IN THE
SUPREME COURT OF ILLINOIS
Case No. 121048

PATRICIA ROZSAVOLGYI,	)	Appeal on Certificate of Importance
	)	from the Illinois Appellate Court,
Plaintiff-Appellant,	)	Second District,
	)	No. 15-0493
v.	)	
	)	There Heard on Appeal
CITY OF AURORA,	)	from The Circuit Court for the
	)	Sixteenth Judicial Circuit,
Defendant-Appellee.	)	Kane County, Illinois,
	)	No. 2014 L 49
	)	
	)	Hon. Thomas Mueller,
	)	Judge Presiding.

REPLY BRIEF OF PLAINTIFF-APPELLANT, PATRICIA ROZSAVOLGYI, AND RESPONSE TO CITY'S REQUEST FOR CROSS-RELIEF

Jolianne S. Walters (ARDC No. 6314222)
Glenn R. Gaffney (ARDC No. 6180598)
Gaffney & Gaffney P.C.
1771 Bloomingdale Road
Glendale Heights, IL 60139
(630) 462-1200
F: (630) 462-7698
glenn@gaffneylawpc.com
jolianne@gaffneylawpc.com

Attorneys for Plaintiff-Appellant, Patricia Rozsavolgyi

ORAL ARGUMENT REQUESTED

STATEMENT OF POINTS AND AUTHORITIES

disability discrimination is cognizable under § 2-102(A) of the IHRA.

PLAINTIFF'S REPLY ON RULE 316 APPEAL QUESTIONING APPELLATE COURT'S ANSWER TO THE THIRD CERTIFIED QUESTION.

ARGUMENT

A. PLAINTIFF HAS NOT WAIVED HER ARGUMENT THAT THE THIRD CERTIFIED QUESTION WAS IMPROPERLY FRAMED AND SHOULD NOT HAVE BEEN ANSWERED.

Defendant argues that Plaintiff has forfeited or waived her argument concerning the propriety of the Third Certified Question by failing to: (1) raise the issue in her application for certificate of importance/petition for rehearing; and (2) argue the Appellate Court abused its discretion in allowing the certified question. Defendant's argument fails to consider and account for the actual procedural history of this case. On April 29, 2015, the Circuit Court of Kane County granted Defendant's Rule 308(a) motion to certify three questions for interlocutory appeal over Plaintiff's objection. On May 11, 2015, Defendant filed its Application for Leave to Appeal pursuant to Rule 308 with the Second District Appellate Court. What Defendant conveniently fails to bring to this Court's attention is that on June 1, 2015, Plaintiff filed her Appearance and Answer in Opposition to Defendant's application for Leave to Appeal pursuant to Supreme Court Rule 308 objecting to the propriety of the Third Certified Question, *inter alia*, asserting that: (1) an immediate appeal will not materially advance the ultimate termination of the litigation; (2) the question is improperly framed; (3) there is no substantial ground for difference of opinion; (4) the question improperly seeks an advisory opinion; and (5) resolution of the question would require the Appellate Court to make factual determinations. On June 23, 2015, the Appellate Court granted the City's application over Plaintiff's objection, and the case proceeded through the appeal process.

Given that the record plainly preserves Plaintiff's objections to the propriety of the Third Certified Question and the Appellate Court's decision thereon, the issue has clearly not been waived here. What's more is that Defendant has conceded this waiver objection by its citation at page 20 of its Brief to *Hubble v. Bi-State Development Agency of Illinois-Missouri Metropolitan Dist.*, 238 Ill.2d 262, 267 (2010), for the proposition that under Supreme Court Rule 316, "the whole case comes before the Supreme court and not only a particular issue." See also, *People v. Robinson*, 223 Ill.2d 165, 174 (2006) (to preserve issue for appeal, party must raise issue in post-trial motion, in the appeal before the Appellate Court, or in the petition for leave to appeal to the Supreme Court). Therefore, it matters not that Plaintiff did not re-raise this already raised and decided issue in her petition for rehearing, because the current appeal is not limited to merely one order of the Appellate Court. As Defendant made clear, the entire record on appeal, including the propriety of the Appellate Court's grant of Defendant's application for Rule 308 appeal over Plaintiff's objection, is properly before this Court. As such, Plaintiff stands by her arguments raised in her opening brief and requests that this Court vacate the Appellate Court's answer to the Third Certified Question because it was improperly framed.

B. THE TIA CANNOT APPLY TO IHRA CLAIMS.

Should this Court not vacate the Second District's answer to the Third Certified Question, it must answer the question in the negative and find that the Local Governmental and Governmental Employees Tort Immunity Act, ("TIA"), cannot apply to claims brought under the Illinois Human Rights Act, ("IHRA"). The Supreme Court of Illinois abolished the doctrine of sovereign immunity in 1959. *Village of Bloomingdale v.*

CDG Enterprises, Inc., 196 Ill.2d 484, 489 (2001), citing *Moliter v. Kanelane Comm. Unit. Dist. No. 302*, 18 Ill.2d 11, 25 (1959). The Illinois General Assembly thereafter enacted the TIA, which serves "to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1(a). Under this Act, "Illinois adopted the general principle that local governmental units are liable in tort, but limited this liability with an extensive list of immunities based on specific government functions. *Village of Bloomingdale*, 196 Ill.2d at 489. Defendant argues, generally, that the immunities provided under the TIA generally apply to IHRA claims asserting constitutionally-based civil rights violations because the TIA did not expressly exempt IHRA claims from its gambit and the IHRA's definition of "employer" to include local governmental entities does not overcome the TIA's protections. To support its position, Defendant cites to *Boyles v. Greater Peoria Mass Transit Dist.*, 113 Ill.2d 545 (1986), *Epstein v. Chicago Bd. Of Educ.*, 178 Ill.2d 370 (1997), and *Lynch v. Dep't of Transp.*, 2012 IL App (4th) 111040, for the general proposition that public policy does not preclude TIA immunity in the face of the common law or another statute's imposition of a duty on local governmental entities.

Firstly, these cases are all distinguishable for several important reasons. For example, Defendant's argument in reliance on *Lynch* fails because that case did not stand for the proposition that the State could not be held liable altogether under the IHRA. That case merely held that the State did not consent to be sued in the circuit courts. The case of *Envoy v. Illinois State Police*, 429 F. Supp. 2d 989, 998-99 (N.D. Ill. 2006), explains this point when it held that "there can be no viable contention that Illinois state government and state agencies relied on immunity from suit in shaping their conduct with respect to

invidious discrimination against state employees." The court went on to state that "since long before the adoption of the State Lawsuit Immunity Act, the Illinois Human Rights Act's prohibition against age-based and disability-based discrimination against employees has applied to state governmental agencies." *Id.*; See also, 56 Ill.Admin. Code § 2500.10 ("for purposes of the prohibition against disability discrimination, § 2-102 applies to all units of State and local government in Illinois"). The *Envoy* court went on further to state that even if the IHRA somehow did not apply to state government employers, the state still would be subject to suit in the Illinois Court of Claims for an IHRA violation involving a government employee. *Id.*, citing 775 ILCS 5/10-102(A)(1); 705 ILCS 505/8(a); See also, *Lynch v. Dep't of Transp.*, 2012 IL App (4th) 111040, at *¶ 31 (State could be sued in the Commission for violations of IHRA). Thus, despite Defendant's contentions otherwise, the State is not immune from civil rights violations under the IHRA. Importantly, no such restriction is imposed for local governmental entities, like the City; therefore, the City can be sued in circuit courts for IHRA claims. 775 ILCS 5/7A-102(G)(2).

In the same way, Defendant's reliance on *Boyles* and *Epstein* for the proposition that other statutory or common law schemes' imposition of a duty on local public entities do not overcome TIA immunity is also misplaced because the IHRA, as a specific statutory scheme, is a unique beast. As the Second District so comprehensively held in *Rozsavolgyi*, the IHRA is the statutory vehicle which protects and enforces constitutional rights to ensure that persons in this State are free from unlawful discrimination. See, *Rozsavolgyi v. City of Aurora*, 2016 IL App (2nd) 150493, at ¶ 111 (concluding that claims under the IHRA are constitutionally grounded and/or derived); *Thakkar v. Wilson*

Enterprises, Inc., 120 Ill.App.3d 878, 880 (1st Dist. 1983) (the IHRA is the procedural vehicle for enforcing the constitutional right to be free from unlawful discrimination); *Dilley v. Americana Healthcare Corp.*, 129 Ill.App.3d 537, 538 (4th Dist. 1984) (same). Furthermore, Defendant's argument that Plaintiff's claims are not "constitutional claims" under § 19 of the Illinois Constitution because that section relates only to "hiring and promotion practices of any employer" was expressly rejected by the Fifth District in *Ritzheimer v. Insurance Counselors, Inc.*, 173 Ill.App.3d 953 (5th Dist. 1988), rejected on other grounds by *Baker v. Miller*, 159 Ill.2d 249 (1994). In that case, the court determined that it was proper to interpret the Constitution's use of the phrase "hiring and promotion practices," to include practices that result in demotion or termination. *Ritzheimer*, 173 Ill.App.3d at 957,[disagreeing with Defendant's case, *Yount v. Hesston Corp.*, 124 Ill.App.3d 943, 949 (2nd Dist. 1984)].

Turning to the crux of Defendant's argument, while neither *Boyles* nor *Epstein* involved claims for constitutional violations, the federal courts have addressed the issue of whether governmental immunity can insulate the government from liability for its own constitutional violations. For example, the United State Supreme Court, in the case of *Owen v. City of Independence, Mo.*, 445 U.S. 622, 622 (1980), found that "a municipality has no immunity from liability under § 1983 flowing from its constitutional violations." [See pg. 33 of Defendant's brief, citing *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999), acknowledging that Plaintiff's IHRA claims are "constitutional tort" claims akin to § 1983 claims]; See also, *Melbourne Corp. v. City of Chicago*, 976 Ill.App.3d 595, 603 (1st Dist. 1979) (to constitute a "constitutional tort" beyond the scope of the TIA, defendant's actions must constitute a knowing or malicious violation of

plaintiff's clearly established constitutional rights). The *Owen* court determined that § 1983's language imposes liability upon every person, which encompasses municipal corporations, who under the color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.* The court further recognized that this expansive sweep of § 1983's language is confirmed by its legislative history. *Id.* The same is true for IHRA claims, for which legislative history similarly confirms that State and local governmental entities have always been subject to the requirements of the IHRA. 81st Ill. Gen. Assem., Reg. Sess., May 25, 1979 (under the IHRA "every Act or every phase incorporated into this merger acts now upon local government because its State law already").

