255.00

ILLINOIS HUMAN RIGHTS ACT

INTRODUCTION

The purpose of the Illinois Human Rights Act ("the Act"), 775 ILCS 5/1 et seq., is "to secure for all individuals within Illinois the freedom from discrimination because of race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service" in connection with several spheres of activity, including but not limited, to employment. 775 ILCS 5/l-l02(A).

The Act prohibits "any employer" from engaging in unlawful discrimination. 775 ILCS 5/2-102(A). An employer's status as "employer," as defined in the Act, is an essential element of the cause of action and must be pleaded and proved by the plaintiff. *Aero Servs. Int'l v. Hum. Rts. Comm'n*, 291 Ill. App. 3d 740, 752 (1997).

The Act defines unlawful discrimination as "discrimination against a person because of his or her actual or perceived: 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 Section 1-103 of the Act. 775 ILCS 5/l-l03(Q).

The Act also prohibits retaliation by a person or persons, including but not limited to, an employer, against a person because she or he has 1) opposed that which she or he reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment, discrimination based on citizenship status in employment; 2) has filed a charge or a complaint, or has testified, assisted, or participated in an investigation, proceeding, or hearing under the Act; or 3) has requested, attempted to request, used, or attempted to use a reasonable accommodation allowed under the Act. 775 ILCS 5/6-l0l(A).

Article 2 and Section 6-l0l(A) of the Act address the subject of these instructions - unlawful discrimination and retaliation in employment. 775 ILCS 5/2-101-2-110; 775 ILCS 5/6-101(A).

Article 2 of the Act applies to any person who employs one or more employees (as that term is defined under Section 2-l0l(A)(1) of the Act) within Illinois for at least 20 weeks within the calendar year of or preceding the alleged violation, and to any person employing one or more employees when the complainant alleges a civil rights violation based upon his or her physical or mental disability unrelated to ability, pregnancy, or sexual harassment without regard to the number of employees. 775 ILCS 5/2-101(B)(1)(a) and (b). The Act also applies to state government and any of its subdivisions and to municipal or local governmental entities without regard to the number of persons they employ. 775 ILCS 5/2-l0l(B)(1)(c).

The Act's definition of "employer" excludes any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by any such entity of its activities. 775 ILCS 5/2-101 (B)(2). This statutory provision is in addition to case law addressing the scope of the constitutional "ministerial exception" to certain instances of alleged employer liability of churches and other religious institutions. *See Rehfield v. Diocese of Joliet*, 2021 IL 125656; *Our Lady of Guadalupe School v. Morrisey-Berru*, l40 S.Ct. 2049 (2020).

Illinois courts have explicitly rejected arguments to extend the scope of the Act and have stressed that Article 2 is intended to apply to employers and employees as those terms are defined by the Act. *Watkins v. Office of the State App. Def.*, 2012 IL App (1st) 111756, ¶ 37; *Anderson v. Mod. Metal Prods.*, 305 Ill. App. 3d 91, 101-02 (2d Dist. 1999).

Where a person asserts a claim for employment discrimination under the Act against an individual other than her or his employer, the Illinois Department of Human Rights and the courts lack subject-matter jurisdiction over that claim, as it must be brought against the employer, and only the employer, and not against an individual representative of that employer. *Watkins*, 2012 IL App (1st) 111756, ¶ 37 (affirming dismissal of claims under the Act against an individual representative of plaintiff's employer). Section 2-l0l(E) of the Act, however, permits a claim for sexual harassment to be brought against both the employer, under a theory of *respondeat superior*, and any individual employee in a managerial or supervisory position who engaged in the complained of acts of sexual harassment toward the plaintiff. *Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rts. Comm'n*, 233 Ill.2d 125, 144 (2009).

Additionally, the Act subjects an employer to liability for sexual harassment and retaliation committed by a non-managerial or non-supervisory employee or by a non-employee who directly performs services for the employer pursuant to a contract (such as a vendor) if the employer becomes aware of the conduct and fails to take reasonable corrective measures. 775 ILCS 5/2-102(A-l 0), 2-l02(D), 2-l02(D-5), 6-101.

A plaintiff may present either direct or indirect evidence of discrimination in violation of the Human Rights Act. *Schnitker v. Springfield Urb. League, Inc*., 2016 IL App (4th) 150991 ¶ 46; *Lalvani v. Hum. Rts. Comm 'n*, 324 Ill. App. 3d 774, 790 (2001). Direct evidence is that which "proves the particular fact in question, without reliance on inference or presumption." *Lalvani*, 324 Ill. App. 3d 774, 790. Direct evidence of discrimination is evidence the employer "placed substantial reliance" on a prohibited factor--such as the plaintiff's race, age, or disability--in making its employment decision. *Id.* Under the direct method, once a plaintiff establishes by direct evidence that the employer placed substantial reliance on a prohibited factor in taking the challenged material adverse action toward the plaintiff, the burden shifts to the defendant employer to prove by a preponderance of the evidence that it would have made the same decision even if the prohibited factor had not been considered. *Id.*

When analyzing claims of employment discrimination under the Act in the absence of direct evidence of discrimination, Illinois courts adopt the analytical framework set forth in United

States Supreme Court decisions such as *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), addressing claims arising under Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e - 2000e-17). *Zaderaka v. Ill. Hum. Rts. Comm'n*, 131 Ill.2d 172, 178 (1989); *Zoepfel-Thuline v. Black Hawk Coll.*, 2019 IL App (3d) 180524, ¶ 26. The elements of a *prima facie* claim for employment discrimination are varied and nuanced depending on the circumstances. Generally, the employee must establish that: (1) she is a member of a protected class; (2) she was performing her job to the employer's legitimate expectations; (3) adverse employment action was taken against the employee, such as a termination of employment; and (4) similarly situated employees outside of the employee's protected class were treated more favorably by the employer. After the *prima case* is established, the burden shifts "to the employer to articulate some legitimate, nondiscriminatory reason" for its action. *McDonnell Douglas*, 411 U.S. at 802; Then, the burden shifts back to the plaintiff to present evidence to show that the employer's stated reason is a "pretext," which, if proven, gives rise to an inference of unlawful discrimination. *Zaderaka*, 131 Ill. 2d at 179.

In *Ortiz v. Werner Enters., Inc*., 834 F.3d 760 (7th Cir. 2016), the Seventh Circuit, while affirming the burden-shifting approach, cast doubt on the rigid distinction between a "direct" and an "indirect" method for proving discrimination. In reversing summary judgment entered by the trial court, the Seventh Circuit panel stated that "[t]he district court's effort to shoehorn all evidence into two methods," and its insistence that either method be implemented by looking for a "convincing mosaic," detracted attention from the sole question that matters: whether a reasonable juror could conclude that Ortiz would have kept his job if he had a different ethnicity, and everything else had remained the same. *Ortiz*, 834 F.3d at 763- 64.

Subsequently, in *Lau v. Abbott Lab'ys*, 2019 IL App (2d) 180456, the Illinois appellate court reversed summary judgment in the employer's favor because there was sufficient conflicting evidence to raise a factual dispute over whether the plaintiff and a similarly situated employee were treated differently. Citing *Ortiz*, the court stated "[t]he Seventh Circuit has cautioned that courts considering whether a plaintiff has met her burden must not conduct overly narrow inquiries that distinguish direct from indirect evidence of discriminatory intent: '[e]vidence must be considered as a whole, rather than asking whether any particular [type or] piece of evidence proves the case by itself.'' *Id* at ¶ 39; *see also Thai v. Triumvera 600 Naples Ct. Condo. Ass'n*, 2020 IL App (1st) 192408, ¶ 45 ("To avoid the entry of summary judgment, the plaintiff must present evidence raising an inference that the adverse action was motivated, at least in part, by an improper retaliatory motive. The plaintiff can do so by, among other things, pointing to evidence suggesting that the defendant's proffered reason is pretextual and unworthy of credence. The Seventh Circuit has cautioned that courts considering whether a plaintiff has met its burden must not conduct overly narrow inquiries that distinguish direct from indirect evidence of discriminatory intent: '[e]vidence must be considered as a whole, rather than asking whether any particular [type or] piece of evidence proves the case by itself.'") (internal citations omitted).

