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ARTICLES

An Overview of the Arkansas Civil Rights Act of 1993

Theresa M. Beiner*

INTRODUCTION

In 1993, the Arkansas legislature enacted a law that was novel for this state but on a parity with laws enacted in most of the United States. After almost thirty years of avoiding issues that the rest of the country had already addressed, Arkansas enacted its first modern civil rights act, the Civil Rights Act of 1993 (hereinafter "the Arkansas Act"). Finally, Arkansas, only one of two states that had no civil rights legislation, enacted a law that would cover discrimination based on race, religion, national origin, gender and disability. Yet, three years after the statute was enacted, litigants have filed very few cases under the new law. This is especially surprising given that the Arkansas

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4. This is based on the number of reported decisions that even mention the Arkansas Act. As of the date of this article, there are only five reported cases in Arkansas state courts, and none of these cases actually interprets the Arkansas Act in any meaningful sense. See Malone v. Trans-States Lines, Inc., 926 S.W.2d 659 (Ark. 1996); Citizens to Establish a Reform Party in Arkansas v. Priest, 926 S.W.2d 432 (Ark. 1996); Masterson v. Stambuck, 902 S.W.2d 803 (Ark. 1995); McCuen v.
Act actually offers the potential plaintiff several advantages over parallel federal laws. However, it does not mean that it is always preferable to file under state law; for the state act also leaves several significant areas uncovered, which will be more fully explored in this article.\(^5\)

It is difficult to account for the lack of interest this statute has generated among potential plaintiffs (and their attorneys) in Arkansas. Perhaps it is due to the Arkansas Bar's reliance on federal law,\(^6\) as the principal means of vindicating civil rights. Plaintiffs' attorneys have become so accustomed to suing under the federal laws prohibiting discriminatory conduct that they do not want the bother of learning the new state law. It is also possible that the Bar views the federal courts as more receptive to civil rights claims than state courts. This does not explain why parties have not tagged the state law claims onto their federal claims through supplemental jurisdiction.\(^7\) Yet, there are very few reported federal cases that include Arkansas civil rights claims.\(^8\) Often plaintiffs include all parallel state claims along with their federal claims. Although the relief for employment discrimination is essentially the same

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6. Federal law only requires notice pleading, where Arkansas law requires fact pleading. See *Fed. R. Civ. P.* 8(a); *Ark. R. Civ. P.* 8(a). Indeed, in one of the few cases decided under the Arkansas Act, the Arkansas Supreme Court upheld dismissal for failure to state a claim under fact pleading standards. See *Malone*, 926 S.W.2d at 661.
7. See 28 U.S.C. § 1367(a) (1994) (allowing a plaintiff to bring non-federal claims in federal court so long as there is basis for federal jurisdiction and the state law claims arise out of the same case or controversy).
under both state and federal laws, it certainly does not hurt—at least on the face of it—to include the state claim.

Perhaps it is also due to a lack of knowledge on the part of the Bar as to how the law actually will operate in a given case. With few court interpretations of the Arkansas Act to guide prospective plaintiffs, why risk losing a cause of action that clearly exists under federal law? Perhaps it is simply that nobody is aware of the law. However, a review of local news reports on the Arkansas Act suggests that it did get coverage by the media at the time of its initial passage and that most people would have at least heard that the legislature had passed some sort of civil rights legislation.

For whatever reason, the Arkansas Act has not spawned a significant amount of litigation. An investigation into precisely what this Act does and what potential advantages and disadvantages it possesses over parallel fed-

9. However, there is the argument that inclusion of the state claim adds nothing in terms of remedies and simply confuses what might be a simple case under federal law.

10. There are several ways a plaintiff could lose his or her federal cause of action by filing a state claim, although a careful lawyer should not do so. First, if a plaintiff files a state claim and is unsuccessful, she runs the risk that res judicata or collateral estoppel (also known as claim preclusion and issue preclusion, respectively) will bar litigation of the parallel federal claim in federal court. See generally Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); University of Tenn. v. Elliot, 478 U.S. 788 (1986); Bechtold v. City of Rosemount, 104 F.3d 1062 (8th Cir. 1997) (litigation of state claim barred federal action under ADEA). Also, there are charge filing requirements under federal law. If the plaintiff fails to file a timely charge with the EEOC because she is pursuing her state law claim, she likely will be barred from pursuing her federal claim later unless she can make some sort of tolling argument. 42 U.S.C. § 2000e-5(e)(i) (1994).

eral laws may provide some answers to these questions as well as inform the Arkansas Bar about how this law might operate in practice. This article will begin by describing the history of the Arkansas Act as best as possible without an official legislative history. What follows is a thorough description of the entire Arkansas Act. Throughout the discussion of various aspects of the Arkansas Act, parallel federal laws are noted and described, with a view toward highlighting differences in the state and federal laws as well as resolving potential ambiguities in the state law.

I. HISTORICAL BACKGROUND

Numerous articles appeared in national newspapers while then-Governor Clinton was running for the presidency criticizing him for his pro-civil rights stance while serving as the governor of a state that had no civil rights act. This charge, made by former California Governor

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12. The Arkansas Legislature does not keep any official legislative history. However, the courts do consider legislative history in construing statutes, although any sort of intent is generally contained in the statute itself. See, e.g., Ark. Code Ann. § 10-3-201 (Repl. 1996); Haase v. Starnes, 915 S.W.2d 675, 682 (Ark. 1996) (Dudley, J., dissenting); Stucco, Inc. v. Rose, 914 S.W.2d 767, 772 (Ark. App. 1996) (en banc) (Rogers, J., dissenting). Arkansas courts look first at the plain meaning of the statute in the context within which it is written. Stucco, 914 S.W.2d at 772. In addition, the courts look at the subject matter of the statute, "the object to be accomplished, the purpose to be served, the remedy provided . . . and other appropriate matters that throw light on the matter." Id. Recently, in the context of deciphering two conflicting statutes, the court stated, "As a guide in ascertaining legislative intent, we often examine the history of the statutes involved, as well as the contemporaneous conditions at the time of their enactment, the consequences of interpretation, and all other matters of common knowledge within the court's jurisdiction." Priest, 926 S.W.2d at 435. Finally, the courts look to the intent behind similar federal legislation where appropriate. Moore v. State, 903 S.W.2d 154, 159 (Ark. 1995).

13. Because of the broad nature of the civil rights violations the Arkansas Act covers, it is impossible to detail every difference between it and parallel federal laws. I hope to highlight the most significant differences and provide sources, through citation, to other works that detail the scope and finer points of parallel federal acts.

Jerry Brown, the Reverend Jesse Jackson and eventually President George Bush, had some effect on the campaign. Arkansas, along with Alabama, had the dubious honor of being one of only two states in the United States that did not have some sort of civil rights legislation.

In fact, as governor in 1991, Clinton had tried to pass civil rights legislation in Arkansas. Civil rights legislation was introduced during Arkansas’ 1991 legislative session and was approved by the Senate. The legislators apparently were motivated by the erosion of federal civil rights laws and the lack of any gap-filling by the state of Arkansas. The law was intended in part to mirror the federal Civil Rights Act of 1871 (also known as section 1983), which gave individuals a cause of action against the state for violation of their rights by state actors. At the time, the Arkansas constitution gave individuals significant rights; however, there was no enforcement mechanism to guarantee that these rights were upheld absent some action by the state against an individual. Initially, the supporting legislators envisioned a series of bills rather than one all-encompassing measure. In creating several bills, they hoped to avoid having the entire law fail based on a small controversial sub-part.

It does not appear from the newspaper accounts that separate laws were actually introduced. Instead, the initial 1991 legislation was drafted broadly and prohibited discrimi-
ination based on race, religion, ancestry, national origin, gender, and disability. It was also aimed at violations by the state and hate crimes, making actionable incidents of harassment, intimidation or violence against people because they belong to a certain group. This bill, like the Arkansas Act eventually passed, did not contemplate the creation of an Arkansas Civil Rights Commission, but instead gave plaintiffs a right to bring their own claims directly in court. The bill that eventually passed the Senate prohibited discrimination in “employment, public facilities, financial transactions and the political process.” It covered discrimination based on “race, religion, ancestry, national origin, gender and disability.” It also included hate crimes coverage.

Once the companion bill was introduced into the House, it met strong political opposition from the Arkansas Chamber of Commerce. In addition, several local businesses, including Union National Bank, International Paper, and the Arkansas Poultry Federation met with Governor Clinton in an effort to reach a compromise on the bill. Businesses were concerned with several aspects of the bill: (1) jury trials; (2) a proposed three-year statute of limitations; and (3) paying attorney’s fees, as well as compensatory and punitive damages. At the time this legislation was being considered, it provided for additional damages not then available under federal law. Local businessmen were concerned that this would deter other busi-
nesses from locating in Arkansas and encourage other businesses to leave the state. In addition, the law covered all businesses in the state—there was no set number of employees a company had to employ in order to fall within the Act’s proscriptions.

Eventually, the Chamber of Commerce introduced its own bill. After several attempts at compromise, a stalemate was reached. The Chamber of Commerce’s watered-down bill eventually passed the House. Finally, no bill became law, but instead the Senate created a Commission to consider creating civil rights legislation during the next legislative session.

By 1993, the next legislative session, the Arkansas legislature was ready to give civil rights legislation another try. Initially, three different bills were proposed. One was sponsored by Senator Bill Lewellen of Marianna (which was endorsed by the Civil Rights Task Force, a lobbyist group), one was sponsored by Representative Bill Walker of Little Rock, who proposed the 1991 House bill, and one was

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36. *Id.*


41. Indeed, the House Committee on Public Health, Labor and Welfare adjourned before a presentation by proponents of the more liberal legislation in order to avoid letting the supporting legislators even speak. Caroline Decker, *Panel Stops Civil Rights Bill by Refusing to Bring it Up*, ARKANSAS GAZETTE, Mar. 27, 1991, at H5.