The *Owen* court further reasoned that municipalities could not be immune for its constitutional violations because to the extent the municipality was performing the same proprietary functions as a corporate body, like any other private corporation, for which such private corporation would be liable for its torts, it was not functioning as an arm of the State, and therefore, was not acting in a governmental capacity. *Id.* at 644-45; See also, *Platinum Partners Value Arbitrage Fund, Ltd. Partnership v. Chicago Bd. Options Exchange*, 2012 IL App (1st) 112903, at *¶15 (entities that enjoy absolute immunity when performing governmental functions cannot claim that immunity when they perform non-governmental functions. When these entities perform duties that pertain to the exercise of private franchises, powers and privileges which belong to them for their own corporate benefit, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a

private corporation under like circumstances). Additionally, the court went on further to reason that even if the municipality was performing governmental functions, it still could not be immune for its constitutional violations because the doctrine granting a municipality immunity for "discretionary" functions cannot serve as the foundation for immunity under § 1983, because a municipality has no "discretion" to violate the Federal Constitution. *Id.* at 623.

Thus, contrary to Defendant's position, the U.S. Supreme Court has made it unequivocally clear that there is no "tradition so well grounded in history and reason," (like those traditions upholding immunity under the TIA, for example), that would warrant the conclusion that Congress extended to municipalities immunity for its constitutional violations. *Id.* at 650. Absent any clearer indication that Congress intended to limit the reach of a statute expressly designed to provide a "broad remedy for violations of federally protected civil right," the U.S. Supreme Court was unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep. *Id.* at 650-51 (the central aim of the Civil Rights Act was to provide protection to those persons wronged by the misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law); Compare, *Arlington Park Race Track Corp. v. Human Rights Com'n*, 199 Ill.App.3d 698, 703 (1st Dist. 1990) (as a remedial statute, the IHRA should be liberally construed to effectuate its purpose); *Castaneda v. Ill. Human Rights Com'n*, 132 Ill.2d 304, 318 (1989) (in analyzing the IHRA, a court should look to the evil that the legislature sought to remedy or the object it sought to attain in enacting the legislation). To this point, "how uniquely amiss it would be...if the governmental

itself---the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct—were permitted to disavow liability for the injury it has begotten. *Id.* at 651, citing *Adickes v. Kress & Co.*, 398 U.S. 144 (1970).

Furthermore, to more fully stress the fact that "no tradition" warrants the immunization of constitutionally violative conduct, the *Owen* court specifically found unavailing public policy arguments premised on protecting the financial interests of local government. To that point, the court stated that § 1983 was intended not only to provide compensation to the victims of past abuses, but to also serve as a deterrent against future constitutional deprivations and it is because of this deterrent interest that the knowledge that a municipality will be liable for all of its injurious conduct should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. *Id.* at 651-52. Therefore, the court reasoned that the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. *Id.* at 652. **Thus, a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees**, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. *Id.* at 651 (emphasis added). As such, unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. *Id.*

Taking it a step further, in response to Defendant's argument concerning the constitutionality of the TIA, the *Owen* analysis here confirms the Supreme Court's previous holding in *Sherbert v. Verner*, 374 U.S. 398, 406-08 (1962), where it held that an interest in avoiding financial burdens is not compelling to overcome fundamental rights to be free from religious discrimination protected under a state's constitution. Furthermore, to the extent the TIA impedes upon protected constitutional rights, specifically those fundamental constitutional rights protected under the IHRA, the TIA must be held unconstitutional because protecting the financial interests of government does not outweigh the State's interest in protecting its citizen's fundamental constitutional rights to be free from unlawful discrimination. *Anderson v. Wagner*, 61 Ill.App.3d 822, 826 (4th Dist. 1978) (strict scrutiny is employed in cases concerning suspect classifications, such as race, sex, ethnic background, residency, and alienage, or fundamental interests, such as right to travel freely or to practice a religion); See also, 775 ILCS 5/1-103(Q) (defining "unlawful discrimination" to include, *inter alia*, discrimination based on race, color, religion, national origin, sex, disability, etc.).

What's more is that this rule of law set forth in *Owen* and *Sherbert* has trickled down to cases construing the IHRA. For example, the Seventh Circuit in *E.E.O.C. v. Elrod*, 674 F.2d 601, 611-12 (7th Cir. 1982), an age discrimination case construing the IHRA, in part, stated that the state's interests in binding the government to public policy to protect against constitutional violations is not in conflict with the federal interest in non-discrimination and the importance of having that policy uniformly applied in the public and private sectors. Further, to the Defendant's financial interest public policy argument, the Seventh Circuit further confirmed that there is no significant burden of

increased costs on the state and the limited intrusion into the employment decisions of state and local governments against the interest in prohibiting discrimination tips the balance in favor of the federal interest to protect constitutional guarantees. *Id.* at 612; See also, *Rumbold v. Town of Bureau*, 221 Ill.App.3d 222, 231-32 (3rd Dist. 1991) (citing *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980) with approval that municipalities cannot be immune for its constitutional violations); *Streeter v. County of Winnebago*, 44 Ill.App.3d 392, 394-95 (2nd Dist. 1976) (the TIA does not bar actions for constitutional violations); *Firestone v. Fritz*, 119 Ill.App.3d 685, 689 (2nd Dist. 1983) (same); *People ex rel. Birkett v. City of Chicago*, 325 Ill.App.3d 196, 202 (2nd Dist. 2001) (same).

Additionally, because the State is not so concerned about its financial burdens under the IHRA, given the fact that it has consented itself to suit for violations thereunder in the Commission or the Court of Claims, as set forth by *Lynch*, this Court should not be so concerned with Defendant's financial burdens in this regard. *Owen*, 445 U.S. at 623 (a municipality's "governmental" immunity is abrogated when the sovereign makes itself amenable to suit). The reason is because the ultimate result will be that taxpayer dollars would flow anyway from the Commission or Court of Claims decision to impose upon governmental employers those remedies available under § 8A-104 of the IHRA. To this point as well, the fact that monetary relief can be awarded under the IHRA is further evidence that the TIA cannot apply to Plaintiff's IHRA claim. The reason is because IHRA remedies are considered restitution, outside the scope of TIA preclusion. See, 775 ILCS 5/8A-104 (the Commission may provide for any relief or penalty identified in this section, by entering an order directing the respondent to, for example, pay actual

damages, back pay, pay attorneys' fees and costs, and provide other make-whole relief); *Watson v. Potter*, 2002 U.S. Dist. LEXIS 16743, 2002 WL 31006129, at *13 (N.D. Ill. 2002) (equitable relief is also referred to as make-whole relief); *People ex rel. Birkett*, 325 Ill.App.3d at 204-206 (the TIA does not bar claims for equitable relief); *Foster v. Costello*, 2014 U.S. Dist. LEXIS 64189, 2014 WL 1876247, at *39 (N.D. Ill. 2014) (finding plaintiff's claim for reinstatement could proceed, which is consistent with the TIA's allowance for equitable remedies); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) (finding that both back pay and front pay are equitable remedies, which can only be awarded after a victim of discrimination has been actually or constructively discharged); *Rogers v. Loether*, 467 F.2d 1110, 1121 (7th Cir. 1972) (finding back pay is restitution, which is an equitable remedy because the retention of wages, which would have been paid but for the statutory violation is considered "ill-gotten gains" and ultimate payment restores the situation to that which would have existed had the statute not been violated).

In fact, as this Court, in *Raintree Homes, Inc. v. Vill. of Long Grove*, 209 Ill.2d 248, 257 (2004) has held, "sometimes courts use the term damages when they mean restitution." [See e.g., Defendant's cases, *ISS Intern. Serv. Sys., Inc. v. Ill. Human Rights Com'n*, 272 Ill.App.3d 969, 980-81 (1st Dist. 1995) and *Pechan v. DynaPro, Inc.*, 251 Ill.App.3d 1072, 1080 (2nd Dist. 1993), which hold that IHRA remedies include "damages" awards]. In this regard, this Court clarified that a "damages award is not the only money award courts make. Courts may also award restitution in money." *Id.* Damages differs from restitution in that damages are measured by the plaintiff's loss; restitution is measured by the defendant's unjust gain. *Id.* Thus, the remedies available

under the IHRA are just that, monetary remedies for Defendant's unjust, "ill-gotten" gains. Moreover, to further illustrate that the TIA cannot bar IHRA remedies, Defendant's cases, cited at pgs. 36-37 of its Brief, are all distinguishable, because these cases do not hold that the TIA bars relief against governmental entities when the relief is sought under a statute which protects the constitutional rights of persons of this State. See, *Vill. of Bloomingdale*, 196 Ill.2d at 500-01 (applying TIA to bar quasi-contract damages claim), *Melvin v. City of West Frankfort*, 193 Ill.App.3d 425, 431-33 (5th Dist. 1981) (applying TIA to bar compensatory damages sought from enforcement of unconstitutional provision of the Illinois Municipal Code of 1961, which concerned the examination of applicants, applicant disqualifications, and the removal of employees of various boards of fire and police commissioners); *Halleck v. County of Cook*, 264 Ill.App.3d 887, 890-92 (1st Dist. 1994) (applying TIA to bar damages sought for common law retaliatory discharge action). Therefore, Defendant's financial interest argument to preserve immunity for constitutional violations holds no weight here, because the government will be liable to pay, whether in one forum or another, for its constitutional violations under the IHRA for those monetary restitution remedies available thereunder. Accordingly, as the numerous courts in this State and many more across the nation have found, there can be no immunity tradition so engrained in policy that it overcomes those protections so cherished under the Constitution. As such, the TIA, as an entire statutory scheme, cannot cognizably immunize Defendant for its own malfeasance upon Plaintiff's constitutional rights protected by the IHRA, lest it be found unconstitutional.

C. IF THE TIA, GENERALLY, CAN APPLY TO IHRA CLAIMS, TIA §§ 2-103, 2-201, AND 3-108 DO NOT IMMUNIZE DEFENDANT FROM PLAINTIFF'S IHRA CLAIMS.

Even though the TIA cannot generally provide immunity over IHRA claims due to the grave potential that constitutional infringements by the government would run afoul, if this Court determines otherwise, Defendant is not immune from Plaintiff's IHRA claims under TIA §§ 2-103, 2-201, and 3-108.

