No. 121048

IN THE
SUPREME COURT OF ILLINOIS

| | | |
|---|---|---|
| PATRICIA ROZSAVOLGYI,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>CITY OF AURORA,<br><br>Defendant-Appellee,<br><br>and<br><br>ILLINOIS DEPARTMENT OF HUMAN RIGHTS,<br><br>Intervenor-Appellant. | ) | On Certificate of Importance from the Illinois Appellate Court, Second Judicial District, No. 2-15-0493<br><br>There Heard on Appeal from the Circuit Court of the Sixteenth Judicial Circuit, Kane County, Illinois, No. 2014 L 49<br><br>The Honorable THOMAS MUELLER, Judge Presiding. |

**REPLY BRIEF AND BRIEF IN RESPONSE TO REQUEST FOR CROSS-RELIEF OF ILLINOIS DEPARTMENT OF HUMAN RIGHTS**

**LISA MADIGAN**
Attorney General
State of Illinois

**DAVID L. FRANKLIN**
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Illinois Department of Human Rights

**BRETT E. LEGNER**
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2146
Primary e-mail service:
CivilAppeals@atg.state.il.us
Secondary e-mail service:
blegner@atg.state.il.us

FILED

MAR 17 2017

SUPREME COURT
CLERK

## POINTS AND AUTHORITIES

## ARGUMENT

### I. This Court should vacate the answer to Third Certified Question because that question was not proper under Rule 308.

The Third Certified Question is overly broad and requires the resolution of a host of factual issues; therefore, the Question should be deemed improper and the appellate court's answer to that Question vacated.

The Third Certified Question asks: "Does the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/1, *et seq.*, apply to a civil action under the Illinois Human Rights Act where the plaintiff seeks damages, reasonable attorneys' fees and costs?" The breadth of this question renders it improper because, as the Department explained in its opening brief, there are many different types of actions that may be raised under the Human Rights Act, those actions concern different obligations of, or conduct by, municipalities or other local entities, and not all of those actions are at issue in this case. Dep't Br. 8-9. An answer to this much-too-broad question would thus affect causes of action that are not raised here and have not been adequately considered by the Court. This would result in an advisory opinion on the applicability of the Tort Immunity Act to civil actions under sections of the Human Rights Act that are not raised in this case and under different factual scenarios than are presented by the underlying complaint. The Court should not answer this question, which extends far beyond the issues and facts presented by this case. *See People v. Fiveash*, 2015 IL 117669, ¶ 42 ("the court

of this state may not properly issue advisory opinions to provide guidance to future litigants").

The City suggests that this Court can modify the Question to correct any problem. City Br. 22. But the City poses no alternative question. Moreover, the City ignores that resolving an even narrower Question on this issue turns on the resolution of factual issues. Dep't Br. 9-11. That is because the facts of a local entity's conduct — what actions it did or did not take in the particular circumstances and whether its conduct was negligent or rose to the level of being willful and wanton — will often be dispositive of whether a tort immunity applies. *See DeSmet ex rel. Estate of Hays v. City of Rock Island*, 219 Ill. 2d 497, 521 (2006); *Vill. of Bloomingdale v. CDG Enters., Inc.*, 196 Ill. 2d 484, 490 (2001). In fact, the City's own brief demonstrates this, as it relies on the specific factual allegations of Rozsavolgyi's complaint to argue that certain Tort Immunity Act provisions are applicable. *See, e.g.*, City Br. 46-48.

The City also argues that this Court may resolve the Third Certified Question because the appellate court addressed it and, under Illinois Supreme Court Rule 316, the entire case comes before this Court on review. City Br. 20-21. But that is beside the point. The fact that the appellate court addressed the Third Certified Question as framed does not mean that the question was proper, or that this Court must therefore consider it on the merits. Instead, the proper course is to find that the Third Certified Question was improper

and exercise this Court's authority on review to vacate the appellate court's answer to that question.

The City also asserts that Rozsavolgyi forfeited the claim that the Third Certified Question was not proper. *Id.* at 20. Even if that were true, it is axiomatic that "forfeiture is a limitation on the parties and not this court" and this Court "may overlook any forfeiture in the interest of maintaining a sound and uniform body of precedent." *Klaine v. S. Ill. Hosp. Servs.*, 2016 IL 118217, ¶ 41. Any forfeiture should not result in an answer to an improperly framed certified question, especially when that answer would address situations not before the Court and result in an advisory opinion.

In sum, this Court should find that the Third Certified Question was improper and vacate the appellate court's answer to that Question. That Question asks broadly whether the Tort Immunity Act applies to bar a claim under the Human Rights Act for damages and other remedies. But the Human Rights Act authorizes a variety of civil actions, not all of which are at issue in this case. Moreover, whether a municipality's conduct falls within the Human Rights Act and the provisions of the Tort Immunity Act is a fact-intensive inquiry. For these reasons, the applicability of the Tort Immunity Act to specific claims raised under the Human Rights Act should not be resolved in the answer to a certified question. Rather, it should be answered at a later point in this litigation, if it needs to be answered at all.