sponsored by Representative Bob Fairchild of Fayetteville.\footnote{Noel Oman, \textit{With Civil Rights Bill on Desk, Tucker Dallies on Details}, Arkansas Democrat-Gazette, Mar. 31, 1993, at B5; Kevin Walker, \textit{Task Force to Tackle Civil Rights Bills}, Arkansas Democrat-Gazette, Feb. 2, 1993, at B4.} There was also a bill proposed by Little Rock attorney Russell Gunter, a member of the Civil Rights Task Force.\footnote{Kevin Walker, \textit{Task Force to Tackle Civil Rights Bills}, Arkansas Democrat-Gazette, Feb. 2, 1993, at B4.} Much of the battle during the bill’s passage (publicly documented by the media) concerned the extent of the Arkansas Act’s coverage. Specifically, there was some debate as to whether discrimination based on disability and homosexuality should be included.\footnote{Glen Chase, \textit{Tucker Opposes Including Gay Rights in State Bias Bill}, Arkansas Democrat-Gazette, Feb. 10, 1993, at B3; Mike Trimble & Rachel O’Neal, \textit{Committee Leaves Gays Out of Bill}, Arkansas Democrat-Gazette, Feb. 24, 1993, at B1; Kevin Walker, \textit{Task Force to Tackle Civil Rights Bills}, Arkansas Democrat-Gazette, Feb. 2, 1993, at B4; Kevin Walker, \textit{Groups Seek Inclusion in Rights Bill}, Arkansas Democrat-Gazette, Feb. 9, 1993, at B1.} There was also debate concerning placing a cap on damages.\footnote{Kevin Walker, \textit{Task Force to Tackle Civil Rights Bills}, Arkansas Democrat-Gazette, Feb. 2, 1993, at B4.} Further discussion centered on which businesses, based on the number of employees, would be subjected to the Act’s coverage.\footnote{Rachel O’Neal, \textit{Senate Loads Up 2 Civil Rights Bills, but House Dumps 1}, Arkansas Democrat-Gazette, Mar. 24, 1993, at A1.} The proposals for the number of employees ranged anywhere from zero to fifteen, which is the number set by Title VII of the Civil Rights Act of 1964 (hereinafter “Title VII”).\footnote{42 U.S.C. § 2000e(b) (1994).} The ultimate debate as portrayed in the media was between nine or fifteen. At nine, the coverage extended to approximately 200,000 additional Arkansas residents.\footnote{Noel Oman, \textit{With Civil Rights Bills on Desk, Tucker Dallies on Details}, Arkansas Democrat-Gazette, Mar. 31, 1993, at B5.} There was also debate regarding the inclusion of certain types of conduct, for example, hate crimes and housing discrimination.\footnote{Noel Oman, \textit{Tucker “Happy” with Rights Bill as Deadline Nears}, Arkansas Democrat-Gazette, Apr. 7, 1993, at B4.} Ultimately, the bill that passed was a compromise, which covered some of these areas, while omitting others.
II. LANGUAGE AND COVERAGE OF THE ARKANSAS ACT

A detailed description of the Arkansas Civil Rights Act is necessary to fully understand the broad nature of the Arkansas Act as well as the causes of action that it creates. The Arkansas Act gives significant civil rights protection to the citizens of Arkansas in several areas, even though the area of employment discrimination provoked the most debate.51

Section 16-123-107 of the Arkansas Act (hereinafter "section 107"), which contains the employment discrimination section, also prohibits discrimination in contracts, public accommodations, property transactions, and voting. Section 16-123-104 of the Arkansas Act provides a cause of action for hate crimes. In addition, the Arkansas Act provides for protection against governmental actors who violate people's rights under color of state law. During the 1995 legislative session, a new section covering housing discrimination was added to the law.52 Because the housing discrimination provisions were added later as separate sections to the Arkansas Act, they will be addressed separately in this article.

A. Section 107 Coverage

Section 107 of the Arkansas Act protects persons against discrimination based on various types of statuses—race, religion, national origin, gender, and disability.53 The legislature gave several of these groups more explicit treatment in the definitional section of the Act. Specifically, religion is defined to include "all aspects of religious belief, observance, and practice."54 In addition, national origin is defined to include ancestry.55 Gender discrimination includes discrimination "on account of pregnancy, childbirth, or related medical conditions."56 Finally, disability discrimi-

51. See supra notes 35-50 and accompanying text.
nation includes discrimination based on the presence of any sensory, mental, or physical disability, which is defined as "a physical or mental impairment that substantially limits a major life function."^57 Alcoholism, along with several other disorders, is explicitly denied coverage as a disability under the Arkansas Act,^58 while parallel federal legislation does cover it.^59

Along with these protected groups, the Arkansas Act sets out what types of discrimination are unlawful. The Arkansas Act creates a series of "rights," which in turn creates a right of action for persons injured by acts of "intentional discrimination" in violation of the Act.^60 These protections include the right to: obtain and hold employment;^61 "accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage or amusement;"^62 "engage in property transactions without discrimination;"^63 "engage in credit and other contractual transactions without discrimination;"^64 and "vote and fully participate in the political process."^65 Obviously, the Act

57. Ark. Code Ann. § 16-123-102(3) (Supp. 1995). The definition expressly excludes compulsive gambling, kleptomania, pyromania, illegal drug use, and alcoholism. Id. One federal court has indirectly addressed what is a disability for purposes of the Arkansas Act. In Morrow v. City of Jacksonville, 941 F. Supp. 816, 823 (E.D. Ark. 1996), the district court used ADA analysis to conclude that whether obesity is a disability covered by the Arkansas Act is a question of fact. The Americans with Disabilities Act, parallel federal legislation covering discrimination against individuals with disabilities, similarly contains exclusions from the term "disability." However, the federal act contains some additional exclusions, including "[t]ransvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders" as well as "psychoactive substance use disorders resulting from current illegal use of drugs," homosexuality, and bisexuality. 29 C.F.R. § 1630.3(d)(1), (3) (1996).


59. 29 C.F.R. § 1630.16(b)(4) (1996). See also Richards, supra note 5, at 88 (describing exclusion of alcoholism as a limitation on the Arkansas Act's coverage).


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goes well beyond employment discrimination and constitutes a broad-based civil rights statute.66

1. Employment Discrimination Sections

a. Definitions of "Employer" and "Employee"

For purposes of discrimination in employment, the Arkansas Act defines employer as "a person who employs nine or more employees in Arkansas in each of twenty or more calendar weeks in the current or preceding calendar year, or any agent of such person."67 The implications of this language are fairly obvious. Although the term employee is not directly defined, it does not include "[a]n individual employed outside the State of Arkansas."68 Therefore, the Arkansas Act's coverage extends only to businesses employing the requisite number of employees in Arkansas. In addition, an individual working for an Arkansas employer outside of the state would not be a covered "employee" within the plain language of the Arkansas Act. Finally, the Arkansas Act does not cover causes of action against employers by members of the employer's immediate family. If the plaintiff is employed by a corporation with stock owned by an immediate family member, the Arkansas Act most likely would not provide an exemption.69

One of the few cases interpreting the Arkansas Act has addressed the "employer" definition. In Morrow v. City of Jacksonville,70 a federal court decided that individual actors could not be held liable in their individual capacities as the plaintiff's "employer" for purposes of the Arkansas Act.71 While the court did not state its precise reasons for this

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66. Housing discrimination, a more recent addition to the Arkansas Act not included in rights described in § 107, will be discussed separately in this article. See infra notes 276-327 and accompanying text.
71. Id. at 820.
holding, it is noteworthy that the lawsuit was not dismissed against the individuals in their “official” capacities. This is consistent with many courts’ opinions under Title VII, including those of the Eighth Circuit, which limit liability to the actual employer.\footnote{72} There are two potentially meaningful differences in the definition of employer between the Arkansas Act, Title VII, and the Americans with Disabilities Act of 1990 (hereinafter “ADA”), the counterpart federal legislation.\footnote{73} The Arkansas Civil Rights Act defines “employer” as an entity having nine or more employees.\footnote{74} Both Title VII and the ADA cover employers of fifteen or more.\footnote{75} As was noted earlier in this article, this makes the Arkansas Act applicable to approximately 200,000 more working Arkansans.\footnote{76} Obviously, if an employer has less than fifteen employees, but at least nine, the Arkansas Act is the employee’s primary way to sue a private employer for employment discrimination.\footnote{77} The manner in which employees are counted for this calculation is slightly different. Under the Arkansas Act, the employer need only have nine employees work for twenty calendar weeks to be considered an employer for purposes of the Arkansas Act.\footnote{78} Under Title VII and the ADA, the statute reads that the employer must have fifteen employees “for each working day in each of twenty or more calendar weeks.”\footnote{79} This implies that the fifteen employees

\begin{footnotes}
72. Id. at 819-20, and cases cited therein.
76. See supra note 49.
\end{footnotes}
must work every day of the week that is considered a "work
day" to be counted, which would arguably take an em-
ployer of fifteen out of Title VII's reach if it employed one
of the fifteen on a part-time basis. The Arkansas Act ap-
parently has no such requirement and should not cause the
same sorts of ambiguities that Title VII initially spawned in
counting employees.\textsuperscript{80}

There are several distinctions based on the definition
of employee. The Arkansas Act excludes persons em-
ployed by parents, spouses, or, children; persons employed
in certain training programs; and persons employed outside
Arkansas.\textsuperscript{81} Title VII only excludes state-elected officials
and some of their appointed staff members.\textsuperscript{82} The ADA
has no exceptions of this sort. Therefore, there is a limita-
tion on the definition of employee in the Arkansas Act that
is not found in parallel federal legislation.

In addition, the language of the two acts regarding
pregnancy differs significantly. The Arkansas Act generally
prohibits discrimination "on the basis of pregnancy."\textsuperscript{83} The
federal act defines discrimination on the basis of sex as "be-
cause of or on the basis of pregnancy." Furthermore, the
federal act states that "women affected by pregnancy, child-
birth, or related medical conditions shall be treated the
same for all employment-related purposes, including re-
cipe of benefits under fringe benefit programs, as other
persons not so affected but similar in their ability or inabil-
ity to work."\textsuperscript{84} This language has led courts to liken preg-
nancy to other statuses unprotected by Title VII and has
provided a basis for adverse employment actions against
pregnant women.\textsuperscript{85} The express prohibition of discrimina-

\textsuperscript{80} The United States Supreme Court recently resolved this ambiguity in fed-
eral law. In Walters v. Metropolitan Educ. Enter., 117 S. Ct. 660 (1997), the Court
adopted the "payroll" method of counting employees, whereby a count of employ-
ees actually on the payroll is used to determine whether the employer has the requi-
site number of employees.

\textsuperscript{81} ARK. CODE ANN. § 16-123-102(4) (Supp. 1995).


\textsuperscript{83} ARK. CODE ANN. § 16-123-102(1) (Supp. 1995).


\textsuperscript{85} See, e.g., Marafino v. St. Louis County Cir. Ct., 707 F.2d 1005 (8th Cir.
1983). In this case, the employer refused to hire a pregnant woman because she
would soon take a leave of absence. The employer successfully argued it would treat
tion based on pregnancy in the Arkansas Act, however, could be read to prohibit any adverse employment action taken due to an employee's pregnancy. 86

b. Definitions of “Employment Discrimination”

There are several significant distinctions in the definition of “discrimination” under the federal acts and the Arkansas Act. Of particular note is the discrepancy between what is required under federal law for disability discrimination and what is required under state law. Further, the types of discriminatory acts covered under state law appear to be less broad than under federal law.

