IN THE
SUPREME COURT OF ILLINOIS
Case No. 121048

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

BRIEF OF DEFENDANT-APPELLEE CITY OF AURORA CROSS-RELIEF REQUESTED

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE ACTION

This action was brought under section 2-102(A) of the Illinois Human Rights Act, 775 ILCS 5/1-101 ("IHRA"). Plaintiff's complaint alleged four civil rights violations based on disability against her employer, the City of Aurora ("City"), for reasonable accommodation (count I), discharge/disparate treatment (count II), retaliatory discharge (count III), and hostile work environment by nonsupervisory co-employees (count IV). (SR-0006 to SR-0023).

In a series of interlocutory orders, the circuit court ruled that: (1) counts I and IV alleged legally cognizable claims for civil rights violations under section 2-102(A) of the IHRA; (2) the City's tort immunity affirmative defenses, raised under sections 2-103 (against all counts), 2-201 (against counts I and IV) and 3-108 (against counts I and IV) of the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/1 ("TIA"), be stricken based on precedent holding that "the [TIA] applies only to tort actions and does not apply to constitutional claims;" and (3) three questions be certified pursuant to Supreme Court Rule 308. (SR-0001 to SR-0005).

A divided panel of the Appellate Court answered the certified questions as follows:

> (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; (2) section 2–102(D) of the [IHRA] applies to hostile-work-environment disability-harassment claims brought under section 2-102(A), and the employee always bears the ultimate burden of persuasion in such a case; and (3) the [TIA] applies to actions under the [IHRA]; the City … can assert immunity with respect to plaintiff's request for damages but not to her request for equitable relief; and we acknowledge that the supreme court has impliedly rejected our holdings that the [TIA] applies only to tort actions and does not apply to constitutional claims and, thus, we do not follow that precedent.

Rozsavolgyi v. City of Aurora, 2016 IL App (2d) 150493, ¶ 2.

Plaintiff timely filed a petition for rehearing pursuant to Supreme Court Rule 367 and an application for certificate of importance pursuant to Supreme Court Rule 316. The Appellate Court denied the petition for rehearing, but granted the certificate of importance.

The questions raised on the pleadings are:

1. Whether counts I and IV of the complaint allege legally cognizable causes of action for civil rights violations under section 2-102(A) of the IHRA.

2. Whether the City's third, fourth and fifth amended affirmative defenses are substantially insufficient in law.

ISSUES PRESENTED FOR REVIEW

1. Whether the Tort Immunity Act applies to Plaintiff's causes of action under the Illinois Human Rights Act.

2. Whether an employer's alleged failure to provide a reasonable accommodation for disability is an actionable civil rights violation under section 2-102(A) of the Illinois Human Rights Act.

3. Whether a disability-based hostile work environment created by nonsupervisory co-employees is an actionable a civil rights violation under section 2-102(A) of the Illinois Human Rights Act.

4. Whether Plaintiff's unreasonable failure to utilize her employer's preventative and remedial policies for reasonable accommodation and disability harassment bars her from recovering damages resulting from the City's alleged civil rights violations.

STATEMENT OF JURISDICTION

This Court has jurisdiction of the "whole case" pursuant to art. 6, § 4(c) of the 1970 Illinois Constitution and Supreme Court Rules 316 and 318. See *Hubble v. Bi-State Dev. Agency of the Illinois-Missouri Metro. Dist.*, 238 Ill.2d 262, 267 (2010) ("[U]nder Supreme Court Rule 316 ... the whole case comes before the supreme court and not only a particular issue."); *Nowicki v. Union Starch and Ref. Co.*, 54 Ill.2d 93, 95 (1973) ("Rule 316 of this court and its predecessors have long provided for the issuance of a certificate of importance by a division of the appellate court, but the certification of a particular question or questions by the appellate court is neither necessary nor appropriate."); Ill. S. Ct. R. 318(a) (eff. Feb. 1, 1994) ("In all appeals, by whatever method, from the Appellate Court to the Supreme Court, any appellee ... may seek and obtain any relief warranted by the record on appeal without having filed a separate petition for leave to appeal or notice of cross-appeal or separate appeal.").