Illinois courts recognize that one method of proving pretext is to show that other employees outside the plaintiff's protected class who were involved in similar misconduct were treated more favorably than the plaintiff. *Owens v. Dep't of Hum. Rts*., 403 Ill. App. 3d 899, 919 (2010). To prove pretext, the plaintiff "must show that the employer's reason was false and that discrimination was the real reason for the action." *Sola v. Ill. Hum. Rts. Comm'n*, 316 Ill. App. 3d 528, 537 (2000).

To do so, the plaintiff "must show: (1) the articulated reason has no basis in fact; (2) the articulated reason did not actually motivate the employer's decision; or (3) the articulated reason was insufficient to motivate the employer's decision." *Id*. The ultimate burden of persuasion remains on the plaintiff throughout the case. *Owens*, 403 Ill. App. 3d at 919.

In some cases, there may be evidence that the employer had a "mixed motive" for taking the material adverse action toward the plaintiff; i.e., the evidence shows that the employer considered both permissible and impermissible factors in making its decision. In such a case Illinois courts recognize the mixed motive method of proof to determine discrimination. *Schnitker*, 2016 IL App (4th) at ¶ 57.

The legal concepts of pretext and mixed motive, however, are not interchangeable. Under the traditional *McDonnell Douglas* burden-shifting analysis the Illinois Supreme Court adopted in *Zaderaka v. Ill. Hum. Rts. Comm'n*, 131 Ill.2d 172, 178 (1989), the plaintiff may rely on indirect evidence of discrimination to prove pretext. On the other hand, to use the mixed motive method of proof, the plaintiff must show by direct evidence that the defendant's decision maker(s) placed substantial negative reliance on an illegitimate criterion in reaching its decision. To utilize the mixed motive method of proof, the plaintiff's evidence must do more than create an inference of discrimination; rather, it must establish a clear nexus between the employer's reliance on an impermissible factor and the employer's subsequent decision to discharge (or take other material adverse action toward) the plaintiff. Once the plaintiff has provided direct evidence that the defendant-employer relied on illegitimate criteria, the defendant must demonstrate it would have reached the same decision even if it had not relied on illegitimate criteria. *Schnitker*, 2016 IL App (4th) at ¶ 58.

The Act provides that the following forms of relief may be granted to a plaintiff where the court finds that a civil rights violation as defined by Article 2 or retaliation as defined by Section 6-101(A) of the Acts has occurred: actual damages for the injury or loss suffered by the plaintiff; hire, reinstate, or upgrade the plaintiff with or without back pay or provide such fringe benefits that the plaintiff may have been denied; admit or restore the plaintiff to labor organization membership, to a guidance program, apprenticeship training program, on-the-job training program, or other occupational training or retraining program; reasonable attorney's fees and costs incurred by the plaintiff. 775 ILCS 5/8A-104.

Introduction approved December 2022.

255.01 HUMAN RIGHTS ACT – MATERIAL ADVERSE ACTION EMPLOYMENT DISCRIMINATION – ISSUES INSTRUCTION

Issues Made by the Pleadings – Material Adverse Action Employment Discrimination Claims

[In Count . . . of the Complaint] the plaintiff claims that the defendant violated the Illinois Human Rights Act by

[briefly describe the plaintiff's allegation(s) of adverse action constituting employment discrimination in violation of the Human Rights Act; e.g., denying the plaintiff's request for promotion; discharging the plaintiff from employment because of plaintiff's [insert plaintiff's protected class status/characteristic]

and that plaintiff sustained damages as result of the defendant's violation of the Human Rights Act.

The defendant denies that [his/her/its] conduct toward the plaintiff violated the Human Rights Act because of the plaintiff's [*insert plaintiff's protected class status/characteristic*].

[The defendant has articulated a non-discriminatory reason for its decision to

[briefly describe the adverse action(s) alleged by the plaintiff to have violated the Human Rights Act; e.g., denied the plaintiff's request for promotion; discharged the plaintiff from employment] 's employment.]

[The plaintiff claims that the reason(s) articulated by the defendant for [his/her/its] decision(s) to

[*state the alleged adverse action(s) the defendant took toward the plaintiff*]

is/are a pretext for discrimination.]

The defendant also denies that the plaintiff [sustained damages/sustained damages to the extent claimed].

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction is to be used in conjunction with the instructions defining "material adverse action" and "pretext" in cases of employment discrimination where the defendant introduces evidence articulating one or more alleged non-discriminatory reasons for taking the material adverse action toward the plaintiff.

The bracketed sections of this instruction concerning the defendant's stated non-discriminatory reason for its material adverse action and the instruction defining pretext should not be used where the plaintiff presents evidence of discrimination by the defendant and the defendant does not produce evidence articulating a non-discriminatory reason for taking the material adverse action toward the plaintiff. *See Schnitker v. Springfield Urb. League*, 2016 IL App (4th) 150991, ¶¶ 46 – 47; *Lalvani v. Hum. Rts. Comm'n*, 324 Ill. App. 3d 774, 790 (2001).

255.02 HUMAN RIGHTS ACT -MATERIAL ADVERSE ACTION EMPLOYMENT DISCRIMINATION CLAIMS- BURDEN OF PROOF INSTRUCTION

Burden of Proof on the Issues – Material Adverse Action Employment Discrimination Claims

As to [his/her/their] claim of discrimination [in Count ... of the Complaint] the plaintiff has the burden of proving each of the following propositions by a preponderance of the evidence:

a) The plaintiff is a member of a protected class;
b) The plaintiff was performing [his/her/their] job duties to the defendant's legitimate expectations;
c) The defendant took material adverse action toward the plaintiff;
d) The defendant took the material adverse action because of the plaintiff's [*insert plaintiff's protected class status; e.g., age, gender, race, sexual orientation, national origin*]; and
e) The plaintiff sustained damages because of the defendant's material adverse action.

[In considering whether the defendant took material adverse action toward the plaintiff because of the plaintiff's [*insert plaintiff's protected class status; e.g., age, gender, race, sexual orientation, national origin*], you must consider the defendant's stated reason(s) for taking this action.]

[In considering the defendant's stated reason(s) for [his/her/its/their] decision, you should not concern yourselves with whether the defendant's action(s) (was/were) correct, wise, reasonable, or fair. Rather, your concern is only whether the plaintiff has proved by a preponderance of the evidence that the defendant's stated reason(s) for [*briefly describe the material adverse action taken by the defendant toward the plaintiff alleged to have violated the Human Rights Act*] (was/were) a pretext for discrimination.]

If you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict will be for the defendant and you should proceed to Verdict Form . . . .

On the other hand, if you find from your consideration of all the evidence that the plaintiff has proved all of the propositions required of [him/her/them] as set forth in this instruction, then your verdict will be for the plaintiff and you will proceed to Verdict Form . . . .

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

The bracketed sections in this instruction concerning the defendant's cited non-discriminatory reasons for its employment decision(s) are to be used and the instruction defining Pretext is to be given where the defendant produces evidence of one or more non-discriminatory reasons for taking the at-issue material adverse

action toward the plaintiff. *Zaderaka v. Ill. Hum. Rts. Comm'n*, 131 Ill.2d 172, 178-79 (1989); *Owens v. Dep't of Hum. Rts.*, 403 Ill.App.3d 891, 919 (2010).

This instruction should be used in conjunction with IPI 21.01.

Comment

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the United States Supreme Court established a burden-shifting approach to discrimination cases brought under Title VII of the of the Civil Rights Act of 1964. In cases where there is not explicit evidence of racial animus, the Court found that a complainant under the Act could meet her initial burden of proving racial discrimination by showing: (i) that she belongs to a racial minority; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite her qualifications, she was rejected; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants from persons with complainant's qualifications. *Id*. at 802. Once the plaintiff establishes a *prima facie* case, the burden shifts to the defendant to provide a non-discriminatory reason for the rejection. *Id*. At 802. If the defendant offers such a reason, the burden then shifts back to the plaintiff to prove that the proffered reason was really a pretext for the discrimination. *Id*. at 804. After *McDonnell Douglas*, this burden-shifting approach was applied broadly to discrimination claims based on other types of adverse employment actions and became known as the "indirect" method of proving discrimination, although that term is not used in the case. *See, e.g.*, *Humphries v. CEOCS West, Inc*., 474 F.3d 387, 404 (7th Cir. 2007).