First, the Arkansas Act only creates a right to “obtain and hold employment.” 87 Title VII, on the other hand, makes it an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. 88

The ADA likewise contains broad language prohibiting a variety of discriminatory conduct by employers 89 and extends to “terms, conditions, and privileges of employment.” 90 Title VII and the ADA are clearly broader, encompassing not only obtaining and holding employment but also the terms, conditions, and privileges of employment. The courts have extended Title VII to encompass a

86. See Richards, supra note 5, at 90-91.
89. See 42 U.S.C. §§ 12112(a)-(b) (1994).
broad variety of discriminatory acts,91 including distinctions in fringe benefits92 and even lunch hours.93 Plaintiffs have also used Title VII to address discrimination in promotions,94 assignments,95 and pay.96

In addition, the United States Supreme Court has interpreted Title VII to cover harassment.97 Courts have applied hostile environment claims to harassment based on disability as well.98 The Supreme Court has determined that if harassment is sufficiently severe and pervasive so that it amounts to a change in a term or condition of employment, the harassment is actionable under Title VII. The harassment could be based on race,99 sex,100 religion,101 or national origin.102

While the Arkansas Act does not contain the "term, condition, or privilege" language of Title VII, there is room to argue that harassment might well be covered. The Ar-
Arkansas Act creates a right to "obtain and hold employment." Harassment based on a protected status could greatly affect a person's ability to hold employment. Indeed, if the harassment is pervasive enough, it may be impossible for a person to remain employed without risk of psychological damage. Therefore, a plaintiff could argue that, to the extent harassment makes it difficult or impossible to "obtain and hold employment," it should be actionable under the Arkansas Act. Indeed, one federal court interpreting the Arkansas Act assumed that it covered harassment. It is not clear, however, whether the Title VII standards for harassment will be adopted. To be actionable under Title VII, harassment need only affect a term, condition, or privilege of employment. Therefore, the plaintiff need not experience any concrete psychological harm to pursue a claim.

Under the Arkansas Act, harassment would have to affect the person's ability to obtain or hold employment. This suggests a slightly higher standard. The Arkansas courts could borrow from constructive discharge case law to determine whether harassment affects the employee's ability to hold employment. The Eighth Circuit Court of Appeals has stated, "[t]o constitute a constructive discharge, the employer must deliberately create intolerable working conditions with the intention of forcing

103. Smith, 941 F. Supp. at 809-810. The tort of outrage can also be used in the sexual harassment context. See Hale v. Ladd, 826 S.W.2d 244 (Ark. 1992). However, in order to be actionable under this theory, the harassment must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society." Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380, 382 (Ark. 1988).


105. Under Title VII, an employee can maintain an action for discriminatory termination if the employee quits due to difficult working conditions. A thorough discussion of constructive discharge is beyond the scope of this article. For more on this concept, see Kathryn A. Johnson, Constructive Discharge and "Reasonable Accommodation" under the Americans with Disabilities Act, 65 U. COLO. L. REV. 175 (1993); Mark S. Kende, Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies, 71 NOTRE DAME L. REV. 39 (1995); Sarah H. Perry, Enough is Enough: Per Se Constructive Discharge for Victims of Sexually Hostile Work Environments under Title VII, 70 WASH. L. REV. 541 (1995).
the employee to quit and the employee must quit.”

A constructive discharge arises only “when a reasonable person would find the conditions of employment intolerable.” In addition, the Eighth Circuit Court of Appeals requires the employee “not to jump to conclusions too quickly,” and to give the “employer a reasonable chance to work out a problem” before arguing constructive discharge. Because the standard for constructive discharge is higher than the standard applied to harassment claims, adopting constructive discharge standards for harassment places a fairly heavy burden on an employee suing on a harassment claim. For this reason Arkansas courts may adopt the harassment standards applied under Title VII.

Another significant distinction between the Arkansas Act and the federal law is in the area of disability discrimination. It is not clear under the Arkansas Act that an employer must make reasonable accommodations for an individual’s disability. Indeed, there is no language at all regarding accommodation of physical or mental disabilities. Because there is explicit language in the Arkansas Act regarding religious accommodations, it could be inferred that there is no disability accommodation contemplated under the Act. However, an accommodations requirement might be read into the Arkansas Act’s “obtain and hold employment” language. An accommodation that is necessary for a person with disabilities to “obtain and hold employment” would directly affect his or her ability to exercise this right. In effect, the right could become meaningless to persons with disabilities if the courts do not read an accommodation requirement into the Arkansas Act. Regardless of the outcome on this issue, the accommoda-
tion provisions of the ADA are still applicable to employers of fifteen or more.

Finally, there is no remedy for age discrimination under the Arkansas Act. Although apparently age was covered under the proposed 1991 legislation, age discrimination did not survive in the final version of the Arkansas Act. If an employee believes he or she is being discriminated against based on age, the Age Discrimination in Employment Act \(^{111}\) provides the principal basis for relief in Arkansas. \(^{112}\)

2. Public Accommodations Discrimination

In addition to creating the “right to obtain and hold employment,” the Arkansas Act creates a right to “the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement[.]” \(^{113}\) Such places specifically include “any place, store, or other establishment, either licensed or unlicensed, that supplies accommodations, goods, or services to the general public, or that solicits or accepts the patronage or trade of the general public, or that is supported directly or indirectly by government funds[.]” \(^{114}\) It does not include a lodging establishment with five rooms or less that is occupied by the proprietor of the establishment as his or her residence. \(^{115}\) In addition, it does not include private clubs that are not in fact open to the public. \(^{116}\)

The proscription of discrimination in public accommodations as detailed in this statute goes well beyond those

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\(^{112}\) Other federal laws such as § 1983 provide alternate bases for relief against defendants acting under color of state law under appropriate circumstances. See Morrow, 941 F. Supp. at 826 (holding that age is not covered by the Arkansas Act; but stating that “deprivation of a right secured by Title VII, the ADEA, or the ADA by one acting under color of state law constitutes grounds for a § 1983 claim”).

\(^{113}\) ARK. CODE ANN. § 16-123-107(a)(2) (Supp. 1995). This is very similar to the public accommodation language of the ADA. 42 U.S.C. § 12182 (1994).


\(^{115}\) ARK. CODE ANN. § 16-123-102(7)(A) (Supp. 1995). Such a lodging should be covered under the fair housing sections of the Arkansas Act. See infra notes 276-327 and accompanying text.

contained in the parallel federal law—Title II of the Civil Rights Act of 1964 (hereinafter “the Public Accommodations Act”). However, it is not clear whether the Arkansas Act goes as far as the accommodation sections of the ADA. The Public Accommodations Act prohibits discrimination by lodging establishments, and entertainment establishments, and “any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment, and . . . which holds itself out as serving patrons of such covered establishment.” Like the state act, Title II exempts private clubs.

From the plain language of these statutes, it is obvious that the Arkansas Act is more broadly written. The federal act is limited to places of public amusement, while the Arkansas Act would apply to any establishment open to the public with a few limited exceptions. Although the courts have broadly construed the federal act to include more unconventional places of amusement, Title II has

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119. 42 U.S.C. § 2000a(b)(1) (1994). Lodging establishments include hotels, motels, or inns. Like the Arkansas Act, the establishment must have five rooms or more to be covered by the Public Accommodations Act. Id.
120. 42 U.S.C. § 2000a(b)(2) (1994). It specifically applies to “any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station.” Id.
121. 42 U.S.C. § 2000a(b)(3) (1994). Entertainment establishments include movie theaters, live theaters, concert halls, sports arenas, or stadiums. Id.
125. See, e.g., Rousseve v. Shape Spa for Health & Beauty, 516 F.2d 64 (5th Cir. 1975) (women’s health spa covered); Anderson v. Pass Christian Isles Golf Club, Inc., 488 F.2d 855 (5th Cir. 1974) (golf course covered); Miller v. Amusement En-
not been applied to retail sales establishments. A retail store, which would not be covered under the federal act unless it served food or provided some sort of entertainment, would be covered under the language of the Arkansas Act. Because the federal act was enacted pursuant to Congress' Commerce Clause power, it is limited to places that affect commerce or are supported by state action. While the courts have interpreted the Commerce Clause broadly for purposes of Title II, the Arkansas Act has no such limitation.

Moreover, the "full enjoyment" language suggests a broad proscription of discrimination under the state act. For example, differences in the services given by an establishment, whether it be in seating patrons in a different order than "first come, first served," or treating them differently in other aspects of service, arguably are covered under the "full enjoyment" language. Cases interpreting similar language under Title II have upheld causes of action by African-American clientele who were permitted to sit in a restaurant, but were never served by the attending waitperson. The refusal to serve as well as delayed service "are equally condemned by the Civil Rights Act of 1964." In addition, litigants have used the federal act to attack dual dining areas for African-American and white patrons. Recently, Denny's restaurants paid a $54 mil-ters., Inc., 394 F.2d 342 (5th Cir. 1968) (amusement park covered even though it did not present live shows); United States v. Slidell Youth Football Ass'n, 387 F. Supp. 474 (E.D. La. 1974) (youth football league covered).


127. In Baird, two video game machines were enough to transform a convenience store into a place of entertainment for purposes of the Act. Baird, 85 F.3d at 453.


lion settlement for similar acts of race discrimination.\footnote{Denny's Chain Is Sued By Black Customers Alleging Race Bias, \textit{WALL ST. J.}, Dec. 19, 1994, at C15; Benjamin A. Holden, \textit{Denny's Chain Settles Suits By Minorities}. \textit{WALL ST. J.}, May 24, 1994, at A3.} Thus, given the broad interpretation of the federal act and the even broader language of the Arkansas Act, there is the potential for a wide variety of lawsuits challenging discriminatory treatment by dining or retail establishments.

The ADA also has public accommodations provisions protecting persons with disabilities.\footnote{42 U.S.C. § 12182(b)(2) (1994). This section prohibits a broad range of discrimination in public accommodations.} The ADA is broader than Title II in the types of establishments it covers\footnote{128. 42 U.S.C. § 12182(b)(2)(A)(ii) (1994).} and in what it requires of proprietors of public accommodations. For example, the ADA prohibits a broad range of discrimination in public accommodations,\footnote{42 U.S.C. § 12182(b)(2)(A)(i) (1994).} and requires "reasonable modifications in policies, practices, or procedures,"\footnote{42 U.S.C. § 12182(b)(2)(A)(ii) (1994).} auxiliary aids and services,\footnote{42 U.S.C. § 12182(b)(2)(A)(iii) (1994).} and the removal of architectural or communication barriers to help ensure participation by individuals with disabilities.\footnote{42 U.S.C. § 12182(b)(2)(A)(iv) (1994).} Furthermore, the ADA contains requirements concerning the accessibility of individuals with disabilities to both newly constructed and already existing commercial facilities.\footnote{42 U.S.C. § 12183(a) (1994).} However, the ADA specifically exempts private clubs, religious organiza-
tions, and entities controlled by religious organizations from its coverage.\footnote{141}{42 U.S.C. § 12187 (1994).}

It is unclear how far the Arkansas Act extends with respect to accommodations for persons with disabilities. While the Arkansas Act provides for a right to the “full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement[,]”\footnote{142}{ARK. CODE ANN. § 16-123-107(a)(2) (Supp. 1995).} it does not contain the explicit and broad accommodations requirements of the ADA. While the right to “full enjoyment” of public accommodations may be meaningless if, for example, a person with a disability cannot access the facility due to the lack of ramps necessary for wheelchairs, it is unclear whether such modifications of structures are contemplated under the Arkansas Act. However, given its broad coverage of public accommodations, it seems likely that the ADA would apply to most public facilities in Arkansas.\footnote{143}{Unlike the ADA, the Arkansas Act has no explicit exemption for religious organizations and entities controlled by such organizations. The ADA does not directly apply to housing, although Title III of the ADA, prohibiting discrimination in public accommodations, may apply to housing. Discrimination based on disability is covered under federal fair housing laws, which will be discussed in the sections of this article devoted to the Arkansas Act’s fair housing sections. See infra notes 276-327 and accompanying text.}