STATUTES INVOLVED

A. Illinois Constitution

Ill. Const. 1970, art. I, § 19, art. II, § 1, and art. XIII, § 4 (West 2014). (A-1).

B. IHRA

775 ILCS 5/1-102(A), (B), (F) and (H) (West 2014). (A-2).

775 ILCS 5/1-103(D), (I)(1), (O) and (Q) (West 2014). (A-3).

775 ILCS 5/2-101(B)(1), (E) and (F) (West 2014). (A-4).

775 ILCS 5/2-102(A), (D), (I) and (J) (West 2014). (A-5 to A-7).

775 ILCS 5/3-102.1(B) and (C) (West 2014). (A-8 to A-9).

775 ILCS 5/5A-102 (West 2014). (A-10).

775 ILCS 5/10-102(C) (West 2014). (A-11).

C. IDHR Regulations

56 Ill. Adm. Code § 2500.40 (West 2014). (A-12).

D. TIA

745 ILCS 10/1-101.1, 1-203, 1-204, and 1-210 (West 2014). (A-13).

745 ILCS 10/2-101, 2-103, 2-109, and 2-201 (West 2014). (A-14 to A-15).

745 ILCS 10/3-108 (West 2014). (A-15).

745 ILCS 10/8-101 (West 2014). (A-16).

E. Other Persuasive Statutes

42 U.S.C.A § 12111(5)(A) (West 2014). (A-17).

42 U.S.C.A § 12112(a) and (b)(5)(A) (West 2014). (A-17).

CAL GOV. CODE § 12940(a), (j), (k), (m) and (n) (West 2014). (A-18 to A-19).

STATEMENT OF FACTS

The facts and procedural history are accurately set forth in paragraphs 4-18 of the Appellate Court's decision. *Rozsavolgyi*, 2016 IL App (2d) 150493, ¶ 4-18.

A. Summary of the Pertinent Undisputed Facts

- The City is both an "Employer" under the IHRA and a "Local public entity" under section 1-206 of the TIA. (SR-0025 and SR-0038).

- The complaint (at ¶ 13) alleged that Plaintiff's nonsupervisory co-employees "engaged in an intentional pattern and practice creating a hostile and offensive work environment in an effort to ... provoke [Plaintiff] ... to cause her ... to get her into trouble with management by responding in kind and obtain her termination, either voluntary or involuntary." (SR-0008). The "hostile and offensive work environment" was "based upon Plaintiff's disability" and "constitutes unlawful disability discrimination in violation of [section 2-102(A) of the IHRA]." (Compl. ¶ 19); (SR-0015).

- On or around July 13, 2012, the City terminated Plaintiff's employment for making a statement to a co-worker using the word "idiots" during a workplace incident that occurred on July 3, 2012. (Compl. at ¶ 16); (SR-0009 and SR-0029).

- When Plaintiff made her statement to a co-worker using the word "idiots" on July 3, 2012, she "was at her wits end and depressed because of all the harassment she had endured." (Compl. ¶ 17); (SR-0009).

- The City denied having notice of the alleged harassment *before* Plaintiff was involved in her workplace incident on July 3, 2012. (SR-0028 and SR-0038).

- The City enacted and maintained corrective, preventative and remedial policies that expressly prohibited harassment based on disability and provided reasonable accommodations for disability. (SR-0037 to SR-0038 and SR-0043 to SR-0048).

- According to the City's anti-harassment policy, "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). "All City of Aurora department heads, division directors, and supervisors are expected to *** Monitor the workplace environment for signs that harassment may be occurring *** Stop any observed acts that may be considered harassment and take appropriate steps to intervene [and] Notify the Director of Human Resources immediately of the initial receipt of any complaint or evidence of any harassment." (SR-0043 to SR-0044). All City employees shall "Immediately report any actions personally observed that could be perceived as harassment *** [and] Failure to report may lead to disciplinary action." (SR-0044). Furthermore,

> All reports describing conduct that is inconsistent with this policy will be promptly and thoroughly investigated.
>
> * * *
>
> During the investigation of complaints, under this policy, the City may impose discipline for inappropriate conduct with regard to whether the conduct constitutes a violation of the law and even if the conduct does not rise to the level of violating this policy.
>
> Corrective action, up to and including termination of employment, will be implemented in those situations determined to require such action.
>
> Upon completion of the investigation, the results will be communicated to the complainant .... Resolutions that are not accepted by the complainant as completely satisfactory will be reviewed by the Mayor.