1. TIA § 2-103 provides no immunity from Plaintiff's IHRA claims.

TIA § 2-103 provides that "a local public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." 745 ILCS 10/2-103. Defendant impermissibly enlarges the plain language of this statute to provide immunity for failing to "comply" with an enactment. Firstly, this is not the plain language of the statute. *Lulay v. Lulay*, 193 Ill.2d 455, 466 (2000); *People v. Larson*, 379 Ill.App.3d 642, 652 (2nd Dist. 2008) (it is not the court's role to rewrite the statute according to preferences); *Harshman v. DePhillips*, 218 Ill.2d 482, 512 (2006) (a court cannot restrict or **enlarge** the meaning of an unambiguous statute) (emphasis added). Secondly, courts have found that local public entities are not immune under § 2-103 for failing to comply with the ministerial requirements imposed by law. *Vill. of Itasca v. Vill. of Lisle*, 352 Ill.App.3d 847, 859-860 (2nd Dist. 2004) (finding village not immune from liability under § 2-103 where the issue was whether village had complied with the ministerial requirements under the law); *Snyder v. Curran Tp.*, 167 Ill.2d 466, 474 (1995) (where tailored statutory and regulatory guidelines place certain constraints on the decision of officials, a court should be reluctant to label decisions falling wholly outside the established parameters as "discretionary"); 775 ILCS 5/2-102(A) (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 or citizenship status).

Based on the plain language of § 2-102(A) of the IHRA, while it is conceivable that a local government employer can act with discretion in determining what applicants to hire, how to structure its staff, who to promote, what reasonable business circumstances warrant employment decisions, and how to impose discipline, in performing these discretionary tasks, once undertaken, such employer has no discretion to unlawfully discriminate against its employees. See, *Snyder*, 167 Ill.2d at 474-75 (once a decision requiring discretion is made, actions implementing it in conformance with the law are ministerial); See also, *Owen*, 445 U.S. at 623 (a local public entity has no discretion to violate the constitution). The IHRA clearly spells out the statutory and regulatory guidelines placing certain constraints on local government employers mandating that they not unlawfully discriminate against their employees in making employment-related decisions. This is a ministerial function and there is no room for discretion here. Therefore, Defendant cannot conceivably be immune for failing to comply with the IHRA's ministerial impositions.

2. TIA § 2-201 provides no immunity from Plaintiff's Counts I and IV IHRA claims.

TIA § 2-201 states, "except as otherwise provided by statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201. The first reason Defendant is not immune from Plaintiff's IHRA claims under this TIA section is because, as more fully set forth above in *Owen* and *Snyder*, a local public entity

has no discretion to not follow the law to not unlawfully discriminate against its employees in the terms, privileges, and conditions of employment. 775 ILCS 5/2-102(A).

The second reason Defendant is not immune from Plaintiff's IHRA claims under TIA § 2-201 is because the plain language of § 2-201's use of the phrase, "except as otherwise provided by statute," when compared with § 3-108's use of the phrase, "except as otherwise provided in this Act," clearly shows that the legislature can affirmatively differentiate when it means for immunity to be limited by other provisions within the TIA and whether it means for immunity to be limited, in general, by other statutes, including those outside the TIA. See, *In re Marriage of Kates*, 198 Ill.2d 156, 163 (2001) (the statute should be read as a whole and construed so that no term is rendered superfluous or meaningless); *Barnett v. Zion Park Dist.*, 171 Ill.2d 378, 388-89 (1996) (construing, as a whole, each provision of the TIA in connection with every other section).

Thus, based on this plain language, the IHRA is one such statute which can abrogate immunity under § 2-201 of the TIA. Any other construction would be an unwarranted rewriting of the TIA to read into it exceptions, limitations, or conditions not intended by the legislature. *Lulay*, 193 Ill.2d at 466; *People*, 379 Ill.App.3d at 652 (it is not the court's role to rewrite the statute according to preferences); *Harshman*, 218 Ill.2d at 512 (a court cannot **restrict** or enlarge the meaning of an unambiguous statute) (emphasis added); *Kraft, Inc. v. Edgar*, 138 Ill.2d 178, 189 (1990) (we must not depart from the plain language of the Act be reading into it exceptions, limitations, or conditions that conflict with the express legislative intent); [But see Defendant's case, *Albers v. Breen*, 346 Ill.App.3d 799, 806-07 (4th Dist. 2004) (Confidentiality Act's imposition of liability against public employees did not abrogate TIA's § 2-201 general immunity

provision because it "cannot be right" for the General Assembly to require itself to remember to reincorporate immunity into each new statute establishing a cause of action)]. The holding in *Albers* is in direct and explicit contravention to the rules of statutory construction. First of all, the TIA is in derogation of common law, which this Court has repeatedly said ***must be strictly construed against the local public entity***. *Aikens v. Morris*, 145 Ill.2d 273, 278 (1991) (emphasis added). Therefore, the Fourth District's excuse for the General Assembly, which alleviates their responsibility to, in fact, *reincorporate immunity* into each new statute if it wishes for immunity to be imposed, and belief that the General Assembly did not mean what it actually meant by surmising that "it cannot be right," is an unwarranted enlargement of the TIA and reads into it exceptions and conditions not expressly set forth in the plain language of the Act. Therefore, to the extent *Albers* is controlling here on that point, it must be overturned. *People v. Deatherage*, 401 Ill. 25, 31 (1948) (even if the legislative intent might be thought crude or unwise and the law unjust or oppressive, errors of legislation are not subject to judicial review unless they exceed some limitation imposed by the constitution).

The third reason Defendant is not immune from Plaintiff's IHRA claims under this TIA section is because the plain language of § 2-201 provides only that a "public employee" is not immune for making a determination of policy. To reiterate Plaintiff's position in her opening brief, an individual employee cannot be held liable under § 2-102(A) of the IHRA. Thus, the inquiry of whether Defendant can be immune under this TIA section is not even reached here because liability attaches to the employer itself, for which TIA § 2-201 provides no immunity. See e.g., *Smith v. Waukegan Park Dist.*, 231

Ill.2d 111, 118 (2008) (it is the employer who 'acts' within the meaning of TIA § 2-109 in a discharge action); *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12, 22 (1998) (general agency principles are not implicated when it is the employer, itself, who acts). Furthermore, Defendant's cases are distinguishable, because in those cases immunity was imposed only after it was determined that the public employee, whether actually sued or not, could be held liable under those cases' respective actions. See, *Melvin*, 193 Ill.App.3d at 431 (TIA § 2-201 applied because individual city officials could be held liable for violating Illinois Municipal Code); *Collins v. Bd. of Educ. of North Chi. Comm. Unit Sch. Dist. 187*, 792 F. Supp. 2d 992, 999 (N.D. Ill. 2011), citing *Anderson v. Grayslake Sch. Dist. No. 46*, 1997 WL 639032, at *1 (N.D. Ill. 1997) (plaintiff's claims are based on defendants' actions, including individual board members, in their official capacity); *Caldwell v. Montoya*, 897 P.2d 1320 (Cal. 1995) (in FEHA action where action could be brought against individuals, individual members of an elected school board, sued personally, are immune for discretionary acts). As stated, the same is not true for § 2-102(A) IHRA claims, which provides no avenue for individual liability. Therefore, the inquiry is not reached and Defendant cannot be immune under § 2-201 of the TIA.

3. TIA § 3-108 provides no immunity from Plaintiff's Counts I and IV IHRA claims.

TIA § 3-108(a) provides, "except as otherwise provided in this Act, neither a local public entity nor a public employee who undertakes to supervise an activity on or the use of any public property is liable for an injury unless the local public entity or public employee is guilty of willful and wanton conduct in its supervision proximately causing such injury." 745 ILCS 10/3-108(a). As Defendant has acknowledged at page 47 of its

brief, the City cannot be immune under this section when it embarks on "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." Firstly, Plaintiff has admitted nothing by her interrogatory answers because Defendant's argument that Plaintiff did not make Defendant aware of her requests is a highly-contested issue of fact, which is improper for determination on a Rule 308(a) appeal. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 58 (2007) (courts will not answer questions of fact on a 308(a) interlocutory appeal); See also, *Flewellen v. Atkins*, 99 Ill.App.2d 409, 419 (1st Dist. 1968) (answers to interrogatories are not pleadings and are not judicial admissions or evidence in case unless and until they are read into evidence); *Ponticiello v. Aramark Unif. & Career Apparel Servs.*, 2006 U.S. Dist. LEXIS 66977, 2006 WL 2699416, at *30-31 (N.D. Ill. 2006) (a plaintiff can prove the defendant was aware of the harassment by using formal channels for complaints or by telling anyone that the victim reasonably believed could receive and respond to complaints of harassment).

Thus, because the Court is required to take Plaintiff's allegations in the light most favorable to Plaintiff at this time, Defendant's failure to take corrective measures and engage in the interactive process, despite its knowledge of Plaintiff's requests for accommodation and request to stop the harassment, constitutes a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property. *Bohacs v. Reid*, 63 Ill.App.3d 477, 480 (2nd Dist. 1978) (conduct may be willful and wanton without deriving from negligence and a defendant's violation of a plaintiff's

constitutional rights can constitute willful and wanton conduct because it is an intentional act); *Murray v. Chi. Youth Ctr.*, 224 Ill.2d 213, 237 (2007) (willful and wanton conduct can involve circumstances where defendant acts with a conscious and deliberate disregard for the rights of others); *Mack Industries, Ltd. v. Village of Dolton*, 2015 IL App (1st) 133620, at *¶ 41 (Although the question of whether a public employee's actions amounts to willful and wanton conduct is generally a question of fact, a court may hold, as a matter of law, that an action is willful and wanton when no other contrary conclusion can be drawn); See e.g., *Hill v. Galesburg Comm. Unit Sch. Dist. 205*, 346 Ill.App.3d 515, 522 (3rd Dist. 2004) (defining the spectrum of willful and wanton conduct and finding that teacher's failure to supervise chemistry class and violating the Eye Protection Act stated sufficient facts to allege willful and wanton conduct avoiding immunity under § 3-108(a)). Willful and wanton conduct does not occupy a precise point on the continuum of liability between negligence and intentional conduct. *Hill*, 346 Ill.App.3d at 522. Willful and wanton conduct can be slightly more than negligence, slightly less than intentional conduct, or anywhere in between, depending on the circumstances. *Id.*

Furthermore, this section, on its face, is not applicable to Plaintiff's claims because she is not alleging that there was a failure to "supervise an activity on or the use of public property." At a minimum, it is a highly factual undertaking to determine whether Plaintiff claims arise out of a purported failure to "supervise an activity" or not. Notably, Plaintiff has filed no claims for negligent retention or negligent supervision; rather, Plaintiff alleges that her employer failed to reasonably accommodate her, allowed a hostile work environment to persist, unabated, and discriminated and retaliated against her as a result of her disability and because she had engaged in protected conduct under

the IHRA. It is a broad and unwarranted stretch, in direct contravention to the strict construction the TIA requires, to reach the conclusion that these claims are governed by statutory language, which relates to an obligation to undertake "to supervise an activity on or the use of public property." Therefore, Defendant cannot be immune under TIA § 3-108 because it engaged in willful and wanton conduct.