## II. The Tort Immunity Act does not shield municipalities from liability for violations of the Human Rights Act.

On the merits of the Third Certified Question, nothing in the City's response brief counters the Department's opening argument that the Human Rights Act's express creation of causes of action against local governments and enumeration of specific relief available against them, including damages, must be given effect over the general immunities provided by the Tort Immunity Act. The City exalts the importance of its statutory immunities, but those immunities are to be narrowly construed, while the remedial regime enacted by the Human Rights Act is to be liberally construed. In this case, therefore, the specific causes of action and remedies provided by the Human Rights Act control over the general immunities afforded under the Tort Immunity Act.

### A. As a matter of statutory construction, the obligations and remedies created by the Human Rights Act should be given effect over the general immunities established by the Tort Immunity Act.

As the Department explained in its opening brief, this Court should read the provisions of the Human Rights Act and the Tort Immunity Act together. Dep't Br. 21. The Court's construction of these statutes should be guided by the principles that the Human Rights Act is to be construed broadly to give effect to its remedial purpose and that the Tort Immunity Act is to be construed narrowly as it is derogation of common law. *Id.* at 12-17. Reading these statutes together admits one proper conclusion: the specific liabilities

imposed on municipalities under the Human Rights Act are not eviscerated by the general immunities provided by the Tort Immunity Act. *Id.* at 17-23.

In its response, the City ignores these arguments and instead asserts that to determine whether the Tort Immunity Act applies, "this Court must look to the TIA, and not the common law or the IHRA." City Br. 24. This contention fails as a matter of basic statutory construction. As discussed, the Human Rights Act imposes liability on municipalities as employers and delineates specific remedies, including damages, that may be awarded against those municipalities. Dep't Br. 14-16. The Tort Immunity Act grants liability to municipalities from damages claims for certain injuries. *Id.* at 21. These statutes govern the same subject matter — the liability of a municipality for certain conduct — and therefore must be read together. *See Stone v. Dep't of Emp't Sec. Bd. of Review*, 151 Ill. 2d 257, 262 (1992). And where two statutes relate to the same subject matter, such as municipal liability in this case, the more specific statute controls over the general provision. *See Moon v. Rhode*, 2016 IL 119572, ¶ 29. The Human Rights Act is the more specific statute here because it sets forth certain causes of action and enumerates the type of municipal liability for those causes, whereas the Tort Immunity Act provides general categories of immunity. This construction is buttressed by the fact, which the City cannot dispute, that the Human Rights Act is to be construed liberally to give effect to its remedial nature, while the Tort Immunity Act is to

be construed narrowly. *See* Dep't Br. 17-23. Therefore, the City is wrong that the Court should look to the Tort Immunity Act without reference to the Human Rights Act.

The City notes that the Tort Immunity Act expressly excludes certain claims from its scope, and Human Rights Act claims are not listed as express exclusions. City Br. 24-25. Section 2-101 of the Tort Immunity Act states that the Act does not "affect the right to obtain relief other than damages against a local public entity or public employee." 745 ILCS 10/2-101 (2014). That provision continues that "[n]othing in this Act affects the liability, if any, of a local public entity or public employee" based on contract, operation as a common carrier, the Workers' Compensation Act, the Workers' Occupational Disease Act, § 1-4-7 of the Municipal Code, or the Uniform Conviction Information Act. *Id.* Section 2-101, however, does not state that it provides an exhaustive list of claims that are unaffected by the Tort Immunity Act. *See id.* Thus, the Court should consider the text, structure, and purpose of the Human Rights Act to determine whether claims under that statute are unaffected by the immunities provided by the Tort Immunity Act.

The City further argues that the focus on the inclusion of local governmental entities within the definition of "employer" under the Human Rights Act "mistakenly conflates the existence of a duty under the IHRA with the existence of an immunity for breach of said duty under the TIA." City Br.

27. But the Department's argument does not rest only on the creation of a duty for local governments under the Human Rights Act. Instead, that statute also explicitly provides that employers — defined to include municipalities — shall be liable for damages. *See* 775 ILCS 5/8A-104 (2014); 775 ILCS 5/10-102(C) (2014). Therefore, the Human Rights Act does not only create duties or obligations for parties, but also creates a remedial regime for its violation. The City's brief consistently overlooks this fundamentally important aspect of the Human Rights Act.

The City also is wrong that the Department's construction of the statutes renders §§ 1-204 and 2-101 of the Tort Immunity Act superfluous in all cases where a specific statute does not expressly preclude application of the Tort Immunity Act. *See* City Br. 28. To the contrary, the Department's argument is that under the unique considerations provided by the Human Rights Act, which must be read liberally and expressly subjects local governments to liability for damages, those provisions of the more general Tort Immunity Act should give way.

For these reasons, this Court should construe the Tort Immunity Act in light of the purposes and structure of the Human Rights Act and hold that civil actions for damages under the Human Rights Act are not subject to the general immunities provided in the Tort Immunity Act.

### B. The cases the City relies upon are inapposite.

Throughout its argument, the City relies on *Epstein v. Chicago Board of Education*, 178 Ill. 2d 370 (1997), but *Epstein* is not on point. In *Epstein*, this Court addressed whether § 3-108(a) of the Tort Immunity Act, providing an immunity for failure to supervise an activity on public property, applied to a Structural Work Act claim. *Id.* at 373. The court noted that the plaintiff "asks us to read exceptions into this provision for both Structural Work Act claims and construction activities." *Id.* at 376. The court declined to do so, explaining that it has "admonished against reading exceptions into or engrafting tacit limitations onto the Tort Immunity Act's language that conflict with the express legislative intent." *Id.* at 376-77. The court observed that § 3-108 grants immunity "except as otherwise provided by this Act," and that the rest of the Tort Immunity Act did not except Structural Work Act claims from its coverage. *Id.* at 377.