(SR-0044 to SR-0045, original emphasis).

- According to the City's reasonable accommodations policy, "An employee with a known disability shall request an accommodation from his immediate supervisor. The immediate supervisor, in concert with the Department Head and the Reasonable Accommodation Committee, shall determine if the accommodation is reasonable and provide the accommodation as provided [by the City's policy]." (SR-0048). An employee may also appeal directly to the City's Human Resources Director. (*Id.*) The City's "Reasonable Accommodation Committee, consisting of representatives from Human Resources and Corporate Counsel, shall meet periodically on an as-needed basis to review decisions on reasonable accommodations made by supervisors and department or division heads [and] ... other proposed or requested accommodations." (*Id.*)

- Plaintiff did not avail herself of the complaint procedure and corrective apparatus provided by the City's anti-harassment policy or otherwise initiate a request for reasonable accommodation under the City's reasonable accommodations policy. (SR-0070; Pl.'s Ans. to Interrog. Nos. 20 and 21).

- The complaint (at ¶ 23) alleged that Plaintiff's request for reasonable accommodation consisted of "multiple and repeated requests upon management to take appropriate action to make the aforesaid harassing and demeaning conduct stop." (SR-0011). Plaintiff's answer to interrogatory # 19 showed that her alleged requests were "oral requests" made to unidentified City employees at unknown times. (SR-0069). The City denied having notice of Plaintiff's alleged oral requests. (SR-0031 and SR-0038).

- Counts I through IV contained identical prayers for relief seeking "all legal and equitable relief available under the [IHRA]" including "back pay, front pay, the value of lost employment benefits, actual damages, emotional distress and other compensatory

damages, reinstatement with full seniority, attorney's fees, litigation expenses, and costs of suit ...." (SR-0012 to SR-0016).

- Plaintiff demanded trial by jury. (SR-0016).

B. The Underlying Circuit Court Orders

On October 17, 2014, the circuit court struck and dismissed counts I and IV for failing to state legally cognizable causes of action under the IHRA. (SR-0005). While the matter came before the court on Plaintiff's motion to strike the affirmative defenses, the City withdrew the defenses as moot following the court's decision to reverse a prior order denying the City's section 2-615 motion to dismiss counts I and IV.

On January 23, 2015, the circuit court granted Plaintiff's motion to reconsider its October 17, 2014 order, reinstated counts I and IV, and gave the City leave to file its amended affirmative defenses. (SR-0004).

On April 22, 2015, the circuit court granted Plaintiff's motion to strike the City's third, fourth and fifth affirmative defenses based solely on precedent holding that "the [TIA] applies only to tort actions and does not apply to constitutional claims." See (SR-0003); (Def.'s Rule 308 application, p. 5-6). While the circuit court denied Plaintiff's motion to strike the City's second (*Faragher-Ellerth*) affirmative defense, it rejected the City's alternative argument that Plaintiff had the burden of alleging and proving that: (1) she availed herself of the City's policies to avoid or mitigate the harms alleged in counts I and IV; (2) she requested a reasonable accommodation and cooperated with the City's policies and procedures for her reasonable accommodation claim in count I; and (3) the City was aware of her alleged harassment by her nonsupervisory co-workers and failed to take reasonable corrective measures for her hostile work environment claim in count IV.