3. Credit and Other Contractual Transactions

In addition to the above-mentioned rights under section 107, the Arkansas Act prohibits discrimination in “credit and other contractual transactions.”\footnote{144}{ARK. CODE ANN. § 16-123-107(a)(4) (Supp. 1995). Credit related to the purchase of real property should be covered by the Arkansas Fair Housing Act sections of the Civil Rights Act and will be discussed in the portion of the article covering that Act. See infra notes 252-303 and accompanying text.} Such transactions include purchases on credit at retail stores and related establishments as well as other types of contractual agreements, including franchise agreements, sales contracts, and employment contracts. While the federal Civil Rights Act of 1866 (hereinafter “section 1981”), makes it illegal in contracts to discriminate because of race,\footnote{145}{42 U.S.C. § 1981(a)-(b) (1994).} this section
does not apply to discrimination based on sex, religion, national origin or disability. The Arkansas Act, therefore, is broader by explicitly prohibiting discrimination related to contracts for all protected classes. Section 1981 applies in the employment context and explicitly applies to “making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Like section 1981, the Arkansas Act should apply when an employment contract is involved. However, it is unclear what it will take for such a contract to exist and whether the act will be interpreted as broadly as section 1981. Like the Arkansas Act, section 1981 has no cap on damages for dis-


dernation in contracts.\textsuperscript{150} Without the damage caps, both subsection 107(a)(4) of the Arkansas Act and section 1981 offer a significant advantage over both Title VII and the Arkansas Civil Rights Act's employment sections for those pursuing employment-related discrimination claims.

4. Voting and Participation in the Political Process

The final protection provided under section 107\textsuperscript{151} makes it illegal to discriminate with respect to the right to vote and participate fully in the political process.\textsuperscript{152} While this section would obviously overlap with the governmental wrongdoing sections of the Arkansas Act,\textsuperscript{153} it is not clear how this might apply in the context of private discrimination.\textsuperscript{154} In addition, such causes of action specifically are cognizable under federal law when discrimination is based on "race, color, or previous condition of servitude."\textsuperscript{155} Federal laws also protect individuals with disabilities in this context.\textsuperscript{156} Like the federal contractual discrimination pro-


\textsuperscript{151} Subsection 107 also prohibits discrimination in property transactions. Ark. Code Ann. § 16-123-107(3) (Supp. 1995). However, because there is now an extensive fair housing act covering property transactions in Arkansas, this section will be covered in the Arkansas Fair Housing Act section of this article. See infra notes 276-327 and accompanying text.


\textsuperscript{153} See infra notes 213-238 and accompanying text.

\textsuperscript{154} It is possible, however, to envision a basis for a violation in the private context. For example, if an employer refuses to give female employees leave to vote on election day, while giving male employees paid leave to vote, a private employer could be held liable under the Act for discrimination based on sex.


\textsuperscript{156} See 42 U.S.C. § 1973ee (1994). In addition, § 504 of the Rehabilitation Act of 1973 prohibits agencies and other entities that receive federal funding from discriminating against individuals with disabilities and requires the entities to provide reasonable accommodations. 29 C.F.R. § 794 (1996). Because the state office of the Federal Election Commission in each state receives federal funding, it comes under the dual mandate of § 504 of nondiscrimination and reasonable accommodations. See also 11 C.F.R. § 6150 (1996) (covering accessibility); 42 U.S.C. §§ 4151-57 (1996); 11 C.F.R. § 6151 (1996) (setting out accessibility requirement for new con-
visions, the federal Voting Rights Act does not apply to discrimination based on religion, disability, national origin or sex. However, these forms of discrimination would likely be covered as an equal protection violation under section 1983.

There are two basic types of discrimination recognized under federal voting rights laws. The first is disenfranchisement or the inability to vote at all. This type of injury occurs when the government puts restrictions or requirements on a person's right to vote such as a poll tax or literacy test. The other form of discrimination is dilution. This occurs when a certain group's votes count less than the votes of other voters.

There is no reason why both forms of discrimination should not be encompassed within the Arkansas Act's prescription of discrimination in voting and participation in the political process.

164. It is noteworthy that a third type of discrimination was recognized by the Supreme Court in Shaw v. Reno, 509 U.S. 630, 631 (1993). In Shaw, the Court identified a new equal protection violation in the voting rights area:
The federal act has a section expressly addressing intimidation, threats, or coercion used to interfere with a person's right to vote. Similar conduct should be covered under the retaliation provisions of the Arkansas Act. In addition, section 5 of the federal act requires any state or political subdivision that seeks to administer any voting qualifications to submit them for approval to the United States Attorney General's office. Arkansas is exempt from section 5 of the federal act, although is required to obtain limited preclearance under section 3 of the federal act. There is no preclearance requirement under the Arkansas Act, although obviously the state and its political subdivisions must comply with the federal act. There is a split of authority as to whether the federal act creates a pri-

[A] plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification.


166. ARK. CODE ANN. § 16-123-108(b) (Supp. 1995); see infra notes 201-211 and accompanying text.


vate right of action, although such violations would be cognizable as private rights of action under section 1983. The Arkansas Act clearly creates such a right of action.

B. Retaliation Provisions

Additional categories of wrongdoing were added to the Arkansas Civil Rights Act during the 1995 legislative session. Along with prohibiting direct acts of discrimination, the Arkansas Act also expressly prohibits retaliation. Rather than tracking the language of Title VII, however, the Arkansas Act tracks the broader language of the ADA. Specifically, the Act provides that:

No person shall discriminate against any individual because such individual in good faith has opposed any act or practice made unlawful by this act or because such individual in good faith made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this act.

This language is virtually identical to that of the ADA, which also prohibits retaliation based on protest activity as well as participation in the charge process. While Title VII prohibits similar actions, its language is more limited. Instead of applying to a “person,” it applies to retaliation by an “employer” against “any of his employees or applicants for employment.” This difference is significant. The Arkansas Act clearly provides a cause of action to those outside of the employment relationship.


175. See Richards, supra note 5, at 89.


177. The Supreme Court has recently interpreted the language of Title VII in a broad manner, making it applicable to acts of retaliation perpetuated against former employees. See Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997).
The Arkansas Act contains another retaliation section that similarly applies to "persons" rather than employers. The Act states:

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this act.\(^{178}\)

This provision is almost identical to that of the ADA;\(^{179}\) however, Title VII does not contain similar language. This section of the Arkansas Act should provide a cause of action to any person, even though not employed by the particular company involved, who is threatened for encouraging an employee to pursue a discrimination claim against his employer.

These provisions go beyond employment discrimination-related activities and also encompass all rights guaranteed under the Arkansas Act, including sections involving public accommodations, property transactions, credit and other contractual transactions, and participation in the political process. This section also should apply to the housing discrimination sections of the Act (a description of which follows) because the fair housing sections of the Arkansas Act likewise declare the "opportunity to obtain housing and other real estate" without discrimination a "civil right."\(^{180}\)

C. Remedies for Discrimination Under Section 107

The Arkansas Act distinguishes between remedies available for the general categories of discrimination and those available for employment discrimination. Essentially, the distinction in the employment discrimination context comes down to the difference between intentional discrimination and other forms of discrimination.\(^{181}\) This reflects

\(^{178}\) ARK. CODE ANN. § 16-123-108(b) (Supp. 1995).
\(^{179}\) 42 U.S.C. § 12203(b) (1994).
\(^{180}\) ARK. CODE ANN. § 16-123-203 (Supp. 1995).
\(^{181}\) This reflects an implicit acknowledgment of federal cases (and now legislation) holding that employment discrimination need not be intentional to violate Ti-
the legislature's understanding and adoption of the disparate impact theory of employment discrimination that has been developed by the courts and acknowledged by Congress under Title VII.182

For non-employment related forms of discrimination, the Act provides that:

Any person who is injured by an intentional act of discrimination [with respect to all rights except employment] . . . shall have a civil action in a court of competent jurisdiction to enjoin further violations, to recover compensatory and punitive damages, and, in the discretion of the court, to recover the cost of litigation and a reasonable attorney's fee.183

Compensatory damages are defined as “damages for mental anguish, loss of dignity, and other intangible injuries,” but explicitly do not include punitive damages.184 While the Arkansas Act leaves costs and attorney's fees within the discretion of the trial court, it should be noted that the federal courts have interpreted similar language applicable to Title VII to essentially require attorney's fees awards to prevailing plaintiffs.185 Unlike the employment sections, there is no cap on the amount of damages allowed for discrimination covered by this section.

In cases of employment discrimination, a person shall have a civil action in a court of competent jurisdiction, which may issue an order prohibiting the discriminatory practices and provide affirmative relief from the effects of the practices, and award back pay, interest on

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183. ARK. CODE ANN. § 16-123-107(b) (Supp. 1995).


185. Christianburg Garment Co. v. EEOC, 434 U.S. 412, 417 (1978). Several recent Eighth Circuit cases have limited the concept of prevailing party under Title VII and have denied attorney's fees on that basis. See, e.g., Pedigo v. P.A.M. Transport, Inc., 98 F.3d 396, 397-98 (8th Cir. 1996).
back pay, and, in the discretion of the court, the cost of litigation and a reasonable attorney’s fee.\textsuperscript{186} This section provides the only relief\textsuperscript{187} for disparate impact discrimination, which requires no showing of intent.\textsuperscript{188} Under the Supreme Court’s analysis of Title VII prior to the addition of compensatory and punitive damages by the federal Civil Rights Act of 1991, a plaintiff was entitled to back pay earned from the date of discharge to the date of reinstatement (or front pay, if no reinstatement was ordered),\textsuperscript{189} and lost fringe benefits, such as vacation and pension benefits.\textsuperscript{190} There is no reason to believe that this section of the Arkansas Act contemplates different types of relief. Under the Arkansas Act, back pay is limited to two years prior to the filing of an action.\textsuperscript{191}

In addition, for acts of “intentional discrimination,” the plaintiff in an employment discrimination case can recover compensatory and punitive damages,\textsuperscript{192} but unlike other types of discriminatory acts covered by section 107 of the Arkansas Act, there are caps on the amount of compensatory and punitive damages available in the employment discrimination context.\textsuperscript{193} The caps are as follows: (1) $15,000 for employers of fewer than fifteen; (2) $50,000 for employers of more than fourteen and fewer than 101; (3) $100,000 for employers of more than 100 and fewer than 201; (4) $200,000 for employers of more than 200 and fewer than