In *Epstein*, there was no discussion of the provisions of the Structural Work Act that purportedly imposed liability on the local governmental defendant. Similarly, there was no suggestion that the structure of that statute was similar to the Human Rights Act. Nor was there any indication that the Structural Work Act was to be liberally construed to give effect to a remedial purpose. Simply put, *Epstein* did not involve the interplay between

the Human Rights Act and the Tort Immunity Act nor did it address the statutory construction issues raised here. That case, then, does not aid the determination of this issue.

Similarly, *Melvin v. City of West Frankfort*, 93 Ill. App. 3d 425 (5th Dist. 1981), also cited by the City, does not resolve the matter. In *Melvin*, the appellate court held that the Tort Immunity Act barred damages against city officials for violation of human rights statutes. *Id.* at 431-33. But the court in *Melvin* did not undertake the statutory construction of the Human Rights Act and the Tort Immunity Act at issue in this case.

Nor is this Court's decision in *Village of Bloomingdale* dispositive. The City relies on *Village of Bloomingdale*, in part, for the proposition that a court should not read exceptions into the Tort Immunity Act that were not expressed by the General Assembly. *See, e.g.*, City Br. 24. The Department, however, does not ask the Court to read an exception into the Tort Immunity Act. Instead, the Department asks the Court to read the two statutory regimes together and find that the specific remedial provisions of the Human Rights Act should be given meaning in this situation in light of the purposes of both statutes.

### C. The amendment to the definition of "injury" under the Tort Immunity Act does not support the City's position.

Nor is there merit to the City's argument that the amendment to § 1-204 to include statutory and constitutional claims within the Tort Immunity

Act's definition of "injury" was intended to provide immunity to claims under the Human Rights Act. *See* City Br. 30-31. The City argues that the General Assembly "specifically amended" § 1-204 "to expressly include civil actions based on the Illinois Constitution following the Second District's decision in *Firestone v. Fritz*, 119 Ill. App. 3d 685, 689 (2d Dist. 1983)." *Id.* at 30. But the City cites no legislative history showing that the General Assembly intended to address *Firestone* or that the amendment was intended to provide immunity from violations of the Human Rights Act.

*Firestone* did not involve a Human Rights Act claim. The plaintiff there claimed that the municipality and its agent violated the equal protection clauses of the United States and Illinois Constitutions and 42 U.S.C. § 1983 by permitting construction of a retaining wall that failed to fully comply with building codes and resulted in the flooding of the plaintiff's property. 119 Ill. App. 3d at 689. The court found that the defendants were not protected by the Tort Immunity Act because that statute only applied to tort claims. *Id.* Even if the General Assembly was reacting to *Firestone* when it passed Public Act 84-1431, which among other things amended § 1-204 of the Tort Immunity Act, that does not support the conclusion that the General Assembly intended to immunize local government entities from violations of the Human Rights Act given the structure and purpose of that latter statute.

Moreover, the legislative history of Public Act 84-1431 does not support the conclusion that the General Assembly sought to provide immunity from the Human Rights Act, which, again, expressly provides for municipal liability for damages. Instead, the focus of Public Act 84-1431 was "tort reform and insurance regulation." Proceedings of the 84th General Assembly, Senate Transcript, June 30, 1986 at 76-77 (Statement of Sen. Rock); *see id.* at 82 (Sen. Schuneman); *id.* at 84 (Sen. Berman); *id.* at 105 (Sen. Marovitz). In that vein of reforming Illinois's tort laws, Senator Berman explained "we've addressed the problems of the cities and the park districts and the school districts as relates to injury liability." *Id.* at 85 (Sen. Berman). According to Representative Greiman, the article of Public Act 84-1431 that related to local government immunity limits tort liability but "makes sure that communities will still be liable for wanton and willful conduct that disregards, with conscious indifference, the safety of its citizens." Proceedings of the 84th General Assembly, House Transcript, June 30, 1986 at 6 (Rep. Greiman). That article also shortened the statute of limitations "so that claims cannot hang out for long periods of time against local government," extended to insurance carriers that insure municipalities "the kind of immunities that local government is given," and allowed judgments to be deferred over a long period of time and paid in installments. *Id.* The focus of this enactment was on tort claims, not statutory Human Rights Act claims.

Representative O'Connell clarified the intended scope of the Public Act by focusing on concerns about tort liability: "We have [been] told that the individual park districts could not open up their playgrounds, so we have addressed that by providing for extensive immunity for park districts" and "[w]e have provided in this Bill that insurance companies that provide the insurance also obtain the tort immunity that local government had." *Id.* at 19 (Rep. O'Connell). Representative Greiman specifically discussed the part of the legislation that amended § 9-104 of the Tort Immunity Act, noting that was "the piece that local governments wanted in here." *Id.* at 39-40 (Rep. Greiman). Section 9-104, as amended by Public Act 84-1431, permits local governments to pay "a *tort* judgment" in installments. 745 ILCS 10/9-104 (2014) (emphasis added). While the Tort Immunity Act defines "tort judgment" to be "a final judgment founded on an injury, as defined by this Act," 745 ILCS 10/9-101(d) (2014), the expansion of the definition of "injury" by Public Act 84-1431 to include statutory and constitutional violations should not be read to undercut the legislature's clear concern with tort liability when it enacted that legislation.