PLAINTIFF'S RESPONSE TO DEFENDANT'S REQUEST FOR CROSS-RELIEF REGARDING THE FIRST CERTIFIED QUESTION.

STATEMENT OF FACTS

Plaintiff's Claims

Plaintiff alleges that, as of July 2012, she had a medical history of unipolar depression, anxiety, panic attacks, and partial hearing loss. (SF-0007, ¶ 9). Plaintiff alleges that her medical conditions did not prevent her from performing the duties and responsibilities of her position. (SR-0007, ¶ 11). However, Plaintiff, when provoked, was more likely to react strongly but never in a physical manner. (SR-0007-0008, ¶ 11). Yet, Plaintiff alleges that she did not violate any Defendant Code of Conduct. (SR-0007-0008, ¶ 11). Plaintiff also alleges that certain members of her staff and co-workers engaged in an intentional pattern and practice of creating a hostile and offensive work environment in an effort to agitate, embarrass, humiliate, degrade, harass, discriminate and provoke Plaintiff. (SR-0008, ¶ 13). As a result of Plaintiff's co-workers' conduct, Plaintiff sustained further emotional harm, aggravation to her medical conditions, which impacted her ability to concentrate and focus at work. (SR-0009, ¶ 15). Because of the hostile work environment, Plaintiff suffered from multiple symptoms. (SR-0009, ¶ 15).

Plaintiff further alleges that at or near the time she was terminated from her employment for making a statement to a co-worker using the word "idiots," (SR-0009, ¶ 16), Plaintiff was at her wits end and depressed because of the hostile work environment she endured. (SR-0009, ¶ 17). Had management taken reasonable steps to prevent this, Plaintiff would not have been in such a vulnerable condition. (SR-0009, ¶ 17). Plaintiff also claims that she was discriminated against because she had a history of the aforesaid medical conditions, (SR-0010, ¶ 19), and that Defendant asked the Union to "guarantee"

that Plaintiff was not a threat to commit physical violence in the workplace. (SR-0010, ¶ 19). In response, the Union president accurately represented to Defendant that Plaintiff's counselors and doctors did not deem her to be a physical threat. (SR-0010, ¶ 19). Defendant then made the decision to terminate Plaintiff's employment as an act of unlawful disability discrimination and unlawful retaliation. (SR-0010, ¶ 20).

The City's Awareness of Plaintiff's Requests for Accommodation

Defendant's statement of facts relies upon Plaintiff's answer to an interrogatory, as opposed to a pleading. (SR-0069-0070, ¶ 20). There, Plaintiff was asked, "Did you ever ***file*** a complaint of harassment pursuant to the City's anti-harassment policy? If so, state: (a) the nature of the complaint; (b) the date you made the complaint; (c) to whom you made the complaint to; (d) the manner or form in which you made the complaint; and attached any documents supporting your answer." (emphasis added). (SR-0069-0070, ¶ 20). Plaintiff responded, "No." (SR-0070, ¶ 20). The City's "Reasonable Accommodation" policy, however, provides that "an employee with a known disability shall request an accommodation from his immediate supervisor." (SR-0048). Plaintiff has set forth sufficient facts to show that she requested an accommodation pursuant to the City's reasonable accommodation policy. For example, during the time Plaintiff was employed by the City, her supervisors were Dave Dykstra and Mark Anderson. (SR-0051, ¶ 1). Plaintiff states under oath within her Verified Charge of Discrimination and also in her Complaint that she made multiple requests upon management that she was seeking an accommodation because of her medical conditions and that she wanted the City to take appropriate action to make the harassing and demeaning conduct stop. (SR-0011, ¶ 23; SR-0018, ¶¶ 5, 7; SR-0027, ¶ 12). Plaintiff set forth that her two supervisors,

Dave Dykstra and Mark Anderson, were among the members of management who were apprised that she was requesting an accommodation. (SR-0051, ¶ 1; SR-0052, ¶ 1).

Plaintiff then alleges that the City had a duty to engage in an interactive process, so as to determine whether or not such request was either prohibitively expensive or would unduly disrupt the ordinary conduct of business pursuant to the applicable IHRA provisions of the Illinois Administrative Code. (SR-0031, ¶ 24). However, rather than considering Plaintiff's request for a reasonable accommodation, Plaintiff alleges that she City dismissed Plaintiff's accommodation request and that the City never made an individualized assessment in violation of the IHRA and the regulations adopted thereunder. (SR-0031-0032, ¶ 24). Instead, Plaintiff alleges that she was told that she had to "live with it," "deal with it," ignore it," "I don't think that's harassment," or "do what you gotta do." (SR-0028, ¶ 14).

The City's Awareness that Plaintiff was being subjected to a Hostile Work Environment on the basis of her Disability

The City's "Anti-Harassment" policy states that "if an employee feels that he/she has experienced or witnessed harassment, the employee is to immediately report the act of harassment to his/her immediate supervisor, Division Director, Department Head, Corporation Counsel, or Director of Human Resources." (SR-0044). Plaintiff alleges that she repeatedly made oral complaints to management, including her supervisors Dave Dykstra and Mark Anderson, about the discriminatory, hostile, harassing, demeaning, and provoking conduct. (SR-0008, ¶ 14; SR-0018, ¶ 7; SR-0051, ¶ 1; SR-0052, ¶ 1; SR-0069, ¶ 19). Despite her repeated complaints to management and her supervisors, the City failed to take appropriate actions to make the harassing conduct stop. (SR-0015, ¶ 17).

The Underlying Trial Court Orders

On October 17, 2014, the trial court struck and dismissed Plaintiff's Counts I and IV claims for failing to state legally cognizable causes of action under the IHRA. Plaintiff, thereon, filed a motion to reconsider that decision. On January 23, 2015, the trial court reconsidered its October 17, 2014, decision and reinstated Counts I and IV and gave the City leave to file its amended affirmative defenses. (SR-0004). Then, on April 29, 2015, the trial court entered an order finding that the interlocutory orders involved questions of law as to which there were substantial grounds for difference of opinion and that an immediate appeal from said orders may materially advance the termination of the litigation pursuant to Rule 308(a). (SR-0001-0002). The trial court then certified three questions and appeal was considered by the Illinois Appellate Court for the Second District of Illinois over Plaintiff's objections. (SR-0001-0002).

The Appellate Court's Decision

On April 27, 2016, the Appellate Court answered the trial court's three certified questions, and gave the following answer to the First Certified Question:

> (1) section 2-102(A) of the IHRA prohibits hostile work environment disability harassment, and a reasonable-accommodation claim may be brought as a separate claim under that provision. *Rozsavolgyi v. City of Aurora*, 2016 IL App (2nd) 150493, at *¶ 2.

On July 6, 2016, Plaintiff's Application for Certificate of Importance relating the Appellate Court's answer to the Third Certified Question pursuant to Supreme Court Rule 316, which was granted. On that application, Defendant seeks cross-relief regarding the Appellate Court's answer to the First Certified Question.

ARGUMENT

A. PRINCIPLES OF STATUTORY CONSTRUCTION.

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Sangamon County Sheriff's Dep't v. Illinois Human Rights Com'n*, 233 Ill.2d 125, 136 (2009). In doing so, it is fundamental that statutes be read in light of the attendant conditions and the state of the law at the time of their enactment. *Kotecki v. Cyclops Welding Corp.*, 146 Ill.2d 155, 168 (1991). In other words, statutes are to be construed as they were intended to be construed when they were enacted. *Id.* So, if the language of a statute is susceptible to two constructions, one of which will carry out its purpose and another which will defeat it, the statute will receive the former construction. *Tri-State Coach Lines, Inc. v. Metro. Pier & Exposition Auth.*, 315 Ill.App.3d 179, 190 (1st Dist. 2000); *People v. Flaugher*, 396 Ill.App.3d 673, 692 (4th Dist. 2009) (courts are not bound by the literal language of a statute if that language produces absurd or unjust results not contemplated by the legislature). Thus, while an amendment is usually presumed to effect a change in the law, if the circumstances suggest that the amendment is intended to interpret the rule, the presumption of a change is rebutted. *Kellett v. Roberts*, 276 Ill.App.3d 164, 171 (2nd Dist. 1995). Further, the judicial construction of a statute becomes a part of the law and it is presumed that the legislature in passing the law knew of the construction of the words in a prior enactment. *R.D. Masonry, Inc. v. Indus. Com'n*, 215 Ill.2d 397, 403-04 (2005). Additionally, where an agency's interpretation of a statute is involved, courts give substantial weight and deference to the agency's interpretation because its interpretation expresses an informed

source for ascertaining the legislative intent. *Abrahamson v. Ill. Dep't of Professional Reg.*, 153 Ill.2d 76, 97-98 (1992).

B. PLAINTIFF'S COUNTS I AND IV CLAIMS ARE COGNIZABLE UNDER SECTION 2-102(A) OF THE IHRA.

The First Certified Question asks:

> Does section 2-102(A) of the Illinois Human Rights Act prohibit "disability harassment" as a civil rights violation? Alternatively, do counts I and IV of Plaintiff's Complaint state cognizable civil rights violations under section 2-102(A) of the Illinois Human Rights Act?