\paragraph{Notes}
\begin{itemize}
\item[\textsuperscript{186}] \textit{ARK. CODE ANN.} § 16-123-107(c)(1)(A) (Supp. 1995).
\item[\textsuperscript{187}] I use the term “relief” here because such awards are considered equitable in nature for purposes of Title VII. \textit{See} 42 U.S.C. § 2000e-5(g)(1) (1994) (characterizing backpay as equitable); Franks v. Bowman Transp. Co., 424 U.S. 747, 768 n.27 (1976) (characterizing lost benefits and retroactive seniority as restitution).
\item[\textsuperscript{188}] \textit{Griggs}, 401 U.S. at 429-33.
\item[\textsuperscript{189}] \textit{See United States v. Burke}, 504 U.S. 229, 239 n.9 (1992) (acknowledging use of front pay in lieu of reinstatement); Deloach v. Delchamps, Inc., 897 F.2d 815, 822 (5th Cir. 1990) (front pay awarded where reinstatement not feasible).
\item[\textsuperscript{190}] \textit{Burke}, 504 U.S. at 239.
\item[\textsuperscript{191}] \textit{ARK. CODE ANN.} § 16-123-107(c)(1)(B) (Supp. 1995).
\item[\textsuperscript{192}] The characterization of such awards as compensatory “damages” supports a reading of the forms of relief available under \textit{ARK. CODE ANN.} § 16-123-107(c)(1)(A) (Supp. 1995), such as backpay and lost benefits, as consistent with Title VII. \textit{See Suggs v. ServiceMaster Educ. Food Management}, 72 F.3d 1228, 1233 (6th Cir. 1996). Therefore, it would seem likely that awards of backpay, attorney’s fees and the like would be considered equitable in nature and therefore subject to suit in chancery court rather than circuit court.
\item[\textsuperscript{193}] \textit{ARK. CODE ANN.} § 16-123-107(c)(2)(A) (Supp. 1995).\end{itemize}
501; (5) $300,000 for employers of more than 500. These are identical to the caps set under Title VII and for employment discrimination under the ADA. For employment discrimination under the state Act, the action must be brought within one year of the alleged discrimination or within ninety days of receipt of a right to sue letter or determination from the Equal Employment Opportunity Commission (hereinafter “EEOC”), whichever is later. This gives the potential plaintiff a significant extension of time compared to Title VII and the ADA in which to file claims. Under Title VII and the ADA, the employee in Arkansas must file her charge with the EEOC within 180 days of the alleged discriminatory act.

In addition, the provisions regarding retaliation refer back to the employment discrimination provisions for purposes of damages. The remedies and procedures for violation of the retaliation provisions are the same as those available under section 106, namely, a civil action to enjoin further violation, to recover compensatory and punitive damages, and, in the discretion of the court, to recover costs and attorney’s fees.

D. Coverage for Hate Crimes Under Section 106

Closely related to discrimination, section 106 of the Arkansas Act (hereinafter “section 106”) covers damages and injunctive relief available to victims of “hate offenses.” Specifically, it states that:

An action for injunctive relief or civil damages, or both, shall lie for any person who is subjected to acts of:

(1) Intimidation or harassment; or
(2) Violence directed against his person; or


197. The ADA requires a plaintiff to follow the same procedures as are followed under Title VII. 42 U.S.C. § 12117(a) (1994).
Vandalism directed against his real or personal property, where such acts are motivated by racial, religious, or ethnic animosity. While other provisions of the Act explicitly apply to gender discrimination, the hate crimes section does not. There is no federal act aimed at hate crimes in particular except for violence based on gender.

Similar hate crimes statutes have come under constitutional attack as First Amendment violations. Sections 2


203. Hate crimes are encompassed within various civil rights statutes. See 18 U.S.C. § 241 (1994) (prohibiting conspiracies designed to interfere with a person's enjoyment of his or her civil rights); 42 U.S.C. § 1983 (1994) (covering deprivation of civil rights under color of state law); 18 U.S.C. § 247 (1994) (making it illegal to deface, damage, or destroy any religious real property because of its religious function as well as to obstruct by force or threat of force a person's enjoyment of his or her right to freedom of religion); 42 U.S.C. § 3604 (1994) (forbidding interference with the exercise of fair housing rights). In addition, the federal sentencing guidelines provide for a heightened punishment under appropriate circumstances for criminal activities motivated by "race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation." U.S.S.G. § 3A1.1(a).
204. 42 U.S.C. § 13981 (1994); but see note 203.
205. See, e.g., Wisconsin v. Mitchell, 508 U.S. 476 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). Both these Supreme Court cases raised the First Amendment issue in the context of criminal prosecutions. In R.A.V., the Court held that a city ordinance prohibiting bias-motivated disorderly conduct facially invalid under the First Amendment because it prohibited speech solely based on content. R.A.V., 505 U.S. at 381, 391-92. Mitchell considered the constitutionality of sentence enhancements for racially motivated criminal acts. The Court held a Wisconsin statute constitutional under both the First and Fourteenth Amendments because it prohib-
and 3 of the Arkansas Act would likely withstand such a challenge. The First Amendment generally does not cover conduct, even if it has expressive content. The United States Supreme Court has held that physical assault is conduct and not speech protected by the First Amendment. This holding would clearly encompass violations of section 2 of the Arkansas Act—violence directed against a person. By analogy, it should also cover section 3, as vandalism likewise is conduct that does not have a First Amendment component. It is unclear whether the intimidation and harassment section would withstand constitutional scrutiny. Certainly if the conduct amounts to an assault, it will be the type of conduct unprotected by the First Amendment. However, the vague nature of the acts covered by this section makes it problematic.

The hate crimes section provides that any party who prevails in an action under this section “shall be entitled to damages, including punitive damages, and in the discretion of the court to an award of the cost of the litigation, and a reasonable attorney’s fee in an amount to be fixed by the court.” This language makes damages, and specifically punitive damages, mandatory. Unlike the recovery available for discriminatory acts covered by section 107, it also mandates attorney’s fees and costs as opposed to making them discretionary. In addition, unlike the employment discrimination provision, there is no cap on punitive damages awarded for hate crimes. Obviously, this section has more teeth than section 107. However, employees and other potential defendants under section 107 should not rest easy. It seems reasonable that if an employer subjects

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207. Id.
an employee to actions that fit within this part of the statute—the acts rise to the level of hate crimes—that employer would not be able to take advantage of the cap on damages. Harassment based on these characteristics should fit within this section of the statute. This section does except speech covered by the First Amendment of the United States Constitution or article 2, section 6 of the Arkansas Constitution.211

E. Governmental Section: Wrongful Conduct
Under "Color" of Law

There is a section of the Arkansas Act that expressly applies to the violation of rights by governmental actors. It functions essentially as the state equivalent to the federal section 1983.212 This section used to apply to "[e]very governmental entity or natural person."213 During the 1995 legislative session, the statute was changed slightly and now reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or any of its political subdivisions, subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution, shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress.214

The new provision also limited protection to "any person within the jurisdiction thereof." Thus, persons outside the jurisdictional reach of Arkansas courts cannot sue under

211. ARK. CODE ANN. § 16-123-106(c) (Supp. 1995).
212. 42 U.S.C. § 1983 (1994). Indeed, the two statutes have very similar language. Section 1983 provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.
the statute. This section allows the court, in its discretion, to require the "party held liable" for costs of litigation and attorney's fees.\textsuperscript{215}

This section explicitly states that the courts should look to cases interpreting 42 U.S.C. § 1983 (hereinafter "section 1983") as of January 1, 1993, to construe the Arkansas Act.\textsuperscript{216} It is noteworthy that section 1983, like the state statute, provides for discretionary attorney's fees, which, like those under Title VII, have become essentially a mandatory award for prevailing plaintiffs.\textsuperscript{217} Section 1983 applies to a wide range of governmental conduct, including prisoner's rights cases,\textsuperscript{218} the exercise of First Amendment rights,\textsuperscript{219} and employment discrimination.\textsuperscript{220} This suggests a broad array of applications for the state act. However, decisions under section 1983 are given only persuasive authority for purposes of the Arkansas Act.\textsuperscript{221}

One federal court has had occasion to engage in limited interpretation of this section. In Morrow v. City of Jacksonville,\textsuperscript{222} the court noted the limited application of this section to deprivations of "rights, privileges, or immunities secured by the Arkansas Constitution."\textsuperscript{223} The plaintiff alleged employment discrimination based on her disability. Although the court was brief in its reasoning, apparently it found no support for such a claim under the Arkansas Constitution. This case highlights a significant distinction between the Arkansas Act and the federal § 1983. The federal act applies not only to constitutional

\textsuperscript{215} \textsc{Ark. Code Ann.} § 16-123-105(a) (Supp. 1995).

\textsuperscript{216} \textsc{Ark. Code Ann.} § 16-123-105(c) (Supp. 1995).


\textsuperscript{218} \textit{See}, \textit{e.g.}, \textit{Vitek v. Jones}, 445 U.S. 480 (1980) (involuntary commitment of prisoner to mental hospital).

\textsuperscript{219} \textit{See}, \textit{e.g.}, \textit{Swineford v. Snyder County}, 15 F.3d 1258, 1270 (3d Cir. 1994).


\textsuperscript{223} \textit{Id.} at 820 n.2 (quoting \textsc{Ark. Code Ann.} § 16-123-103 (Supp. 1995)).
deprivations but also to any arising under "the laws." 224 Therefore, the federal act's coverage is broader and encom-
passes violations based on federal anti-discrimination
laws. 225 The Arkansas Act only covers deprivations of
rights guaranteed under the Arkansas Constitution. This is
a significant limitation.

The Arkansas Act is somewhat confusing, because it
creates a cause of action against governmental actors, while
at the same time it provides for sovereign immunity for the
state. Section 16-123-104 states that "[n]othing in this sub-
chapter shall be construed to waive the sovereign immunity
of the State of Arkansas." 226 This apparently means that
the Civil Rights Act does not apply to the state. However,
there seems to be no reason why the Arkansas Act could
not be used against individuals acting in their "individual"
capacities, through the reasoning of Ex parte Young. 227
Young limits a potential plaintiff to injunctive and declara-
tory relief, 228 along with other forms of incidental relief,
such as attorney's fees. 229

The Arkansas courts have similarly held that a request
for declaratory or injunctive relief that does not have an
impact on the state treasury is not a claim against the state
for purposes of sovereign immunity. 230 However, it is not
clear whether relief characterized as "incidental" by the
federal courts will be considered similarly by the Arkansas
courts. Indeed, precedent thus far suggests that it is un-

225. See Morrow, 941 F. Supp. at 826.
226. ARK. CODE ANN. § 16-123-104 (Supp. 1995). Instead, the state Claims
Commission has "exclusive jurisdiction over all claims against the State of Arkan-
sas." ARK. CODE ANN. § 19-10-204(a) (Supp. 1995).
227. 209 U.S. 123 (1908). In Young, the Court engaged in a legal fiction, reason-
ing that Minnesota's Attorney General was not acting in his "official" capacity when
he sought to enforce the state's laws that were unconstitutional. The reasoning of
the Court was that a state official does not act in his or her official capacity when he
or she seeks to enforce an unconstitutional act. The state would only sanction con-
stitutional actions, and therefore the lawsuit could not be considered one against the
state. Id. at 168. See Commission on Judicial Discipline and Disability v. Digby, 792
S.W.2d 594 (Ark. 1990).
228. Young, 209 U.S. at 162-63.
230. Digby, 792 S.W.2d at 595; Cammack v. Chalmers, 680 S.W.2d 689 (Ark.
1984).
likely that any sort of monetary relief against the state would be attainable.\textsuperscript{231} The legislature's inclusion of section 1983 case law as persuasive authority for the Arkansas Act supports this conclusion, as the doctrine of \textit{Young} was developed prior to 1993 in the section 1983 context.\textsuperscript{232} Legislation enacted in 1981 provides for tort remedies against state employees to the extent they are covered by liability insurance,\textsuperscript{233} although several cases decided in the 1980s have caused some confusion with respect to this legislation's operation.\textsuperscript{234} In addition, state employees are not immune from suit to the extent they act maliciously.\textsuperscript{235}