In *Zaderaka v. Ill. Hum. Rts. Comm'n*, 131 Ill.2d 172, 178-79 (1989), the Illinois Supreme Court adopted this burden-shifting approach for cases brought under the Illinois Human Rights Act. Under that test, the plaintiff-employee must first establish, by a preponderance of the evidence, a *prima* facie case of unlawful discrimination. *Zaderaka*, 131 Ill.2d at 178-79. If the plaintiff establishes a *prima facie* case, a rebuttable presumption arises that the defendant employer unlawfully discriminated against the plaintiff, which the defendant may rebut with evidence articulating a nondiscriminatory reason for its employment decision. *Id* at 179. If the employer articulates such a reason, then the plaintiff must prove, by a preponderance of the evidence, that the employer's stated reason was untrue and a pretext for discrimination. *Id*. The ultimate burden of proof remains at all times with the plaintiff. *Id*.; *Burns v. Bombela-Tobias*, 2020 IL App (1st) 182309, ¶ 58.

In *Ortiz v. Werner Enters., Inc*., 834 F.3d 760 (7th Cir. 2016), the Seventh Circuit, while affirming the burden-shifting approach, cast doubt on the rigid distinction between a "direct" and an "indirect" method for proving discrimination. In reversing summary judgment entered by the trial court, the Seventh Circuit panel stated that "[t]he district court's effort to shoehorn all evidence into two methods," and its insistence that either method be implemented by looking for a "convincing mosaic," detracted attention from the sole question that matters: Whether a

reasonable juror could conclude that Ortiz would have kept his job if he had a different ethnicity, and everything else had remained the same. *Ortiz*, 834 F.3d at 763-64.

Subsequently, in *Lau v. Abbott Lab'ys*, 2019 IL App (2d) 180456, the Illinois appellate court reversed summary judgment in the employer's favor because there was sufficient conflicting evidence to raise a factual dispute over whether the plaintiff and a similarly situated employee were treated differently. Citing *Ortiz*, the court stated "[t]he Seventh Circuit has cautioned that courts considering whether a plaintiff has met her burden must not conduct overly narrow inquiries that distinguish direct from indirect evidence of discriminatory intent: '[e]vidence must be considered as a whole, rather than asking whether any particular [type or] piece of evidence proves the case by itself.'" *Id*. at ¶ 39; *see also Thai v. Triumvera 600 Naples Ct. Condo. Ass'n*, 2020 IL App (1st) 192408, ¶ 45. ("To avoid the entry of summary judgment, the plaintiff must present evidence raising an inference that the adverse action was motivated, at least in part, by an improper retaliatory motive. The plaintiff can do so by, among other things, pointing to evidence suggesting that the defendant's proffered reason is pretextual and unworthy of credence. The Seventh Circuit has cautioned that courts considering whether a plaintiff has met its burden must not conduct overly narrow inquiries that distinguish direct from indirect evidence of discriminatory intent: '[e]vidence must be considered as a whole, rather than asking whether any particular [type or] piece of evidence proves the case by itself.'") (internal citations omitted).

255.03 HUMAN RIGHTS ACT – MATERIALLY ADVERSE ACTION DEFINED – DISCRIMINATION CLAIM

A materially adverse employment action is one that significantly alters the terms and conditions of an employee's job or causes a material change in the employment relationship. To be actionable, there must be more than a mere inconvenience or an alteration of job responsibilities; there must be a significant change in employment status.

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction should be used where the court has determined that the question of whether the defendant's conduct toward the plaintiff constituted a material adverse action is a question of fact. In some cases, the court may decide this issue as a matter of law, in which case the jury should be so informed and the instruction is unnecessary.

Comment

This instruction recognizes the principle that "'[A] broad array of actions may constitute an adverse employment action including such employer acts as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or some other action causing a significant change in benefits.'" *Hoffelt v. Ill. Dep't of Hum. Rts.*, 367 Ill. App. 3d 628, 634 (1st Dist. 2006) (quoting *Burlington Indus, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Among those actions, "Illinois courts recognize constructive discharge as sufficient to establish an adverse employment action under the Human Rights Act." *Cooksey v. Bd. of Educ*., No. 13 C 8619, 2014 U.S. Dist. LEXIS 22640, at *6-7 (N.D. Ill. Feb. 24, 2014) (citing *Steele v. Ill. Hum. Rts. Comm'n*, 160 Ill. App. 3d 577 (1987); *Motley v. Ill. Hum. Rts. Comm 'n,* 263 Ill. App. 3d 367 (1994); *Stone v. Dep't of Hum. Rts.*, 299 Ill. App. 3d 306 (1998).

Although courts have defined the term "adverse action" broadly, it "must be 'materially' adverse, meaning more than 'a mere inconvenience or an alteration of job responsibilities.'" *Ribando v. United Airlines, Inc*., 200 F.3d 507, 510-11 (7th Cir. 1999) (considering Title VII of the Civil Rights Act) (quoting *Crady v. Liberty Nat'l Bank & Trust Co. of Ind*., 993 F.2d 132, 136 (7th Cir. 1993)); *see also Young v. Ill. Hum. Rts. Comm'n*, 2012 IL App (1st) 112204, ¶ 35. "A materially adverse employment action is 'one that significantly alters the terms and conditions of the employee's job' or causes a material change in the employment relationship." *Young v. Ill. Hum. Rts. Comm'n*, 2012 IL App (1st) 112204, ¶ 35 (quoting *Owens v. Dep't of Hum. Rts.*, 403 Ill. App. 3d 899, 919 (1st Dist. 2010) (internal quotation

marks omitted)). "To be actionable, there must be a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibility, or a decision causing a significant change in benefits.'" *Id*. (quoting *Lewis v. City of Chi*., 496 F.3d 645,653 (7th Cir. 2007)). As the Seventh Circuit has explained, "a materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Crady*, 993 F.2d at 136 (considering Age Discrimination in Employment Act, 29 U.S.C.S. §§ 621-634.) "In other words, [a plaintiff must show that 'material harm has resulted from . . . the challenged actions.'"' *Hoffelt v. Ill. Dep't of Hum. Rts.*, 367 Ill. App. 3d 628, 636 (1st Dist. 2006) (quoting *Traylor v. Brown*, 295 F.3d 783, 788 (7th Cir. 2002)).

In *Hoffelt*, the court stated as follows: "In order to be considered materially adverse enough to constitute discrimination, an employment action must constitute a 'severe or pervasive' change in the daily 'conditions' of employment . . . ." 367 Ill. App. 3d at 633, quoting *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005). For the "severe and pervasive" language, *Washington* cited *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) and *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (1998). Neither *Burlington* nor *Oncale* involved adverse action claims. Both cases used the "severe and pervasive" language to describe conduct in the context of harassment and hostile work environment claims. Thus, *Oncale* stated "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated,'" quoting *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21, (1993). *Hoffelt* involved harassment, adverse action, and retaliation claims. Subsequent to *Hoffelt*, the court in *Young* did not utilize the "severe or pervasive" language. Both cases involved adverse action and not harassment claims.

255.04 HUMAN RIGHTS ACT - DEFINITION OF PRETEXT

When I use the word "pretext" in these instructions, I mean more than just faulty reasoning or mistaken judgment by the defendant, but instead a false or phony reason for the action(s) taken by the defendant toward the plaintiff.

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction is to be used when the defendant does not dispute that it took the challenged adverse action toward the plaintiff but asserts that it did so for one or more nondiscriminatory reasons as shown by the evidence. The plaintiff bears the burden to show that the defendant's stated reason is a pretext for unlawful discrimination. *Zaderaka v. Ill. Hum. Rts. Comm'n*, 131 Ill.2d 172, 178-79 (1989); *Owens v. Dep't of Hum. Rts.*, 403 Ill. App.3d 899, 919 (2010); *Law v. Abbott Lab'ys*, 2019 Ill. App. (2d) 180456, ¶ 55, citing *Argyropoulos v. City of Alton*, 539 F.3d 724, 736 (7th Cir. 2008); *Russell v. Acme-Evans Co*., 51 F.3d 64, 68 (7th Cir. 1995).

255. 05 HUMAN RIGHTS ACT - SEXUAL HARASSMENT - DEFINITION OF SEXUAL HARASSMENT

There was in force in the State of Illinois at the time of the occurrence[s] in question a certain statute which provides as follows:

> "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment. For purposes of this definition, the phrase "working environment" is not limited to a physical location an employee is assigned to perform his or her duties.

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction adopts the format of IPI 60.01 and sets forth the definition of sexual harassment under Section 2-101 (E) of the Illinois Human Rights Act. This instruction is to be used in conjunction with the issues and burden of proof instructions in claims for sexual harassment under Section 2-101 (E) of the Illinois Human Rights Act.

