]n action commenced pursuant to [this subsection] may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business.").

282. *See id.* § 37.2801(1) (West 2001).

283. King v. Gen. Motors Corp., 356 N.W.2d 626, 629 (Mich. Ct. App. 1984).

284. *Id.*; *see also* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801 (West 2001); Meyers v. Chapman Printing Co. Inc., 840 S.W.2d 814, 819-20 (Ky. 1992).

benefit unavailable to Indiana employees.[285] Furthermore, because plaintiffs' success rates before juries are slightly higher than success rate before a judge[286] and because jury trials have a deterrent effect on other employers,[287] Indiana should adopt language from Michigan's Code and give plaintiffs the option to proceed before a jury.

C. Expand Damage Provisions to Provide More Complete Compensation

One of the major shortcomings of Indiana's Code is that it drastically limits the damages available to employees injured by unlawful discrimination.[288] In contrast, Kentucky provides a full panoply of remedies in employment discrimination cases.[289] Indeed, in Kentucky, damages are available for both humiliation and personal indignity.[290]

Similarly, Illinois provides more expansive damage provisions than Indiana.[291] According to the Illinois Code, relief may include "such action as may be necessary to make the individual complainant whole, including, but not limited to, *awards of interest on the complainant's actual damages and backpay from the date of the civil rights violation*."[292] By allowing the victorious party to recover backpay and interest on damages,[293] Illinois's civil rights act seems more plaintiff-friendly. Furthermore, Illinois case law indicates that punitive damages are permitted when "highly appropriate and necessary."[294] Although this language gives the court a great deal of discretion, addition of Illinois's language to the Indiana statute would be a definite improvement.

Ohio also allows recovery of more damages than Indiana.[295] Ohio's Code has been interpreted to permit punitive damage awards when actual malice can be

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285. *See* KY. REV. STAT. ANN. § 344.450 (West 2006); MICH. COMP. LAWS ANN. § 37.2801 (West 2001); *Meyers*, 840 S.W.2d at 819-20; *King*, 356 N.W.2d at 629.

286. Oppenheimer, *supra* note 82, at 523.

287. *See* Johnson, *supra* note 756 at 216 (discussing the deterrent effect of public resolution of a dispute).

288. *See* IND. CODE § 22-9-1-6(k)(A) (2007) (damages limited to those necessary "to restore complainant's losses incurred as a result of discriminatory treatment," which in an employment context includes "only wages, salary, or commissions"). Similarly, in Michigan punitive damages are not available in employment discrimination cases. *See King*, 356 N.W.2d at 628 ("[W]e find error in the instructions to the jury allowing both compensatory and exemplary damages for plaintiff's mental and emotional distress and anguish. We thus vacate the exemplary damages award . . . .").

289. *See Meyers*, 840 S.W.2d at 819 (allowing damages for mental and emotional injury).

290. McNeal v. Armour & Co., 660 S.W.2d 957, 958 (Ky. Ct. App. 1983).

291. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001), *with* IND. CODE § 22-9-1-6(k) (2007).

292. 775 ILL. COMP. STAT. ANN. 5/8A-104(J) (West 2001) (emphasis added).

293. *Id.*

294. Page v. City of Chicago, 701 N.E.2d 218, 228 (Ill. App. Ct. 1998).

295. OHIO REV. CODE ANN. § 4112.05(G)(1)(a) (West 2007 & Supp. 2008).

shown.[296] In contrast, Indiana does not permit punitive damages in employment discrimination cases.[297] Ohio case law also indicates that in some situations front pay may be awarded.[298] However, Ohio's Code provision is not the best choice for Indiana because Ohio requires the plaintiff to prove actual malice in order to demand punitive damages.[299] Because Ohio places this burden on the plaintiff, Indiana should look to either Illinois or Kentucky for guidance when expanding its damage provision.

Although there is some variation among surrounding states with respect to damages in employment discrimination cases, neighboring states, with the exception of Michigan, all have more extensive damage provisions than Indiana. Thus, despite the similarity to Michigan law, Indiana should revise its provision on damages and, at the very least, adopt language similar to Illinois's statute, which allows interest on damage awards, as well as backpay.

Furthermore, as written, the ICRL provides fewer remedies than the federal law does under Title VII. As a result, Indiana plaintiffs will attempt to litigate in federal court whenever possible.[300] However, because Title VII caps compensatory damage awards[301] and does not apply to all employers, it is not a feasible remedy for many plaintiffs.[302] Although adopting some of Title VII's damage provisions would certainly improve Indiana's statute, the best choice is adopting language from either Illinois or Michigan to expand Indiana's damage provisions.

D. Provide Attorney's Fees to the Prevailing Party

The final difference between Indiana's civil rights statute and those of surrounding states is that Indiana does not award attorney's fees to the prevailing party.[303] Even Michigan, which, like Indiana, refuses to award punitive damages,

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296. *See* Rice v. CertainTeed Corp., 704 N.E.2d 1217, 1221 (Ohio 1999); Berge v. Columbus Cmty. Cable Access, 736 N.E.2d 517, 542 (Ohio Ct. App. 1999).

