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Rhode Island's Homeless Bill of Rights: How Can the New Law Provide Shelter from Employment Discrimination?

Michael F. Drywa, Jr.*

On a single night in 2012 there were 633,782 homeless people in the United States, including 394,379 who were homeless as individuals and 239,403 people who were homeless in families.¹

In Rhode Island, a single night count from December 12, 2012, revealed that there were 996 Rhode Islanders homeless on that day.²

INTRODUCTION

On June 27, 2012, Rhode Island Governor, Lincoln Chafee, signed into law the Homeless Bill of Rights (“HBOR”),³ the first law in the United States that provides for comprehensive legal protections to homeless persons. This landmark legislation

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1. U.S. DEP'T OF HOUS. & URBAN DEV., Office of Cmty. Planning & Dev., 1 ANNUAL HOMELESS ASSESSMENT REPORT 3 (2012), *available at* https://www.onecpd.info/resources/documents/2012AHAR_PITestimates.pdf [hereinafter Homeless Report].

2. Press Release, Rhode Island Coalition for the Homeless, New Homeless Numbers Show a System at a Dangerous Tipping Point (Dec. 19, 2012), *available at* <http://www.rhomeless.org/Portals/0/Uploads/Documents/Winter%20shelter%20release12.pdf>.

3. R.I. GEN. LAWS ANN. §§ 34-37.1-1 to -5 (West 2006 & Supp. 2013).

provides protection against discrimination in connection with (1) freedom of movement in public; (2) access to municipal services; (3) employment; (4) emergency medical care; (5) voting; (6) confidentiality of personal records; and (7) privacy rights in personal property.⁴ This article specifically addresses how the HBOR applies in the *employment* context, and further explores how the statute fits within the State's administrative and court systems and the challenges plaintiffs may experience in seeking to enforce the remedial provision of the law.

Without question, homelessness as a protected category is something altogether new in the field of employment discrimination law; an area of law that continues to expand to less so-called "mainstream" categories, oftentimes with Rhode Island at the forefront of this expansion.⁵ Of course, Rhode Island is not alone in adding to an ever-expanding list of protected categories, as many other states (although not all) have also amended or enacted laws to provide protection to other categories.⁶ However, it can be said with certainty that Rhode Island is the first to add "homelessness" to this list.⁷

In light of the fact that the HBOR is the first statute of its kind, there are no published legal decisions that address the question of a plaintiff's discrimination in employment on the basis of homelessness, including the methods for asserting a claim, the mechanism of proof, and the statute of limitations. However, it is worth noting that the homeless have been at the legal gristmill for

4. R.I. GEN. LAWS ANN. § 34-37.1-3 (West 2006 & Supp. 2013).

5. For example, the Rhode Island Fair Employment Practices Act was amended in 1995 to add "sexual orientation" as a protected category and in 2001 to add "gender identity and expression." R.I. GEN. LAWS ANN. § 28-5-41 (West 2006); R.I. GEN. LAWS ANN. § 28-5-41.1 (West 2006). Additionally, in 2002, the General Assembly passed a law to protect against employment discrimination on the basis of genetic testing; in 2004 on the basis of off-duty tobacco use; and in 2009 because of HIV/AIDS status and testing. R.I. GEN. LAWS ANN. § 28-6.7-1 (West 2006); R.I. GEN. LAWS ANN. § 23-20.10-14 (West 2006); R.I. GEN. LAWS ANN. § 23-6.3-11 (West 2006 & Supp. 2010).

6. See, e.g., CAL. GOV'T CODE § 12940 (West 2014) (Genetic information, sexual orientation, gender expression, and gender identity); CONN. GEN. STAT. ANN. § 46a-60 (West 2013) (Gender identity or expression, and genetic information); FLA. STAT. ANN. § 448.075 (West 2002) (Sickle-cell); ME. REV. STAT. ANN. tit. 5, § 4552 (2013) (Sexual orientation); MASS. GEN. LAWS ANN. ch. 111, § 70F (West 2013) (No employer can require HIV tests as a condition of employment).

7. R.I. GEN. LAWS ANN. § 34-37.1-3 (West 2006 & Supp. 2013).

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many years, grinding away for legal protection on a number of fronts, many of which are grounded in general principles of Constitutional fairness.⁸ However, these cases address only the *general* civil rights of the homeless, not how that status plays into an employment discrimination claim, which is a legal animal of different stripes.⁹ Rhode Island's HBOR fills that void for its citizens, but due to its novelty, there is no way to predict how a claim for employment discrimination based on homelessness will find its way through the system.

Regardless of one's view on the justification or need for the HBOR, homelessness can be fairly categorized as an unconventional category in the same vein as, for example, laws precluding discrimination on the basis of height or weight.¹⁰ That is not to say that these categories are any less worthy of protection; only that they have until now been relegated to marginal status. Times are changing, however, and with them, the law. For instance, Michigan, although presently providing no legal protection for its homeless population, *does* provide anti-discrimination protection for height and weight in the Elliott-Larsen Civil Rights Act, section 37.2102(1) of the Michigan Compiled Laws, which states as follows:

The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, *height, weight*, familial status, or marital status as prohibited by this act, is recognized

8. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992) (finding that city's continual arrest and harassment of homeless constituted cruel and unusual punishment in violation of the Eighth Amendment and due process rights); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1016, 1019 (C.D. Cal. 2011), *aff'd*, 693 F.3d 1022 (9th Cir. 2012) (finding that homeless plaintiffs demonstrated likelihood of success on claims that City's seizure and destruction of personal property as "abandoned" violated the Fourth and Fourteenth Amendments).