If the plaintiff is proceeding under a theory of sexual harassment that involves only one or two of the three-part definition, the instruction can be modified to eliminate extraneous material. *See Old Ben Coal Co. v. Hum. Rts. Comm'n*, 150 Ill.App.3d 304, 501 N.E.2d 920 (5th Dist. 1986) (Any unwelcome conduct of a sexual nature by a supervisor that adversely impacts the "terms, conditions or privileges of employment" of an employee is actionable as quid pro quo sexual harassment.)

255.06 HUMAN RIGHTS ACT - HOSTILE ENVIRONMENT SEXUAL HARASSMENT - ISSUES INSTRUCTION

Issues Made by the Pleadings - Hostile Environment Sexual Harassment

[In Count . . . of the Complaint] the plaintiff claims that the defendant violated the Illinois Human Rights Act by

> [*briefly describe the plaintiff's allegation(s) of the conduct of the defendant constituting quid pro quo sexual harassment in violation of the Illinois Human Rights Act; e.g., sexual advances, requests for sexual favors, or any other verbal or physical conduct of a sexual nature*.]

The plaintiff claims that the conduct of the defendant [the defendant's employee/s] was unwelcome and this conduct was based on the plaintiff's [sex/gender/sexual orientation]. The plaintiff further claims that this conduct had the purpose or effect of substantially interfering with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment and that this conduct was severe or pervasive. (For cases where the plaintiff alleges a claim against a defendant based on the conduct of a nonmanagerial or nonsupervisory employee or of a nonemployee: [The plaintiff further alleges that the defendant became aware of the conduct and failed to take reasonable corrective measures]).

The plaintiff further claims [he/she/they] sustained damages because of the defendant's conduct.

The defendant [denies that [he/she/it] engaged in the conduct alleged by the plaintiff]; [denies that the conduct alleged by the plaintiff was unwelcome]; [denies that the conduct alleged by the plaintiff was based on the plaintiff's [sex/gender/sexual orientation]; (*for cases where the alleged conduct was committed by a nonemployee or a nonmanagerial or nonsupervisory employee of the defendant*: denies that [he/she/ it] [became aware of the alleged conduct of its employee(s) and failed to take reasonable corrective measures]), and denies that the plaintiff sustained damages [to the extent claimed] because of the alleged conduct.

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction is to be used when the plaintiff alleges a claim of hostile environment sexual harassment under Section 2-101(E) of the Human Rights Act. 775 ILCS 5/2-101(E).

This instruction is not to be used for claims of *quid pro quo* sexual harassment or for claims of harassment of a non-sexual nature under Section 2-101 (E-l) of the

Illinois Human Rights Act. There are separate issues and burden of proof instructions for such claims.

In cases where the conduct in question was committed by a nonmanagerial or nonsupervisory employee of the defendant or by a nonemployee, the instruction must include the language "that the defendant became aware of the alleged conduct of its employee or non-employee and failed to take corrective steps."

Comment

This instruction incorporates the definition of hostile environment sexual harassment in Section 2-101(E) of the Illinois Human Rights Act and Section 2-102(D) of the Act, which articulates the circumstances under which an employer will be liable for sexual harassment where the conduct in question was committed by a nonemployee or by a nonmanagerial or nonsupervisory employee.

In cases where the conduct in question was committed by a nonmanagerial or nonsupervisory employee of the defendant or by a nonemployee, Section 2-102(D) of the Illinois Human Rights Act requires the plaintiff to show that the employer was: a) aware of the conduct by its nonmanagerial and nonsupervisory employee(s); and b) failed to take reasonable corrective measures. 775 ILCS 5/2-102(D); *Rozsavolgi v. City of Aurora*, 2016 Ill. App. (2d) 150493, ¶ 94. Section 2-102(D) of the Illinois Human Rights Act, however, does not apply to cases where the alleged sexually harassing conduct was committed by a supervisory or managerial employee of the defendant. *Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rts. Comm'n*, 233 Ill.2d 125 (2009).

255.07 HUMAN RIGHTS ACT - QUID PRO QUO SEXUAL HARASSMENT - ISSUES INSTRUCTION

Issues Made by the Pleadings - Quid Pro Quo Sexual Harassment

[In Count . . . of the Complaint] the plaintiff claims that the defendant violated the Illinois Human Rights Act by committing one or more of the following acts:

> [*briefly describe the plaintiff's allegation(s) of the conduct of the defendant constituting quid pro quo sexual harassment in violation of the Illinois Human Rights Act; e.g., sexual advances, requests for sexual favors, or any other verbal or physical conduct of a sexual nature*.]

The plaintiff claims that the conduct of the defendant was unwelcome; the defendant's conduct was based on the plaintiff's [sex/gender/sexual orientation]; submission to such conduct was made either explicitly or implicitly a term or condition of the plaintiff's employment; and the plaintiff's submission to or rejection of such conduct was used by the defendant as the basis for making one or more employment decisions that adversely affected the plaintiff.

[*For cases where the plaintiff alleges a claim against a defendant employer based on the conduct of a nonemployee or a nonmanagerial or nonsupervisory employee*: The plaintiff further claims that the defendant became aware of the conduct of its employee(s) and failed to take reasonable corrective measures].

The plaintiff further claims that the plaintiff sustained damages because of the defendant's violation of the Illinois Human Rights Act.

The defendant [denies that [the defendant] engaged in the conduct alleged by the plaintiff]; [denies that the conduct alleged by the plaintiff was unwelcome]; [denies that the conduct alleged by the plaintiff was based on the plaintiff's [sex/gender/sexual orientation]; [denies that the plaintiff's submission to such conduct was made either explicitly or implicitly a term or condition of the plaintiff's employment]; [denies that the plaintiff's submission to or rejection of such conduct was used by the defendant as the basis for making employment decisions affecting the plaintiff]; [*for cases where the alleged conduct was committed by a nonemployee or a non-managerial or nonsupervisory employee of the defendant*): denies that [the defendant] [became aware of the alleged conduct of its employee(s) and failed to take reasonable corrective measures], and [denies that the plaintiff sustained damages [to the extent claimed] because of the alleged conduct].

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction is to be used where the plaintiff alleges a claim of *quid pro quo* sexual harassment under Section 2-101(E) of the Illinois Human Rights Act. 775 ILCS 5/2-101(E).

This instruction is not to be used for claims of hostile work environment sexual harassment or for claims of harassment of a non-sexual nature under Section 2-101(E-l) of the Illinois Human Rights Act. There are separate issues and burden of proof instructions for such claims.

Comment

This instruction incorporates both the definition of *quid pro quo* sexual harassment in Section 2- 10 I (E) of the Illinois Human Rights Act and Section 2-102(D) of the Act, which articulates the circumstances under which an employer will be liable for sexual harassment where the conduct in question was committed by a nonemployee or by a nonmanagerial or nonsupervisory employee.

In cases where the conduct in question was committed by a nonmanagerial or nonsupervisory employee of the defendant or by a nonemployee, Section 2-1 02(D) of the Illinois Human Rights Act requires the plaintiff to show that the employer was: a) aware of the conduct by its nonmanagerial and nonsupervisory employee(s); and b) failed to take reasonable corrective measures. 775 ILCS 5/2-102(D); *Rozsavolgi v. City of Aurora*, 2016 Ill. App. (2d) 150493, ¶ 94. Section 2-102(D) of the Illinois Human Rights Act, however, does not apply to cases where the alleged sexually harassing conduct was committed by a supervisory or managerial employee of the defendant. *Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rts. Comm'n*, 233 Ill.2d 125 (2009).

255.08 HUMAN RIGHTS ACT - HOSTILE ENVIRONMENT SEXUAL HARASSMENT - BURDEN OF PROOF INSTRUCTION

Burden of Proof on the Issues - Hostile Environment Sexual Harassment

As to plaintiff's claim of sexual harassment [in Count . . . of the Complaint], the plaintiff must prove each of the following propositions by a preponderance of the evidence:

a) The defendant [the defendant's employee/s] [made unwelcome sexual advances,] [requests for sexual favors,] [engaged in conduct of a sexual nature];

b) The conduct of the defendant [defendant's employee/s] was based on the plaintiff's [sex/gender/sexual orientation];

c) The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive;

d) At the time the conduct occurred, plaintiff believed that the conduct made his/her work environment hostile or abusive;

e) (*for cases where the plaintiff alleges a claim against a defendant employer based on the conduct of a nonmanagerial or nonsupervisory employee or of a nonemployee*: [The defendant became aware of the conduct and failed to take reasonable corrective measures]); and

f) The plaintiff sustained damages because of the defendant's conduct.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict will be for the plaintiff and you should proceed to Verdict Form . . . .

