HANDICAP DISCRIMINATION IN THE WORKPLACE: HOW TO DETERMINE IF A DISABILITY IS RELATED TO THE ABILITY TO WORK

INTRODUCTION

Protecting handicapped individuals from employment discrimination is an important goal being set today by society. The Rehabilitation Act of 1973 was a milestone in paving the way to equal employment opportunities for the handicapped. The Rehabilitation Act, however, fails to provide adequate protection against discrimination of the handicapped. Numerous states have overcome the inadequacy of federal legislation by enacting statutes prohibiting discrimination of the handicapped by employers.

Nebraska is one such state that has taken affirmative action to eliminate employment discrimination against the handicapped. The Nebraska Fair Employment Practice Act ("Act") was enacted to assist in the employment of all employable persons on the basis of merit, regardless of disability. In reaching this goal, the employer's complete discretion in hiring practices should yield to the handicapped individual's autonomy interest. However, if the handicapped individual is not capable of performing the job as well as an able-bodied person, the handicapped individual's interest must yield to the employer's interest.

This Note focuses on the threshold requirements of a complainant's prima facie case in a handicap employment discrimination suit, specifically, the requirement of whether the complainant is a mem-

2. Id.
9. Id.
ber of a protected class.¹⁰ For a disability to fall within the purview of the Nebraska Fair Employment Practices Act, the disability must be “unrelated to such person’s ability to engage in a particular occupation.”¹¹ In this context, this Note discusses the case of Father Flanagan’s Boys’ Home v. Goerke.¹² The employee in Goerke was an epileptic, and for this reason this Note focuses on epilepsy.

This Note discusses cases which have dealt with how a disability relates to a particular job.¹³ Further, this Note discusses whether the court in Goerke correctly decided the issue as applied to an epileptic with Goerke’s particular characteristics.¹⁴ This Note concentrates on establishing a workable standard for evaluating whether a particular handicap is unrelated to the job in question.¹⁵ Finally, this Note applies the proposed standard to the Goerke case.¹⁶

FACTS AND HOLDING

Danny Goerke was dismissed from his position of assistant family teacher by Father Flanagan’s Boys’ Home (“Home”) when the Home learned that Goerke was an epileptic.¹⁷ Goerke then filed an employment discrimination charge against the Home with the Nebraska Equal Opportunity Commission (“Commission”).¹⁸ The Commission determined that the Home unlawfully discriminated against Goerke.¹⁹ The Commission’s decision was reversed by a Nebraska district court.²⁰ The Nebraska Supreme Court affirmed the district court, thus upholding Goerke’s dismissal.²¹

At the age of seven, Goerke discovered he was an epileptic upon suffering a grand mal epileptic seizure.²² As a result of this seizure,
Goerke lost consciousness and went into convulsions. Goerke began medication for his epilepsy, which continues today. During his youth, Goerke also experienced petit mal seizures. Approximately one and one half minutes after these petit mal seizures, Goerke lost consciousness for approximately fifteen seconds.

Goerke's epilepsy had been under control since 1973. Goerke rarely forgot to take his medication, and even on days he did forget Goerke did not suffer seizures. The amount of medication Goerke took correlated directly with the amount of stress he anticipated. Goerke's epilepsy had no effect on his mental thought, concentration, or coordination.

Goerke applied for a position at Father Flanagan's Boys' Home. The Home educates and cares for children from age ten to nineteen. The care is provided by teaching couples simulating a family setting. These couples live in the Home's housing facilities with their own family and eight to ten boys from the Home. The position Goerke applied for was that of an assistant family teacher. The assistant teacher takes over the family couple's responsibilities when the couple is away. The assistant teacher's duties also include working with the children from 2:30 p.m. to 10:30 p.m. five days a week, as well as some driving requirements. There was no indication of the amount of time Goerke would be required to drive, but evidence indicated that an assistant's work consisted of driving fifty percent of the time. The Home does not allow the boys to drive themselves.

When Goerke applied for the assistant teacher position, he stated

23. Goerke, 224 Neb. at 733, 401 N.W.2d at 462.
24. Id.
25. Id.
26. Id.
27. Id. The conclusion that Goerke's epilepsy was under control was made by Goerke's neurologist. Id.
28. Id.
29. Id.
30. Id.
31. Id. at 734, 401 N.W.2d at 463.
32. Id. at 733, 401 N.W.2d at 462. The children at the Home are "homeless, abandoned, neglected, delinquent, or otherwise disadvantaged." Id.
33. Id.
34. Id.
35. Id. at 734, 401 N.W.2d at 463.
36. Id.
37. Id. at 735, 401 N.W.2d at 463. As an assistant teacher, Goerke would have further been required to assist with the operation of a motivational system, supervise the children's activities, occasionally prepare meals, develop relationships with the boys, and assist in general. Id.
38. Id.
39. Id. at 734, 401 N.W.2d at 463.
in his application "that he had no physical handicaps . . . impair[ing] his ability to perform the job."40 In an interview, Goerke was asked about his physical health, and he again stated he was in good physical health.41 The only job requirements Goerke was informed of were the necessity of a valid driver's license and a high school diploma.42 Goerke had a valid Minnesota driver's license and was a high school graduate.43

Prior to applying for the assistant teacher position, Goerke worked for a Minnesota State juvenile correction facility.44 This facility housed boys between the ages of twelve and eighteen.45 One of Goerke's duties at the correction facility was driving the boys into town.46 The nearest town was fifty miles away.47 Goerke encountered no problems during those trips.48

Goerke was hired by Father Flanagan's Home as an assistant teacher and was assigned to a family couple to be trained.49 Goerke's epilepsy was discovered when he asked the family couple where he should keep his epilepsy medication.50 This information was then conveyed to the Home.51 At this time, the Home informed Goerke of its policy prohibiting epileptics from holding the position of assistant teacher, and subsequently discharged Goerke from that position.52 The Home's policy prohibiting epileptics from holding assistant teacher positions began in 1980 as a result of some of the Home's employees suffering epileptic seizures.53 From that time, the policy prohibited staff members with a history of epileptic seizures to be