This legislative history shows that the General Assembly was concerned with *tort* liability and *tort* reform. This history does not support the conclusion that the General Assembly intended to provide local governments with immunity from damages for violations of the Human Rights Act. This is not to

say that the Tort Immunity Act applies only to tort claims narrowly construed. But it is to say that when the legislators expanded the definition of "injury" in that statute, they did so as part of legislation that was concerned with tort reform. There is nothing to show a legislative intent to immunize conduct that would violate the Human Rights Act, especially where that statute expressly permits damages against municipalities. Absent such a clear showing, this Court should give effect to the entirety of the Human Rights Act's remedial regime.

### D. The State's sovereign immunity from Human Rights Act claims brought in circuit court is not relevant to this case.

The City also finds relevance in appellate decisions holding that the State's sovereign immunity bars claims against the State under the Human Rights Act. City Br. 27-28 (citing *Watkins v. Office of State App. Defender*, 2012 IL App (1st) 111756; *Lynch v. Dep't of Transp.*, 2012 IL App (4th) 111040). Although the Human Rights Act does not limit the liability of the State, the State is entitled to sovereign immunity from damages claims for statutory violations where those claims are brought directly in the circuit court, as opposed to administrative actions before the Human Rights Commission, which are not barred by sovereign immunity. *Lynch*, 2012 IL App (4th) 111040, ¶ 30; *Watkins*, 2012 IL App (1st) 111756, ¶ 23. But the State Lawsuit Immunity Act, 745 ILCS 5/0.01 *et seq.* (2014), which is the basis

of the State's sovereign immunity, operates differently than the Tort Immunity Act.

Indeed, the State Lawsuit Immunity Act "expressly states that the State does not waive immunity except as provided in certain other statutes, and the Human Rights Act is not enumerated as an exception to the Immunity Act." *Watkins*, 2012 IL App (1st) 111756, ¶ 23; *see* 745 ILCS 5/1 (2014). The State thus retained its sovereign immunity in actions under the Human Rights Act brought directly in circuit court because "there is no affirmative language in the Human Rights Act, or in the Immunity Act, stating that the State has waived its immunity for claims under the Human Rights Act." *Watkins*, 2012 IL App (1st) 111756, ¶ 23. That *affirmative* waiver must be "clear and unequivocal" for the State's sovereign immunity not to apply. *In re Special Educ. of Walker*, 131 Ill. 2d 300, 303-04 (1989).

The Tort Immunity Act, however, does not work in that way. It starts with the basic premise that "local governmental units are liable in tort." *In re Chi. Flood Litigation*, 176 Ill. 2d 179, 192 (1997). It then provides specific immunities "based on specific government functions." *Id.* The general rule, then, is that municipalities are liable, and that presumption is overcome only if there is an affirmative statutory provision stating otherwise. *See id.* Thus, whereas the General Assembly must make an affirmative statement to *deprive* the State of its sovereign immunity conferred by the State Lawsuit Immunity

Act, it must make an affirmative statement to *confer* a municipality with immunity under the Tort Immunity Act.

### E. The specific immunities raised by the City do not apply to shield it from damages liability for violations of the Human Rights Act.

The City claims that § 2-103 of the Tort Immunity Act provides it with immunity from Rozsavolgyi's claims. City Br. 39-41. That provision grants immunity to a local government "for an injury caused . . . by failing to enforce any law." 745 ILCS 10/2-103 (2014). But there is a difference between the failure to *enforce* a law and the failure to *comply* with a law that imposes substantive obligations on a municipality. It would be absurd to hold the City immune under this provision for its failure to "enforce" the requirements of the Human Rights Act against itself. *See* Dep't Br. 26.

The City also asserts that its "discretionary immunity" under §§ 2-109 and 2-201 of the Tort Immunity Act bars liability for Rozsavolgyi's harassment claims. City Br. 41-46. Section 2-109 provides immunity to a public entity for an injury resulting from an act or omission of an employee where the employee is not liable. 745 ILCS 10/2-109 (2014). As explained in the Department's opening brief (Dep't Br. 24-25), there is no question of employee liability for Rozsavolgyi's claims; that liability under the Human Rights Act extends only to the employer. Thus, this is not a situation where an employee is not liable for certain conduct and therefore the employer cannot be liable. Under the

Human Rights Act provisions invoked by Rozsavolgyi, *only* the employer can be liable in the first place.

Similarly, § 2-201 does not apply because it extends immunity to a public employee exercising discretion, 745 ILCS 10/2-201 (2014), but, again, the issue here under the Human Rights Act is not the liability of a public employee but rather of the public entity. And as the Department has explained, § 2-201 immunity is subject to the limitation "except as otherwise provided by Statute," and the Human Rights Act is a statute imposing liability for the exercise of discretion in certain circumstances. Dep't Br. 25.

The City responds that the Department has "mistake[n] the existence of a duty with the application of an immunity." City Br. 44. The City, however, misunderstands the nature of the Human Rights Act. That statute not only imposes duties upon entities and individuals, but also specifically provides remedies that may be obtained against those parties for violations of the Act. In other words, the Human Rights Act does not only create duties. Instead, its remedial provisions are explicit statutory statements that conduct that violates the statute's terms are not immunized. The Human Rights Act both imposes duties and provides remedies. Its remedial regime is inconsistent with application of the Tort Immunity Act to statutory human rights claims.