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict will be for the defendant, and you should proceed to Verdict Form . . . .

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction is to be used, as modified, in conjunction with claims for hostile work environment sexual harassment under Section 2-10 I (E) of the Human Rights Act.

This instruction incorporates both the definition of hostile work environment sexual harassment in Section 2-101(E) of the Illinois Human Rights Act and Section 2-102(D) of the Act, which articulates the circumstances under

which an employer will be liable for sexual harassment where the conduct in question was committed by a nonemployee or by a nonmanagerial or nonsupervisory employee.

In cases where the conduct in question was committed by a nonmanagerial or nonsupervisory employee of the defendant or by a nonemployee, the plaintiff bears the burden of proving the employer was: a) aware of the conduct by its non-managerial and nonsupervisory employee(s); and b) failed to take reasonable corrective measures. 775 ILCS 5/2-102(D); *Rozsavolgi v. City of Aurora*, 2016 Ill. App. (2d) 150493, ¶ 94. Section 2-102(D) of the Illinois Human Rights Act does not apply to cases where the alleged sexually harassing conduct was committed by a supervisory or managerial employee of the defendant. *Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rts. Comm'n*, 233 Ill.2d 125 (2009).

This instruction is not to be used in a claim for *quid pro quo* sexual harassment, which has separate issues and burden of proof instructions that do not include the element requiring the defendant's conduct to be "severe or pervasive," which applies only in the context of a claim for hostile environment sexual harassment. *See Cook Cnty. Sheriff's Off. v. Cook Cnty. Comm'n on Hum. Rts.*, 2016 IL App (1st) 150718, ¶ 32.

This instruction is also not to be used for claims of harassment of a non-sexual nature under Section 2-101(E-l) of the Human Rights Act. There is a separate burden of proof instruction for such claims.

Comment

The requirement that the allegedly harassing conduct be severe or pervasive applies to claims of sexual harassment alleging that the conduct created a hostile working environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), where the United States Supreme Court held that prohibited discrimination under Title VII was not limited to "economic" or "tangible" discrimination (i.e., discrimination that affects an employee's compensation or terms, conditions, or privileges of employment), but extends to discrimination that results in the employee sustaining noneconomic injury, such as a hostile work environment that "unreasonably interferes with an individual's work performance." *Id.* at 64. The Supreme Court held, however, that not all alleged hostile environment harassment violated Title VII; rather, the harassing conduct must be "severe or pervasive." *Id.* at 67.

Since the Supreme Court decided *Meritor Savings Bank* in 1986, several Illinois and federal cases have explained the "severe or pervasive" element of a claim for hostile environment sexual harassment. A plaintiff "must show that his or her work environment was both subjectively and objectively hostile." *Adusumilli v. City of Chi.*, 164 F.3d 353, 361 (7th Cir. 1996). In determining the severity or pervasiveness of the conduct at issue, Illinois courts follow the two-part test set out in the United States Supreme Court's decision in a Title VII case, *Harris v. Forklift*

Sys., Inc., 510 U.S. 17 (1993);*see Cook Cnty. Sheriff's Off. v. Cook Cnty. Comm'n on Hum. Rts.*, 2016 IL App (1st) 150718, ¶ 32. Under this test, the plaintiff must present evidence that the employer engaged in behavior (I) that was severe or pervasive enough to create a work environment that a reasonable person would find to be "hostile or abusive"; and (2) that the employee subjectively perceived to be hostile or abusive. *Harris*, 510 U.S. at 21-22.

Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. To trigger the protective measures of anti-discrimination laws, an employee must be faced with a "steady barrage" of offensive comments and "more than a few isolated incidents of harassment[.]" *Vill. of Bellwood Bd. of Fire and Police Comm'rs v. Hum. Rts. Comm'n*, 184 Ill. App. 3d 339,350 (1989). "[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 US 775, 788 (1998) (omitting internal quotation marks).

255.09 HUMAN RIGHTS ACT - QUID PRO QUO SEXUAL HARASSMENT - BURDEN OF PROOF INSTRUCTION

Burden of Proof on the Issues - Quid Pro Quo Sexual Harassment

As to plaintiff's claim of sexual harassment [in Count . . . of the Complaint], the plaintiff has the burden of proving each of the following propositions by a preponderance of the evidence:

a) The defendant [the defendant's employee/s,] [made unwelcome sexual advances,] [requests for sexual favors,] [engaged in conduct of a sexual nature];

b) The defendant's conduct was based on the plaintiff's [sex/gender/sexual orientation];

c) Submission to such conduct was made either explicitly or implicitly a term or condition of the plaintiff's employment;

d) The plaintiff's submission to or rejection of such conduct was used as a basis for one or more employment decisions by the defendant adversely affecting the plaintiff;

e) (*for cases where the plaintiff alleges a claim against a defendant employer based on the conduct of a nonmanagerial or nonsupervisory employee or of a nonemployee*: [The defendant became aware of the conduct and failed to take reasonable corrective measures]); and

f) The plaintiff sustained damages because of the defendant's conduct.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict will be for the plaintiff and you should proceed to Verdict Form . . .

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict will be for the defendant and you should proceed to Verdict Form . . . .

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction is to be used, as modified, in conjunction with claims for *quid pro quo* sexual harassment under Section 2-101(E) of the Human Rights Act and IPI 21.01.

This instruction is not to be used in a claim for "hostile environment" sexual harassment, which has separate issues and burden of proof instructions which reflect that the element requiring the defendant's conduct to be "severe or pervasive" applies only in the context of a claim for hostile environment sexual

harassment. *See Cook Cnty. Sheriff's Off. v. Cook Cnty. Comm'n on Hum. Rts.*, 2016 IL App (1st) 150718, ¶ 32 (determining the severity or pervasiveness of the conduct at issue, Illinois courts follow the two-part test set out in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21-22 (1993), which requires a plaintiff to present evidence that the employer engaged in behavior (1) that was severe or pervasive enough to create a work environment that a reasonable person would find to be "hostile or abusive"; and (2) that the employee subjectively perceived to be hostile or abusive).

This instruction is also not to be used for claims of harassment of a non-sexual nature under Section 2-101 (E-1) of the Human Rights Act. There is a separate burden of proof instruction for such claims.

Comment

This instruction incorporates both the definition of *quid pro quo* sexual harassment in Section 2- 101(E) of the Illinois Human Rights Act and Section 2-102(D) of the Act, which articulates the circumstances under which an employer will be liable for sexual harassment where the conduct in question was committed by a nonemployee or by a nonmanagerial or nonsupervisory employee.

In cases where the conduct in question was committed by a nonmanagerial or nonsupervisory employee of the defendant or by a nonemp1oyee, the plaintiff bears the burden of proving the employer was: a) aware of the conduct by its non-managerial and nonsupervisory employee(s); and b) failed to take reasonable corrective measures. 775 ILCS 5/2-102(D); *Rozsavolgi v. City of Aurora*, 2016 Ill. App. (2d) 150493, ¶ 94. Section 2-102(D) of the Illinois Human Rights Act does not apply to cases where the alleged sexually harassing conduct was committed by a supervisory or managerial employee of the defendant. *Sangamon Cnty. Sheriff's Dep't v. Ill. Hum. Rts. Comm'n*, 233 Il1.2d 125 (2009).

255.10 HUMAN RIGHTS ACT - HARASSMENT - DEFINITION OF HARASSMENT

There was in force in the State of Illinois at the time of the occurrence[s] in question a certain statute which provided as follows:

> "Harassment" means any unwelcome conduct on the basis of an individual's actual or perceived race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, unfavorable discharge from military service, or citizenship status that has the purpose or effect of substantially interfering with the individual's work performance or creating an intimidating, hostile, or offensive working environment. For purposes of this definition, the phrase "working environment" is not limited to a physical location an employee is assigned to perform his or her duties.