On April 29, 2015, the circuit court entered an order finding that the aforementioned 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 to SR-0002). The circuit court then certified three questions for interlocutory review pursuant to Supreme Court Rule 308 as follows:

> 1. 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?
>
> 2. If section 2-102(A) of the Illinois Human Rights Act permits a cause of action for disability harassment, does the statutory provision contained in section 2-102(D) of the Illinois Human Rights Act "that an employer shall be held responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures" similarly apply to a cause of action for disability harassment brought under section 2-102(A) of the Illinois Human Rights Act?
>
> If yes, does the employee or the employer bear the burden of alleging and proving that the employer is: (a) aware of the conduct by its nonmanagerial and nonsupervisory employees; and (b) fails to take reasonable corrective measures?
>
> If no, can an employer assert the "*Faragher-Ellerth*" affirmative defense to a hostile work environment harassment claim brought under section 2-102(A) of the IHRA?
>
> 3. Does the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/1, *et seq.*, apply to a civil action under the Illinois Human Rights Act where the plaintiff seeks damages, reasonable attorneys' fees and costs?
>
> If yes, should this Court modify, reject or overrule its prior holdings 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) that "the Tort Immunity Act applies only to tort actions and does not bar actions for constitutional violations"? (SR-0001 to SR-0002).

C. The Appellate Court's Decision

The Appellate Court exercised its discretion under Supreme Court Rule 308 to allow an appeal, and a divided panel of the Appellate Court answered the three certified questions as previously indicated. *Supra* p. 1.

For its answer to the first certified question, the majority acknowledged that: (a) the question presented issues of first impression concerning the statutory construction of the IHRA; (b) the statutory text expressly made *only* "sexual harassment" and reasonable accommodation for pregnancy as civil rights violations in employment; and (c) the statutory text did not expressly prohibit as civil rights violations in employment "disability harassment" (*i.e.*, a hostile work environment based on disability) or reasonable accommodation for disability. See *id.* ¶ 29, 34, 56 and 59. The majority, however, found that the statute was "ambiguous" because it "can reasonably be read" to extend beyond the express civil rights violations for sexual harassment and reasonable accommodation for pregnancy to include the count I and IV claims under section 2-102(A)'s general prohibition of unlawful discrimination in the "terms, privileges or conditions of employment." See *id.* ¶ 42 and 60.

While the majority found the statute "ambiguous" because it "does not explicitly state that sexual harassment is the only type of harassment that constitutes a civil rights violation[,]" see *id.* ¶ 42, the dissent observed that the majority's construction ignored the "legal maxim of statutory interpretation '*inclusio unius est exclusio alterius,*'" resulting in "the logical gymnastics required by the majority's analysis[.]" *Id.* ¶ 122. Hence, the dissent concluded that "if the legislature wanted to enlarge the reach of the statute to

include *any or all* types of harassment beyond sexual harassment, it easily could have done so. It did not." *Id.* (original emphasis).

Regarding the second certified question, the Appellate Court held "that the parameters for employer liability under section 2–102(D) of the [IHRA] apply to disability harassment claims brought under section 2-102(D) and that the employee bears the burden of persuasion with respect to such claims." *Id.* ¶ 95. The Appellate Court reasoned that section 2-102(A) was "ambiguous" as to the parameters for employer liability in "disability harassment" claims. See *id.* ¶ 90. Accordingly, the Appellate Court turned to section 2-102(D) of the IHRA to conclude that applying the same parameters to "disability harassment" claims "will result in consistent treatment of all types of harassment claims under the [IHRA]." *Id.* ¶ 91.

While the City agreed that the Appellate Court's answer to the second certified question was the most reasonable construction in the event it answered the first certified question in the negative, the City argued that an employee's failure to plead and prove that she utilized her employer's corrective, preventative and remedial policies for reasonable accommodation and harassment absolutely bars her related IHRA civil rights claims based on the statutory text and legislative history. The Appellate Court, however, declined to reach this argument. See *id.* ¶ 92.

Concerning the third certified question, the majority held that the TIA applied to Plaintiff's claims for damages, but not to her request for "equitable relief" (*i.e.*, the request for back pay, front pay, lost benefits, and reinstatement). *Id.* ¶ 97, 110, 115. The majority held that the TIA applied to Plaintiff's IHRA claims based on the plain language of sections 1-204, 2-101 and 8-101(c) of the TIA. See *id.* ¶ 112-115. The majority rejected the prior

precedent constructing the TIA as applying only to tort actions and not constitutional claims because it was contrary to the TIA's plain language, implicitly rejected by this Court, and erroneously derived from case law holding that the TIA does not apply to federal civil rights or constitutional claims due to the supremacy clause of the United States Constitution. See *id.* ¶ 112-114 and n. 14.