## III. Rozsavolgyi's claims for failure to accommodate her disability are cognizable under the Human Rights Act.

As the appellate court correctly concluded, failure to provide a reasonable accommodation for a disability is independently actionable under the Human Rights Act. *See Rozsavolgyi v. City of Aurora*, 2016 IL App (2d) 150493, ¶¶ 51-79.

### A. The Human Right Act should be broadly construed to achieve its purpose of preventing discrimination in employment.

In the Human Rights Act, the General Assembly declared that it is the State's public policy to "secure for all individuals within Illinois the freedom from discrimination because of his or her . . . physical or mental disability." 775 ILCS 5/1-102(A) (2014). Because the Human Rights Act, as indicated, is a remedial statute, it "should be construed liberally to give effect to its purpose." *Sangamon Cty. Sheriff's Dep't v. Ill. Human Rights Comm'n*, 233 Ill. 2d 125, 140 (2009); *see also Bd. of Trs. of Cmty. Coll. Dist. No. 508 v. Human Rights Comm'n*, 88 Ill. 2d 26 (1981) (same); *Arlington Park Race Track Corp. v. Human Rights Comm'n*, 199 Ill. App. 3d 698, 703-04 (1st Dist. 1990) ("It is apparent that the Illinois Human Rights Act is remedial legislation. . . . Since the Act is remedial legislation, it must be construed liberally to give effect to its purposes.") (citing *Rackow v. Human Rights Comm'n*, 152 Ill. App. 3d 1046, 1059 (2d Dist. 1987)). Where conduct is not expressly enumerated in the Act but is sufficiently connected to the statute's purposes, it falls within the

statute's "broad range of discriminatory practices banned by the Act." *Bd. of Trs.*, 88 Ill. 2d at 26.

Additionally, the Department's interpretation of the Human Rights Act and the administrative regulations should receive deference from this Court. "[A]n agency's interpretation of its regulations and enabling statute are 'entitled to substantial weight and deference' given that 'agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent.'" *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16 (quoting *Provena Covenant Med. Ctr. v. Dep't of Revenue*, 236 Ill. 2d 368, 387 n.9 (2010)).

### B. An employer's failure to provide a reasonable accommodation for a disability is within the Human Rights Act's scope.

The Human Rights Act declares that an employer's actions that affect the conditions of employment are a civil rights violation if those actions are based, among other things, on an individual's qualifying disability. Because the failure to provide a reasonable accommodation to an employee with a disability affects the conditions of that employee's employment, it is a violation of the Human Rights Act.

The Human Rights Act defines "disability" as "a determinable physical or mental characteristic of a person," or that, for the purposes of claims of employment discrimination, "is unrelated to the person's ability to perform

the duties of a particular job." 775 ILCS 5/1-103(I)(1) (2014). "Unlawful discrimination" is defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, *disability*, military status, sexual orientation, pregnancy, or unfavorable discharge from military service" as those terms are defined in the statute. 775 ILCS 5/1-103(Q) (2014) (emphasis added). Under § 2-102, it is a "civil rights violation" for any employer to "refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment" on the basis of "unlawful discrimination." 775 ILCS 5/2-102(A) (2014). Thus, the Human Rights Act "prohibits discrimination in employment against the physically and mentally disabled." *Planell v. Whitehall N., L.L.C.*, 2015 IL App (1st) 140799, ¶ 44. As part of the analysis of a disability discrimination claim, the appellate court has recognized a "duty to accommodate." *Fitzpatrick v. Human Rights Comm'n*, 267 Ill. App. 3d 386, 392 (4th Dist. 1994); *see also Truger v. Dep't of Human Rights*, 293 Ill. App. 3d 851, 861 (2d Dist. 1997); *Ill. Bell Tel. Co. v. Human Rights Comm'n*, 190 Ill. App. 3d 1036, 1050 (1st Dist. 1990).

The Department's administrative regulations specify that failure to provide a reasonable accommodation for a disability violates the Human Rights Act. The regulations provide that employers "must make reasonable

accommodation of the known physical or mental limitation of otherwise qualified disabled applicants or employees." 56 Ill. Admin. Code § 2500.40(a). The employer may demonstrate that accommodation would be "prohibitively expensive or would unduly disrupt the ordinary conduct of the business," and in that case the employer is not legally obligated to provide accommodation. *Id.* This determination involves weighing the cost and inconvenience of the accommodation against its benefits, which include facilitating the disabled individual's employment and facilitating access by other disabled employees, applicants, clients, and customers. *Id.* The regulations provide that accommodation may include, among other things, alteration of the work site, modification of work schedules or leave policy, acquisition of equipment, or job restructuring. *Id.* But an employer is not required to hire two employees to perform one job to accommodate an individual with a disability. 56 Ill. Admin. Code § 2500.40(b).

An employee with a disability seeking an accommodation bears the initial burden of apprising the employer of the employee's disability and submitting any necessary medical documentation. 56 Ill. Admin. Code § 2500.40(c). The employee must "ordinarily initiate the request for accommodation." *Id.* Once the request has been initiated, or if a potential accommodation is obvious in the circumstances, it is the employer's duty to provide a reasonable accommodation, if any. 56 Ill. Admin. Code § 2500.40(d).