9. See *Pottinger*, 810 F. Supp. at 1583; *Lavan*, 797 F. Supp. 2d at 1016, 1019.

10. See, e.g., Elliott-Larsen Civil Rights Act, MICH. COMP. LAWS ANN. § 37.2102(1) (West 2001) (providing protection against height and weight discrimination), discussed *infra*.

and declared to be a civil right.¹¹

Interestingly, the Michigan statute provides no protection for sexual orientation or gender identity and expression.¹² Hence, at least in that respect, Rhode Island can claim a more progressive position.¹³ In that same vein, it may just be a matter of time until the Rhode Island legislature enacts or amends statutes to include these other categories to comport with changing ideals of social fairness.¹⁴ In any event, the enactment of the HBOR does place into context the ever-expanding statutory protections of Rhode Island's anti-discrimination laws.

Section I of this Article briefly discusses the history of Rhode Island's anti-discrimination laws leading up to the passage of the HBOR. Section II analyzes how the HBOR fits within the State's existing statutory scheme for employment discrimination claims. Section III reviews the procedural mechanisms that a person asserting a violation of the HBOR in the employment context should follow, the legal test to prove such a claim, and the applicable statute of limitations. Section IV highlights some of the logistical and procedural challenges faced by plaintiffs asserting employment discrimination claims under the HBOR, and Section

11. *Id.* (emphasis added).

12. *See id.*

13. R.I. GEN. LAWS ANN. §§ 34-37.1-1 to -5.

14. The courts, however, often do not wait for legislatures to act. For example, in 1993, the Supreme Court of California held that a person's weight may qualify as a protected "handicap" within the meaning of the state's Fair Employment Act if medical evidence showed that it is the result of "a physiological condition affecting one or more of the basic bodily systems and limits a major life activity." *Cassista v. Community Foods, Inc.*, 856 P.2d 1143, 1144 (Cal. 1993). "We do not intend, nor indeed are we at liberty, to define 'physical handicap' in terms we believe to be morally just or socially desirable." *Id.* at 1146. Although the *Cassista* court did not create a new category of "weight" discrimination, it also was not that far off, either. The Court found a way to provide protection to a class of persons who had no statutory protection previously. Similarly, in *Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals*, the plaintiff had alleged that she was denied employment because the defendant perceived that she was disabled due to her morbid obesity. 10 F.3d 17, 22 (1st Cir. 1993). There, the court determined that a jury could have found that the metabolic dysfunction and failed appetite-suppressing neural signals that led to the plaintiff's obesity were beyond her control and rendered her effectively powerless to manage her weight. *Id.* at 24. In both these cases the courts may have been sending messages to the state legislatures.

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V reviews how other states are following Rhode Island's lead in addressing the need to provide statutory protection to their homeless population.

I. RHODE ISLAND'S ANTI-DISCRIMINATION LEGACY

The HBOR is nothing if not innovative. It is, as already noted, the first statute in United States to offer legal protections to the homeless.¹⁵ However, Rhode Island's place in this historical moment should come as no surprise to those familiar with the General Assembly's long-established compassion for its marginalized population.¹⁶ Indeed, the Rhode Island General Assembly has shown a willingness to regularly amend Rhode Island's anti-discrimination laws—or enact new laws—to reflect the changing views of Rhode Island's populace and the progression of modern society.¹⁷ For example, Rhode Island passed its Fair Employment Practices Act (“FEPA”)¹⁸ in 1949, some fifteen years before the United States Congress enacted the Civil Rights Act of 1964.¹⁹ Since that time, the General Assembly has amended the FEPA to include more progressive categories such as “sexual orientation” in 1995,²⁰ and “gender identity and expression” in 2001.²¹ More recently, the General Assembly passed laws protecting against employment discrimination based on genetic testing (2002),²² off-duty tobacco use (2004),²³ and HIV/AIDS

15. R.I. GEN. LAWS ANN. § 34-37.1-3 (West 2006 & Supp. 2013).

16. See, e.g., R.I. GEN. LAWS ANN. § 28-5-41 (West 2006) (sexual orientation); R.I. GEN. LAWS ANN. § 28-5-41.1 (West 2006) (gender identity and expression); R.I. GEN. LAWS ANN. § 28-6.7-1 (West 2006) (genetic testing); R.I. GEN. LAWS ANN. § 23-20.10-14 (West 2006) (off-duty tobacco use); R.I. GEN. LAWS ANN. § 23-6.3-11 (West 2006 & Supp. 2010) (HIV/AIDS status and testing).

17. See R.I. GEN. LAWS ANN. § 28-5-41; R.I. GEN. LAWS ANN. § 28-5-41.1; R.I. GEN. LAWS ANN. § 28-6.7-1; R.I. GEN. LAWS ANN. § 23-20.10-14; R.I. GEN. LAWS ANN. § 23-6.3-11.

18. R.I. GEN. LAWS ANN. §§ 28-5-1 to -7 (West 2006).

19. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2–2000e-3 (2006).

20. R.I. GEN. LAWS ANN. § 28-5-41.

21. R.I. GEN. LAWS ANN. § 28-5-41.1. It is worth noting that Congress has still not seen fit to amend Title VII to include protections for sexual orientation and gender identity or expression and it appears, as of this writing, that there nothing afoot at the federal level in that regard.

22. R.I. GEN. LAWS ANN. § 28-6.7-1 (Among other things, employers cannot require or administer a genetic test, affect the terms and conditions of employment of any employee who obtains a genetic test, or deny employment

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status and testing (2009).²⁴ These laws demonstrate the General Assembly's continued response to the desires of Rhode Island's population to see all of its citizens protected against discriminatory treatment.²⁵ Homelessness is simply the next category taken up and there is no reason to believe that more categories will not be added in the future. Indeed, the rationale for enacting the HBOR is set forth in the text of the statute and indicates as follows:

(1) At the present time, many persons have been rendered homeless as a result of economic hardship, a severe shortage of safe, affordable housing, and a shrinking social safety net.

(2) Article 1, Section 2, of the Rhode Island Constitution states in part, that "All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws."

(3) Concordant with this fundamental belief, no person should suffer unnecessarily or be subject to unfair discrimination based on his or her homeless status. It is the intent of this chapter to ameliorate the adverse effects visited upon individuals and our communities when the state's residents lack a home.²⁶

or take any other adverse action on an employee's refusal to submit to a genetic test, provide a family health history, or reveal whether the employee has submitted to a genetic test and the test results).