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40. Id.
41. Id. Goerke did state that he had a bad knee. Id.
42. Id. The issue of whether Goerke was required to have a valid Nebraska drivers license was not raised. Id. See NEB. REV. STAT. §§ 60-403, -410 (Reissue 1984) (discussing the application requirements for a Nebraska driver's license and the effect of nonresident drivers in the state).
43. Goerke, 224 Neb. at 734, 401 N.W.2d at 463. Goerke acquired a drivers license at the age of 16, and prior to that he held a farm permit in Minnesota. Id. at 738, 401 N.W.2d at 465 (Shanahan, J., dissenting). Goerke has operated many different agricultural type vehicles including farm machinery, tractors, trucks and cars. Id.
44. Id. at 734, 401 N.W.2d at 463.
45. Id.
46. Id. The trips to town were for the boys' medical appointments, picking up supplies and equipment, and various other reasons. Id.
47. Id.
48. Id.
49. Id.
50. Id. at 735, 401 N.W.2d at 463.
51. Id.
52. Id. at 735, 401 N.W.2d at 463-64. The Home offered Goerke alternate positions in the home's maintenance and custodial departments, but offered Goerke no position working with the boys. Id.
53. Id. at 735, 401 N.W.2d at 464.
allowed to transport the boys.\textsuperscript{54} This policy was virtually unwritten except for the communications to the various epileptic employees affected by the policy at the time of its inception.\textsuperscript{55}

The question of whether the Home discriminated against Goerke on the basis of his epilepsy is governed by the Nebraska Fair Employment Practice Act.\textsuperscript{56} The Act provides that an employer should not discriminate against an individual because of such person's disability.\textsuperscript{57} Epilepsy and seizure disorders are included within the definition of disability under the Act if these impairments effect job performance.\textsuperscript{58} An employer may deny employment based upon a disability if it obstructs the performance of a particular job.\textsuperscript{59}

The court followed a three step analysis in determining whether the Home engaged in unlawful employment practices.\textsuperscript{60} First, Goerke was required to prove a prima facie case of discrimination.\textsuperscript{61} To fulfill this burden, Goerke was required to demonstrate that: (1) he belonged to a protected class under the Act;\textsuperscript{62} (2) he was qualified for the assistant teacher position;\textsuperscript{63} (3) he was dismissed from that position;\textsuperscript{64} and (4) after he was dismissed, the job remained open.\textsuperscript{65} Second, if Goerke established his prima facie case, the burden shifted to the Home to prove a legitimate nondiscriminatory reason for discharging Goerke.\textsuperscript{66} Third, if the Home fulfilled its burden, Goerke had the opportunity to prove that the reasons expressed by the Home were not valid reasons for discharging Goerke, but merely a

\textsuperscript{54} Id. Epilepsy was not mentioned in the job description as a nonqualifying condition. \textit{Id.}

\textsuperscript{55} \textit{Id.}


\textsuperscript{57} \textit{Id.} § 48-1104. This section provides in part that it "shall be an unlawful employment practice for an employer: (1) To . . . discharge any individual, . . . because of such individual's . . . disability." \textit{Id.}

\textsuperscript{58} \textit{Id.} § 48-1102(8). This section provides: "Disability shall mean . . . epilepsy or seizure disorders . . . unrelated to such person's ability to engage in a particular occupation." \textit{Id.}

\textsuperscript{59} \textit{Id.} § 48-1111(1). This section provides that "it shall not be an unlawful employment practice for an employer . . . to deny privileges of employment when the nature and extent of a disability reasonably preclude the performance of the particular employment." \textit{Id.}

\textsuperscript{60} Goerke, 204 Neb. at 736, 401 N.W.2d at 464.

\textsuperscript{61} \textit{Id.}

\textsuperscript{62} \textit{Id.} at 737, 401 N.W.2d at 464. Facts in each discrimination case vary, causing the prima facie proof required to fulfill the burden to vary. \textit{Id.}

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.}

\textsuperscript{65} \textit{Id.}

\textsuperscript{66} \textit{Id.} The court does not discuss requirements (2), (3) and (4). See \textit{Id.} at 737-38, 401 N.W.2d at 464-65. However, the dissenting opinion considered these requirements fulfilled. \textit{Id.} at 740, 401 N.W.2d at 466 (Shanahan, J., dissenting).

\textsuperscript{67} \textit{Id.} at 736, 401 N.W.2d at 464.
The court reasoned that the "Nebraska Fair Employment Practice Act does not require the home to risk the safety of the boys . . . on the assumption that Goerke has not forgotten to take his medication and that he has accurately forecast the amount of stress he will encounter and has properly adjusted his dosage." The court considered the varying stress factors involved in transporting boys that could require an adjustment in the dosage needed to prevent a seizure. After evaluating the stress factors, the court reasoned that the Home should not risk a disastrous accident involving the safety of the boys merely because Goerke had not had a seizure in the past while transporting boys.

The court further relied on a United States Department of Transportation regulation that disqualifies epileptics from driving in interstate commerce. The court realized the regulation did not apply to the Home, but nevertheless gave weight to the Department's conclusion that epileptics are not qualified for commercial operation of motor vehicles. Despite the vast differences in interstate commerce and driving boys as an assistant teacher for the Home, the court reasoned that the safety concerns were similar.

Thus, the Nebraska Supreme Court held in a four to three opinion that Goerke was not a member of a protected class, and thus failed to establish a prima facie case. Although epilepsy is an element qualifying Goerke to be a member of a protected class, his epilepsy had to be unrelated to his ability to perform the duties of an assistant teacher. Despite Goerke's medical record, which showed

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68. Id.
69. Id. at 737, 401 N.W.2d at 465.
70. Id. at 737-38, 401 N.W.2d at 465. The court considered factors such as weather, road conditions, the amount of traffic, mechanical problems and the behavior of the passengers. Id.
71. Id.
72. Id. at 738, 401 N.W.2d at 465.
73. Id. A person is not qualified to drive a motor vehicle in interstate commerce if that person "[h]as . . . [a] clinical diagnosis of epilepsy or any other condition which is likely to cause loss of consciousness or any loss of ability to control a motor vehicle." 49 C.F.R. § 391.41(b)(8) (1985).
74. Goerke, 224 Neb. at 738, 401 N.W.2d at 465.
75. Id. A discussion of the differences between driving in interstate commerce and driving for the home is beyond the scope of this article.
76. Id.
77. Id. at 738-41, 401 N.W.2d at 465-67.
78. Id. at 737, 401 N.W.2d at 465. The Nebraska Fair Employment Practice Act expressly includes epilepsy and seizure disorders in its definition of "disability." Although epilepsy is included in the definition of disability, section 48-1102(8) further requires the disability to be unrelated to the individual's ability to perform the duties required. NEB. REV. STAT. § 48-1102(8) (Reissue 1984).
no epileptic seizures for the prior ten years, the court concluded that Goerke's epilepsy was not unrelated to his ability to fulfill the duties of an assistant teacher, and that his epilepsy precluded his performance of that position.