The regulations further provide that, in response to a discrimination charge involving "a refusal to provide an accommodation," the employer must show that: (1) the individual with a disability would be unqualified even with accommodation; (2) the accommodation would be prohibitively expensive or would unduly disrupt the conduct of business; or (3) the accommodation is subject to one of the exceptions specified in the regulations. *Id.* This regulation has "the force and effect of law," and administrative agencies "enjoy wide latitude in adopting regulations reasonably necessary to perform the agency's statutory duty." *Hartney Fuel*, 2013 IL 115130, ¶ 38.

The appellate court has properly followed this regulation and held that "[d]iscrimination on the basis of [disability] includes a failure to make reasonable accommodation." *Brewer v. Bd. of Trs. of Univ. of Ill.*, 339 Ill. App. 3d 1074, 1080 (4th Dist. 2003) (citing 56 Ill. Admin. Code § 2500.40), *abrogated on other grounds*, *Blount v. Stroud*, 232 Ill. 2d 302 (2009). For instance, in *Illinois Department of Corrections v. Illinois Human Rights Commission*, the appellate court cited the regulation and explained that "[o]nce an employee requests an accommodation, it becomes the burden of the employer to show that there is no possible reasonable accommodation or that the employee would be unable to perform the job even with the accommodation." 298 Ill. App. 3d 536, 542 (3d Dist. 1998) (citing 56 Ill. Admin. Code § 2500.40). In that

case, the court found that the failure to provide a reasonable accommodation of a disability was a violation of the Human Rights Act. *Id.* at 542-43.

Additionally, the court in *Illinois Bell* explained that the "employer's duty to accommodate [disabled] workers attaches when the employee asserts or claims that he or she would have performed the essentials of the job if afforded reasonable accommodation." 190 Ill. App. 3d at 1050. In giving effect to § 2500.40, the court continued that "the Commission's rules place the burden on the employee to assert the duty [to accommodate] and to show that the accommodation was requested and necessary for adequate job performance." *Id.* The *Illinois Bell* court upheld the Human Rights Commission's finding that the employer violated the Human Rights Act "when it unreasonably failed to provide available accommodations to [the employee's disability]." *Id.* at 1051.

In arguing that failure to accommodate an employee's disability is not an "independent" violation of the Human Rights Act, the City argues that § 2-102 does not explicitly enumerate failure to accommodate as a civil rights violation, while other provisions of the Human Rights Act do enumerate a failure to provide accommodation as a violation in certain circumstances. City Br. 50. In particular, the City points to § 2-102(J), 775 ILCS 5/2-102(J) (eff. Jan. 1, 2015), which specifies that the failure to provide a reasonable

accommodation for pregnancy in the employment context is a violation of the Human Rights Act.

But that the General Assembly amended the Human Rights Act in 2015 to expressly state that an employer's failure to reasonably accommodate pregnancy is a civil rights violation does not mean that failure to accommodate an employee's disability is *not* a civil rights violation. First, the administrative regulations defining an employer's failure to provide a reasonable accommodation as a violation of the Human Rights Act date back to September 15, 1982, over 30 years prior to the amendment to § 2-102(J). *See* 6 Ill. Reg. 11489 (1982). Therefore, for more than three decades the Department has interpreted the Human Rights Act to prohibit the failure to provide a reasonable accommodation for a disability, and, as discussed, courts had given effect to that regulation. The General Assembly is assumed to know about that longstanding interpretation of the statute and yet has not amended the Human Rights Act to change it. *See Ready v. United/Goedecke Servs., Inc.*, 232 Ill. 2d 369, 380 (2008) (legislature has acquiesced in statutory interpretation when it chooses not to amend statute after interpretation).

Second, Public Act 98-1050, which amended § 2-102(J), was narrowly focused on addressing discrimination in a particular context (pregnancy) where the existing statutory and regulatory remedies were not proving adequate. *See* 2014 Ill. Legis. Serv. P.A. 98-1050 (H.B. 8). In Public Act 98-

1050, the General Assembly found that "[c]urrent workplace laws are inadequate to protect pregnant workers from enjoying equal employment opportunities" and that pregnant workers are often "forced to take unpaid leave or are fired, despite the availability of reasonable accommodations that would allow them to continue to work." P.A. 98-1050, §§ 5(1), (2).

At the same time, the General Assembly expressly acknowledged that employers also are required to provide reasonable accommodations to employees with disabilities: "Employers are familiar with the reasonable accommodations framework. Indeed, employers *are required to reasonably accommodate people with disabilities*." *Id.* at § 5(4) (emphasis added). The General Assembly, however, continued: "Sadly, many employers refuse to provide reasonable accommodations or decline to extend workplace injury policies to pregnant women." *Id.*

Thus, the amendment to the Human Rights Act adding § 2-102(J) does not establish that failure to accommodate a disability is not a civil rights violation. Instead, the Public Act creating that section states the exact opposite — employers are now required to accommodate pregnancy in the same way that they accommodate disabilities. Accommodation of pregnancy is given explicit statutory treatment because of a specific history of inadequate accommodation. But that in no way means that failure to accommodate a disability is not a civil rights violation. Instead, the longstanding

interpretation of the Human Rights Act as evidenced by the regulations has provided a satisfactory remedy to that problem, so a further express statutory amendment was not necessary, unlike with pregnancy discrimination.