23. R.I. GEN. LAWS ANN. § 23-20.10-14 (Employers cannot require an employee to refrain from smoking when off duty and cannot discriminate in the employee's terms and conditions of employment for smoking while during off-duty hours).

24. R.I. GEN. LAWS ANN. § 23-6.3-11 (West 2006 & Supp. 2010) (Employers cannot discriminate against an employee because of a positive HIV test, or perception of a positive test, and cannot require an HIV test as a condition of employment).

25. See R.I. GEN. LAWS ANN. § 28-5-41; R.I. GEN. LAWS ANN. § 28-5-41.1; R.I. GEN. LAWS ANN. § 28-6.7-1; R.I. GEN. LAWS ANN. § 23-20.10-14; R.I. GEN. LAWS ANN. § 23-6.3-11.

26. R.I. GEN. LAWS ANN. § 34-37.1-2 (West 2006 & Supp. 2013).

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Hence, the General Assembly has declared unequivocally that the HBOR is grounded in traditional notions of Constitutional fairness and “equal protection.”²⁷ This constitutional rationale could apply to essentially any and every characteristic, and could become the basis for any future anti-discrimination statute or amendment for categories that have not yet received legal protection in Rhode Island.

Notably, although the HBOR’s rationale is clear, the statute makes no finding or declaration that homeless persons were the subjects of discriminatory treatment to begin with.²⁸ That is not to say that the statute is merely aspirational; it is a statute with teeth, providing for the prosecution of a civil action for damages.²⁹ However, if homeless discrimination is (or was) a problem in Rhode Island as it relates to employment discrimination, this cannot be gleaned from the content of the statute, which states only that it intends “to ameliorate the adverse effects” of homelessness.³⁰ By way of comparison, the FEPA, in addressing discrimination in employment, declares as follows:

The denial of equal employment opportunities because of such discrimination and the consequent failure to utilize the productive capacities of individuals to fullest extent deprive large segments of the population of the state of earnings necessary to maintain decent standards of living, necessitates their resort to public relief, and intensifies group conflicts, thereby resulting in grave injury to the public safety, health, and welfare.³¹

This may not be a fair comparison, where the HBOR deals with more than just employment discrimination while the FEPA exclusively addresses employment.³² That said, the question

27. *See id.* The FEPA shares a similar rationale in that the statute declares that it is “the public policy of this state to foster the employment of all individuals in this state in accordance with their fullest capacities . . .” R.I. GEN. LAWS ANN. § 28-5-2 (West 2006).

28. *See* R.I. GEN. LAWS ANN. § 34-37.1-2.

29. R.I. GEN. LAWS ANN. § 34-37.1-4 (West 2006 & Supp. 2013).

30. R.I. GEN. LAWS ANN. § 34-37.1-2. That is not to say that the author takes the position that there was no pressing need for the HBOR. To be sure, the General Assembly and Governor, as representatives of the citizens of the State, made the HBOR the law of the land.

31. R.I. GEN. LAWS ANN. § 28-5-2.

32. R.I. GEN. LAWS ANN. § 34-37.1-3 (West 2006 & Supp. 2013); R.I. GEN.

turns to how a homeless person can pursue a claim of employment discrimination if he or she believes the HBOR has been violated.

II. PROTECTION AGAINST DISCRIMINATION IN EMPLOYMENT

As noted previously, the HBOR addresses a homeless person's right to employment:

A person experiencing homelessness . . . [h]as the right not to face discrimination while seeking or maintaining employment due to his or her lack of permanent mailing address, or his or her mailing address being that of a shelter or social service provider.³³

Given its plain meaning, this section seems to codify the general principle that a homeless person enjoys the same protections as those afforded under the Rhode Island FEPA and the Rhode Island Civil Rights Act ("RICRA").³⁴ However, the FEPA makes it unmistakably clear that "it shall be an *unlawful employment practice*" to (1) refuse to hire an applicant; (2) discharge an employee; or (3) discriminate against an employee in the terms and conditions of employment *because of* a person's "race or color, religion, sex, sexual orientation, gender identity or expression, disability, age, or country of ancestral origin."³⁵ The RICRA precludes discrimination more broadly as follows:

All persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as otherwise provided or permitted by law, the same rights to make and enforce contracts, to inherit, purchase, to lease, sell, hold, and convey real and personal property, to sue, be parties, give evidence, and to

LAWS ANN. § 28-5-5 (West 2006).

33. R.I. GEN. LAWS ANN. § 34-37.1-3(3).

34. R.I. GEN. LAWS ANN. §§ 42-112-1 to -2 (West 2006 & Supp. 2013). Under the FEPA those protections include, among other things, freedom from discrimination in hiring, discharge, terms and conditions of employment, matters directly or indirectly related to employment, and (for disabled employees) a refusal to accommodate. R.I. GEN. LAWS ANN. § 28-5-7(1) (West 2006). The RICRA, on the other hand, provides exceptionally broad protections that are virtually limitless, providing that no one in the enumerated categories could be denied the "equal benefit of all laws." R.I. GEN. LAWS ANN. § 42-112-1(a).

35. R.I. GEN. LAWS ANN. § 28-5-7(1).

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the full and equal benefit of all laws and proceedings for the security of persons and property . . .³⁶

The term “homelessness” is nowhere to be found in either the FEPA or the RICRA.³⁷ Although the General Assembly did not expressly declare discrimination in employment based on homelessness to be “unlawful,” it is clear that was its intent in enacting the HBOR and in providing a remedy in the courts.³⁸ That intent, however, may be swallowed up by the verbiage.