The dissent reasoned that: (1) this Court's decision in *Raintree Homes* did not imply that the TIA applies to all non tort actions against a government; (2) "the specific inclusion of municipal corporations in the [IHRA] meant that the legislature intended that public employees be given the same rights as employees in the private sector;" and (3) the TIA did not apply to Plaintiff's IHRA claims because her "injury in this case arose from a breach of contract, not from a tort." See *id.* ¶ 128-129.

STANDARD OF REVIEW

The resolution of a certificate of importance, certified question, statutory construction, and whether a pleading is substantially insufficient in law involve questions of law subject to *de novo* review. See *Hubble*, 238 Ill.2d at 267 (reviewing certificate of importance, certified question, and statutory construction); *Hampton v. Metro. Water Reclamation Dist.*, 2016 IL 119861, ¶ 9 and 23 (reviewing certificate of importance, certified question, and legal sufficiency of pleadings).

The decision to allow an appeal pursuant to Supreme Court 308 should be reviewed for an abuse of discretion. See *Healy v. Vaupel*, 133 Ill.2d 295, 305-306 (1990) (reviewing the appellate court's denial of Rule 308 petition for abuse of discretion, but disagreeing that its scope of review was limited to same).

ARGUMENT

I. INTRODUCTION

The central issues in this case are whether expanding the scope of the IHRA and contracting the scope of TIA are the responsibility of the General Assembly or this Court.

Plaintiff argues that this Court should both expand the scope of the IHRA beyond the specific acts expressly prohibited as civil rights violations, and also preclude immunity from damages beyond those claims expressly excluded from immunity under the TIA. Plaintiff does not argue that any statutory text is ambiguous. Rather, Plaintiff contends that the General Assembly did not mean what the plain language of either statute imports because it might result in a perceived injustice, oversight or unwise result. Accordingly, Plaintiff requests that this Court "depart from the plain language of the [statute] by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." See *Barnett v. Zion Park Dist.*, 171 Ill.2d 378, 388 (1996).

This Court should reject Plaintiff's appeal because, "[u]nder the doctrine of separation of powers, courts may not legislate, rewrite or extend legislation. If the statute as enacted seems to operate in certain cases unjustly or inappropriately, the appeal must be to the General Assembly, and not to the court." See *People v. Garner*, 147 Ill.2d 467, 475-476 (1992). As this Court has observed:

> It is the province of the legislature to enact laws; it is the province of the courts to construe them. Courts have no legislative powers; courts may not enact or amend statutes. A court cannot restrict or enlarge the meaning of an unambiguous statute. The responsibility for the justice or wisdom of legislation rests upon the legislature. A court must interpret and apply statutes in the manner in which they are written. A court must not rewrite statutes to make them consistent with the court's idea of orderliness and public policy.

Henrich v. Libertyville High Sch., 186 Ill.2d 381, 394-395 (1998) (internal cites omitted).

If the General Assembly wants to divert public funds from their intended purpose to pay IHRA damage claims, it must amend the TIA to except IHRA claims. See 745 ILCS 10/2-101; *Epstein v. Chicago Bd. of Educ.*, 178 Ill.2d 370, 375 (1997) ("[T]he Tort Immunity Act governs whether and in what situations local governmental units ... are immune from civil liability.").

If the General Assembly wants to create a new duty to reasonably accommodate disabled employees as an independent IHRA civil rights violation or provide that a reasonable accommodation for disability falls under the IHRA's definition of disability, it must do so explicitly. Compare 775 ILCS 5/2-102(A) with 775 ILCS 5/2-102(J) and 775 ILCS 5/3-102.1(C); compare 775 ILCS 5/1-103(I)(1) with 775 ILCS 5/2-101(F).

If the General Assembly wants to prohibit nonsupervisory disability harassment as an independent IHRA civil rights violation, it must do so explicitly. Compare 775 ILCS 5/2-102(A) with 775 ILCS 5/2-102(D); see *Bd. of Tr. of S. Ill. Univ. v. IDHR*, 159 Ill.2d 206, 213 (1994) ("*SIU*") (dismissing racial hostile classroom claim because "Since 1983, the Department has had jurisdiction over higher education, but only over a very distinct type of claim: sexual harassment.").