As written, the First Certified Question asks this Court to make several improper and unwarranted assumptions. The first assumption is that the IHRA needs to use the statutory term "disability harassment" at all in order for a hostile work environment to be actionable pursuant to § 2-102(A). The second assumption is that the cognizability of Plaintiff's Count I claim for "failure to accommodate" is contingent upon whether or not she was subjected to any "disability harassment," or hostile work environment, which, pursuant to § 2-102(A), impacted the terms, privileges, and conditions of her employment. In Count I, Plaintiff alleged that she suffered from the known medical conditions of "unipolar depression, anxiety, panic attacks, and partial hearing loss." (SR-0007, ¶ 9). Plaintiff complained that she was being subjected to certain conduct, some of which, had nothing to do directly with "disability harassment," which includes being called a "prostitute, bitch, ignorant...[along with] nasty mailbox notes, spitting on her car window, and the creation of false rumors," including the rumor that she was a "physical threat." (SR-0008, ¶ 13). This co-worker conduct, which was egregious, but yet unrelated to her disability, exacerbated her conditions and impacted the terms, privileges, and conditions of her employment, resulting in a very reasonable request for an

accommodation. So, the First Certified Question allows Defendant to set up a strawman argument, which fails to take into consideration the actual terms and provisions of the IHRA, as well as the allegations of Plaintiff's complaint at Counts I and IV.

As such, the wording of this question and the assumptions it calls for automatically requires a "no" answer, which is patently unfair and prejudicial to Plaintiff. Obviously, this is not the true question the Court is called upon to answer. The true question, which strikes at the heart of Plaintiff's Counts I and IV claims, is:

> Does § 2-102(A) of the Illinois Human Rights Act recognize independent claims for disability discrimination in the "terms, privileges, and conditions of employment," when such claims are founded on the knowing creation or allowance of a hostile work environment, which exacerbated known medical disabilities and a subsequent failure to consider or provide a reasonable accommodation, despite requests?

Henceforward, Plaintiff requests that this Court answer the above revised question, which is more properly framed to directly address the issues presented for this Court's review. See, *Firemans Fund Ins. Co. v. SEC Donahue, Inc.*, 176 Ill.2d 160, 164-65 (1997) (modifying certified question based on parties' request).

1. There is overwhelming precedence that independent claims for "failure to accommodate" are cognizable under § 2-102(A) of the IHRA.

The plain language of § 2-102(A) of the IHRA, the Administrative Regulations, the Illinois case law, the Human Rights Commission decisions, and the legislative history of the IHRA all overwhelmingly and unequivocally establish that "failure to accommodate" claims can be brought as independent civil rights violations under § 2-102(A) of the IHRA.

a. <u>The plain language of § 2-102(A) of the IHRA establishes that "failure to accommodate" claims can be brought as independent civil rights violations.</u>

The plain language of § 2-102(A) of the IHRA reads as follows:

> Civil Rights Violations--Employment. It is a civil rights violation:
>
> (A) Employers. 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 or citizenship status. 775 ILCS 5/2-102(A).

This Court has explicitly held in *Boaden v. Dep't of Law Enforcement*, 171 Ill.2d 230, 248 (1996), that an employer violates the IHRA when the employer acts with respect to the terms, privileges, and conditions of employment on the basis of unlawful discrimination. Courts in this State have interpreted the phrase "terms, privileges or conditions of employment" under § 2-102(A) of the IHRA as a broad and expansive concept. *Old Ben Coal Co. v. Ill. Human Rights Com'n*, 150 Ill.App.3d 304, 308 (5th Dist. 1986); *Arlington Park Race Track Corp.*, 199 Ill.App.3d at 703 (as a remedial statute, the IHRA should be liberally construed to effectuate its purpose).

Given the broad interpretation of this statutory language, courts in this State have generally found that an employer's duty to provide accommodations affects the employee's work environment, for which work environment is a term, privilege, or condition of employment. See e.g., *Owens v. Dep't of Human Rights*, 356 Ill.App.3d 46, 54 (1st Dist. 2005), citing *Salmon v. Dade Cty. Sch. Bd.*, 4 F.Supp.2d 1157, 1163 (S.D. Fla. 1998) (an employer is required to provide reasonable accommodations that eliminate barriers in the work environment); See also, *Merry v. A. Sulka & Co.*, 953 F. Supp. 922, 927 (N.D. Ill. 1997) (a reasonable accommodation allows the employee the opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee

without a disability); *Dey v. Milwaukee Forge*, 957 F. Supp. 1043, 1050 (E.D. Wis. 1996) (an employer makes accommodations by making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work). Therefore, because being afforded a reasonable accommodation impacts upon the employee's work environment, which is a term, privilege, or condition of employment, the discriminatory denial of the same amounts to a separate and distinct civil rights violation under the plain language of § 2-102(A) of the IHRA.

Furthermore, based on the plain language of § 2-102(A) of the IHRA and a reading of the IHRA as a whole, a plaintiff who has been specifically refused a reasonable accommodation can be entitled to those remedies available under § 8A-104 of the IHRA because the plain language of § 8A-104 explicitly sets forth that the enumerated remedies are available "upon finding a civil rights violation." The IHRA clearly defines "civil rights violation" as inclusive of those specific acts set forth in §§ 2-102 and 6-101, *inter alia*. 775 ILCS 5/1-103(D). As set forth above, § 2-102(A) of the IHRA explicitly makes it a civil rights violation to discriminate with respect to the terms, privileges and conditions of employment. Additionally, § 6-101(A) of the IHRA explicitly contemplates that an employee can request, attempt to request, use, or attempt to use a reasonable accommodation as allowed by the IHRA. 775 ILCS 5/6-101(A). Thus, the plain language of the statute, as a whole, clearly indicates that it is a civil rights violation in the broad terms, privileges and conditions of employment to fail to accommodate an employee as allowed by the Act, which allows a complainant to seek those remedies available under § 8A-104.

b. The Commission regulation, 56 Ill. Adm. Code. § 2500.40, establishes that "failure to accommodate" claims can be brought as independent civil rights violations.

The Administrative Regulations for the Illinois Human Rights Commission has also promulgated a rule which requires that "employers and labor organizations must make reasonable accommodation of the known physical or mental limitations of otherwise qualified disabled applicable or employees." 56 Ill. Adm. Code. § 2500.40(a). The Regulation also states that "once a disabled individual has initiated a request for accommodation, or if a potential accommodation is obvious in the circumstances, it is the duty of the employer or labor organization involved to provide the necessary accommodation in conformance with subsection (a)." 56 Ill. Adm. Code. § 2500.40(d) (indicating that a Charge of Discrimination can be investigated based solely on an employer's refusal to provide an accommodation); See also, *Northern Illinois Automobile Wreckers & Rebuilders Ass'n v. Dixon*, 75 Ill.2d 53, 58 (1979) (administrative rules and regulations have the force and effect of law and, like statutes, are presumed valid and must be construed under the same standards which govern the construction of statutes). This regulation clearly evidences that a breach of the employer's duty to provide a reasonable accommodation states a claim for failure to accommodate under the IHRA, which can be investigated as an independent civil rights violation upon the filing of a Charge of Discrimination on that basis.

c. The Illinois case law establishes that "failure to accommodate" claims can be brought as independent civil rights violations.

Courts across this State have also repeatedly recognized independent claims for failure to accommodate under § 2-102(A) of the IHRA. For example, the Third District, in *Ill. Dep't of Corr. v. Ill. Human Rights Com'n*, 298 Ill.App.3d 536, 541 (3rd Dist.

1998), determined that the plaintiff could state a *prima facie* case of handicap discrimination under the IHRA based solely on whether the employer failed to provide a reasonable accommodation. The First District, in *Harton v. City of Chicago Dep't of Pub. Works*, 301 Ill.App.3d 378, 390 (1st Dist. 1998), also allowed the plaintiff employee to proceed with her failure to accommodate claim and holding that if the employee would have been qualified to perform job with or without an accommodation, an employer who fails to investigate the possibility of accommodating a physically or mentally impaired employee will be deemed to have violated the IHRA, as long as an accommodation exists. Similarly, the court in *Ill. Bel. Tel. Co. v. Human Rights Com'n*, 190 Ill.App.3d 1036, 1051 (1st Dist. 1989), determined that the Commission's decision that petitioner unlawfully discriminated against complainant when it unreasonably failed to provide available accommodations to her handicap was not against the manifest weight of the evidence. Again, in *Constant v. Turris Coal Co.*, 199 Ill.App.3d 214, 222 (4th Dist. 1990), the court also held that the employee stated claim under IHRA where he contended that the employer failed to make accommodation to his disability. See also, *Raintree Health Care Ctr. v. Ill. Human Rights Com'n*, 173 Ill.2d 469, 481-483 (1996) (requiring employers to make individualized determinations of a handicap person's abilities because it is the express policy of the State that the eligibility for employment be based upon individual capacity).

Most significantly, the Second District in *Rozsavolgyi* has not departed from this state-wide finding. For example, the Second District explicitly stated that reasonable accommodation claims are separate and distinct from disparate treatment or disparate impact claims because a fact finder could, on the one hand, find that, although the City

did not violate its duty to accommodate plaintiff, it nonetheless terminated her employment because of an unlawful motive related to her disability; or, on the other hand, it could find that the City violated its duty to accommodate but did not terminate plaintiff's employment because of an unlawful motive. *Rozsavolgyi,* 2016 IL App (2nd) 150493, at *¶ 73. Thus, the claims are distinct, they involve different facts and considerations, and they are established by different approaches. *Id.* To that point, Plaintiff has alleged that the hostile work environment and Defendant's subsequent failure to consider any accommodations exacerbated her medical conditions. (SR-0009, ¶ 15). Therefore, putting aside Plaintiff's termination for a moment, it is clear that Plaintiff sustained direct harm as a result of being refused an accommodation, namely, the exacerbation of her medical conditions, *inter alia*. See also, *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002) (a discrete act is an incident of discrimination that constitutes a separate, actionable unlawful employment practice). The IHRA provides a remedy for such harm. 775 ILCS 5/8A-104. What's more is that provisions of the IHRA additionally contemplate these situations when it provides for injunctive relief as a potential remedy. 775 ILCS 5/8A-104(A); See also, 775 ILCS 5/10-102(C); 775 ILCS 5/10-102(D). Furthermore, in response to Defendant's arguments that the failure to accommodate can be included as a consideration within a disparate treatment case, although the availability of an accommodation may well be an appropriate consideration in that context, as the Second District noted, that does not preclude an aggrieved party from bringing a stand-alone failure to accommodate claim, which has its own elements and potential relief and recovery. *Id.* at *¶ 74. Moreover, nothing within the IHRA requires a failure to accommodate claim to be hinged to other disparate treatment acts. To

do so would undermine the statute's intent to prohibit civil rights violations and provide a remedy when violations occur.