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction adopts the format of IPI 60.01 and sets forth the definition of harassment under Section 2-101(E-1) of the Human Rights Act. This instruction is to be used in conjunction with the issues and burden of proof instructions governing claims for harassment where the evidence would support a finding that the injury complained of was the result of conduct by the defendant constituting harassment as defined by Section 2-101(E-1). The issues and burden of proof instructions incorporate the other requirement of a claim for harassment as set forth in the applicable case law and in Section 2-101(A) of the Illinois Human Rights Act.

These instructions are not to be used in claims of sexual harassment, which have their own issues, burden of proof, and definitional instructions based on Section 2-101(E) of the Illinois Human Rights Act and the governing case law.

Comment

Section 2-101(E-1) of the Illinois Human Rights Act was amended, effective January1, 2020, to include unwelcome conduct "based on actual or perceived membership in a protected class" as defined by the Illinois Human Rights Act.

An actionable claim for harassment or hostile work environment contains the following four elements: (1) the employee was subject to unwelcome harassment; (2) the harassment was based on a reason forbidden by anti-

discrimination laws; (3) the harassment was so severe or pervasive that it altered the conditions of employment and created a hostile or abusive working environment; and (4) there is a basis for employer liability. *Smith v. Ill. Dep't of Transp.*, 936 F.3d 554, 560 (7th Cir. 2019). The determination of whether a work environment is hostile or abusive is contextual and depends on factors such as the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or is a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. *Zoepfel-Thuline v. Black Hawk Coll.*, 2019 IL App (3rd) 180524 ¶ 34, citing *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 23 (1993); *Cook Cnty. Sheriff's Off. v. Cook Cnty. Comm'n on Hum. Rts.*, 2016 IL App (1st) 150718, ¶ 32.

Where the conduct of a nonsupervisory or nonmanagerial employee forms the basis for the defendant's alleged liability for harassment, Section 2-102(A) of the Human Rights Act requires the plaintiff to show that the defendant (1) was aware of the conduct; and (2) failed to take corrective measures. 775 ILCS 5/2-102(A); *Rozsavolgi v. City of Aurora*, 2016 IL App (2d) 150493, ¶ 91.

255.11 HUMAN RIGHTS ACT - HARASSMENT - ISSUES INSTRUCTION

[In Count . . . of the Complaint] the plaintiff claims that the defendant violated the Illinois Human Rights Act by committing one of more of the following acts:

[*briefly describe the plaintiff's allegation(s) of the unwelcome conduct of the defendant constituting harassment in violation of the Human Rights Act; e.g., offensive, insulting, demeaning, or threating conduct or comments made or directed to the plaintiff on account of the plaintiff's protected-class status*.]

[*For cases where the plaintiff alleges a claim against a defendant employer based on the conduct of a nonemployee or a nonmanagerial or nonsupervisory employee*: the plaintiff further claims that the defendant became aware of the conduct and failed to take reasonable corrective measures.]

The plaintiff further alleges that the plaintiff sustained damages because of the defendant's violation of the Human Rights Act.

The defendant denies that [he/she/it engaged in the conduct alleged by the plaintiff,] [denies that [his/her/its] conduct toward the plaintiff constituted harassment in violation of the Human Rights Act,] [*for cases where the alleged conduct was committed by a nonemployee or a non-managerial or nonsupervisory employee of the defendant*: denies that he/she/it became aware of the alleged conduct and failed to take reasonable corrective measures,] [and denies that the plaintiff sustained damages [to the extent claimed] because of the alleged conduct.]

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction is to be used, as modified, for claims of harassment under Section 2-101 (E-1) of the Human Rights Act. This instruction is not to be used for claims of sexual harassment under Section 2-101 (E) of the Human Rights Act. There is a separate issues instruction for sexual harassment claims.

255.12 HUMAN RIGHTS ACT - HARASSMENT - BURDEN OF PROOF INSTRUCTION

As to plaintiff's claim of harassment [in Count . . . of the Complaint], the plaintiff must prove each of the following propositions by a preponderance of the evidence:

a) The defendant [the defendant's employee/s] [briefly describe the unwelcome conduct on the basis of the plaintiff's actual or perceived race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, unfavorable discharge from military service, or citizenship status];

b) The conduct was sufficiently severe or pervasive that a reasonable person in plaintiff's position would find plaintiff's work environment to be hostile or abusive;

c) At the time the conduct occurred, plaintiff believed that the conduct made his/her work environment hostile or abusive;

d) [*for cases where the plaintiff alleges a claim against a defendant employer based on the conduct of a nonemployee or a nonmanagerial or nonsupervisory employee:* The defendant became aware of the conduct and failed to take reasonable corrective measures]; and

e) The plaintiff sustained damages because of the defendant's conduct.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict will be for the plaintiff and you should proceed to Verdict Form . . . .

On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict will be for the defendant and you should proceed to Verdict Form . . . .

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction is to be used, as modified, in conjunction with claims for harassment other than sexual harassment under Section 2-101 (E-l) of the Human Rights Act. This instruction incorporates Section 2-102(A) of the Human Rights Act regarding the circumstances under which an employer will be liable for harassment where the conduct in question was committed by a nonemployee or by a nonmanagerial or nonsupervisory employee.

Comment

In cases where the conduct in question was committed by a nonmanagerial or nonsupervisory employee of the defendant or by a nonemployee, the plaintiff bears the burden of proving the employer was: a) aware of the conduct by its non-managerial and nonsupervisory employee(s); and b) failed to take reasonable corrective measures. *Rozsavolgi v. City of Aurora*, 2016 Ill.App. (2d) 150493, ¶ 94; 775 ILCS 5/2-102(D).

In determining the severity or pervasiveness of the alleged conduct, Illinois courts follow the two-part test set out in the United States Supreme Court's decision in a Title VII case, *Harris v. Forklift Sys., Inc*., 510 U.S. 17 (1993). *See Cook Cnty. Sheriff's Off. v. Cook Cnty. Comm'n on Hum. Rts.*, 2016 IL App (1st) 150718, ¶ 32. Under this test, the plaintiff must present evidence that the employer engaged in behavior (1) that was severe or pervasive enough to create a work environment that a reasonable person would find to be "hostile or abusive"; and (2) that the employee subjectively perceived to be hostile or abusive. *Harris*, 510 U.S. at 21-22. A plaintiff "must show that his or her work environment was both subjectively and objectively hostile." *Adusumilli v. City of Chi.*, 164 F.3d 353, 361 (7th Cir. 1996).

Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23.

To trigger the protective measures of anti-discrimination laws, an employee must be faced with a "steady barrage" of offensive comments and "more than a few isolated incidents of harassment[.]" *Vill. of Bellwood Bd. of Fire and Police Comm'rs v. Hum. Rts. Comm'n*, 184 Ill. App. 3d 339, 350 (1989). "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (omitting internal quotation marks).

This instruction is not to be used for claims of sexual harassment under Section 2-101(E) of the Human Rights Act. There is a separate burden of proof instruction for such claims. Additionally, this instruction does not incorporate any defenses that may be available to a local governmental entity defendant pursuant to the Tort Immunity Act, 745 ILCS 10/1 -204.

255.13 HUMAN RIGHTS ACT - ISSUES MADE BY THE PLEADINGS - RETALIATION

In [Count . . .] of the Complaint, plaintiff claims that defendant[s] retaliated against plaintiff in violation of the Illinois Human Rights Act by

> [*briefly describe plaintiff's allegations of protected activity and material adverse action in violation of the Illinois Human Rights Act, e.g., the defendant fired the plaintiff because the plaintiff complained that she was denied promotion based on her race*]

and that plaintiff sustained damages because of [the materially adverse action] of the defendant[s].

Defendant denies [that plaintiff engaged in the protected activity,] [that defendant took the action,] [that the action was materially adverse to plaintiff,] [that defendant took the action because plaintiff engaged in the protected activity,] and [that plaintiff sustained damages,] [that plaintiff sustained damages to the extent claimed.]

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

In many cases one or more of the elements of plaintiff's claim may be admitted. For example, there may be no dispute that the plaintiff engaged in the protected activity; there may be no dispute that the defendant took action; and/or there may be no dispute that the action defendant took was materially adverse to plaintiff. Therefore, the bracketed phrases in the last paragraph should be included only to the extent that defendant actually disputes that particular element of plaintiff's claim.