If the General Assembly wants to prohibit disability harassment that does not culminate in a materially adverse tangible employment action, or is committed by other co-employees, it must do so through explicit statutory amendment. Compare 775 ILCS 5/2-102(A) with 775 ILCS 5/2-101(E) and 775 ILCS 5/2-102(D); see *Sangamon County Sherriff's Dep't v. Illinois Human Rights Com'n*, 233 Ill.2d 125, 137-138 (2009) ("*Sangamon*") (constructing section 2-102(D) of the IHRA as "unambiguous" and distinct from section 2-102(A) because it clearly imposes strict liability for hostile work

environment sexual harassment by any supervisor regardless of authority to affect the terms and conditions of employment).

If the General Assembly wants to clarify that a disability harassment claim may be brought as disability discrimination claim under section 2-102(A) of the IHRA, or allow an employee to recover damages for nonsupervisory co-employee harassment without utilizing the employer's available internal reporting, preventive and remedial measures, it should explicitly do so. See 775 ILCS 5/2-102(D); (SR-0077 to SR-0078).

Principles of statutory construction should not be stretched beyond their breaking point by an interpretation that says "discrimination" in the "terms, privileges or conditions of employment" under the IHRA means the same thing as the IHRA's expressly stated definitions and civil rights violations for "sexual harassment" and "reasonable accommodation" or reads exceptions into the TIA.

This Court should not expand the scope of the IHRA or read exceptions into the TIA when the count I and IV claims can form elements of proof for the count II and III claims or Plaintiff could have pursued other avenues of recovery, such as a declaratory judgment or preliminary injunction under the IHRA, federal law (*e.g.*, the Americans with Disabilities Act), collective bargaining agreement, or the workers compensation act.

Therefore, this Court should hold that: (1) the TIA applies to Plaintiff's IHRA claims, and the City's tort immunities bar Plaintiff's requested damages relief; (2) counts I and IV fail to state legally cognizable claims because the General Assembly has not created independent IHRA civil rights violations for an employer's failure to (a) provide reasonable accommodation for disability, or (b) take reasonable corrective measures for disability-based nonsupervisory harassment/hostile work environment; and (3) an

employee's admitted failure to utilize her employer's reporting, preventative and remedial policies for reasonable accommodation and disability harassment bars the employee's recovery of IHRA damages resulting from the alleged civil rights violations.

II. STATUTORY CONSTRUCTION PRINCIPLES

"The primary rule of interpreting statutes, to which all other rules are subordinate, is that a court should ascertain and give effect to the intent of the legislature." *Henrich*, 186 Ill.2d at 387. "The best indication of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning." *Sangamon*, 233 Ill.2d at 136. "Where the statutory language is clear and unambiguous, it is unnecessary to turn to other tools of construction." *Id.*

"Also, the statute should be evaluated as a whole; the language within each section of a statute must be examined in light of the entire statute." *Henrich*, 186 Ill.2d at 387. "In interpreting a statute, a court should, if possible, give significance and effect to every word without destroying the sense or effect of the law. The court should interpret the statute, if possible, so that no word is rendered meaningless or superfluous." *Id.* at 394.

"Where a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions." *Bridgestone/Firestone, Inc. v. Aldridge*, 179 Ill.2d 141, 151-152 (1997). "This rule of statutory construction, *expressio unius est exclusio alterius,* is based on logic and common sense. It expresses the learning of common experience that when people say one thing they do not mean something else. The maxim is closely related to the plain language rule in that it emphasizes the statutory language as it is written." *Id.* at 152.

Furthermore, "the erroneous construction of a statute by an administrative agency is not binding on this court" and "deference to administrative expertise will not serve to license a governmental agency to expand the operation of a statute." *Boaden v. Dep't of Law Enforcement*, 171 Ill.2d 230, 239 (1996). "Nor, under the guise of statutory interpretation, can [the court] 'correct' an apparent legislative oversight by rewriting a statute in a manner inconsistent with its clear and unambiguous language." *People v. Pullen*, 192 Ill.2d 36, 42 (2000). "Where the language of a statute is unambiguous, the only legitimate function of the courts is to enforce the law as enacted by the legislature. There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute says." *Henrich*, 186 Ill.2d at 391.