Additionally, from a pleading standpoint, the Illinois Code of Civil Procedure requires separate causes of action upon which a separate recovery might be had to be stated in separate counts. 735 ILCS 5/2-603(b)(c); *Smith v. Heissinger*, 319 Ill.App.3d 150, 154 (4th Dist. 2001) (the purpose of that section is to give notice to the Court and to the parties of the claims being presented); *Herman v. Hamblet*, 81 Ill.App.3d 1050, 1056 (1st Dist. 1980) (a complaint can be properly dismissed because it improperly alleges multiple causes of action in a single count); *Brainerd v. First Lake County Nat. Bank of Libertyville*, 109 Ill.App.3d 251, 257 (2nd Dist. 1969) (counts III and IV purported to allege two causes of action in a single count, without alternative allegations, in violation of the Civil Practice Act). As such, Plaintiff's pleading, which separately alleges her claim for failure to accommodate, must be liberally construed with a view of doing substantial justice between the parties. Besides, Defendant's arguments in this regard should have been raised within a § 2-615 motion to dismiss, but they were not. Thus, it is improper for Defendant to now raise that issue here as part of this SCR 308(a) interlocutory appeal based on a certified question.

Additionally, to Defendant's argument that Plaintiff's failure to accommodate can result in double recovery, the Second District properly found that separate claims within separate counts do not result in double recoveries. *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 75, citing *Robinson v. Vill. of Oak Park*, 2013 IL App (1st) 121220, at *¶¶ 23-35 (the plaintiff brought separate claims, one alleging religious discrimination and one alleging failure to accommodate her religious beliefs; the reviewing court *separately*

analyzed the claims because, although the "two claims are factually related, they are analytically distinct"). Thus, this Court should similarly find that failure to accommodate claims can be stated independently under § 2-102(A) of the IHRA and affirm the Second District's answer to the First Certified Question.

d. The Human Rights Commission decisions establish that "failure to accommodate" claims can be brought as independent civil rights violations.

The Illinois Human Rights Commission has also, for many decades, recognized failure to accommodate claims as independent actions for civil rights violations under § 2-102(A) of the IHRA. For example, in *In re Matter of Lorraine Harton and City of Chicago*, 1998 CN 1768, 1997 WL 684076, at *6-11 (Ill. Hum. Rts. Com. 1997), the Commission found that despite a request from complainant for a reasonable accommodation, the respondent discriminated against complainant by failing in its duty to attempt to find a reasonable accommodation for her blindness, for which failure, itself, violated the law. The Commission also noted that separate harm could flow from a failure to accommodate violation. *Id.* at *12; See also, 775 ILCS 5/8A-104. In another case, *In re Matter of Walter Zepplin and Caterpillar*, 1991 CN 2603, 1996 WL 209570, at *6, 11 (Ill. Hum. Rts. Com. 1996), the Commission found that the complainant could not pursue her failure to accommodate claims because she did not exhaust her administrative remedies with regards to that particular claim by timely filing a Charge of Discrimination.

Another Commission decision, *In re Matter of Kim Liddell and Special Interest Answering*, 2003 CF 2467, 2008 WL 5622593, at *5-6 (Ill. Hum. Rts. Com. 2008), laid out the elements of a failure to accommodate claim as: (1) complainant must show she is

a member in the protected class; (2) complainant must show that her handicap is unrelated to her ability to perform the job with reasonable accommodation; and (3) complainant must show that respondent refused to provide such accommodation and held that complainant stated a *prima facie* case of handicap discrimination based solely on respondent's failure to provide her with a reasonable accommodation and *Id.* at *6. Notably, the Commission stated that the reasonableness of an accommodation is determined by a balancing test, which must be conducted on a case-by-case basis so that the entire context within which the accommodation was requested is considered before a ruling is issued. *Id.*

The Commission, in *In re Matter of Frederick Woolery and Dolton East Sch. Dist. No. 149*, 1988 CF 1314, 1992 WL 721789, at *12 (Ill. Hum. Rts. Com. 1992), also found that respondent's failure to provide complainant with a reasonable accommodation amounted to a violation of the IHRA. Significantly, the Commission stated that the Illinois Appellate Court has ruled that, for certain types of handicap claims, like those for failure to accommodate, the traditional *prima facie* case and three-part analysis of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), should be abandoned because it is logically inapplicable. *Id.* at *13, citing *Bd. of Trustees of Univ. of Ill. v. Human Rights Com'n*, 138 Ill.App.3d 71 (4th Dist. 1985); See also, *Nawrot v. CPC Intern.*, 259 F.Supp.2d 716, 722 (N.D. Ill. 2003) (in failure to accommodate claim, an employee is not required to prove an adverse employment action as part of a *prima facie* case); *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 71, citing *McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004) (plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim). The Commission

reasoned that since the complainant contended that respondent failed to accommodate his handicap, the issue in the case centered on whether that refusal was reasonable under the circumstances. *Id.*

These decisions, spanning several decades are entitled to substantial weight and deference because the Commission, the entity in charge of interpreting the IHRA, has substantial experience and expertise in construing the statute. *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 82, citing *Wanless v. Illinois Human Rights Com'n*, 296 Ill.App.3d 401, 403 (3rd Dist. 1998). Therefore, these administrative decisions clearly evidence that a breach of the employer's duty to provide a reasonable accommodation states a claim for failure to accommodate under the IHRA.

e. The legislative history of the IHRA establishes that "failure to accommodate" claims can be brought as independent civil rights violations.

Despite this overwhelming precedence recognizing independent, stand alone, claims for failure to accommodate under the IHRA, Defendant would have this Court believe that the IHRA does not recognize a separate claim for failure to accommodate under the plain language of § 2-102(A) of the IHRA merely because the legislature purportedly enacted § 2-102(J), [775 ILCS 5/2-102(J)], to provide that only pregnancy accommodation claims were cognizable as independent violations of the Act. Firstly, both the Fifth District in *Old Ben Coal*, 150 Ill.App.3d at 307 and the Second District in *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 42, have explicitly found that § 2-102(A)'s use of the phrase "terms, privileges, and conditions" was reasonably subject to differing interpretations and; therefore, rendered the statute ambiguous. Given the ambiguity, this Court can look to interpretive aids to ascertain the legislature's intent. *Old Ben Coal Co.*,

150 Ill.App.3d at 307. One such appropriate interpretive aid is the legislative debates. *Id.*; *Kirwan v. Welch*, 133 Ill.2d 163, 168-70 (1989) (courts may properly consider legislative history when attempting to divine legislative intent).

In this regard, on the 119th Legislative Day, April 10, 2014,[1] Illinois Representative Mary E. Flowers, in presenting HB 00008, [P.A. 98-1050, (eff. Jan. 1. 2015)], which amended the IHRA to add § 2-102(J), clearly explained the legislature's intent behind enacting § 2-102(J) when she stated, in relevant part:

> The courts have ruled that even though employers admit that they treat pregnant workers differently than others, a pregnant women [sic] cannot win her case unless she can prove that the refusal to provide accommodation was motivated by a specific intent to cause her harm. As a result, employers are refusing to extend the same reasonable accommodation to pregnant women that they are...that they give to other workers. This is unfair and this is contrary to the intent of Senate Bill 1122. So, therefore, I bring you House Bill 8....***This Bill clarifies the law*** so that pregnant women receive the same reasonable accommodation employers are already acquired...required to provide under the Americans with Disabilities Act and the Human Rights Act to employees with disability... (emphasis added).

Legislator Flowers' statements here fly directly in the face of Defendant's arguments. In fact, Legislator Flowers' statements evidence an admonishment on the courts that the courts had not been properly construing the IHRA and consequently causing pregnant women to fall through the cracks where there should have been no cracks in the first place. See, e.g., *Maganuco v. Leyden Comm. High Sch. Dist. 212*, 939 F.2d 440, 445 (7th Cir. 1991) (employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees, even to the point of conditioning the availability of an employment benefit on an employee's decision to return to work after

[1] http://www.ilga.gov/House/transcripts/Htrans98/09800119.pdf (last visited Dec. 21, 2016, pg. 112-114).

the end of the medical disability that pregnancy cases); *Ill. Bell. Tel. Co. v. Fair Employment Practices Com'n*, 81 Ill.2d 136, 143 (1980) (approving exclusion of pregnancy from Bell's plan because pregnancy is not a "sickness"); *Erickson v. Bd. of Governors of State Colleges and Universities for Northeastern Illinois University*, 207 F.3d 945, 949 (7th Cir. 2000) (the ADA, by contrast to the Pregnancy Discrimination Act, requires employers to consider and to accommodate disabilities). Based on this, it is clear that § 2-102(A) is ambiguous if courts were leaving out claims under that section which they were not supposed to be leaving out. *People ex rel. Dep't of Labor v. Sackville Const., Inc.*, 402 Ill.App.3d 195, 201 (3rd Dist. 2010) (generally, the enumeration of specific items implies that the legislature intended to exclude all others; however, this rule of statutory construction is subordinate to the primary rule that the intent of the legislature governs statutory interpretation, and it can be overcome by a strong indication of contrary legislative intent or policy). In fact, by finding that § 2-102(A) is ambiguous, as the Fifth and Second Districts have done, the purpose of the IHRA, as an entire statutory scheme, is better served because legitimate discrimination claims will not be siphoned off or cut out.

Furthermore, it cannot be conceivably argued that the enactment of the § 2-102(J) operated to evidence that there was never any requirement that employers accommodate persons with disabilities. In fact, P.A. 98-1050, (eff. Jan. 1. 2015), expressly states at ¶ 4 that "employers are familiar with the reasonable accommodations framework. "Indeed employers are required to reasonably accommodate people with disabilities." Furthermore, because of the legislative pronouncements therein, it is clear that the General Assembly enacted § 2-102(J) so as to give pregnant women, who are not

"disabled" under § 1-103(I) of the IHRA, the same rights as individuals with qualified disabilities. See, *People v. Badoud*, 122 Ill.2d 50, 56 (1988) (where the statute is amended soon after questions have arisen regarding its interpretation, it is logical and reasonable to regard the amendment as a legislative interpretation of the original statute). Therefore, this Court should affirm the Second District's answer to the First Certified Question.

2. Plaintiff's Count IV claim for hostile work environment disability discrimination is cognizable under § 2-102(A) of the IHRA.