Finally, the legislature is limited by the Arkansas Constitution, which explicitly provides for the sovereign immunity of the state.\textsuperscript{236} Arguably, the legislature could not abrogate sovereign immunity even if it wished to without a constitutional amendment, as sovereign immunity is guaranteed under the Arkansas Constitution.\textsuperscript{237} With this express limitation on actions against the state, the most significant area of applicability for this section will likely be against political subdivisions and other official actors who do not act on behalf of the State of Arkansas. However, political subdivisions have been granted immunity in certain contexts by the legislature.\textsuperscript{238}

\begin{itemize}
\item \textsuperscript{231} See \textit{Digby}, 792 S.W.2d at 595 (plaintiff dropped claim for costs and expenses apparently to avoid sovereign immunity claim).
\item \textsuperscript{232} \textit{Young}, 209 U.S. at 123; \textit{Digby}, 792 S.W.2d at 594.
\item \textsuperscript{233} \textit{Ark. Code Ann.} \textsection 19-10-305(a) (1987); \textit{Smith v. Denton}, 895 S.W.2d 550 (Ark. 1995).
\item \textsuperscript{235} \textit{Bland v. Veser}, 774 S.W.2d 124 (Ark. 1989); \textit{Beaulieu v. Gray}, 705 S.W.2d 880 (Ark. 1986).
\item \textsuperscript{236} \textit{Ark. Const. art. 5, § 20} ("The State of Arkansas shall never be made defendant in any of her courts."). See \textit{Arkansas State Highway Comm'n v. Lasley}, 390 S.W.2d 443 (Ark. 1965).
\item \textsuperscript{237} \textit{Roesler v. Denton}, 390 S.W.2d 98, 99 (Ark. 1965); \textit{Bryant v. Arkansas State Highway Comm'n}, 342 S.W.2d 415, 416 (Ark. 1961).
\item \textsuperscript{238} \textit{Ark. Code Ann.} \textsection 21-9-301 (Repl. 1996). This section explicitly states: "Counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the state shall be immune from liability and from suits for damages, except to the extent that they may be covered by liability insurance." \textit{Id.} These provisions have withstanded constitutional attack. See \textit{Thompson v. Sanford}, 663 S.W.2d 932, 934 (Ark. 1984) (holding that statutes "granting political subdivision immunity . . . are legal"); \textit{Hardin v. City of Devalls Bluff}, 508
F. Express Exceptions to the Act's Coverage

There are several broad categories of exemption from the Arkansas Act's coverage under these sections. They cover four main areas: (1) religious entities; (2) non-discriminatory actions; (3) insurance-related practices; and (4) state actors. Because these are categories of exemption, they are likely to be considered affirmative defenses, with the burden of proof placed on the employer. In addition, there are exemptions available under parallel federal laws that may make the Arkansas Act a more attractive alternative for plaintiffs.

With respect to religious institutions, the provisions of the Arkansas Act that relate to employment discrimination do not apply to "employment by a religious corporation, association, society, or other religious entity." There is a similar exemption under Title VII. The ADA likewise

S.W.2d 559 (Ark. 1974) (legislative enactments granting counties, municipal corporations, and other political subdivisions immunity from tort liability are constitutional). One of the few cases interpreting the Arkansas Act actually deals with an attempt to gain sovereign immunity by a local utility company. Masterson v. Stambuck, 902 S.W.2d 803 (Ark. 1995), involved a fatal car crash between a garbage truck and car. Three persons died as a result of the accident. The garbage truck hit a utility pole, which broke in two and hit the cab of the truck. Along with the driver, the plaintiffs sued Conway Corporation for negligently maintaining the pole too close to the highway. Conway Corporation responded by claiming governmental and charitable immunity. Apparently, the claim of governmental immunity lead to one of the plaintiff's estates claiming a violation of the governmental entity section of the Arkansas Civil Rights Act. Ark. Code Ann. § 16-123-105(a) (Supp. 1995). The estate alleged that Conway Corporation had deprived the deceased of his life. Conway Corporation moved to dismiss this claim, arguing that the Arkansas Act did not apply under such circumstances. In granting the motion to dismiss, the Court did not directly address the Civil Rights Act, holding instead that Conway Corporation is not entitled to governmental immunity and is not entitled to charitable immunity. This suggests a more limited approach to entities trying to tag on state sovereign immunity because of a loose affiliation with a governmental entity. Masterson, 902 S.W.2d at 810-11.


contains a provision relating to religious entities, although it is different.\(^\text{242}\) It provides that the ADA "shall not prohibit a religious corporation, association, educational institution, or society from giving preference in employment to individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."\(^\text{243}\) The ADA also permits religious entities to require employees to "conform to the religious tenets of such organization."\(^\text{244}\)

In addition, employers need not accommodate religious practices of an employee or prospective employee if "the employer demonstrates that he is unable to reasonably make such accommodation without undue hardship on the conduct of the employer's business."\(^\text{245}\) This parallels the language of Title VII.\(^\text{246}\) The courts have interpreted this language in Title VII to impose a less than "de minimis" cost in accommodating the employee's religious beliefs.\(^\text{247}\) If the burden is more than de minimis, the employer need not accommodate the employee's belief. Given the similar language in both the Arkansas Act and Title VII, Arkansas courts may interpret the state act similarly.

Defendants are not liable under the Arkansas Act if they can show that their "actions were based on legitimate, nondiscriminatory factors and not on unjustified reasons."\(^\text{248}\) This applies to all aspects of discrimination covered by the Act.\(^\text{249}\) This language is somewhat confusing. While the federal courts have interpreted Title VII as shift-

\(\text{242. 42 U.S.C. } \S 12113(c) (1994).\)
\(\text{243. 42 U.S.C. } \S 12113(c)(1) (1994).\)
\(\text{244. 42 U.S.C. } \S 12113(c)(2) (1994). \text{ The ADA also exempts the government of the United States or Indian tribe from its employment discrimination coverage. 42 U.S.C. } \S 12111(5)(B)(I) (1994). \text{ The United States, however, is covered by the Rehabilitation Act of 1973. See 29 U.S.C. §§ 790-94 (1994). In enacting the ADA, Congress reaffirmed its commitment to antidiscrimination in employment based on an individual's "state of physical handicap." 42 U.S.C. } \S 12205(b)(I) (1994).\)
\(\text{245. Ark. Code Ann. } \S 16-123-103(b) (Supp. 1995).\)
\(\text{246. 42 U.S.C. } \S 2000e(j) (1994).\)
\(\text{248. Ark. Code Ann. } \S 16-123-103(c) (Supp. 1995).\)
\(\text{249. Ark. Code Ann. } \S 16-23-103(c) (Supp. 1995). \text{ Sub-sections (a) and (b) of this exemption section apply only to employment discrimination. Ark. Code Ann. } \S 16-23-103(a), (b) (Supp. 1995).\)
ing a burden of production on employers to show that they were motivated by a legitimate, nondiscriminatory reason, this appears to shift the burden of persuasion under the Arkansas Act. In addition, this language suggests that only a legitimate business reason provides an exemption. So if an employer has what might be characterized as an irrational or "illegitimate" reason—such as an employee's zodiac sign—for taking an adverse employment action, that employer's action arguably does not fall within the exemption. The result, if this analysis is accurate, could essentially amount to abrogation of the at-will rule in Arkansas. It is very unlikely that this is what the legislature intended given Arkansas' fierce defense of employment at-will, but the issue remains for the courts' interpretation. Perhaps this section is meant as a gap-filler for other legitimate reasons for distinguishing between employees that are not expressly set out in the Arkansas Act.

The Arkansas Act is missing several exemptions that are contained in Title VII. Notably, Title VII provides an exemption for bona fide occupational qualifications as well as bona fide seniority or merit systems. Differences

251. See Griffin v. Erickson, 642 S.W.2d 308, 310 (Ark. 1982) (affirming the at-will rule in Arkansas). After M.B.M. Co. v. Counce, 596 S.W.2d 681 (Ark. 1980), it seemed that the Arkansas Supreme Court had recognized a public policy exception to employment at-will. See Mark L. Martin, Wrongful Discharge of Employees Terminable at Will—A New Theory of Liability in Arkansas, 34 Ark. L. Rev. 729 (1980). However, only rarely has the court held that a public policy was violated such that employment at-will did not apply. Wal-Mart, Inc. v. Baysinger, 812 S.W.2d 463 (Ark. 1991); Mapco, Inc. v. Payne, 812 S.W.2d 483 (Ark. 1991); Sterling Drug, Inc. v. Oxford, 743 S.W.2d 380 (Ark. 1988). The public policy exception recognized in the worker's compensation context in both Wal-Mart and Mapco was later legislatively overruled. Ark. Code Ann. § 11-9-107(d) (1996) ("This section shall not be construed as establishing an exception to the employment at will doctrine."). For an analysis of these cases and the legislature's reaction to them, see J. Thomas Sullivan, The Arkansas Remedy for Employer Retaliation Against Workers' Compensation Claimants, 16 U. Ark. Little Rock L.J. 373 (1994). The majority of cases have held that no public policy was violated. See Cross v. Coffman, 805 S.W.2d 44 (Ark. 1991); Proctor v. East Cent. Ark. EOC, 724 S.W.2d 163 (Ark. 1987); Newton v. Brown & Root, 658 S.W.2d 370 (Ark. 1983); Counce, 596 S.W.2d at 683-84; Koenighain v. Schilling Motors, Inc., 811 S.W.2d 342 (Ark. App. 1991).
between employees based on seniority or objective merit (for example, the amount of sales last year) would normally provide a legitimate reason to differentiate between, for example, a candidate for promotion. These defenses should fit within the "legitimate, nondiscriminatory factors" exemption discussed above. If they fall within this exemption, they will constitute affirmative defenses, which is consistent with federal law.

The Arkansas Act may not be intended to contain a bona fide occupational qualification (hereinafter "BFOQ") defense for employers. The BFOQ defense has been of decreased use to employers as a defense under Title VII because of the narrow reading the courts have given it. Therefore, the state simply could have chosen not to include this defense because it is of limited applicability. For the few employers who would have the defense available to them under Title VII, the Arkansas Act may not provide the same defense.