Judge Shanahan, joined by Chief Justice Krivosha and Judge White, strongly dissented, stating that "if facts and law are disregarded, today's decision may become acceptable." Judge Shanahan emphasized Goerke's past driving experience. Further, the dissent quoted the policy behind the Act. This policy called for the employment of persons based on merit, not disabilities. The statute further provided that denial of equal employment opportunities is contrary to freedom principles and burdens Nebraska's public policy objectives. Employment discrimination based solely on an individual's disability is repugnant in societies that judge individuals on merit. An individual's disability, taken alone, is not an allowable basis on which to determine a person's capabilities.

To determine if an employer discriminated against an individual on the basis of his or her handicap, the dissent stated the test as "whether the nature and extent of an individual's disability reasonably precludes adequate performance of the particular job." Judge Shanahan reasoned that Goerke was capable of performing the duties required of an assistant teacher based on Goerke's work history and evidence provided by Goerke's neurologist. Because Goerke was capable of adequately performing the job, the dissent reasoned that Goerke fulfilled his burden of proving a prima facie case.

The dissent then discussed the United States Department of Transportation's regulation prohibiting epileptics to drive in interstate commerce. Judge Shanahan concluded that the differences between Goerke's driving requirements and commercial interstate driving dispose of any relevance the regulations might have had to

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79. Goerke, 224 Neb. at 733, 401 N.W.2d at 462.
80. Id. at 738, 401 N.W.2d at 465.
81. Id. (Shanahan, J., dissenting).
82. Id. at 741, 401 N.W.2d at 467 (Shanahan, J., dissenting).
83. Id. at 738, 401 N.W.2d at 465 (Shanahan, J., dissenting).
84. Id.
85. Id. at 739, 401 N.W.2d at 466 (Shanahan, J., dissenting).
86. Id.
87. Id.
88. Id.
89. Id. at 739, 401 N.W.2d at 466 (Shanahan, J., dissenting).
90. Id. at 740, 401 N.W.2d at 466 (Shanahan, J., dissenting).
91. Id.
92. Id. Proving a prima facie case only satisfies the first step in a three step analysis. See supra notes 61-68 and accompanying text.
93. Goerke, 224 Neb. 740, 401 N.W.2d at 466 (Shanahan, J., dissenting).
the case. Judge Shanahan further disagreed with the majority’s conclusion that a disastrous result was inevitable if an epileptic was allowed to drive the boys. According to the dissent, the majority’s opinion did not fulfill the objective of preventing discrimination on the basis of stereotyping handicapped individuals. Judge Shanahan concluded by questioning the far reaching capabilities of the majority decision.

BACKGROUND

The Supreme Court of Minnesota faced the question of employment discrimination in Lewis v. Remmele Engineering, Inc., when Gregory Durham, an employee suffering from epilepsy, was discharged. Remmele discharged Durham from the machinist apprenticeship program when Durham’s examining physician informed Remmele that Durham’s epilepsy would prevent him from performing the work required. Durham suffered his first epileptic seizure when he was in the Air Force, and thereafter was honorably discharged. Durham suffered grand mal seizures which would occur without warning and result in a complete loss of consciousness. Medication was prescribed to control the seizures, and Durham had not suffered a seizure in seven years.

Remmele was a manufacturer of special machine fabrication. The machines used in this process performed “high speed grinding, boring and cutting of metal . . . components.” Remmele customized these components, which required frequent part adjustments. Because of the custom work and frequent adjustments, the machines were not equipped with safety devices.

According to the testimony of a physician certified and experienced in the practice of occupational medicine, the machinist posi-

94. Id.
95. Id. at 740-41, 401 N.W.2d at 466-67 (Shanahan, J., dissenting).
96. Id. at 741, 401 N.W.2d at 467. (Shanahan, J., dissenting).
97. Id. Justice Shanahan ended the dissent by stating “Today, epileptics; tomorrow, diabetics; thereafter . . . ?” Id.
98. 314 N.W.2d 1 (Minn. 1981).
99. Id. at 2-3.
100. Id. at 3.
101. Id. at 2.
102. Id.
103. Id. After the medication was first prescribed in 1968, the employee suffered two or three seizures. Each of these seizures were associated with the employee’s failure to take the medication.
104. Id.
105. Id.
106. Id.
107. Id. at 2.
tion was a threat to Durham's health and safety. The physician's conclusion was based in part on the type of seizure the employee suffered, as it provided no warning prior to losing consciousness. The physician's testimony further stated that a long period between seizures will not create a greater probability of a seizure recurring.

The applicable Minnesota statutes allowed employers a defense in discrimination claims if the employee's handicap posed a threat to the safety of other persons. This reasoning was expanded to take the employee's health and safety into consideration. Because the machinery at Remmele was extremely dangerous, Durham's seizures occurring without warning posed a serious threat to his health and safety and, thus, the employer's decision to discharge Durham was upheld.

Samens v. Labor and Industry Review Commission addressed a similar issue to that of Lewis. In Samens, the issue centered on an applicant, Samens, who had a long history of epilepsy. To control seizures, Samens had taken medication on a daily basis. Wisconsin Power & Light Company ("WP&L"), the employer, was informed of the applicant's epileptic condition in an interview. Following this interview, WP&L informed Samens that he would not be hired for the position sought, a truck driver/groundsman. The applicant then filed charges with the Department of Industry, Department of Labor and Human Relations, and the Equal Rights Division.

The applicant was required to prove three elements to prevail. First, Samens was required to prove he was actually handicapped. Second, Samens needed to show that he was discriminated against on
the basis of his handicap. Third, Samens was required to prove the employer's actions were not legitimate according to Wisconsin law. Both parties conceded to the first element, that the applicant was in fact handicapped, and the court additionally accepted the Commission's finding that Samens was discriminated against solely on the basis of his epilepsy. Therefore, the only question remaining was whether WP&L's rejection of Samens was legitimate.