For the same reasons why Defendant's argument concerning Plaintiff's "failure to accommodate" claim fails, Defendant argument that Plaintiff's Count IV claim is not cognizable under § 2-102(A) of the IHRA because the enactment of § 2-102(D), [775 ILCS 5/2-102(D)], indicates that the legislature does not recognize "harassment" claims in any other context besides "sexual harassment" also fails. Contrary to Defendant's argument, the Illinois Human Rights Commission, federal courts, and, most significantly, Illinois judicial decisions have repeatedly recognized a claim for "hostile work environment" on the basis of unlawful discrimination in the "terms, privileges, and conditions of employment." See e.g., *Old Ben Coal Co.*, 150 Ill.App.3d at 309; *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶¶ 39, 45, 46; *Cook Cty Sheriff's Office*, 2016 IL App (1st) 150718, at *¶¶ 40-45; *E.E.O.C. v. International Profit Assoc., Inc.*, 2007 WL 844555, at *34-35 (N.D. Ill. 2007).

For example, in addition to the Second District's findings here and the Fifth District's analysis in *Old Ben Coal*, most recently and significantly, on May 20, 2016, the First District, in *Cook Cty Sheriff's Office v. Cook Cty Com'n on Human Rights*, 2016 IL App (1st) 150718, weighed in on this very question. In this very recent First District

decision, that court was tasked with determining whether a jail employee could bring a hostile work environment claim based on age discrimination in the "terms, privileges, and conditions of employment" under the Cook County Code of Ordinance § 42-35(b)(1), which is akin to § 2-102(A) of the IHRA. *Cook Cty Sheriff, Id.* at ¶ 31. In answering the question of whether "age-related harassment" was cognizable under the Ordinance, the Court relied, in part, on *Village of Bellwood Bd. of Fire & Police Commissioners v. Human Rights Com'n*, 184 Ill.App.3d 339, 350 (1st Dist. 1989), which found a claim for "racial harassment" actionable under § 2-102(A) the IHRA. *Id.* at ¶ 43; See also, *Bd. of Directors, Green Hills Country Club v. Human Rights Com'n*, 162 Ill.App.3d 216, 221 (5th Dist. 1987) (an employee experiencing violations of his civil rights need not tolerate such violations as a condition of employment, and thus "illegal discrimination constitutes intolerable work conditions"). The Court, also relied on *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993), which observed that Title VII's phrase barring employers from discriminating regarding the "terms, conditions or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment, which includes requiring people to work in a discriminatorily hostile or abusive environment." *Id.* Based on this overwhelming case law, the Court determined that the same rationale must hold true to age-discrimination claims brought under the Ordinance. *Id.* at ¶ 45. The Court stated that "it is readily apparent that, where an employer subjects an employee to a work environment sufficiently hostile or abusive, it is 'acting with respect to' the 'terms, privileges, or conditions' of that individual's employment under § 42-35(b)(1)." *Id.* Therefore, "where an employee can prove that her age was used as a basis to create such a hostile work environment, such proves unlawful

discrimination under the Ordinance." *Id.* As such, the Court concluded that "a showing of a hostile work environment based upon age-related harassment constitutes discrimination within the meaning of the Ordinance." *Id.*

The Second District's reasoning here regarding "disability harassment" is no different from the analysis employed by the First District and, in fact, expounds upon and gives further support to the First District's analysis by delving into Illinois Human Rights Commission decisions. See, *Rozsavolgyi, supra* at ¶ 45 (collecting Commission decisions); See also, *In re Matter of Colleen Rennison and Amax Coal Co. of Amax Inc.*, Charge No. 1980SF0472, 1985 ILHUM LEXIS 218, at *16 (1985) ("among the conditions of employment is the psychological well-being of the employee"); *In re Matter of Elvee Hines and Chicago Urban Day School*, Charge No. 1988CN0644, 1996 ILHUM LEXIS 1081, at *7-8 (1996) ("harassment has been defined as any form of behavior which makes a working environment so hostile and abusive that it constitutes a different term and condition of employment based on a discriminatory factor"); *In re Matter of Frank Gonzalez and Ill. State Toll Highway Auth.*, Charge No. 2006CF2012, 2010 ILHUM LEXIS 148, at *21 (2010) ("there is no logical reason why the [IHRA] should tolerate workplace harassment based on a handicap when it does not tolerate harassment based on any other protected classification"); See also, 56 Ill. Admin. Code. § 5220.900 (setting forth that employers have an affirmative duty to maintain a working environment free of harassment on the basis of national origin). Furthermore, as both the First and Second Districts have noted, it has been long recognized that claims for hostile work environment in the terms, privileges, and conditions of employment based on a protected class are cognizable under § 2-102(A) of the IHRA. Discernably, the body of

case law in this State regarding this very specific issue is growing, and Defendant has set forth no case in this State to overcome these mounting appellate judicial opinions directly discussing this issue. As such, in order to give effect to the legislature's intent, this Court must affirm the Second District's construction of § 2-102(A) of the IHRA to include hostile work environment claims based on unlawful discrimination in the terms, privileges, or conditions of employment. See, *Sangamon County Sheriff's Dep't*, 233 Ill.2d at 140 (IHRA as remedial legislation, "should be construed liberally to achieve its purpose"); 775 ILCS 5/1-102(A).

Having settled that the aforementioned construction of § 2-102(A) of the IHRA is necessary, appropriate, and serves the legislature's intent, Defendant's argument that the enactment of § 2-102(D) requires a different construction of § 2-102(A) to not include hostile work environment claims is a red herring. As the Second District, here, and the Fifth District in *Old Ben Coal* noted, these statutory provisions can be read together when § 2-102(A) is found to be ambiguous. As Plaintiff discussed in her opening brief, the main purpose of statutory construction is to effectuate the legislature's intent and to read all statutes in a manner which renders none ineffective. *Wade v. City of North Chicago Police Pension Bd.*, 226 Ill.2d 485, 510 (2007) (courts have a duty to construe enactments by the General Assembly so as to uphold their validity if there is a reasonable way to do so); *Durica v. Commonwealth Edison Co.*, 2015 IL App (1st) 140076, at *¶ 32, citing *Land v. Bd. of Educ. of the City of Chicago*, 202 Ill.2d 414, 422 (2002) (recognizing the principle of statutory construction that all provisions are to be given effect if reasonably possible, the court will interpret a statute in a manner that reconciles any apparent conflicts).

As both the Second and Fifth District's reasoned, the enactment of § 2-102(D) did not operate to preclude hostile work environment claims long recognized under § 2-102(A). Notably, if the legislature wanted to preclude those types of claims under § 2-102(A), the legislature would have had to explicitly state so by amendment given the long history of court construction recognizing those types of claims under § 2-102(A). See, *Charles v. Seigfried*, 165 Ill.2d 482, 492 (1995) (where the Legislature has acquiesced in a judicial construction of the law over a substantial period of time, the court's construction becomes part of the fabric of the law, and a departure from that construction by the court would be tantamount to an amendment of the statute itself and the power to make such amendments does not lie with the courts). The reality, however, is that the legislature did not amend § 2-102(A) to delete the language "terms, privileges, or conditions of employment," further define the phrase, or provide any other statutory amendment which stated that discrimination claims which amount to a hostile work environment affecting the terms, privileges, and conditions of employment is not a civil rights violation. As this Court stated in *Charles*, this type of statutory amendment is necessary to overcome this long-held construction of § 2-102(A), which has now become well-settled law.

Thus, contrary to Defendant's position, the case law in this state is clear that the only reason the legislature enacted § 2-102(D) was to clarify and provide greater protection than what was already provided under § 2-102(A). For example, this Court has explicitly held that § 2-102(D)'s enactment established strict liability against employers for managerial/supervisory sexual harassment where none had existed before. Compare, *Sangamon Cty Sheriff's Dep't*, 233 Ill.2d at 136 (Illinois courts have interpreted § 2-

102(D) as imposing strict liability on an employer for the sexual harassment of an employee by the employee's direct supervisor) with *Gray v. Ameritech Corp.*, 937 F.Supp. 762, 771 (N.D. Ill. 1996) (finding plaintiff can bring a disability harassment claim under Title VII, provided it is shown that the employer knew or should have known of the harassment and failed to take appropriate remedial action). Additionally, the plain language of § 2-102(D) also creates a claim specifically against an "employee" individually, which does not exist under § 2-102(A). [Compare § 2-102(A)'s use of only the term "employer," versus § 2-102(D)'s use of the terms, "employer, employee, agent of any employer, employment agency or labor organization"]. By this, the legislature sought to expand coverage for sexual harassment claims. Therefore, this Court should affirm the Second District's answer to the First Certified Question.

C. PLAINTIFF'S COUNT I CLAIM FOR "FAILURE TO ACCOMMODATE" STATES A CAUSE OF ACTION.

Defendant argues that Plaintiff's request to "take appropriate action to stop the harassment" is not a "cognizable reasonable accommodation." Firstly, Defendant's argument goes beyond the scope of the First Certified Question. *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 76 (finding City's question here went beyond the certified question and required the court to make factual determinations). Furthermore, now is not the time for Defendant to be sneaking Illinois Code of Civil Procedure § 2-615 dismissal arguments into a Rule 308(a) appeal. *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill.App.3d 113, 116 (1st Dist. 1994) (the reviewing court "should not expand upon the question to answer other issues that might have been included"). Should, however, this Court allow Defendant to proceed with this argument, Defendant's argument entirely misses the point and should be unheeded. Plaintiff's Count I claim is

that Defendant did not at all engage in the interactive process, which hamstringed her right to any type of reasonable accommodation altogether. Had Defendant engaged in the required interactive process, both Plaintiff and Defendant could have come to an agreement on what types of accommodation would be necessary, appropriate, and reasonable given the circumstances of Plaintiff's employment, like those enumerated under 56 Ill. Adm. Code. § 2500.40(a) (accommodation may include: alteration of the facility or work site; modification of work schedules or leave policy; acquisition of equipment; job restructuring; provision of readers or interpreters; and other similar actions).

For example, Defendant could have "altered the facility or work site" by putting up an office divider separating Plaintiff from her alleged assailants or could have even placed Plaintiff in her own office with a door. Defendant could have also "modified work schedules" by changing Plaintiff's and her alleged assailants' working hours so they would not have to work together. Defendant could have "restructured Plaintiff's job" by transferring her to a different department, where she no longer had to interact with her alleged assailants. These are just several of a number of potential reasonable accommodations Defendant could have employed had it engaged in the interactive process. In other words, it fell on Defendant to determine what was reasonable based on Plaintiff's broad request that Defendant do something to stop the harassment, if at all possible.