Comment

Section 6-101(A) of the Human Rights Act provides two ways in which a person's civil rights may be violated through retaliation. 775 ILCS 5/6-101(A). First, the "opposition clause" of section 6-101(A) states that it is a civil rights violation to "[r]etaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment or sexual harassment in elementary, secondary, and higher education, or discrimination based on citizenship status or work authorization status in employment." *Id*. Second, the "participation clause" of section 6-101(A) states that it is a civil rights violation to "[r]etaliate against a person . . . because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act, or because he or she has requested, attempted to request, used, or attempted to use a reasonable

accommodation as allowed by this Act." *Id*.;*see Zoepfel-Thuline v. Black Hawk Coll.*, 2019 IL App (3d) 180524, ¶¶ 28-29.

Section 6-101(A) of the Human Rights Act was amended effective January 1, 2022 to provide as follows:

It is a civil rights violation for a person, or for 2 or more persons, to conspire, to:

(A) Retaliation. Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment, sexual harassment in elementary, secondary, and higher education, or discrimination based on arrest record or citizenship status in employment under Articles 2, 4, 5, and 5A, because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act, or because he or she has requested, attempted to request, used, or attempted to use a reasonable accommodation as allowed by this Act.

775 1LCS 5/6-101. This amendment deleted "work authorization status" and added "arrest record" and references to Articles 2, 4, 5 and 5A of the Human Rights Act to the "opposition clause."

Under the "opposition clause," plaintiff must have a reasonable and good faith belief that he/she has experienced discrimination or harassment. 775 1LCS 5/6-101 A; *Zoepfel-Thultine v. Black Hawk Coll.*, 2019 1L App (3d) 180524, ¶ 30. A "reasonable and good faith standard" also applies to actions brought under the "participation clause." *Zoepfel-Thultine, at*. ¶ 31. Therefore, where plaintiff did not have a reasonable and good faith belief that he/she had been subjected to sexual harassment, plaintiff had no claim under either the "opposition clause" or the "participation clause." *Id*. Whether plaintiff held a reasonable and good faith belief is measured under both an objective and a subjective standard. *Id*. at ¶ 34, citing *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 23 (1993).

255.14 HUMAN RIGHTS ACT - RETALIATION - DEFINITION OF RETALIATION

There was in force in the State of Illinois at the time of the occurrence[s] in question a certain statute which provided that it was a violation of the Illinois Human Rights Act for a person, or for two or more persons, to conspire to:

> Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment, or discrimination based on arrest record, citizenship status, or work authorization status in employment . . . because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under the Illinois Human Rights Act, or because he or she has requested, attempted to request, used, or attempted to use a reasonable accommodation as allowed by the Illinois Human Rights Act.

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction adopts the format of IPI 60.01 and sets forth the conduct that constitutes retaliation in an employment relationship as defined by Section 6-101(A) of the Illinois Human Rights Act. This instruction is to be used in conjunction with the issues and burden of proof instructions in claims for retaliation under Section 6-101(A) of the Illinois Human Rights Act. This instruction does not include language from Section 6-101(A) that encompasses alleged retaliation that occurs outside of an employment relationship. The ellipses that appear in the instruction reflect where the excluded language appears in the statute. The court may consider giving this instruction without the ellipses for reasons of clarity and to avoid potential confusion of the jury.

This instruction is to be used when the acts of alleged retaliation by the defendant(s) occurred on or after May 13, 2022, per Public Act 102-0813. That legislation corrected an error in Public Act 102-0362, which amended Section 6-101(A) of the Human Rights Act effective January 1, 2022 by adding "arrest record" but deleting "work authorization status" from the itemization of opposition to certain forms of discrimination. Public Act 103-0813 restored "work authorization status" to the statute's itemization of protected oppositional conduct.

Where the acts of alleged retaliation by the defendant(s) occurred from January 1, 2015 through December 31, 2021, this instruction should be modified to state the following, which recites the pertinent language of Section 6-101(A), per Public Act 98-1050, effective January 1, 2015:

> It is a civil rights violation for a person, or for two or more persons to conspire, to:

(A) Retaliation. Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination, sexual harassment in employment or sexual harassment in elementary, secondary, and higher education, discrimination based on citizenship status in employment, or because he or she has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Act, or because he or she has requested, attempted to request, used, or attempted to use a reasonable accommodation as allowed by this Act;

(B) Aiding and Abetting; Coercion. Aid, abet, compel or coerce a person to commit any violation of this Act;

(C) Interference. Wilfully interfere with the performance of a duty or the exercise of a power by the Commission or one of its members or representatives or the Department or one of its officers or employees.

Definitions. For the purposes of this Section, "sexual harassment" and "citizenship status" shall have the same meaning as defined in Section 2-101 of this Act.

255.15 HUMAN RIGHTS ACT - BURDEN OF PROOF - RETALIATION

Plaintiff claims that defendant[s] retaliated against plaintiff because plaintiff [describe plaintiff's protected activity]. To succeed on this claim, plaintiff must prove by a preponderance of the evidence the following:

1. That plaintiff had a reasonable and good faith belief that plaintiff had been [discriminated against and/or harassed];

2. That plaintiff [engaged in protected activity];

3. That defendant[s] [describe action adverse to plaintiff];

4. That defendant's action [describe the action adverse to plaintiff] was materially adverse to plaintiff;

5. The defendant[s] took the materially adverse action because plaintiff [engaged in protected activity];

6. That, because of the materially adverse action, plaintiff sustained damages.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for defendant.

Instruction and Notes on Use approved December 2022.

Notes on Use

In many cases one or more of these elements may be undisputed or may have been decided by the court in advance. For example, there may be no dispute that the plaintiff engaged in the protected activity; there may be no dispute that the defendant took action; and/or there may be no dispute that the action defendant took was materially adverse to plaintiff. In such cases the instruction should be modified to focus only on the elements that are in dispute.

255.16 HUMAN RIGHTS ACT - RETALIATION - REASONABLE AND GOOD FAITH BELIEF

For plaintiff to have a good faith and reasonable belief that plaintiff was [harassed and/or discriminated against], the [discriminatory and/or harassing] conduct must be sufficiently severe or pervasive to create an environment that a reasonable person would find hostile or abusive and plaintiff must have perceived the environment to be hostile or abusive.

Notes on Use

This instruction should only be used when there is a question of fact as to whether the plaintiff had a reasonable and good faith belief that he or she had been discriminated against and/or harassed. *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 23 (1993); *Zoepfel-Thuline v. Black Hawk Coll.*, 2019 IL App (3d) 180524, ¶ 34.

255.17 HUMAN RIGHTS ACT - MATERIALLY ADVERSE ACTION DEFINED - RETALIATION CLAIM

An employment action is materially adverse if it well might have dissuaded a reasonable employee in plaintiff's circumstances from making a complaint or charge of [discrimination] [harassment] [sexual harassment].

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction should be used where the court has determined that the question of whether the defendant's conduct toward the plaintiff constituted a material adverse action is a question of fact. In some cases, the court may decide this issue as a matter of law, in which case the jury should be so informed, and the instruction is unnecessary.

This instruction is not to be used for discrimination claims. There is a separate definition of materially adverse action for such claims.

Comment

The Appellate Court's opinion in *Hoffelt v. Ill. Dep't of Hum. Rts.*, 367 Ill. App.3d 628, 634-35 (1st Dist. 2006), sets forth the definition of material adverse action in the context of a claim for retaliation.

The phrase "well might dissuade" is used twice in *Hoffelt*, and quotes language in *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006) ("In our view, a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have' dissuaded a reasonable worker from making or supporting a charge of discrimination.'" (auoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006), quoting *Washington v. Ill. Dep't of Revenue*, 420 F.3d 658, 662 (7th Cir. 2005)).

"[A] broad array of actions may constitute an adverse employment action including such employer acts as 'hiring, firing, failing to promote, reassignment with significantly different responsibilities, or some other action causing a significant change in benefits." *Hoffelt v. Ill. Dep 't of Hum. Rts.*, 367 Ill. App. 3d 628, 634 (1st Dist. 2006) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)). Among those actions, "Illinois courts recognize constructive discharge as sufficient to establish an adverse employment action under the Human Rights Act." *Cooksey v. Bd of Educ*., No. 13 C 8619, 2014 U.S. Dist. LEXIS 22640, at *6-7 (N.D. Ill. Feb. 24, 2014) (citing *Steele v. Ill. Hum. Rts. Comm 'n*, 160 Ill. App. 3d 577 (1987); *Motley v. Ill. Hum. Rts. Comm 'n*, 263 Ill. App. 3d 367 (1994); *Stone v. Dep't of Hum. Rts.*, 299 Ill. App. 3d 306 (1998).