The Arkansas Act also contains insurance-related provisions that protect certain types of organizations from discrimination claims in specific contexts. These provisions state:

Provided the conduct at issue is based on a bona fide business judgment and is not a pretext for prohibited discrimination, nothing in this subchapter shall be construed to prohibit or restrict:

(1) An insurer, hospital, medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or any bank, savings and loan, or other lender from underwriting insurance or lending risks or administering such risks that are based on or are not inconsistent with federal or state law;

(2) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or are not inconsistent with federal or state law; or

255. See Richards, supra note 5, at 90.
(3) A person covered by this subchapter from establishing, sponsoring, observing, or administering the terms of a bona fide benefit plan that is not subject to federal or state laws that regulate insurance.\textsuperscript{256}

This language is nearly identical to a similar provision in the ADA, with two notable exceptions.\textsuperscript{257} First, it adds language in section one regarding lenders who underwrite insurance or lending risks that is not contained in the parallel section of the ADA. Second, the Arkansas Act contains the preamble language: "Provided the conduct at issue is based on a bona fide business judgment and is not a pretext for prohibited discrimination," which is not present in the ADA.\textsuperscript{258}

The language in sub-sections (1) and (2) limiting the exemptions to the extent they are "not inconsistent with federal law" greatly diminishes their reach. Under Title VII, employers cannot discriminate, for example, in pension pay-outs because women statistically live longer than men.\textsuperscript{259} Generally, the plan must be employer-sponsored to be covered by Title VII.\textsuperscript{260} Title VII also applies to employers' discriminatory practices involving insurance.\textsuperscript{261} For example, in \textit{Los Angeles Department of Water and Power v. Manhart}, the employer was held guilty of discrimination because it made women, based on life expectancy, pay more into a pension plan than men.\textsuperscript{262} In \textit{Arizona Governing Committee v. Norris}, the employer was held guilty of discrimination for paying less in pension benefits to women because of their alleged longer life expectancy. The plan in that case was managed by an outside insurer who set the rules governing payment. However, this did not insulate the employer because it picked the plan. Therefore, it is clear that just because an employer's practice involves in-

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{256} ARK. CODE ANN. §§ 16-123-103(d)(1)-(3) (Supp. 1995).
  \item \textsuperscript{257} 42 U.S.C. § 12201(c) (1994).
  \item \textsuperscript{258} ARK. CODE ANN. § 16-123-103(d) (Supp. 1995); 42 U.S.C. § 12201(c) (1994).
  \item \textsuperscript{259} Los Angeles Dep't. of Water & Power v. Manhart, 435 U.S. 702 (1978).
  \item \textsuperscript{260} Arizona Governing Comm'n v. Norris, 463 U.S. 1073 (1983).
  \item \textsuperscript{261} See Norris, 463 U.S. 1073; Manhart, 435 U.S. 702.
  \item \textsuperscript{262} Manhart, 435 U.S. at 722-23.
\end{itemize}
\end{footnotesize}
insurance, the employer cannot entirely avoid liability under either Title VII or the Arkansas Act.

The ADA also prohibits discrimination in insurance practices. However, it contains nearly identical insurance exemptions, as explained above, to those of the Arkansas Act. This suggests that the Arkansas Act's insurance exemption should have some application in the context of disability discrimination. An insurance or benefit plan that meets the ADA insurance exemption will not violate federal law. Therefore, the Arkansas Act's insurance exemption should relieve an employer of liability to the extent it satisfies the ADA exemption.

The insurance exemption is also applicable to other provisions of the Arkansas Act. In particular, it should be applicable to the public accommodations portion of the Act. Once again, however, federal courts have limited discrimination in insurance allowable under the ADA. Federal courts have held that discrimination in insurance based on disability can violate the public accommodations provisions of the ADA in spite of the insurance exemption. Give the similarity between the Arkansas Act's public accommodation provision and those of the ADA, the insurance section may provide only limited exemption for those discriminating in furnishing insurance.

There is another reason why this section is curious. By its language, the Arkansas Act does not apply to terms, conditions or privileges of employment. Employer-sponsored benefit plans are terms or conditions of employment. While the insurance exemption may be applicable to the public accommodations provision, insurance and benefits

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264. For more on the ADA’s insurance exemption and its reach, see EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, INTERIM ENFORCEMENT GUIDE ON APPLICATION OF ADA TO HEALTH INSURANCE (June 8, 1993), reprinted in, Fair Empl. Prac. Manual 405:7115 (BNA).
do not directly relate to the right to obtain and hold employment.\textsuperscript{268} Therefore, it is not clear why this section is needed, unless the Arkansas Act is actually meant to be broader than its plain language. Considering the limitation based on federal law, to the extent it does establish an "exemption," it does not appear to be a very meaningful one except in the disability context.

In addition, the Arkansas Act states that "[t]his subchapter shall not apply to matters regulated by the Arkansas Insurance Code or the Trade Practices Act of the Arkansas Insurance Code . . . ."\textsuperscript{269} The practical effect of the Insurance Code exemption is not entirely clear. The Arkansas Act already contains insurance exemptions. Also, there are anti-discrimination sections in the Trade Practices Act. The Trade Practices Act prohibits any person in the business of insurance from engaging in certain acts of "unfair discrimination,"\textsuperscript{270} which includes refusing to

\textsuperscript{268} A possible loophole to classify such employer policies as discriminatory would be proof showing the fringe benefits were so disparate as to cause a certain group to quit their jobs. See supra text accompanying notes 105-109.

\textsuperscript{269} \textsc{Ark. Code Ann.} \textsection{} 16-123-103(e) (Supp. 1995).

\textsuperscript{270} The Trade Practices Act is fairly sweeping in the conduct it prohibits, including:

\begin{enumerate}
\item Making or permitting any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of such contract;
\item Making or permitting any unfair discrimination between individuals of the same class and of essentially the same hazard in the amount of premium policy fees or rates charged for any policy or contract of disability insurance, or in the benefits payable thereunder, or in any of the terms or conditions of the contract, or in any other manner whatever;
\item Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling, or limiting the amount of insurance coverage on a property or casualty risk because of the geographic location of the risk . . . .
\item Making or permitting any unfair discrimination between individuals or risks of the same class and of essentially the same hazards by refusing to issue, refusing to renew, canceling, or limiting the amount of insurance coverage on a residential property risk or on the personal property contained therein because of the age of the residential property . . . .
\item Refusing to insure, refusing to continue to insure, or limiting the amount of coverage available to an individual because of the marital status of the individual . . . .
\end{enumerate}
One possible difference this exemption might make involves who may pursue violations. It is unclear whether there is a private right of action under the Trade Practices Act. Section 23-66-202 states that the Arkansas Act is meant to "regulate trade practices in the business of insurance." However, it explicitly states that "no provisions of this subchapter are intended to establish or extinguish a private right of action for a violation of any provision of this subchapter." Therefore, there is no private right of action under the Trade Practices Act. This section presumably would apply to any causes of action existing at the time of its enactment. In that case, because the Trade Practices Act was enacted in 1947, it predates the Civil Rights Act. Therefore, it arguably could not preserve any claims available under the Arkansas Act. Adding to the confusion is section 23-66-204, which states that "[t]he powers vested in the commissioner by this subchapter shall be additional to any other powers to enforce any penalties, fines, or forfeitures authorized by law with respect to the methods, acts, and practices declared to be unfair or deceptive." This suggests that only the insurance commissioner possesses power to enforce this statute. For actions falling within the Trade Practices Act, this could provide a meaningful exception.

G. Housing Discrimination

One of the most impressive sections contained in the Arkansas Act is its sweeping proscription of housing discrimination. While the 1993 version of the Arkansas Act

(F) terminating or modifying coverage or refusing to issue or refusing to renew any policy or contract of insurance solely because the applicant or insured or any employee of either is mentally or physically impaired.

(G) refusing to insure or continue to insure any individual or risks solely because of race, color, creed or sex.


prohibited discrimination in property transactions as well as in credit and other contractual transactions, a provision was added to the Civil Rights Act during the 1995 legislative session explicitly covering fair housing—the Arkansas Fair Housing Act (hereinafter “AFHA”).  The AFHA declares the right to obtain “housing and other real estate without discrimination because of religion, race, color, national origin, sex, disability, or familial status” a civil right. This law has two meaningful additions to its coverage. Unlike other sections of the Civil Rights Act, the AFHA covers “familial status” (though not expressly defined), as well as discrimination based on the status of cohabitants.

The AFHA specifically prohibits a broad range of discriminatory actions:

(a) A person engaging in a real estate transaction, or a real estate broker or salesman shall not [on a basis prohibited].

(1) Refuse to engage in a real estate transaction with a person;

(2) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in the connection therewith;

(3) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction;


279. ARK. CODE ANN. § 16-123-204(a) (Supp. 1995).

280. ARK. CODE ANN. § 16-123-204(a) (Supp. 1995).
(4) Refuse to negotiate for a real estate transaction with a person;
(5) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or knowingly fail to bring a property listing to a person’s attention, or refuse to permit a person to inspect real property;
(6) Make, print, or publish or cause to be made, printed, or published, any notice, statement, or advertisement with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin or an intention to make any such preference, limitation, or discrimination; or
(7) Offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith. 281

A real estate broker or salesman is defined in an earlier section of the Arkansas Act. 282 However, the Arkansas Act applies to others besides real estate brokers or salesmen, essentially encompassing any person involved in a real estate transaction (including, for example, the owner of a home who is selling it).

281. Ark. Code Ann. §§ 16-123-204(a)(1)-(7) (Supp. 1995). Parallel federal legislation, the Fair Housing Act of 1968 and its 1988 amendment extending coverage to individuals with disabilities, prohibits roughly the same categories of discrimination “in the sale or rental, or to otherwise make unavailable or deny” residential property to protected persons. See 42 U.S.C. §§ 3604(a)-(d) (1994). In addition, Title III of the ADA prohibits discrimination on the basis of disability in public accommodations, and may also apply to housing discrimination under appropriate circumstances.

282. The Act defines a real estate broker or salesman as a person, whether licensed or not, who:
(A) For or with the expectation of receiving consideration, lists, sells, purchases, exchanges, rents or leases real property; (B) Negotiates or attempts to negotiate any of those activities; (C) Holds himself out as engaged in those activities; (D) Negotiates or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon real property; (E) Is engaged in the business of listing real property in a publication; or (F) Is a person employed by or acting on behalf of a real estate broker or salesman.

The AFHA covers a broader range of properties than the federal act. Unlike parallel federal legislation, it is not limited to dwellings or residences, but should also include commercial real estate. The terms “real estate transaction” and “real property” are broadly defined under the Arkansas Act, making the AFHA applicable to the “sale, exchange, rental, or lease” of a “building, structure, mobile home, real estate, land, mobile home park, trailer park, tenement, leasehold, or an interest in a real estate cooperative or condominium.”