297. *See* IND. CODE § 22-9-1-6(k) (2007); Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (holding that emotional distress and punitive damages are not available under the Indiana Civil Rights Law), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

298. *See* Potocnik v. Sifco Indus., Inc., 660 N.E.2d 510, 517-18 (Ohio Ct. App. 1995) ("Front pay is available as a remedy for . . . race discrimination, age discrimination, and sex discrimination. . . . [F]ront pay is available for handicap discrimination as well, when appropriate. [However, t]he trial judge must determine if front pay is appropriate and [then] the jury determines the amount of front pay." (citations omitted)).

299. *See Rice*, 704 N.E.2d at 1221; *Berge*, 736 N.E.2d at 542.

300. *See* Gonzalez, *supra* note 116, at 116.

301. *Id.*

302. 42 U.S.C. § 2000e(b) (2006) (defining the term "employer").

303. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104(G) (West 2001), *and* MICH. COMP. LAWS ANN. § 37.2801(3) (West 2001), *with* IND. CODE § 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has

allows the victorious party to recover attorney's fees.[304] Michigan's statute states that damages in employment discrimination cases include "[p]ayment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees."[305] The statute also emphasizes that "[a]s used in [this subsection], 'damages' means damages for injury or loss caused by each violation of this act, *including reasonable attorney's fees*."[306] In *King* the court explained that allowing recovery of attorney's fees is important for policy purposes.[307] The court stated that attorney's fees should be liberally granted because "attorney fee awards are intended to encourage persons deprived of their civil rights to seek legal redress as well as to ensure victims of employment discrimination access to the courts."[308] Furthermore, "allowing attorney fee recovery . . . [facilitates] compliance with the goals of the act and thereby deter[s] discrimination in the work force."[309]

Similarly, Illinois's and Kentucky's civil rights statutes permit the prevailing party to recover his or her attorney's fees.[310] Thus, the Kentucky, Michigan, and Illinois civil rights codes are similar and the Indiana Code is an outlier.[311] By

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proposed but has never enacted legislation awarding attorney's fees to individuals who allege employment discrimination) (citations omitted), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

304. MICH. COMP. LAWS ANN. § 37.2605(2)(i)&(j) (West 2001).

305. *Id.* Sections 37.2605(2)(h) and (k) provide additional remedies for individuals who suffer housing discrimination. *Id.* § 37.2605(2)(h)&(k). For example, section 37.2605(2)(k) indicates that a civil fine is a possible remedy "for a violation of [the civil rights statute] of this act." *Id.* § 37.2605(2)(k). The amount of the fine is to be "directly related to the cost to the state for enforcing this statute [and is] not to exceed: $10,000.00 for the first violation . . . $25,000.00 for the second violation within a 5-year period . . . [or] $50,000.00 for 2 or more violations within a 7-year period." *Id.* § 37.2605(2)(k)(*i*)-(*iii*).

306. *Id.* § 37.2801(3) (emphasis added).

307. King v. Gen. Motors Corp., 356 N.W.2d 626, 629 (Mich. Ct. App. 1984).

308. *Id.*

309. *Id.*

310. *See* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001) (stating that damages may include "[p]ay[ing] to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees incurred in maintaining this action . . . and in any judicial review and judicial enforcement proceedings"); KY. REV. STAT. ANN. § 344.450 (West 2006) (stating that "[a]ny person injured by any act in violation of the provisions of this chapter shall have a civil cause of action in Circuit Court to enjoin further violations, and to recover the actual damages sustained, together with the costs of the law suit. The court's order or judgment shall include a reasonable fee for the plaintiff's attorney of record and any other remedies contained in this chapter").

311. *Compare* 775 ILL. COMP. STAT. ANN. 5/8A-104 (West 2001), *with* KY. REV. STAT. ANN. § 344.450 (West 2006), *and* MICH. COMP. LAWS ANN. § 37.2801(3) (West 2001), *with* IND. CODE § 22-9.5-7-2 (2007), *and* Ind. Civil Rights Comm'n v. Adler, 689 N.E.2d 1274, 1279 (Ind. Ct. App. 1997) (noting that the legislature has proposed but has never enacted legislation awarding

awarding attorney's fees, surrounding states make it more feasible for complainants to litigate disputes. In order to provide individuals injured by employment discrimination full compensation for their injuries, Indiana should allow the prevailing party to recoup his or her attorney's fees.

CONCLUSION

State civil rights laws affect every individual living or working in the geographic area. Civil rights laws are especially relevant in employment contexts because they impact the day to day activities of almost all citizens. Although Title VII has done much to diminish discrimination and improve the working environment for individuals, it is not enough. Therefore, States must enact unbiased, effective anti-discrimination laws to protect employees, as well as employers. Unfortunately, Indiana appears to be lagging behind surrounding states with respect to protection of employee civil rights. Unlike the surrounding states of Michigan, Ohio, Kentucky, and Illinois, Indiana requires both parties to consent to a civil trial, which means that many complainants will be forced to rely on the administrative procedure.[312] To increase the protection afforded employees, Indiana should look to the civil rights laws of surrounding states and use these statutes to guide a revision of the Indiana Code.

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attorney's fees to individuals who allege employment discrimination), *overruled on other grounds by* 714 N.E.2d 632 (Ind. 1999).

312. IND. CODE § 22-9-1-16 (2007).