255.18 HUMAN RIGHTS ACT - DAMAGES

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate plaintiff for any of the following elements of damages proved by the evidence to have resulted from the defendant's [discrimination] [sexual harassment] [harassment] [retaliation] in violation of the Illinois Human Rights Act:

[1. Back Pay.]

[2. Lost Future Earnings.]

[3. The emotional distress that plaintiff has experienced [and is reasonably certain to experience in the future].]

[4. The reasonable expense of health care treatment and services that plaintiff received [and the reasonable expense of health care treatment and services reasonably certain to be received in the future].]

Whether any of these elements of damages has been proved by the evidence is for you to determine.

Instruction and Notes on Use approved December 2022.

Notes On Use

This instruction and the accompanying instructions regarding Back Pay and Lost Future Earnings adopt the format of the IPI 30.00 Series of instructions for damages in personal injury, property damage, and wrongful death cases and encompass the elements of damages a plaintiff may recover in a claim under Sections 2 or 6 of the Human Rights Act. However, it does not include attorney's fees and costs, which are not considered by the jury but instead are considered by the court pursuant to a petition filed by the plaintiff after the court has entered judgment on the jury's verdict in favor the plaintiff.

This instruction contemplates a case involving a single plaintiff and defendant and should be modified as necessary if the case involves more than one plaintiff or more than one defendant; for example, in a case alleging sexual harassment where both the employer and the alleged harassing employee(s) are defendants.

For any future damages, expenses, etc., the parties should consider a variation of IPI 34.02 "Damages Arising in the Future - Discount to Present Cash Value."

255.19 HUMAN RIGHTS ACT - DAMAGES - DEFINITION OF BACK PAY

When I use the term "Back Pay" I mean the value of any [wages] [earnings] [profits] [benefits] plaintiff would have received from the defendant in the past if plaintiff had not been [adverse employment action; e.g., terminated or constructively discharged] by the defendant [minus the earnings and benefits that plaintiff received from other employment during that time] [that plaintiff would not otherwise have received].

Instruction and Notes on Use approved December 2022.

Notes on Use

This instruction is modeled on instruction No. 3.11 of the Federal Civil Jury Instructions of the Seventh Circuit Court of Appeals for employment discrimination claims under Title VII and the Age Discrimination in Employment Act and on IPI 30.07. The bracketed language should be used in accordance with the evidence regarding the specifics of this aspect of the plaintiff's claimed damages.

Section 8A-104(C) of the Illinois Human Rights Act identifies back pay ("back pay") as an element of relief that may be awarded to a complainant for the loss of wages and benefits from his or her job caused by the defendant's violation of the Human Rights Act. 775 ILCS 5/8A-104(C). Back pay represents the wages the plaintiff would have earned had he or she not been discharged in violation of the law. *Stewart v. Ill. Dep't of Transp.*, 2022 IL App (1st) 201104, ¶ 21, citing *Ortega v. Chi. Bd. of Educ.*, 280 F. Supp.3d 1072, 1078 (2017). The purpose underlying an award of back pay "is to make the employee 'whole' with respect to salary, raises, sick leave, vacation pay, pension benefits, etc." *Crowley v. Watson*, 2016 IL App (1st) 142847, ¶ 60.

255.20 HUMAN RIGHTS ACT - DAMAGES - DEFINITION OF LOST FUTURE EARNINGS

[When I say "Lost Future Earnings" I mean the value of any [wages] [earnings] [profits] [benefits] plaintiff would have received from the defendant in the future if plaintiff had not been [adverse employment action] [minus the [wages] [earnings] [profits][benefits] that plaintiff would have received from other employment during that time [that plaintiff would not otherwise have received]].

Instruction and Notes on Use approved December 2022.

Notes on Use

Section 8A-104(B) of the Illinois Human Rights Act provides for an award of "actual damages" for injury or loss suffered by the plaintiff (complainant) because of the defendant's violation of the Human Rights Act. 775 ILCS 5/8A-104(B). The Human Rights Act does not refer specifically to front pay, which is an equitable remedy the court may award a plaintiff in claims under Title VII of the Civil Rights Act of 1964; however, the Appellate Court has recognized that front pay is an element of damages a plaintiff may recover under the Human Rights Act. *See Chas. A. Stevens & Co. v. Hum. Rts. Comm'n*, 196 Ill. App. 3d 748 (1990). The Human Rights Commission has authority to award front pay, "especially when the plaintiff has no reasonable prospect of obtaining comparable employment." *Id.* at 756.

"Front pay" and "lost future earnings" are terms that are used, often interchangeably, to refer to a claim by a plaintiff in an employment discrimination, retaliation, or harassment case for the loss of wages and benefits sustained in the future because of the defendant's conduct where the remedy of reinstating the plaintiff to his or her previous position is either unavailable or is impractical. See Committee Comments (c) and (d) to instruction No. 3.10 of the Federal Civil Jury Instructions of the Seventh Circuit Court of Appeals for employment discrimination claims under Title VII and the Age Discrimination in Employment Act and *Garcia v. Sigmatron Int'l, Inc*., 130 F. Supp. 3d 1249, 1255 (N.D. Ill. 2015) (citing *McKnight v. Gen. Motors Corp*., 908 F.2d 104, 116 (7th Cir. 1990) ("Front pay represents the wages the plaintiff would have earned had [he] not been fired measured from the date of the judgment to some reasonable point in the future.").

To avoid the risk of confusing the jury with the term "front pay," the Committee recommends using the term "lost future earnings" in instructing the jury on this element of a plaintiff's claimed damages. *See Williams v. Pharmacia, Inc*., 137 F.3d 944, 953-54 (7th Cir. 1998) (regarding the confusion and potential overlap between "front pay" and "lost future earnings"). This instruction tracks the language of the instruction defining the elements of potential recoverable damages for back pay and is modeled on IPI 30.07.

255.21 HUMAN RIGHTS ACT - DAMAGES - MITIGATION

The defendant [claims that plaintiff's claim for back pay [and lost future earnings] should be reduced by [describe the reduction].

If you find that

1. Plaintiff did not take reasonable efforts to seek subsequent employment to reduce [his/her] damages, and

2. Plaintiff reasonably might have found comparable employment if [he/she] had taken such action,

you should reduce any amount you might award plaintiff for back pay [and lost future earnings] by the amount plaintiff reasonably would have earned during the period for which you are awarding damages for back pay [and lost future earnings].

It is the defendant's burden to prove both that the reduction should be made and its amount.

Instruction, Notes on Use and Comment approved December 2022.

Notes on Use

This instruction is to be used in conjunction with the "Damages" instructions only if the defendant presents evidence creating an issue of fact as to the plaintiff's efforts to find comparable employment and/or reduce his/her damages and the availability of comparable work.

Comment

A plaintiff in an employment discrimination case is required to make reasonable efforts to seek subsequent employment. The employer has the burden of proving that the employee failed to mitigate damages by making reasonable efforts to seek subsequent employment. *ISS Int'l Serv. Sys. v. Hum. Rts. Comm'n*, 272 Ill. App. 3d 969, 979 (1st Dist. 1995). To establish the plaintiff's failure to mitigate damages, the defendant must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence. *Hutchison v. Amateur Elec. Supply*, 42 F.3d 1037, 1044 (7th Cir. 1994). The focus is on comparable or similar work. *Id*.

A wrongfully discharged employee must act to mitigate his or her damages by seeking similar employment. *Arneson v. Bd. of Trs.*, 210 Ill. App. 3d 844 (5th Dist. 1991); *Schwarze v. Solo Cup Co*., 112 Ill. App. 3d 632 (2d Dist. 1983).

> When the alternate employment is an offer of reemployment by the original employer, the employee need not always accept such an offer or be precluded from seeking damages. It has been recognized that if an employee is hired for a specific position, a subsequent demotion or diminution of duties may be a breach of the employment contract. Moreover, the fact that the salary was the same does not erase the stigma attached to the demotion and change of duties.

Arneson, 210 Ill. App. 3d at 852; *Schwarze*, 112 Ill. App. 3d at 638.

For citations to cases discussing other amounts which may reduce the amount of damages plaintiff may recover for lost wages and benefits in employment discrimination cases generally, see Committee Comment (b) to Federal Civil Jury Instructions of the Seventh Circuit, Employment Discrimination, 3.12 Mitigation of Damages.