It is also worth noting that the FEPA makes clear that the right of persons to be free from discrimination is a civil right,³⁹ while the RICRA (which has the term “Civil Rights” in its title) clearly views protection against discrimination as a civil right.⁴⁰ When the HBOR speaks of rights, it employs the term “has the *right to . . .*” rather than affirmatively declaring such rights to be so-called civil rights.⁴¹ One may argue that this is merely a semantic distinction, but the words say what they say. Nonetheless, the legislative intent seems to contemplate that a homeless person’s right to be free from discrimination is indeed a civil right, insofar as the statute makes reference to the Rhode Island Constitution as a basis for the law.⁴² Ultimately, this has no legal effect and will likely never matter in an action for redress under the HBOR for discrimination. However, there is a clear distinction between affirmatively declaring something a *civil right* and simply declaring that someone has a *right to* be free from something. The question is more appropriately directed toward how the HBOR would address the case of a person who claims their employment rights were impaired due to their homeless status.

36. R.I. GEN. LAWS ANN. § 42-112-1(a).

37. R.I. GEN. LAWS ANN. §§ 28-5-1 to -7; R.I. GEN. LAWS ANN. §§ 42-112-1 to -2.

38. See R.I. GEN. LAWS ANN. § 34-37.1-4 (West 2006 & Supp. 2013) (“In any civil action alleging a violation of this chapter, the court may award appropriate injunctive and declaratory relief, actual damages, and reasonable attorneys’ fees and costs to a prevailing plaintiff.”).

39. R.I. GEN. LAWS ANN. § 28-5-5 (West 2006).

40. See R.I. GEN. LAWS ANN. § 42-112-1. Civil rights are defined as “[t]he individual rights of personal liberty guaranteed by the Bill of Rights . . .” BLACK’S LAW DICTIONARY 281 (9th ed. 2009).

41. R.I. GEN. LAWS ANN. § 34-37.1-3 (West 2006 & Supp. 2013) (emphasis added).

42. See R.I. GEN. LAWS ANN. § 34-37.1-2 (West 2006 & Supp. 2013).

III. WHERE DOES A HOMELESS PLAINTIFF BEGIN?

For a prospective plaintiff, there is no real guidance in the HBOR regarding the first step toward asserting an employment discrimination claim as a result of being homeless. Should the prospective plaintiff look to the FEPA, the RICRA, or neither? If a challenge should be made to the statute's applicability in the context of whether it should be treated identically to other employment discrimination claims filed under the FEPA or RICRA, the Rhode Island Supreme Court would likely follow its canons of statutory interpretation and give deference to the legislature's intent:

It is well settled that the statutory language is the best indicator of the General Assembly's intent. [The] Court will not construe a statute to achieve a meaningless or absurd result. Rather, when interpreting statutes, a court should construe each part or section in connection with every other part or section to produce a harmonious whole.⁴³

Logically, homelessness in the employment discrimination context should be treated the same as other categories in the FEPA or the RICRA. After all, the HBOR makes it clear that a homeless person "[h]as the right not to face discrimination while seeking or maintaining employment[.]"⁴⁴ However, the General Assembly's choice *not* to amend the FEPA or RICRA to include homelessness as a distinct category may leave open a challenge as to whether a legal claim asserted under the HBOR is required to be pursued in the same manner as one brought, for example, for race discrimination under the FEPA; such a race discrimination claim would require that a plaintiff satisfy, at a minimum, certain administrative prerequisites in advance of filing a lawsuit. The HBOR certainly provides for redress in the courts,⁴⁵ but there is nothing in the HBOR that references an administrative filing.

43. *Zambarano v. Ret. Bd. Of Emp. Ret. Sys. of State*, 61 A.3d 432, 436 (R.I. 2013) (internal punctuation marks and citations omitted).

44. R.I. GEN. LAWS ANN. § 34-37.1-3(3).

45. R.I. GEN. LAWS ANN. § 34-37.1-4 (West 2006 & Supp. 2013).

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As a first step, the FEPA requires that a claimant who alleges an employer (or prospective employer) has taken an adverse employment action or has refused to hire based on a protected characteristic file an administrative charge at the Rhode Island Commission for Human Rights (the "Commission") before suit can be initiated.⁴⁶ Does this exhaustion of administrative remedies requirement apply to the HBOR as well? As always, reference to the statutory language is the sensible starting point. Unfortunately, a review of the HBOR's text fails to yield any affirmative guidance. Prudence may dictate that, since the HBOR falls under the same title ("Property") as the Fair Housing Practices Act ("FHPA"),⁴⁷ the administrative filing requirements contained in the FHPA would mandate that any charge under the HBOR be filed with the Commission in advance of seeking a right to sue. A similar position could be taken with regard to the FEPA's administrative prerequisites, at least as the HBOR relates to employment discrimination. Nonetheless, and despite this rational view, the statute is silent on the necessity of seeking redress at the Commission in advance of taking to the courthouse. This dearth of clarity may ultimately lead to a challenge regarding whether such a requirement is statutorily mandated.⁴⁸

On this point, the seminal case of *Ward v. City of Pawtucket* is instructive.⁴⁹ In *Ward*, the plaintiff, a police officer, sued the City of Pawtucket and a number of officials, alleging sexual discrimination after she learned that a male officer with lesser qualifications and a lower ranking on the promotion list was slated to receive a promotion to lieutenant ahead of her.⁵⁰ Almost immediately upon learning this, the plaintiff filed an intake questionnaire with the Commission (the first step in the administrative process) and was informed that, due to the backlog in cases, it would take four to five months before the Commission

46. R.I. GEN. LAWS ANN. §§ 28-5-17 to -18 (West 2006).

47. R.I. GEN. LAWS ANN. § 34-37-1 to -11 (West 2006 & Supp. 2013).

48. The solution is simple: amend both the FEPA and the FHPA to include "homelessness" in the list of characteristics for which protection is provided.

49. 639 A.2d 1379 (R.I. 1994).