The AFHA also contains fewer exemptions than federal statutes. It exempts only (1) housing that contains two units where one unit is occupied by the owner or his or her family member and (2) housing rented by an owner who has temporarily vacated the premises for up to twelve months. In comparison, the federal act exempts (1) homes rented by owners of three or fewer homes who do not advertise their properties for rent or use an agent for rental purposes and (2) dwellings for four or fewer families. The familial status protection under the federal act does not apply to “housing for older persons” as defined under that law. There is no parallel exemption under the AFHA. The federal act does not preclude “reasonable local, state, or federal restrictions” on the maximum number of occupants who may live in a dwelling. The federal act contains exemptions for religious organizations and private clubs. The AFHA contains no parallel exemption for pri-

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However, the AFHA does not prohibit a religious organization "from limiting the sale, rental, or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving a preference to such persons." Aside from this exemption, the AFHA should cover more properties and more landlords than parallel federal law.

Another striking difference between the federal and the state laws is the lack of an administrative process provided for a potential plaintiff to pursue a defendant in court under the AFHA. Under the federal Fair Housing Act, a plaintiff has the option of filing an administrative complaint with the Department of Housing and Urban Development. The conciliation and administrative process available under the federal law can be advantageous to a plaintiff because of its lower cost and streamlined procedures. In this respect, the AFHA has a distinct disadvantage. However, to potential plaintiffs whose properties do not fall within the federal act, the AFHA does create a form of relief that would otherwise be unavailable.

The AFHA is potentially deficient in an area that is significant under the federal act. It is not clear whether the act requires a landlord to require reasonable modifications for individuals with disabilities. Under the federal act, a landlord must modify a unit if a tenant so requests unless circumstances support a denial. Additions such as adding grab bars to bathrooms are generally considered reasonable. Further, the federal Act requires landlords to make

294. However, the public accommodation section contains an exemption for private clubs. ARK. CODE ANN. § 16-123-102(7)(B) (Supp. 1995). In addition, the employment discrimination section contains an exemption for religious organizations. ARK. CODE ANN. § 16-123-103(a) (Supp. 1995). Neither of these exemptions are applicable to the AFHA.


296. A thorough description of federal fair housing laws is beyond the scope of this article. For more information about these laws, see A Fair Housing Enforcement Symposium: A Focus on Special Issues Affecting the Disabled, Families with Children and the First Amendment, 29 J. MARSHALL L. REV. 315 (1996).


300. Id.
modifications to enable a tenant with a disability to acquire or enjoy a housing unit.\footnote{See, e.g., Hodges v. Schmoller, No. 94C 4907 (N.D. Ill. Aug. 12, 1994). See generally F. Willis Caruso, Fair Housing Modifications and Accommodations in the '90s, 29 J. MARSHALL L. REV. 331 (1996).} However, they can be read into the AFHA's proscription of discrimination in the "terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith."\footnote{ARK. CODE ANN. § 16-123-204(a)(2) (Supp. 1995).} If, for example, showers were inaccessible to persons in wheelchairs, this arguably would constitute discrimination in the furnishing of facilities. If such accommodations are read into the AFHA, it is not clear how significant a modification would be required of landlords.

The AFHA has a specific section addressing real estate financing. It prohibits "[a] person to whom application is made for financial assistance or financing in connection with a real estate transaction or in connection with the construction, rehabilitation, repair, maintenance, or improvement of real property" from discriminating against an applicant based on his or her religion, race, color, national origin, sex, disability, or familial status or such a characteristic of a person living with the applicant.\footnote{ARK. CODE ANN. § 16-123-205(a)(1) (Supp. 1995). The federal act contains a similar prohibition. See 42 U.S.C. § 3605 (1994).} This section covers a significant problem. "Studies show that minorities are 60 percent less likely to get lending help than a white person with the same credit rating.\footnote{Private Bar Opportunities in Fair Housing Lending, 21 HUMAN RIGHTS 40 (Fall 1994).} In addition, it forbids applications that are used to keep track of a person's religion, race, color, national origin, sex, disability, or familial status of the applicant or someone residing with the applicant.\footnote{ARK. CODE ANN. § 16-123-205(a)(2) (Supp. 1995).} The application cannot be used to show a "preference, limitation, specification, or discrimination" based on one of these protected characteristics.\footnote{ARK. CODE ANN. § 16-123-205(a)(2) (Supp. 1995).} This section exempts applications required by certain lenders under the National Housing Act,\footnote{12 U.S.C. §§ 1701-1750g (1994).} or "by a regulatory board or of-
ficer acting under the statutory authority of this state or the United States.\textsuperscript{308}

The Arkansas Act also forbids and expressly voids any sort of contractual conditions, restrictions or prohibitions that limit the use or occupancy of property on the basis of religion, race, color, national origin, sex, disability, or familial status.\textsuperscript{309} It also prohibits a person from inserting such a term into a “written instrument” or honoring any such void term.\textsuperscript{310}

Like the federal act,\textsuperscript{311} the AFHA contains what is in essence a hate crimes provision related to housing. It prohibits any person from threatening, intimidating, or interfering “with persons in the enjoyment of their dwelling because of the race, color, national origin, sex, or familial status of such persons, or of visitors or associates of such persons.”\textsuperscript{312} It also forbids any sort of retaliation, including discharging, threatening, coercing, or intimidating an employee, real estate broker, agent or other person for refusing to take part in a “discriminatory housing practice or because he or she had aided or encouraged any other person in the exercise or enjoyment of any right granted under the provisions” of the Act.\textsuperscript{313}

The AFHA contains another retaliation section, which covers conspiracies, including conspiracies to retaliate, violate the act, or interfere with a person’s compliance with the Arkansas Act.\textsuperscript{314} It forbids two or more persons from conspiring to retaliate against a person because he or she opposed a violation of the AFHA or was involved in a complaint, either by filing such a complaint, testifying re-

\textsuperscript{308} ARK. CODE ANN. § 16-123-205(b) (Supp. 1995).
\textsuperscript{309} ARK. CODE ANN. § 16-123-206(a) (Supp. 1995).
\textsuperscript{310} ARK. CODE ANN. § 16-123-206(b) (Supp. 1995).
\textsuperscript{311} 42 U.S. C. § 3617 (1994). The federal act makes it illegal “to coerce, intimidate, threaten or interfere” with any person’s right to fair housing. \textit{Id.} It also makes it a “criminal offense to willfully injure, intimidate or interfere with, by force or threat of force, any person’s fair housing rights.” \textit{See generally} Michael P. Seng, \textit{Hate Speech and Enforcement of Fair Housing Laws}, 29 J. MARSHALL L. REV. 409 (1996).
\textsuperscript{312} ARK. CODE ANN. § 16-123-206(c) (Supp. 1995). The federal act’s proscription has been criticized on First Amendment grounds. \textit{See} Seng, \textit{supra} note 312.
\textsuperscript{313} ARK. CODE ANN. § 16-123-206(c) (Supp. 1995).
\textsuperscript{314} ARK. CODE ANN. § 16-123-208 (Supp. 1995).
This section echoes the language of the earlier section involving retaliation against employees, brokers, or agents who refuse to take part in discriminatory activities covered by the Arkansas Act. Finally, it forbids conspiracies to violate the Arkansas Act as well as interfering with a person's compliance with the Act.

Perhaps the most interesting part of the Arkansas Act is its prohibition of representations regarding property values. To understand the full import of this section of the Act, it is necessary to review it in its entirety:

A person shall not represent, for the purpose of inducing a real estate transaction from which the person may benefit financially, that a change has occurred or will or may occur in the composition, with respect to the religion, race, color, national origin, sex, disability, or familial status of the owners or occupants, in the block, neighborhood, or area in which the real property is located or represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

Similar speech-related statutes and ordinances have been upheld after First Amendment challenges. Indeed, the federal act contains a similar provision. However, several commentators have criticized the hate crimes portions of fair housing laws on First Amendment grounds.

Finally, the Fair Housing Act provides for a civil action for injunctive relief, damages, or both. The AFHA defines damages as "damages for injury or loss caused by each violation of this subchapter, including a reasonable attorney's fees." While this section makes attorney's fees appear mandatory to a successful plaintiff, a later provision states that "the court in its discretion may allow the prevailing party reasonable attorney's fees and costs." In addition, there is yet another provision on attorney's fees stating that "[a] court rendering a judgment in an action brought pursuant to this subchapter may award all or a portion of the costs of litigation, including reasonable attorney's fees and witness fees, to the complainant in the action if the court determines that the award is appropriate." While this seems to imply that defendants, if they do prevail, could not obtain attorney's fees, the earlier section makes awards discretionary for any "prevailing party." If the Act is interpreted consistently with federal civil rights laws, attorney's fees will only be awarded to the defendant in cases that can be characterized as "unfounded, meritless, frivolous or vexatiously brought." Unlike other sections of the Arkansas Civil Rights Act, venue is specifically set in the circuit court in the county in which the violation occurred or where the defendant resides or has his principal place of business.

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325. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (quoting United States Steel Corp. v. United States, 519 F.2d 359, 363 (3d Cir. 1975)).
326. Ark. Code Ann. § 16-123-210(b)(1)-(2) (Supp. 1995). Given that the AFHA provides for injunctive relief, it is not clear whether venue in the circuit court is appropriate. The Arkansas Supreme Court has voided such venue provisions contained in statutes when they are contrary to the state constitutional requirement of separate courts of law and courts of equity. Ark. Const. art. 7, §11; Bates v. Bates, 793 S.W.2d 788 (Ark. 1990); Patterson v. McKay, 134 S.W.2d 543 (Ark. 1939). In Bates, the Arkansas Supreme Court held the state's Domestic Abuse Act, Ark. Code Ann. §§ 9-15-101-211 (1993 & Supp. 1995) unconstitutional because it assigned actions under that Act to the chancery courts. Bates, 793 S.W.2d at 791. Even though the Domestic Abuse Act provided for relief that appeared equitable in nature, such as restraining orders, the court held that because the Act created a new cause of action that did not exist in equity at the time the constitution was enacted in 1874, this case was not cognizable in a chancery court. Id. at 790. In addition, the court refused to expand equity jurisdiction to such actions because other Arkansas code provisions made plaintiff's remedy at law adequate. Id. at 791. The legisla-
CONCLUSION

The Arkansas Civil Rights Act constitutes sweeping civil rights legislation. While not entirely clear on all points, it offers comprehensive coverage for a wide variety of civil rights violations. In addition to the sections aimed at discrimination in employment, contracts, voting and participating in government, and real estate transactions, it provides a cause of action against governmental entities for violation of constitutional and statutory rights. Finally, its coverage for hate crimes is novel for this state and goes well beyond civil rights statutes in other states.327 Aside from the more recently enacted Fair Housing sections of the Act, given the Arkansas Act's broad reach, its lack of use remains a mystery. Through this article, I have endeavored to make an in-depth analysis of the various sections of the Arkansas Act, in the hope that attorneys practicing in the civil rights area will use it at least in those situations in which federal law provides no relief. While several important sections of the Arkansas Act remain less than clear, it still provides gap-filling causes of action that should help Arkansans in their quest for fair treatment. Further, clarifi-

cation of these sections will not come until the local bar starts to sue under the Arkansas Act, giving the judiciary a chance to interpret those sections that are less than clear. One thing does remain obvious, however. The Arkansas Civil Rights Act stands as positive statement by Arkansas that it will not tolerate discrimination in a variety of forms.