In determining whether Samens could perform the duties of a truck driver/groundsman, the court considered two distinct points. First, the court asked whether Samens was physically capable of performing the duties required for the job. Second, the court asked whether hiring the applicant would pose a threat to the health and safety of Samens "himself, [his] co-employees, or the public."

The duties required of a truck driver/groundsman "includ[ed] driving a truck and working with a line crew. The work with the line crew centered around replacing and maintaining high-voltage power lines, poles, and towers. To perform these duties, the applicant would be required to operate a hydraulic boom when replacing the electrical poles. During the process of replacing the electrical poles, the power lines remain energized. The boom was controlled by both hand levers and a foot pedal. Any sudden movement in the hand levers or the foot pedal could result in numerous hazards. The hearing agent concluded that the co-employees' lives depended on the successful operation of the truck driver/groundsman's duties.

To resolve the case, the court used a common carrier standard. This common carrier standard required a higher degree of care,
which resulted in the employer having "a lighter burden concerning safety-based employment standards."¹³⁸ Using this standard, the court believed that the hiring of an individual with epilepsy could put the health and safety of the applicant, the co-employees, and the public in danger.¹³⁹ Therefore, the employer was found not to be in violation of unlawful employment practices.¹⁴⁰

Whereas Lewis and Samens were concerned with the issue of employment discrimination against an epileptic who would have to work in a hazardous environment,¹⁴¹ Foods, Inc. v. Iowa Civil Rights Commission¹⁴² dealt with employment discrimination against an epileptic in a safe environment.¹⁴³ In Foods, Inc., a cafeteria worker, Theresa Cain Harkin, suffered a grand mal seizure while at work.¹⁴⁴ Three days later, Harkin was discharged.¹⁴⁵ Harkin had been receiving treatment and medication to control her epilepsy.¹⁴⁶

While at work, Harkin spent most of her time washing dishes, busing tables and keeping dishes in stock.¹⁴⁷ Although these duties did not pose a high degree of risk to Harkin, she was occasionally required to perform more risky duties.¹⁴⁸ These duties involved operating a grill and a deep fat fryer, as well as slicing meats and cheeses.¹⁴⁹ The district court concluded that the equipment Harkin was working around posed a substantial risk of danger to Harkin, her co-employees, and customers.¹⁵⁰

Despite the district court's conclusion, the Iowa Supreme Court determined that even if Harkin suffered a seizure, there was no risk of harm to the employee, her co-employees, or customers.¹⁵¹ In reaching its decision, the Iowa Supreme Court recognized that Harkin's epilepsy obviously had some relationship to her ability to perform the duties of the job.¹⁵² For example, the court noted that a seizure could render her unconscious and thus unable to do her

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¹³⁸ Id. at —, 345 N.W.2d at 442-43.
¹³⁹ Id. at —, 345 N.W.2d at 446. In making this conclusion, the court considered the characteristics of petit and grand mal seizures. Id. at —, 345 N.W.2d at 445.
¹⁴⁰ Id. at —, 345 N.W.2d at 447.
¹⁴¹ See supra notes 98-140 and accompanying text.
¹⁴² 318 N.W.2d 162 (Iowa 1982).
¹⁴³ Id. at 169.
¹⁴⁴ Id. at 164.
¹⁴⁵ Id.
¹⁴⁶ Id.
¹⁴⁷ Id. at 168.
¹⁴⁸ Id.
¹⁴⁹ Id.
¹⁵⁰ Id.
¹⁵¹ Id. at 169.
¹⁵² Id. at 167.
work, even if unconscious for only a moment. Finding that the standard of determining whether a handicap is merely related to a job is too restrictive, the court formulated a different standard. The new standard depended on whether the employee's performance was reasonably competent and satisfactory. The Iowa Supreme Court held that Foods Inc. unlawfully discriminated against Harkin and ordered that she be reinstated.

While the courts in Lewis, Samens, and Foods, Inc. concentrated on the ability of individuals to perform a particular job, the court in Silverstein v. Sisters of Charity of Leavenworth Health Services Corp. considered whether any epileptic could perform the duties of the job at issue. Silverstein was denied employment as a respiratory therapist because she was an epileptic. For approximately eight years, Silverstein had been a respiratory technician and had never experienced an unfavorable incident with a patient as a result of her epilepsy. Despite her record, she was rejected because the hospital's policy precluded hiring any epileptics if they would be working with patients. This blanket policy failed to consider Silverstein's individual ability to perform the job and eliminated her from consideration for the job solely because she was epileptic.

The applicable handicap discrimination statutes provided that handicapped persons should be employed on the same terms and conditions as persons without handicaps, unless the handicap prevented the individual from doing the work. Because there may be varying degrees of a particular disability, the Silverstein court reasoned that individual consideration of each applicant was needed to determine whether a person was prevented from performing the work based on the disability. Because Silverstein's epilepsy prevented her from performing the work required, the court upheld her discharge.

153. Id.
154. Id.
155. Id.
156. Id. at 164.
157. See supra notes 98-156 and accompanying text.
159. Id. at —, 614 P.2d at 893.
160. Id.
161. Id. at —, 614 P.2d at 894.
162. Id. at —, 614 P.2d at 893-94.
163. Id.
164. The statute provides "the otherwise physically disabled shall be employed in the state service . . . in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied unless it is shown that the particular disability prevents the performance of the work involved." COLO. REV. STAT. § 24-34-801(1)(b) (1873).
165. Silverstein, 43 Colo. App. at —, 614 P.2d at 894.
166. Id. at 893.
As in Silverstein, the Ninth Circuit Court of Appeals in Mantolete v. Bolger\textsuperscript{167} required an employer to consider each applicant individually.\textsuperscript{168} In Mantolete, a job applicant, Bonnie Mantolete, was allegedly denied employment by the United States Postal Service because she was epileptic.\textsuperscript{169} The Postal Service sent Mantolete to a medical clinic for a pre-employment examination, where she received a full medical examination, including an investigation of her medical history.\textsuperscript{170} Based upon the results of the examination, the physician recommended Mantolete not be allowed to drive a vehicle or operate potentially dangerous tools and machines.\textsuperscript{171} Based on the physician's recommendations and Mantolete's medical record, the Postal Service refused to hire her for the position of Multipurpose Letter Sorter Machine ("LSM") operator.\textsuperscript{172} This decision was made even though the LSM was not considered to be a dangerous machine, and Mantolete had previously operated machines that were more dangerous.\textsuperscript{173}