Furthermore, Defendant's cases are distinguishable here. For example, Defendant cites to *Schwarzkopf v. Brunswick Corp.*, 833 F. Supp. 2d 1106, 1111 (D. Minn. 2011) and related cases. In that case, the plaintiff, suffering from mental disabilities, requested

several accommodations. The court found that under the ADA, the initial burden rests on the plaintiff to demonstrate that he is requesting a "reasonable accommodation." *Id.* at 1122. Because of this, the court determined that none of the plaintiff's requests were "reasonable." *Id.* at 1122-23. While this, in some jurisdictions, may be the analysis employed under the ADA, the IHRA, in its remedial nature, **places the onus on employers, and not on employees, to determine what accommodations are reasonable**. This is a very distinct difference here in Illinois.

In Illinois, the *employer* must make an individualized assessment of the employee's ability to perform the job and determine what accommodations would be reasonable. *In re Matter of Phillip L. Tiller and Illinois Dep't of Human Rights*, Charge No. 1996SF0027, 1998 ILHUM LEXIS 237, at *8-9 (IHRC 1998), citing *Bd. of Trustees v. Ill. Human Rights Com'n*, 138 Ill.App.3d 71, 75 (4th Dist. 1985) (employer has the burden to make an individualized determination of the ability of the handicapped person to perform the work sought before rejecting that person); 56 Ill. Admin. Code. § 2500.40(a); *Raintree Health Care Ctr. v. Illinois Human Rights Com'n*, 173 Ill. 2d 469, 482 (1996) (finding *Raintree*'s actions amounted to discrimination under the IHRA because it did not engage in an individualized inquiry to determine whether plaintiff could safely perform his duties as a cook with the HIV virus); See also, *Ill. Dep't of Corr.*, 298 Ill.App.3d at 542 (once a disabled employee requests accommodation under the IHRA, it becomes the burden of the employer to show that there is no possible reasonable accommodation or that employee would be unable to perform job even with accommodation); 56 Ill. Admin. Code § 2500.40(d). The Regulations also instruct that in order to determine what is reasonable, an employer should weigh the cost and

inconvenience against the immediate and potential benefits providing the accommodation. 56 Ill. Admin. Code § 2500.40(a). Obviously, an employee cannot weigh these costs and benefits to determine what type of accommodation would be reasonable. That assessment is squarely within the knowledge of the employer. Therefore, under the IHRA, unlike some jurisdictions have held under the ADA, it is not enough for the employer to merely dismiss one suggestion made by the employee. *In re Matter of Robert Bruss and Bishop Hardware & Supply, Inc.*, Charge No. 1982SN0012, 1984 ILHUM LEXIS 49, at *7 (IHRC 1984).

Additionally, Defendant's argument that Plaintiff has not stated a claim for failure to accommodate because it is not required to provide an accommodation for a "violent" employee is an irrelevant issue here. Plaintiff alleges that she was not a "violent" employee. For example, she has alleged that when she was at her wits end, she made a statement to a co-worker using the word "idiots" and that other employees are not disciplined and certainly not terminated for using such a word. (SR-009, ¶ 16). She also alleged that her Union president conveyed to Defendant that Plaintiff's counselors and doctors did not deem Plaintiff to be a physical threat. (SR-0010, ¶ 19). Furthermore, this is a question of fact, which is not proper for the court to consider on an SCR 308(a) appeal. Therefore, Plaintiff has stated her claim and the Second District's answer to the First Certified Question must be affirmed.

D. PLAINTIFF'S COUNTS I AND IV CLAIMS ARE NOT FORECLOSED BECAUSE PLAINTIFF DID NOT EXPLICITLY REPORT THE "HARASSMENT" OR REQUEST AN ACCOMMODATION PURSUANT TO THE CITY'S POLICIES.

Like Defendant's argument that Plaintiff's allegations are not well-pled going beyond the scope of the First Certified Question, Defendant argument here that Plaintiff

has pled herself out of court by her discovery answers wherein she "admits" that she did not report the alleged "harassment" or request a reasonable accommodation pursuant to Defendant's reporting policies, also goes beyond the scope of the question. (SR-0069 – SR-0070, Interrogatory Nos. 20, 21). *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 58 (2007) (courts will not answer questions of fact on a 308(a) interlocutory appeal). Furthermore, Defendant's argument presents a contested issue of fact because while Plaintiff answered the interrogatory that she did not make a report explicitly pursuant to Defendant's reporting policies, Plaintiff does state that she made her employer aware of the harassment and of her need for an accommodation. (SR-0051, Interrogatory No. 2, SR-0069, Interrogatory No. 19). Defendant conveniently ignores this fact altogether, despite the fact that its own policy does not even require that reports be made in writing. See, *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 11, n. 3 & 4 ("the policy does not specify that the report must be in writing). What's more is that even if Defendant's argument is correct, Plaintiff cannot plead herself out of court by her current interrogatory answers, especially when discovery is not yet closed. See Ill. Sup. Ct. R. 213(i) (a party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party); See also, *Flewellen*, 99 Ill.App.2d at 419 (answers to interrogatories are not pleadings and are not judicial admissions or evidence in case unless and until they are read into evidence).

Should, however, this Court allow Defendant to proceed on its argument, Defendant's argument fails in light of The Fourth District's decision in *Pinnacle Ltd. Partnership v. Ill. Human Rights Com'n*, 354 Ill.App.3d 819 (4th Dist. 2004), which has

directly addressed this issue. In that case, the plaintiff alleged that a male coworker had sexually harassed him and that the employer was liable for the coworker's conduct because it failed to take reasonable corrective measures after the plaintiff's supervisor became aware of the sexual harassment. *Id.* at 820. One of the issues in that case was whether the employer knew of the non-supervisory harassment. To start, the plaintiff acknowledged that he never filed a written complaint with the Hilton's management, as required by the Hilton's harassment policy. *Id.* at 823. Despite this, the evidence did show that the plaintiff's supervisor knew of the harassment, sufficient to give rise to employer liability under§ 2-102(D) of the IHRA. *Id.* at 828-829. Here, although Plaintiff acknowledges she did not specifically utilize Defendant's reporting policies, the facts show that she, nonetheless, apprised her supervisor, Dave Dykstra, of the harassment through numerous oral complaints. (SR-0051, Interrogatory No. 2, SR-0069, Interrogatory No. 19). Based on the reasoning in *Pinnacle*, Dave Dykstra's knowledge should be imputed on the employer. See also, *Ponticiello v. Aramark Unif. & Career Apparel Servs.*, 2006 U.S. Dist. LEXIS 66977, 2006 WL 2699416, at *30-31 (N.D. Ill. 2006) (a plaintiff can prove the defendant was aware of the harassment by telling anyone that the victim reasonably believed could receive and respond to complaints of harassment). Therefore, Defendant's argument fails and this Court should affirm the decision of the Second District regarding the First Certified Question.

CONCLUSION

WHEREFORE, Plaintiff, Patricia Rozsavolgyi, requests that this Honorable Court do the following:

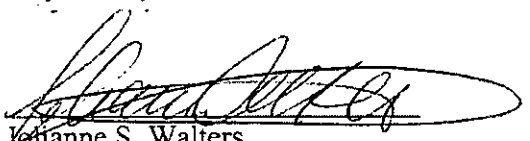
1. Find that the Third Certified Question should never have been answered because the trial court improperly certified it under Illinois Supreme Court Rule 308(a); or, in the alternative,

2. Find that if the Third Certified Question was properly certified under Illinois Supreme Court Rule 308(a), the Third Certified Question should have been answered in the negative;

3. Find that if the Third Certified Question was properly certified under Illinois Supreme Court Rule 308(a), the Second District's prior precedence in *Streeter v. County of Winnebago*, 44 Ill.App.3d 392, 394-95 (2nd Dist. 1976), *Firestone v. Fritz*, 119 Ill.App.3d 685, 689 (2nd Dist. 1983), and *People ex rel. Birkett v. City of Chicago*, 325 Ill.App.3d 196, 202 (2nd Dist. 2001) remain good law, particularly as they relate to civil rights violations under the IHRA; and

4. Affirm the Second District's answer to the First Certified Question.

Respectfully submitted,

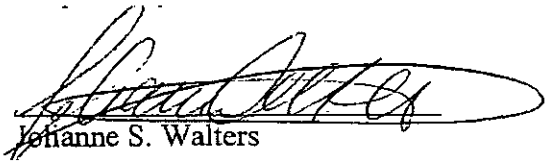


Jolianne S. Walters
One of Plaintiff's Attorneys

Jolianne S. Walters (ARDC No. 6314222)
Glenn R. Gaffney (ARDC No. 6180598)
Gaffney & Gaffney P.C.
1771 Bloomingdale Road
Glendale Heights, IL 60139
(630) 462-1200
glenn@gaffneylawpc.com
jolianne@gaffneylawpc.com

CERTIFICATION 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, and the certificate of service, is 50 pages.



Johanne S. Walters

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies as true that she served the forgoing **Reply Brief of Plaintiff-Appellant, Patricia Rozsavolgyi, and Response to City's Request for Cross-Relief** upon:

Matthew D. Rose (mrose@rmcj.com) Rosenthal, Murphey, Coblentz & Donahue 30 North LaSalle Street, Suite 1624 Chicago, Illinois 60602	Lisa Madigan Carolyn E. Shapiro Brett E. Legner (blegner@atg.state.il.us) 1001 West Randolph Street 12th Floor Chicago, Illinois 60601

by electronic service with return receipt requested and by placing one (1) copies of the same into an envelope correctly addressed as aforesaid and bearing sufficient postage prepaid and depositing same in the U.S. Mail in Carol Stream, Illinois, before 5:00 p.m. on January 20, 2017.

Jolianne S. Walters
Attorney for Plaintiff-Appellant

Jolianne S. Walters (ARDC No. 6314222)
Glenn R. Gaffney (ARDC No. 6180598)
Gaffney & Gaffney P.C.
1771 Bloomingdale Road
Glendale Heights, IL 60139
(630) 462-1200
F: (630) 462-7698
glenn@gaffneylawpc.com
jolianne@gaffneylawpc.com