50. *Id.* at 1380.

could draft a complaint; by then, the promotion list would have expired and the plaintiff would be required to retest and re-qualify for a new list.⁵¹ Within days, the plaintiff brought suit under the RICRA and obtained a temporary restraining order against the police department, preventing the City from promoting anyone to lieutenant.⁵² The police department moved to dismiss the suit, claiming that the court lacked jurisdiction because the plaintiff had failed to exhaust her administrative remedies.⁵³ The court granted dismissal and dissolved the temporary restraining order.⁵⁴ Thereafter, the department promoted a male to the position of lieutenant and, when the promotion list subsequently expired, the plaintiff re-tested and was ranked first on the new list.⁵⁵ The Rhode Island Supreme Court took up the question of whether the trial court correctly dismissed the plaintiff's complaint on the grounds that she had failed to exhaust her administrative remedies under the RICRA.⁵⁶ The Court declared that despite providing "broad protection against all forms of discrimination in all phases of employment," the RICRA contained no language expressly requiring exhaustion of administrative remedies, as the FEPA does.⁵⁷

In the case of the HBOR, there is certainly no language requiring a prospective plaintiff to first file a charge at the Commission.⁵⁸ Yet the statute does reference the right to court action: "In any civil action alleging a violation of this chapter, the court may award appropriate injunctive and declaratory relief, actual damages, and reasonable attorneys' fees and costs to a prevailing plaintiff."⁵⁹ It could fairly be argued that a homeless person's first venue of redress in an employment discrimination context is the courts, not the Commission. Applying the *Ward* rationale, such a position appears eminently reasonable. To be sure, the *Ward* Court noted that there was no ambiguity in the RICRA's language such that an administrative filing requirement

51. *Id.* at 1380–81.

52. *Id.* at 1381.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 1381–82.

58. See R.I. GEN. LAWS ANN. § 34-37-1 to -11 (West 2006 & Supp. 2013).

59. R.I. GEN. LAWS ANN. § 34-37.1-4.

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was a prerequisite to suit: “There is no language requiring, or even suggesting, that a plaintiff must first exhaust any or all administrative remedies before filing a civil action.”⁶⁰

By way of comparison, the Rhode Island Civil Rights of People With Disabilities Act⁶¹ *specifically* references a filing with the Commission:

No persons with a disability whose action for discrimination is otherwise within the jurisdiction of the commission for human rights under chapter 5 of title 28, chapter 24 of title 11 or chapter 37 of title 34 may bring an action under this section, *unless* the commission for human rights has failed to act upon that person’s complaint within sixty (60) days of filing, or the commission has issued a final order on the complaint.⁶²

Although the Disabilities Act stands apart from the FEPA, the FEPA nonetheless designates “disability” as a distinct protected category.⁶³ Hence, the fact that the HBOR retains its own identity would not preclude adding “homelessness” to the list of protected categories in the FEPA, which would then trigger the prerequisite of filing a claim with the Commission.

From a practical (and perhaps social or policy-oriented) perspective, immediate access to the courts for a homeless plaintiff in an employment discrimination case may make sense. Indeed, if a person were terminated from employment because of her homeless status, it would seem her prospects for extricating herself from her homeless plight would be more expeditiously aided by a temporary restraining order or preliminary injunction preserving the status quo (i.e., employment) issued by a court, rather than awaiting the results of a Commission hearing. As the *Ward* Court noted, a Commission hearing’s results could take months or years to issue and would result in an order directing the offending employer to “cease and desist” its unlawful discrimination, even if the results were in the plaintiff’s favor.⁶⁴

60. *Ward*, 639 A.2d at 1382.

61. R.I. GEN. LAWS ANN. § 42-87-1 to -5 (West 2006).

62. R.I. GEN. LAWS ANN. § 42-87-4(b) (emphasis added).

63. R.I. GEN. LAWS ANN. § 28-5-6(4) (West 2006).

64. *See* R.I. GEN. LAWS ANN. § 28-5-24(a)(1) (West 2006); R.I. GEN. LAWS ANN. § 34-37-5(h)(1) (West 2006 & Supp. 2013).

By that time, any remedy may be worthless. Hence, it appears that it was the General Assembly's intent to allow a HBOR plaintiff immediate access to the courts.

Significantly, the HBOR, like the RICRA, provides that a plaintiff may seek *injunctive* relief.⁶⁵ In *Ward*, the court spoke of the remedy of injunctive relief available in the RICRA when addressing whether an administrative filing is needed:

To interpret § 42-112-1(c) as requiring exhaustion of all administrative remedies before filing a civil action would render § 42-112-2 a nullity. This provision created a civil cause of action in a person whose rights under § 42-112-1 have been violated. It specifically states that an aggrieved party may seek injunctive, among other, relief.

The purpose of this injunction is to prevent imminent, irreparable injury. An injunction is an extraordinary remedy available only when there is no adequate remedy at law. Because of the imminent nature of the threatened harm, time is of the essence in any proceeding for injunctive relief. The plaintiff's is clearly the type of situation that the Legislature contemplated when it enacted § 42-112-2. The Rhode Island Commission for Human Rights indicated that it would take four to five months to draft a discrimination complaint on behalf of the plaintiff. By that time, the original promotion list would have expired. Years could pass before an investigation was completed, during which time plaintiff would be denied her civil rights.⁶⁶

The same can be said for a plaintiff claiming discrimination on the basis of homelessness under the HBOR, especially where the loss or denial of employment could exacerbate the condition.

Similarly, from a failure-to-hire perspective, a homeless person who is denied employment *because of* their homeless status—employment that would likely have allowed them to obtain a permanent residence—does not have the luxury of simply

65. See R.I. GEN. LAWS ANN. § 34-37.1-4 (“[a] court may award injunctive and declaratory relief”); R.I. GEN. LAWS ANN. § 42-112-2 (West 2006 & Supp. 2013) (plaintiff “may commence a civil action for injunctive and other appropriate equitable relief”).

66. *Ward*, 639 A.2d at 1382 (citations omitted).

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waiting months or years for the Commission to resolve their complaint. In the interim, due to the very nature of being homeless, the plaintiff may be difficult or impossible to locate during the pendency of the administrative proceeding, resulting in possible default or other negative consequences. In such a case, an administrative filing requirement works to undermine the purpose of the HBOR.