Mantolete brought this suit pursuant to section 501 of the Rehabilitation Act of 1973.\textsuperscript{174} In making its decision, the court relied in part on the definition of a "qualified handicapped person."\textsuperscript{175} This definition provides that "with respect to employment, a handicapped person who . . . can perform the essential functions of the position in question without endangering the health and safety of the individual or others" is a handicapped person qualified for the job.\textsuperscript{176} The court determined that:

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a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The
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\textsuperscript{167} 767 F.2d 1416 (9th Cir. 1985).
\textsuperscript{168} Id. at 1423.
\textsuperscript{169} Id. at 1417-18. The epilepsy was considered to be under control through medication, even though the applicant averaged one grand mal seizure per year. Id. at 1418.
\textsuperscript{170} Id. at 1419.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
\textsuperscript{173} Id. The machines the applicant operated that were more dangerous were "a vapor washer, a high speed box spinner, a wafer scrubber, a high pressure water blasting cleaning machine, a stamping machine" and a slicer. Id.
\textsuperscript{174} Id. at 1421.
\textsuperscript{175} Id. The court noted that "[n]o court has yet defined 'qualified handicapped person' under Section 501." The definition stated is that of section 504. The court found no distinction between section 501 and section 504, other than the accommodation rule and, thus, used the same definition. Id.
\textsuperscript{176} Id. (citing 29 CFR § 1613.702(f) (as revised 1987)).
question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.\textsuperscript{177} This standard set by the court would require a case-by-case analysis of the applicant, and the particular duties and responsibilities of the position sought.\textsuperscript{178} The court then remanded the case to the district court for determining whether Mantolete presented a "reasonable probability of substantial harm."\textsuperscript{179}

**SUMMARY OF CASES**

In *Lewis*, the court upheld an employer's decision not to allow an epileptic who suffered seizures without warning to work with hazardous machines.\textsuperscript{180} The *Lewis* court based its decision on the health and safety of the employee.\textsuperscript{181} The court in *Samens* also considered the health and safety of an epileptic applicant for a truck driver/groundsman job.\textsuperscript{182} *Samens* additionally addressed the health and safety issue of the applicant's co-employees and the public.\textsuperscript{183} Because giving the epileptic the job would have presented a risk to the health and safety of the applicant, co-employees and public, the employer's decision not to hire the epileptic was held lawful.\textsuperscript{184}

Whereas *Lewis* and *Samens* upheld an employer's decision not to hire an epileptic, the court in *Foods, Inc.* held that an epileptic employee should not be discriminated against when the job presented no risk to any person's health and safety.\textsuperscript{185} The *Foods, Inc.* court did, however, require the applicant to have a present ability to physically perform the job in a reasonably competent manner.\textsuperscript{186}

*Silverstein* changed the focus from health and safety, and discussed instead the use of blanket policies that excluded all epileptics from consideration for a job.\textsuperscript{187} The *Silverstein* court disallowed the use of blanket policies and required employers to consider each applicant on an individual basis.\textsuperscript{188}

As in *Silverstein*, the *Mantolete* court also required individual

\textsuperscript{177} *Id.* at 1422.
\textsuperscript{178} *Id.* at 1423.
\textsuperscript{179} *Id.* at 1424.
\textsuperscript{180} See supra notes 98-113 and accompanying text.
\textsuperscript{181} See supra note 113 and accompanying text.
\textsuperscript{182} See supra notes 114-40 and accompanying text.
\textsuperscript{183} See supra note 139 and accompanying text.
\textsuperscript{184} See supra notes 139-40 and accompanying text.
\textsuperscript{185} See supra notes 145-56 and accompanying text.
\textsuperscript{186} See supra note 155 and accompanying text.
\textsuperscript{187} See supra notes 158-66 and accompanying text.
\textsuperscript{188} See supra note 165 and accompanying text.
consideration of each applicant. The Mantolete court further stated that an employer should consider an applicant's work and medical history in relation to the health and safety threats of the particular job.

ANALYSIS

**GOERKE COMPARED TO PRIOR EPILEPSY DECISIONS**

The Nebraska Supreme Court in *Goerke* held that Father Flanagan's Boys' Home made a lawful employment decision in discharging Goerke on the basis of his epilepsy. However, in reaching this decision the court failed to cite any precedent to substantiate its holding. Instead, the court relied exclusively on the risk it perceived regarding epilepsy as it related to driving the boys for the Home. According to the court, this perceived risk precluded Goerke from fulfilling his required duties.

The decision in *Goerke* held that Goerke failed to prove a prima facie case because his epilepsy was not unrelated to his ability to perform the duties of an assistant teacher, and thus he was not a member of a protected class. The court's decision was based on the health and safety of the children. Similarly, the *Samens* court considered the health and safety of persons other than Samens himself. The court in *Samens* evaluated the job requirements the epileptic applicant would be required to perform. These duties required the applicant to operate a hydraulic boom to lift power line poles while co-employees worked around the charged power lines. If the boom was not operated correctly, the poles would have presented a substantial risk to the applicant's co-employees working around the wires. The *Samens* court further concluded that if the epileptic applicant suffered a seizure while operating the boom, the health and safety of his co-employees, and possibly the public, would be in substantial danger. Based on these findings, the *Samens* court upheld the employer's decision not to hire the epileptic appli-

189. *See supra* notes 167-79 and accompanying text.
190. *See supra* note 177 and accompanying text.
191. *See supra* note 21 and accompanying text.
192. *See supra* notes 69-80 and accompanying text.
193. *See supra* notes 69-80 and accompanying text.
194. *See supra* notes 69-80 and accompanying text.
196. *See supra* note 129 and accompanying text.
197. *See supra* notes 130-36 and accompanying text.
198. *See supra* notes 130-33 and accompanying text.
199. *See supra* notes 135-36 and accompanying text.
200. *See supra* note 139 and accompanying text.
Obviously, the facts in Goerke are analogous to those in Samens. In both cases, the health and safety of third parties depended on an epileptic's ability to perform his duties safely. Goerke's suffering a seizure while driving would undoubtedly create a substantial risk of danger to the children. As in Samens, the Goerke court correctly decided that the Home did not act unlawfully in discharging Goerke when there was a substantial risk of harm to others. 