The City argues that "[h]ad the General Assembly intended to create a duty to reasonably accommodate disabled employees as an independent civil rights violation, it would have enacted an amendment expressly stating so, just like it did for 'pregnancy' under section 2-102(J) of the [Human Rights Act]." City Br. 52. The City, however, ignores that the Public Act amending § 2-102(J) did so to treat pregnant employees the same as employees with disabilities under the Human Rights Act. The pregnancy-accommodation amendment, then, means the opposite of what the City claims.

In sum, court decisions and the administrative regulations provide that the failure to provide a reasonable accommodation of a disability in employment constitutes a violation of the Human Rights Act. Under § 2500.40 of the regulations, an employer can rebut a failure-to-accommodate claim by showing that even with the requested accommodation, the individual would be unqualified for the position or the accommodation was otherwise unreasonable. 56 Ill. Admin. Code § 2500.40(d). In any event, the failure to accommodate a disability has long been understood to be a violation of the Human Rights Act.

## IV. Harassment on the basis of a disability is a legally cognizable claim for disability discrimination under § 2-102(A) of the Human Rights Act.

The appellate court also correctly held that a plaintiff can bring a claim for failure to stop harassment on the basis of a disability. *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶¶ 32-50. Under the Human Rights Act, it is unlawful to make any employment decision on the basis of unlawful discrimination. 775 ILCS 5/2-102(A) (2014). The Human Rights Act defines "unlawful discrimination" to include discrimination on a number of grounds, including against a person on the basis of his or her disability. 775 ILCS 5/1-103(Q) (2014). The regulations adopted by the Department further interpret § 2-102 of the Human Rights Act to "prohibit[ ] discrimination in employment against person with disabilities." 56 Ill. Admin. Code § 2500.10.

A disability discrimination claim is analyzed the same as a racial discrimination claim or any other unlawful discrimination claim under the Human Rights Act because, unless otherwise explicitly stated, all categories of discrimination identified in § 1-103(Q) of the Human Rights Act should be treated equally. Accordingly, the presence of harassment in the workplace based on any protected class under § 1-103(Q) amounts to unlawful employment discrimination under § 2-102(A). *See Vill. of Bellwood Bd. of Fire & Police Comm'rs v. Human Rights Comm'n*, 184 Ill. App. 3d 339, 351 (1st Dist. 1989). To establish harassment, a complainant must show that there was

a steady barrage of abusive language and/or conduct that created a hostile work environment. *Id.* at 350. "[T]he misconduct must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive work environment." *Motley v. Ill. Human Rights Comm'n*, 263 Ill. App. 3d 367, 374 (4th Dist. 1994) (internal quotation marks omitted).

In *Bellwood*, the appellate court upheld the Commission's conclusion that a racially charged atmosphere in a police department amounted to racial harassment and constituted discrimination based upon race within the meaning of the Human Rights Act. 184 Ill. App. 3d at 351. The court noted that the administrative record established the complainant was "subjected to a continuous stream of racially derogatory comment, in one form or another, from the officers at the Bellwood police department," and the supervising officers were aware of this conduct but did not take any steps to correct the problem. *Id.* The court concluded: "We believe this is exactly the type of racial harassment which the [Human Rights Act] seeks to prevent." *Id.*

The same rationale employed by the court in *Bellwood* is applicable in a case involving disability harassment. Both race and disability are enumerated protected classes in § 1-103(Q). The same elements of a discrimination claim are applied whether the individual is claiming discrimination based on disability or on race. *See Truger*, 293 Ill. App. 3d at 858-59 (elements of disability discrimination claim under the Human Rights Act); *Bellwood*, 184

Ill. App. 3d at 351-50 (elements of racial discrimination claim under the Human Rights Act). As with a race harassment claim, if a complainant establishes the existence of harassment based on disability, she states a legally cognizable claim for disability discrimination pursuant to § 2-102(A) of the Human Rights Act.

In *Old Ben Coal Company v. Illinois Human Rights Commission*, the appellate court examined whether the Human Rights Act "proscribes sexual harassment as a form of unlawful sex discrimination prior to the effective date of the amendment" expressly delineating sexual harassment as a violation. 150 Ill. App. 3d 304, 306 (5th Dist. 1987). The court held the Human Rights Act prohibited sexual harassment as a form of discrimination before the amendment clarified the statute to make clear that harassment was proscribed. *Id.* at 309. In reaching this conclusion, the court relied on: (1) the legislative debates that showed that the legislators "considered sexual harassment to be prohibited by the Human Rights Act as a form of sex discrimination and that the amendment was needed only to clarify this proscription"; (2) the fact that while both Title VII of the Federal Civil Rights Act and § 2-102(A) may not prohibit "harassment" explicitly, they both provide "that it is a violation for any employer to act with respect to the "terms, privileges or conditions of employment" on the basis of unlawful discrimination, and this statement has been interpreted as prohibiting

harassment based on unlawful discrimination; and (3) the Human Rights Commission's interpretation of the Human Rights Act to encompass sexual harassment was "an informed source for ascertaining legislative intent" that was entitled to deference. *Id.* at 307-09.