For the homeless who suffer termination of employment, their lost income makes the prospect of finding permanent housing more difficult. Moreover, once no longer employed, it will likely be difficult to locate a claimant (who has no permanent address) during the lifeline of a slow-moving administrative proceeding. In short, by the time the Commission may be able to do any good for a homeless person who suffered an adverse employment decision, the employee may have been out of work for months and may have moved numerous times during that period, perhaps even out of state, exacerbating the homelessness problem rather than improving it. Therefore, common sense dictates that a plaintiff asserting a claim for employment discrimination under the HBOR should have immediate access to the courts. The statute certainly does not expressly preclude a lawsuit for failure to bring a claim at the Commission.

Ultimately, it remains unclear whether the HBOR requires that a person aggrieved under its provisions in the employment context needs to take their case before the Commission first, at the peril of losing their right to access the courts. Practitioners should unquestionably err on the side of caution until clarity is brought to the statute by either the courts or the legislature. If the General Assembly means to mandate an administrative filing under the HBOR, it should consider amending the statute in accordance with the aforementioned policy concerns.

B. *Proof of Homeless Discrimination*

Notwithstanding the question of the administrative filing requirement, once a homeless discrimination in employment case is in court, one may expect that the legal test employed by state and federal courts since *McDonnell Douglas Corp. v. Green*,⁶⁷ would be used to determine whether, in fact, employment

67. 411 U.S. 792 (1973).

discrimination on the basis of homelessness had occurred: “Fundamentally, the plaintiff must prove that he or she is a member of a class entitled to the protection of [the anti-discrimination law] and that he or she has been treated differently from other similarly situated employees who are not members of the class.”⁶⁸ Although the elements needed to demonstrate employment discrimination vary with the circumstances,⁶⁹ proof of discrimination is shown via circumstantial evidence using the well-known burden-shifting paradigm set forth in *McDonnell Douglas*.⁷⁰ Applying that methodology to the HBOR, a plaintiff would be required to show (1) she was homeless; (2) she was qualified for the applied-for job or was performing her job at an acceptable level; (3) she was refused the job or suffered some form of adverse employment action; and (4) the position applied for was given to an equally- or lesser-qualified non-homeless person or non-homeless employees were otherwise treated more favorably.⁷¹

Against this framework, the first hurdle would be to show that the plaintiff is homeless within the meaning of the statute. For this, the HBOR borrows the definition contained in the FHPA: “For purposes of this chapter, ‘housing status’ shall have the same meaning as that contained in §34-37-3.”⁷² That definition reads: “The term ‘housing status’ means the status of having or not having a fixed or regular residence, including the status of living on the streets or in a homeless shelter or similar temporary residence.”⁷³ Showing that a plaintiff is homeless should not be

68. *Newport Shipyard, Inc. v. Rhode Island Comm’n for Human Rights*, 484 A.2d 893, 898 (R.I. 1984).

69. *Id.*

70. *Id.*

71. *See id.* *See also* *Neri v. Ross Simons, Inc.*, 897 A.2d 42, 49 (R.I. 2006); *Casey v. Town of Portsmouth*, 861 A.2d 1032, 1037 (R.I. 2004). Unquestionably, the most difficult component of any employment-related discrimination claim is one brought under a “failure to hire” theory. Unlike an employee who has worked for an employer for any measure of time and has, consequently, gotten to know the makeup of the workforce first hand, a prospective employee possesses no such “inside” information.

72. R.I. GEN. LAWS § 34-37.1-5 (West 2006 & Supp. 2013).

73. R.I. GEN. LAWS § 34-37-3(16) (West 2006 & Supp. 2013). Interestingly, the HBOR itself references *homeless* status, R.I. GEN. LAWS, § 34-37.1-2 (West 2006 & Supp. 2013), as opposed to the FHPA’s use of the term “housing status,” which also includes persons *with* fixed or regular residences.

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difficult. To be sure, generally speaking, the plaintiff's burden of proving the entire *prima facie* case under the *McDonnell Douglas* test is not "especially onerous" and creates a rebuttable presumption that discrimination occurred.⁷⁴ Once the *prima facie* case is established, the burden would then shift to the employer to rebut the inference of discrimination by offering a legitimate nondiscriminatory reason for its actions.⁷⁵ The employer's burden at this stage is one of production only, and, once the employer provides a nondiscriminatory reason (e.g., education, experience), the burden shifts back to the plaintiff to show that the employer's reasons for taking the adverse action were false or a "pretext" for covering up discrimination.⁷⁶

The single biggest challenge for a plaintiff who asserts employment discrimination based on homelessness will likely be demonstrating that the "bad actor" was *aware* of the employee or prospective employee's status as "homeless" and used that status as a basis for discrimination. If a homeless person is denied employment in favor of a similarly (or lesser) qualified person, the plaintiff would likely need to show that the employer actually queried about the plaintiff's address (or lack thereof if an application is submitted) and was directly informed that the plaintiff was homeless, resided in a shelter, or otherwise had no permanent address. Practically speaking, if an employer does not know that the applicant is homeless, it cannot discriminate on that basis. This logic is seen in disability discrimination cases where plaintiffs claim their employers discriminated against them without any showing that the employer knew of the disability.

A person alleging a disability protected by the ADA has the burden of establishing with medical evidence the existence of the alleged disability, and presenting the documentation during the term of employment, not following termination. To hold otherwise would render the requirement of a physical impairment superfluous and meaningless and would allow anyone with any kind of condition, regardless of the severity, to claim a physical

74. *Ctr. for Behavioral Health, R.I., Inc. v. Barros*, 710 A.2d 680, 685 (R.I. 1998).

75. *Neri*, 897 A.2d at 49.