Goerke was also correctly decided in light of the Lewis decision. In Lewis, Durham was not hired because there was a risk of substantial harm to him. Durham would have been required to operate hazardous machines that posed a substantial threat to his own health and safety if he were to suffer a seizure during operation. For these reasons, the court in Lewis held that the employer did not unlawfully discriminate against Durham. Because the possibility of Goerke suffering a seizure while driving threatened his health and safety, as well as the boys, the decision in Goerke is in line with the reasoning of Lewis.

The Goerke dissent cited Foods, Inc. in its analysis. Foods, Inc., however, is distinguishable from Goerke. In Foods, Inc., if Harkin had suffered a seizure, there was no risk of injury to Harkin or any other person. Because Harkin could perform the duties required in the cafeteria in a reasonably competent manner without endangering anyone, the Foods, Inc. court held that Foods, Inc. unlawfully discharged Harkin. In Goerke, on the other hand, health and safety concerns prevented the court from even reaching the question of whether Goerke could physically perform the job.

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201. See supra note 140 and accompanying text.
202. See supra notes 69, 139 and accompanying text.
203. See supra note 72 and accompanying text.
204. Lewis v. Remmele Eng'g, 314 N.W.2d 1 (Minn. 1981).
205. See supra note 120 and accompanying text.
206. See supra note 120 and accompanying text.
207. See supra note 120 and accompanying text.
208. See supra note 29 and accompanying text. The fact that Goerke had not suffered a seizure in the ten years prior to his suit should not be given great weight in light of the physician's statement in Samens that a long absence of a seizure does not increase the probability that a seizure will not occur again. See supra note 117 and accompanying text.
209. Foods, Inc. v. Iowa Civil Rights Comm'n, 318 N.W.2d 162 (Iowa 1982).
210. Goerke, 224 Neb. at 740, 401 N.W.2d at 466 (Shanahan, J., dissenting).
211. See supra note 151 and accompanying text.
212. See supra notes 151-56 and accompanying text.
213. See supra notes 60-80 and accompanying text. As the Nebraska Supreme Court held that Goerke was not a member of a protected class, the court never reached the question of whether Goerke was qualified. See supra note 80.
ANALYSIS OF THE GOERKE STANDARD

In *Father Flanagan's Boys' Home v. Goerke*, the Nebraska Supreme Court held that the Home did not discriminate against Goerke, an epileptic, in finding that Goerke's epilepsy was not unrelated to his ability to safely transport boys for the Home. The standard utilized by the court in *Goerke* was based on the determination of whether the handicap in question, epilepsy, was related to Goerke's ability to perform the duties required of an assistant teacher.

The *Goerke* standard was based on whether epilepsy or seizure disorders were included in the definition of "disability", providing that the epilepsy or seizure disorder was "unrelated to such person's ability to engage in a particular occupation." This standard required Goerke to be able to perform the duties of an assistant teacher with no risk of adverse effects. The *Goerke* court relied on the possibility of Goerke suffering a seizure while transporting the boys from the Home in determining whether Goerke's epilepsy was related to his ability to perform the job. Because the amount of medication Goerke took to control his seizure disorder depended on the amount of stress he encountered, which was impossible to foresee, the dosage Goerke took could have been inadequate to avoid a seizure. The court reasoned that the possibility of Goerke taking the wrong dosage, or even forgetting the medication altogether, created a potential hazard to boys in the Home if Goerke were to have a seizure while driving. Because of this potential danger, the court determined that Goerke's epilepsy was not unrelated to his ability to perform as an assistant teacher.

While the result in *Goerke* may have been correct, Nebraska's standard for determining whether a handicap is related to an ability to perform a job is inadequate due to its overbreadth. Such a broad standard is unworkable as it provides employers no substantive basis on which to rely when determining whether to employ a handicapped individual. The overbreadth of the Nebraska standard is

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215. Id. at 738, 401 N.W.2d at 465.
216. Id. at 737, 401 N.W.2d at 464-65.
217. Id.
218. Id.
219. Id. at 738, 401 N.W.2d at 465.
220. Id. at 733, 401 N.W.2d at 462.
221. Id. at 737, 401 N.W.2d at 465.
222. Id.
223. Id. at 738, 401 N.W.2d at 465.
224. See *Foods, Inc.*, 318 N.W.2d at 167 (discussing that the standard of whether the disability is related to the job is virtually the same in Iowa as in Nebraska).
demonstrated by recognizing that any handicap will have at least some relationship to that person's ability to perform the duties of a job. The question then becomes, to what extent must a handicap be related to a job before the handicap prevents safe performance of that job. Such a standard leaves employers guessing and will eventually result in discrimination of handicapped employees and unnecessary lawsuits.

A more preferable standard is one comprised of a combination of the standards in the Lewis, Samens, Foods, Inc., Silverstein, and Mantolete cases. This standard operates differently depending on the health and safety risks involved in a particular case. Independent of the health and safety risks, however, the handicapped individual must demonstrate a present ability to perform the actual physical duties of the job. Once the handicapped person demonstrates a physical ability to perform the duties of the job, the proposed standard categorizes the case into one of three factual situations. The first situation involves no threat to the health and safety of the handicapped person, or any third parties (co-employees or the public). In the second situation, there is a risk of injury to the handicapped person, but not to third parties. The third situation involves a risk of injury to the handicapped person and third parties. Each situation is analyzed separately below.