In response, the City relies on this Court's decisions in *Board of Trustees of Southern Illinois University v. Department of Human Rights*, 159 Ill. 2d 206 (1994), and *Sangamon County Sheriff's Department v. Human Rights Commission*, 233 Ill. 2d 125 (2009). City Br. 62-68. Neither case compels the conclusion that disability harassment is not cognizable under the Human Rights Act.

In *Board of Trustees*, the issue was whether the Department had jurisdiction to hear a charge alleging racial discrimination at a public university. 159 Ill. 2d at 207-08. The court's focus was on whether a public university was subject to the Human Rights Act. In finding that a public university was not subject to the Human Rights Act for purposes of racial discrimination claims, the court first found that public universities did not fall within the statutory definition of places of public accommodation. *Id.* at 211-12. The court then explained that its decision was "bolstered" by the amendment of the Human Rights Act that specifically conferred jurisdiction on the Department to hear claims of sexual harassment in higher education. *Id.* at 213. The court stated that "[h]ad higher education already been covered by

the Human Rights Act, a simple amendment adding sexual harassment to the Department's jurisdiction would have been sufficient." *Id.* The court continued that the "addition of an entire new article evinces the legislature's understanding that, until that new article's passage, no jurisdiction had yet been conferred to the Department over institutions of higher education." *Id.*

*Board of Trustees*, thus, did not examine whether sexual harassment was a civil rights violation under the Human Rights Act before the amendment. And the court did not analyze whether the amendment clarified that harassment was a violation before the amendment. Instead, the court explained that the amendment added institutions of higher education to the Department's jurisdiction for the first time, but only in this limited context. *Board of Trustees* did not discuss or reject *Old Ben Coal*'s determination that sexual harassment was a civil rights violation before the amendment, nor was that question before the court. The court discussed the amendment only to support its view that public universities were generally not covered by the statute — the question was *who* was subject to the Human Rights Act, not *what* was prohibited by the Act. Any suggestion that sexual harassment was not already covered by the Human Rights Act pre-amendment was *dictum* and does not override the thorough analysis and reasoning of *Old Ben Coal*.

Moreover, this Court explained in *Sangamon County* that the sex harassment statute imposes strict liability on an employer for acts of a

supervisory employee who had no authority to affect the terms and conditions of the complainant's employment. 233 Ill. 2d at 137-39. As with *Board of Trustees*, the court in *Sangamon County* did not address the issue answered by *Old Ben Coal* and does not support the conclusion that disability harassment is not a covered form of discrimination under the Human Rights Act.

If anything, *Board of Trustees* and *Sangamon County* are easily read together with *Old Ben Coal*. *Old Ben Coal* establishes that sex harassment was a prohibited form of discrimination prior to the amendment, and that the General Assembly merely clarified that fact through amendment. *Board of Trustees* establishes that in addition to that clarification, the General Assembly extended the reach of the Human Rights Act to public universities. And *Sangamon County* provides that in addition to extending the reach of the statute, it also imposed a new form of liability for this type of discrimination. Thus, the clarifying amendment did more than clarify the Human Rights Act — it made additional parties subject to sex harassment claims and expanded the liability for those claims. That is not inconsistent with the conclusion of *Old Ben Coal* that sex harassment in some form already was covered by the Human Rights Act.

In conclusion, the Human Rights Act includes claims of "harassment" within its definition of "discrimination." Were the City's argument correct, then claims of racial harassment, for instance, would not be civil rights

violations under the Human Rights Act. But the law has been to the contrary for decades, as *Bellwood* made clear. The City asks this Court to substantially rewrite the Human Rights Act and disregard the long-settled understanding of its meaning. This Court should decline the City's invitation.

## CONCLUSION

For these reasons, this Court should decline to answer the Third Certified Question and vacate the appellate court's answer that question. In the alternative, this Court should answer that question in the negative. Additionally, this Court should affirm the appellate court's decision that claims for failure to accommodate a disability and for harassment based on disability are cognizable under the Human Rights Act.

Dated: March 17, 2017

Respectfully submitted,

**LISA MADIGAN**
Attorney General
State of Illinois

**DAVID L. FRANKLIN**
Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Illinois Department
of Human Rights

**BRETT E. LEGNER**
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2146
Primary e-mail service:
CivilAppeals@atg.state.il.us
Secondary e-mail service:
blegner@atg.state.il.us

**SUPREME COURT RULE 341(c)**
**CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 33 pages.

Brett E. Legner
Deputy Solicitor General

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 (2014) that the foregoing **Reply Brief and Brief in Opposition to Request for Cross-Relief of Illinois Department of Human Rights** was served by electronic mail directed to each person named below at the addresses indicated on March 17, 2017, before 5:00 p.m.

John B. Murphey
Matthew D. Rose
Rosenthal, Murphey, Coblentz & Donahue
30 North LaSalle Street, Suite 1624
Chicago, Illinois 60602
jmurphey@rmcj.com
mrose@rmcj.com

Glenn R. Gaffney
Jolianne S. Walters
Gaffney & Gaffney, P.C.
1771 Bloomingdale Road
Glendale Heights, Illinois 60139
glen@gaffneylawpc.com
jolianne@gaffneylawpc.com

Brett E. Legner
Deputy Solicitor General
100 W. Randolph, 12th Floor
Chicago, Illinois 60601
(312) 814-2146
Primary email: CivilAppeals@atg.state.il.us
Secondary email: Blegner@atg.state.il.us