76. *Id.* at 50.

impairment. An employer cannot accommodate a disability of which it is unaware; moreover, employers should not be expected to recognize a physical impairment solely and employee's 'say-so.'⁷⁷

Similarly, if a plaintiff suffers an adverse employment action while working for an employer, the challenge is no less difficult. If the plaintiff was hired *while* homeless, and the employer was aware of this, it would certainly be a monumental task to show that her termination, demotion, or bad performance review was somehow tied to her homeless status—surely not an impossible task, but made all the more difficult by the fact that the employer hired her knowing that she was homeless. A different challenge exists in a case where an employee *becomes* homeless while employed. Again, a plaintiff would need to show the employer was made aware of this fact and, ultimately, that it factored into the adverse employment decision. In contrast, a plaintiff who suffers an adverse employment action on the heels of such a disclosure would presumptively have a stronger case.

Another point to consider, in keeping with the HBOR's comparison to disability discrimination law, is whether an employer is required to provide an accommodation to a homeless employee for circumstances that may be unique to the homeless employee. For instance, if a family lives in a car⁷⁸ and the employee needs to come in late to work because her child will be unsupervised in the car until he goes to school, does the employer face liability under the HBOR for disciplining the employee for chronic tardiness or refusing to allow a modified schedule? The HBOR is silent on this issue, yet it could be fairly argued that adverse employment actions resulting from the need to address a

77. *Kalekirstos v. CTF Hotel Mgmt. Corp.*, 958 F. Supp. 641, 657 (D.D.C. 1997) (internal punctuation and citations omitted); *see also* *James v. Hyatt Regency Chicago*, 707 F.3d 775, 782 (7th Cir. 2013) (“[A] plaintiff must show that: (1) he is a qualified individual with a disability; (2) the employer was aware of his disability; and (3) the employer failed to reasonably accommodate the disability.”) (quoting *Kotwica v. Rose Packing Co.*, 637 F.3d 744, 747–48 (7th Cir. 2011)). Obviously, “knowledge” of a protected characteristic is less of a challenge to prove when the claim is based on gender or race, for example, where such characteristics are self-evident without the need for query.

78. Approximately one-third of homeless persons were in “unsheltered” locations at the time the data was collected. Homeless Report, *supra* note 1, at 3.

condition that directly results from homelessness may qualify for protection under the HBOR.

In summary, a person asserting a claim of homeless discrimination in employment under the HBOR is likely to be bound to the same legal rules that apply to all other types of employment discrimination, including the legal test needed to prove discrimination in the courts. These rules are tried and true, but questions remain on how the courts will treat these claims.

C. *Which Statute of Limitations Should Apply?*

Whether consciously or not, the General Assembly omitted any reference to another practical question: which statute of limitations would apply to an employment discrimination claim grounded in homelessness? If the limitations period set forth in the FEPA and FHPA is used, the time for initiating a charge of discrimination at the RICHR would be one year.⁷⁹ This would certainly make sense because the HBOR is codified under Title 34 of the Rhode Island General Laws entitled Property, which includes the FHPA, a statute that the HBOR references for defining “housing status.”⁸⁰

However, the FHPA explicitly states, in pertinent part, as follows:

[W]henever an aggrieved individual . . . makes a charge . . . to the commission that any person . . . has violated . . . any provision of *this chapter*, and that the alleged discriminatory *housing practice* has occurred or terminated within one year of the date of filing, the commission may initiate an preliminary investigation and if it shall determine after the investigation that it is probable that unlawful *housing practices* have been or are being engaged in, it shall endeavor to eliminate the unlawful *housing practices* . . .⁸¹

The FHPA speaks clearly; the one-year limitation specified in the statute applies only to unlawful *housing practices*, not employment discrimination. Hence, any claim that the FHPA limitations period applies would likely be untenable.

79. See R.I. GEN. LAWS § 28-5-17(a) (West 2006).

80. See R.I. GEN. LAWS § 34-37.1-3 (West 2006 & Supp. 2013).

81. R.I. GEN. LAWS § 34-37-5(b) (West 2006) (emphasis added).

The FEPA parallels this language virtually verbatim as it relates to unlawful *employment* practices, including reference to the one-year limitations period. There should be very little debate regarding which limitation applies when one is claiming discrimination based on the categories listed.⁸² However, since homelessness is not identified in the FEPA as a protected category, the HBOR is left without a defined limitations period. As already noted, the HBOR is unquestionably grounded in constitutional principles, and expressly predicated on the equal protection clause of the Rhode Island Constitution, Article 1, Section 2.⁸³ As discussed in detail above, this makes the HBOR more closely akin to the RICRA, which provides for a three-year statute of limitations.⁸⁴ Of course, the RICRA did not always contain a three-year limitation. Indeed, the Act provided no limitations period until the General Assembly amended the statute after the Rhode Island Supreme Court decision in *Horn v. Southern Union Co.*⁸⁵

In *Horn*, the United States District Court for the District of Rhode Island had certified to the Court the question of whether, in an employment discrimination case asserted under the RICRA, the one-year FEPA period applied or the general three-year limitations period under section 9-1-14(b) for “injuries to the person.”⁸⁶ In answering the question, the Court determined that

[s]ince the FEPA and the RICRA are *in pari materia* with respect to employment discrimination claims, we must make every effort to harmonize the two statutes when determining what statute of limitations applies to employment discrimination claims raised pursuant to the RICRA. It is our opinion that harmonization of these two statutes can best be achieved by engrafting onto the RICRA the one-year statute of limitations contained in the FEPA.⁸⁷

82. Such as race, color, religion, sex, sexual orientation, gender identity or expression, disability, age, county of ancestral origin. See R.I. GEN. LAWS § 28-5-1 (West 2006).

83. See R.I. GEN. LAWS § 34-37.1-2 (West 2006 & Supp. 2013).

84. See R.I. GEN. LAWS § 42-112-2 (West 2006 & Supp. 2013).

85. 927 A.2d 292 (R.I. 2007).

86. See *id.* at 292–94.

87. *Id.* at 295.

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Evidently, the General Assembly disagreed with the Court and amended the RICRA in 2010 to add a three-year limitations period.⁸⁸ In light of this, it would seem that the HBOR would enjoy the same statute of limitations as the RICRA. However, with the Legislature failing to expressly indicate this, a court challenge on this point may be on the horizon.