**No Risk Of Injury**

If there is no threat to the health and safety of any of the parties involved, then the handicap is considered to be completely unrelated to the job, provided the handicapped person fulfills the burden of demonstrating a present ability to perform the requirements of the job. This segment of the proposed standard follows the reasoning of Foods, Inc, wherein an employee with epilepsy was wrongfully discharged. In reaching its decision, the court determined there was no risk of injury to the employee, co-employees, or customers. After determining there was no risk of injury to the parties involved, the court's standard focused on the employee's ability to perform the job in a reasonably competent and satisfactory manner. Because

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225. *Id.*
226. *Samens*, 117 Wis. 2d at —, 345 N.W.2d at 440.
227. See *infra* notes 234-40 and accompanying text.
228. See *infra* notes 241-51 and accompanying text.
229. See *infra* notes 252-63 and accompanying text.
230. See *supra* notes 151-55 and accompanying text.
231. *Foods, Inc.*, 318 N.W.2d at 164.
232. See *supra* note 151 and accompanying text.
233. See *supra* note 155 and accompanying text.
the employee in *Foods, Inc.* could perform the physical requirements of the job,\(^{234}\) and there was no threat to the health and safety to the parties involved,\(^{235}\) the court held the employer had engaged in unlawful employment practices by firing the employee.\(^{236}\)

**Risk of Injury to Employee**

When there is a threat to the handicapped person's health and safety, the disabled individual must show that the handicap does not present a reasonable probability of substantial harm to the disabled person. The handicapped individual must also have a present capability of performing the physical requirements of the job.\(^{237}\) This standard enables employers to determine the extent of the handicapped person's disability, and then evaluate the disabled individual's ability to do the job in a reasonably safe manner.

The *Lewis* court was faced with this same factual situation. In *Lewis*, an applicant applied for a job requiring him to operate dangerous machines.\(^{238}\) Although the applicant was physically capable of running the machines,\(^{239}\) the applicant was not hired because he was an epileptic.\(^{240}\) To determine if the applicant was unlawfully discriminated against, the court considered the risk of injury that the job presented to the applicant.\(^{241}\) Because the court concluded that seizures occurring without warning posed a serious threat to the applicant's health and safety, the employer was justified in not hiring that applicant.\(^{242}\)

To substantiate a decision not to hire a disabled person, an employer could require handicapped applicants to submit to a pre-employment medical examination as the Post Office did in *Mantolete*.\(^{243}\) The *Mantolete* case, like *Lewis*, confronted the question of whether an employer engaged in unlawful discrimination by refusing to hire an applicant with epilepsy when there was a possible threat to the applicant's safety.\(^{244}\) As in *Lewis*, the *Mantolete* court required a showing that there was a probability of substantial harm to the applicant.\(^{245}\) The *Mantolete* court stated that an employer's subjective

\(^{234}\) *Foods, Inc.*, 318 N.W.2d at 166.

\(^{235}\) *Id.* at 169.

\(^{236}\) *Id.* at 164.

\(^{237}\) See supra note 230 and accompanying text.

\(^{238}\) See supra note 113 and accompanying text.

\(^{239}\) *Lewis*, 314 N.W.2d at 3.

\(^{240}\) *Id.*

\(^{241}\) See supra notes 111-13 and accompanying text.

\(^{242}\) See supra note 113 and accompanying text.

\(^{243}\) See supra note 170 and accompanying text.

\(^{244}\) See supra notes 171-73 and accompanying text.

\(^{245}\) See supra note 177 and accompanying text.
evaluation of the applicant's potential risk of harm was inadequate to refuse employment. The standard provided by this court required an employer to evaluate the probability of substantial harm to an applicant, based on the applicant's handicap, by considering the applicant's work and medical history in light of the duties required for the job sought.

**RISK OF INJURY TO HANDICAPPED INDIVIDUAL AND THIRD PARTIES**

When there is a risk of injury to both the handicapped person and third parties, the handicapped person would have to prove that there is not a high probability of a substantial risk of injury, and further that the potential injury is not substantial. Again, the handicapped person would have to show a present ability to perform the requirements of the job. The handicapped individual's burden of proof should be extremely high in this situation to prevent the risk of injury to innocent parties. For an epileptic to fulfill this high burden, there would have to be a showing that the probability of a seizure is extremely low, and that if a seizure was to occur, the amount of harm resulting from the seizure would be minimal.

In *Samens*, an epileptic applied for a job that directly affected the safety of the applicant, co-employees and the public. The applicant's ability to perform the physical requirements of the job was not at issue. The court referred to this standard as a common carrier type standard. The common carrier standard gave the employer greater discretion in rejecting handicapped applicants. Although the *Samens* court did not analyze the applicant's individual characteristics, the reasoning utilized by the court supports the criteria of the proposed standard in this situation. The court determined that the showing of an extremely low chance of a seizure reoccurring was irrelevant, because the danger involved if a seizure was to occur was too high. Following this reasoning, the *Samens* court upheld the employer's decision not to hire the handicapped applicant.

Because utilization of a blanket policy would eliminate epileptics, a preferable standard requires an individual analysis of each appli-
cant, similar to that used in Silverstein.\textsuperscript{256} In Silverstein, an epileptic was refused employment because a hospital’s policy precluded all epileptics from working with patients.\textsuperscript{257} This blanket policy appears to have been for the safety of the patients.\textsuperscript{258} The court in Silverstein reasoned that the varying degrees of handicaps prevented the use of blanket policies and, therefore, held the employer’s blanket policy unlawful, while requiring individual consideration of the applicant.\textsuperscript{259}

**PROPOSED STANDARD APPLIED TO GOERKE**

The factual situation in Goerke is analogous to the third category of the proposed standard in that there was a risk of injury to Goerke and the children. The possibility of Goerke suffering a seizure while driving could very easily create a substantial risk of harm to Goerke, the boys and possibly the public.\textsuperscript{260} Because Goerke falls into the third category, Goerke would have a heavy burden of proving that the probability of his suffering a seizure is extremely low, and that if he were to suffer a seizure, the amount of harm suffered would not be substantial.

Goerke had not suffered a seizure in the ten years prior to this suit.\textsuperscript{261} This tends to show that the probability of Goerke suffering a seizure while driving is extremely low. However, Goerke’s reliance on daily doses of medication, along with the possibility of not taking the correct dosage, add to the probability of a seizure reoccurring.\textsuperscript{262} Considering the facts presented, the probability of Goerke suffering a seizure, after ten years of successful control, should be low enough to allow Goerke to proceed to the next phase of the standard despite his having to adjust the dosage of the medicine.