IV. CHALLENGES FACED BY HBOR PLAINTIFFS

As should be evident from the preceding discussion, there are many challenges that a plaintiff will have in asserting a claim for employment discrimination under the HBOR beyond the uncertainty of where to file first and the time limits of asserting a claim. Logistically, the fact that a plaintiff is homeless creates difficulties in communication between and among the Commission (assuming an administrative filing is required), the court, and his or her attorney and opposing counsel. Regardless of how long a case may languish in the Commission or court, the ability for an employer (whether directly or through counsel) to communicate with an aggrieved employee regarding, say, a settlement or hire/reinstatement offer may be stymied by the inability to reach the employee. With no fixed or steady mailing address, communication may occur only when an employee is able to appear in person to determine the status of the case, which itself may be fortuitous. Similar challenges arise if the employee's attendance is necessary at Commission hearings, depositions, or court appearances. In the context of a court action, default looms if the employee cannot participate in the prosecution of a lawsuit by missing appearance dates or not responding to discovery in a timely fashion.

Another challenge is the ability to retain an attorney to pursue a claim on behalf of a homeless plaintiff. Since it is unlikely that a plaintiff in these circumstances has the financial means to pay for legal services by the hour (they have lost their job or been denied employment), an attorney would be expected to work on a contingency basis, taking a share of the ultimate award or settlement. Although the HBOR provides that a prevailing plaintiff may be awarded attorney's fees and costs, attorneys may balk at taking such cases on a contingency basis since there is no

88. See R.I. GEN. LAWS § 41-112-2.

guarantee that, if successful, they will realize a fair wage for the time expended. Moreover, a homeless plaintiff may be far more willing (even anxious) to settle “short” and take the first settlement offer made by the employer in order to get something immediately. Even if the attorney counsels against a rash resolution, the employee-client is the gatekeeper of the case and, if he or she determines a small settlement amount (relative to the attorney’s valuation of the case) to be fair, the attorney may be left with fees that amount to pennies on the dollar for the time expended. Such impetuous settlement seems even more likely if the plaintiff is appearing *pro se*, with no guidance from a legal professional.

Hence, there are numerous procedural and logistical challenges that face someone who seeks to use the HBOR for redress in employment discrimination. Despite these challenges, at some point a plaintiff asserting such a claim will need to wend his or her way through the administrative and/or court system (either alone or with an attorney) to figure out how the HBOR is supposed to work.

V. OTHER STATES

Rhode Island, despite being the first, is not the only state to provide legal protection to its homeless citizens. As of the date of publication, there are two other states who have taken this step. On August 22, 2013, the Illinois governor signed into law its version of a homeless “bill of rights.”⁸⁹ The text of the Illinois statute mirrors many of the key elements of the Rhode Island HBOR (often verbatim). However, in the context of employment protections, the wording of the Illinois law indicates that a homeless person has “the right not to face discrimination while maintaining employment due to his or her lack of permanent mailing address, or his or her mailing address being that of a shelter or social service provider.”⁹⁰ This differs from the Rhode Island HBOR, which also provides the right to be free from

89. *Homeless ‘Bill of Rights’ Becomes Law in Illinois*, EQUAL VOICE (Aug. 26, 2013), <http://www.equalvoiceforfamilies.org/homeless-bill-of-rights-becomes-law-in-illinois/>.

90. 775 ILL. COMP. STAT. ANN. 45 / 10(a)(3) (West 2013).

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discrimination in seeking employment.⁹¹ Apart from that single omission, the wording of that clause is identical. This would seem to mean that a homeless person suffering discrimination in the hiring process in Illinois has no recourse under the Illinois Homeless Bill of Rights in a “failure-to-hire” context, a peculiar omission in light of the stated purpose of the statute.

In Connecticut, the governor signed that state’s Homeless Bill of Rights into law on July 11, 2013, with an effective date of October 1, 2013.⁹² That law, although again borrowing some of its text from the Rhode Island HBOR, provides more comprehensive protections for homeless persons in the employment context, with a clause indicating that a homeless person has the right to “[h]ave equal opportunities in employment.”⁹³ This would seem to be even more broad-sweeping than the Rhode Island’s HBOR insofar as it does not limit redress in employment to simply “seeking” or “maintaining” employment. Ultimately, it is likely that, in the coming years, other states will attempt or enact laws protecting their homeless citizens from discrimination in all aspects of their lives, including employment. However, there is no grand debate underfoot for “homeless” legislation in any manner that could rival the exposure and passion of recent civil rights movements involving, for instance, gay marriage. Ultimately, the choice will reside with the state, as it is all too evident that the federal anti-discrimination statutes still lag behind most states in expanding protections.

VI. CONCLUSION

Rhode Island’s HBOR, although unquestionably altruistic in its reach, does suffer from a measure of ambiguity on key points as they relate to the employment context, such as questions concerning administrative filings, accommodations, and the statute of limitation. These are no small problems as the lack of guidance in the statute may lead to a number of delays that could prejudice a prospective plaintiff’s rights, such as an unnecessary filing at the Commission or a dismissal in a civil court for failure

91. R.I. GEN. LAWS § 34-37.1-3 (West 2006 & Supp. 2013).

92. Scott Keyes, *Connecticut Passes Landmark ‘Homeless Person’s Bill of Rights’ Law*, THINK PROGRESS (June 12, 2013, 10:30 AM), <http://thinkprogress.org/justice/2013/06/12/2139181/connecticut-homeless/>.

93. CONN. GEN. STAT. ANN. § 1-500(b)(2) (West 2013).

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to exhaust administrative remedies. Now would be the time to clarify these points before homeless plaintiffs (and their attorneys) try to test the system for the appropriate first step.

From a political perspective, having a stand-alone statute entitled “Homeless Bill of Rights” gets a lot of mileage. Of that there is little doubt. However, if the tank runs dry when it comes to practical application, was the lack of efficacy worth the political gain?