The next phase requires Goerke to demonstrate that the amount of harm which would result from a seizure would not be substantial. In analyzing this phase of the test, the court must assume that a seizure will occur, and then determine the extent of harm based on this assumption. A seizure, petit or grand mal, would not only alter Goerke’s conscious state of mind, but also could render Goerke completely unconscious.\textsuperscript{263} If this were to happen while Goerke was driv-

\textsuperscript{256} See supra note 178 and accompanying text.
\textsuperscript{257} See supra notes 162-63 and accompanying text.
\textsuperscript{258} See supra notes 164-65 and accompanying text.
\textsuperscript{259} See supra notes 166-67 and accompanying text.
\textsuperscript{260} See supra note 72 and accompanying text. Although the court considered the risk of harm to Goerke and the boys, the court did not discuss any additional harm to the public that would result from the bus being driven on the public roadways.
\textsuperscript{261} See supra note 27 and accompanying text.
\textsuperscript{262} See supra notes 69-72 and accompanying text.
\textsuperscript{263} See supra notes 22-26 and accompanying text.
ing, the probability of an accident resulting with an injury to Goerke and others would be extremely high. As the court in Goerke has determined, the results of such an accident could be disastrous.264 As the risk of substantial harm is high, Goerke would fail his burden of proof and should not be allowed to drive the boys.

Although the court in Goerke reached the same conclusion as that arrived at under the proposed standard, the Goerke court failed to provide a workable standard to give employers a reference for future employment decisions. If employers are forced to use the vague standard espoused in Goerke to factual situations similar to the three categories previously discussed, the employer would not know whether a lawful employment decision had been made until after an employment discrimination suit brought against the employer had been decided. The proposed standard, therefore, aids the employer in determining whether a handicap is related to the particular job.

CONCLUSION

In Father Flanagan’s Boys’ Home v. Goerke, Goerke was discharged from his job because he was an epileptic.265 The Nebraska Supreme Court upheld the Home’s decision to discharge Goerke.266 In reaching this decision the court held that Goerke’s epilepsy was not unrelated to his ability to perform the requirements of an assistant teacher.267 As Goerke could have suffered a seizure while driving the boys, the court reasoned that the Home should not have to risk the health and safety of the boys.268

The cases discussed concerning an epileptic employee or applicant support the health and safety reasoning used by the court in Goerke. A compilation of these cases reveal that courts are more willing to require employers to hire a handicapped person if there is no health and safety risks involved, as opposed to when the individual’s disability presents a risk to the health and safety of the applicant, co-employees or any other persons.

Following the reasoning of the above discussed cases dealing with employment discrimination of epileptics, the court’s result in Goerke was correct. However, the court in Goerke failed to establish a workable standard for employers to utilize in future employment decisions. A preferable standard would operate differently depending on the health and safety risks involved. This Note established

264. See supra notes 71-72 and accompanying text.
265. See supra note 72 and accompanying text.
266. See supra notes 69-80 and accompanying text.
267. See supra note 77 and accompanying text.
268. See supra note 72 and accompanying text.
such a standard and applied it to the facts in *Goerke*. Although the application of the proposed standard resulted in the same outcome as *Goerke*, the proposed standard is better because it provides a workable framework which enables employers to make nondiscriminatory hiring decisions.

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**APPENDIX**

To initiate a claim of unlawful employment discrimination, the aggrieved party needs to file a written charge of discrimination with the Commission setting forth facts showing the employer engaged in unlawful employment discrimination. The written charge needs to be made within 180 days of the alleged discrimination. The Commission then furnishes the employer with a copy of the charge within ten days, including a statement of the date, place, and circumstances of the alleged discrimination. The Commission then commences a non-public investigation of the charge. If the Commission determines there is reasonable cause to substantiate the claim, the Commission will attempt to eliminate the alleged unlawful employment practices by informal methods. These methods may include conference, conciliation, and persuasion. Nothing said or done in these attempts to alleviate the discrimination will be made public or used as evidence in subsequent proceedings. NEB. REV. STAT. § 48-1118 (Reissue 1984).

If the Commission’s attempt to informally resolve the charge fails to eliminate the discrimination, the Commission may order a public hearing. If a public hearing is ordered, the Commission will issue and serve the employer a written notice and copy of the complaint. The employer is then required to answer the charges in the complaint at a hearing before the Commission. The employee will also be made a party to the hearing. At the hearing, the Commission, employee, and employer may introduce witnesses. Upon completion of the hearing, the Commission will make and file its findings of fact and conclusions. The Commission then makes and enters an appropriate order based on these findings and conclusions. These findings should be detailed “to enable the court on appeal to determine the controverted questions presented by the proceedings and whether proper weight was given to the evidence.” *Id.* § 48-1119.

If the Commission determines the employer engaged in unlawful employment practices, the Commission will enter a cease and desist order against the employer requiring it to refrain from its discriminatory practices. The Commission will also initiate other affirmative action as may be appropriate, which may include reinstatement of
the employee or rehiring the employee with or without backpay. A copy of any order the Commission enters will be served upon the person to whom the order operates against. The order takes effect twenty days after service and runs until the order is revoked by the Commission or until the time designated on the order. If the Commission determines the employer has not engaged in unlawful employment practices, the Commission will state its findings of fact and conclusions accordingly. Id.

Any aggrieved party to these proceedings directly affected by the Commission's decision and order may instigate proceedings in the appropriate district court. The aggrieved party has thirty days from the date the order was entered to instigate proceedings. If the party subject to the order does not pursue judicial review within the thirty day limit, the Commission may obtain a decree of the court for enforcement of the order upon a showing that the employer is subject to the Commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is filed. Any order the Commission may have entered at the hearing will be stayed until adjudication by the district court. Id. § 48-1120.

Proceedings in the district court are initiated by the filing of a petition, and a transcript of the hearing before the Commission with the district court. The Commission and all interested parties who appeared at the hearing will be served with a copy of the petition. The district court's determination of the case extends to all questions of law and fact presented by the entire record. The district court's review of the record before the Commission is de novo. The Commission's order will not be vacated, modified, or set aside unless: (1) the order is prohibited by the statute itself, or is in violation of any constitutional rights; or (2) "[t]he findings of the commission in support of such order are unreasonable or arbitrary or are not supported by a preponderance of the evidence." Id. The district court shall have exclusive jurisdiction, and the district court's judgment shall be final, subject only to "appellate review as provided by law." Id.