III. THE PROCEDURAL OBJECTIONS ARE WAIVED OR MERITLESS.

Plaintiff and Intervenor argue (at Pl.'s Br. p. 14-20; IDHR Br. p. 5-9) that the form of the third certified question is improperly overbroad and "that any answer would be advisory and provisional, for the ultimate disposition ... will depend on a host of factual predicates." See (Pl.'s Br. p. 13, quoting *Dowd and Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 469 (1998)). This procedural objection should be rejected for four primary reasons.

First, Plaintiff forfeited or waived the argument by failing to: (1) raise it in her application for certificate of importance/petition for rehearing; and (2) argue the Appellate Court abused its discretion in allowing the certified question. See (Pl.'s Pet. for Reh'g); Ill. S. Ct. R. 341(a)(7) (eff. Feb. 6, 2013).

Rule 308 provides that: "The Appellate Court may thereupon in its *discretion* allow an appeal from the order." Ill. S. Ct. R. 308(a) (eff. Feb. 26, 2010) (emphasis added). Rule 316 provides that: "Application for a certificate of importance may be included in a petition

for rehearing ... clearly setting forth the grounds relied upon ***." Ill. S. Ct. R. 316. Rule 367(b) requires that: "The petition shall state ... the points claimed to be overlooked or misapprehended by the court, with proper reference to the particular portion of the record and brief relied upon ***." Ill. S. Ct. R. 367(b) (eff. Dec. 29, 2009). Thus, Plaintiff has forfeited or waived her procedural objections by failing to argue: (1) the points in her application for certificate of importance/petition for rehearing; and (2) that the Appellate Court abused its discretion in allowing the appeal.

Forfeiture is appropriate because the City would have objected to the Rule 316 application or requested that the certified question be modified (perhaps to the City's first issue presented for review herein) had the issue been raised. See *Firemans Fund Ins. Co. v. SEC Donahue, Inc.*, 176 Ill.2d 160, 164-165 (1997) (modifying certified question based on parties' request). Similarly, had the Appellate Court foreseen this objection, it may not have granted the certificate of importance or it may have corrected the alleged error by modifying the certified question. See *id.*; Ill. S. Ct. R. 366(a)(5) (eff. Feb. 1, 1994) ("In all appeals the reviewing court may *** enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief * * * that the case may require.").

Second, the objection is irrelevant given this Court's jurisdiction under Rule 316. Even if the certified question may have been improper under Rule 308, it matters not because the Appellate Court determined that "a case decided by it involves a question of such importance that it should be decided by the Supreme Court." See Ill. S. Ct. R. 316. Because "under Supreme Court Rule 316 ... the whole case comes before the supreme court and not only a particular issue[,]" see *Hubble*, 238 Ill.2d at 267, this Court should

determine the propriety of the underlying interlocutory orders regardless of the propriety of the certified question. See cf. *Dowd and Dowd*, 181 Ill.2d at 471 (recognizing that the certified question was improper, but going "beyond the limits of a certified question in the interests of judicial economy" to address the propriety of the underlying interlocutory order); *Hampton*, 2016 IL 119861, ¶ 9-29 (recognizing that the certified question was improperly framed, but still answering the question while also determining the propriety of the underlying order in the "interests of judicial economy and the need to reach an equitable result ***.").

Third, the Appellate Court did not abuse its discretion in allowing the third certified question under Rule 308. For starters, Plaintiff does not dispute that the underlying interlocutory order striking the City's tort immunities "involves a question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." See Ill. S. Ct. R. 308(a). Thus, Plaintiff cannot contend that the appeal was improper.

Be that as it may, Plaintiff asserts that the third certified question is "too broad" because it concerns the general applicability of the TIA to the IHRA instead of addressing the City's specific immunities to her IHRA claims. See (Pl.'s Br. p. 13-16). The question, however, was intended to be framed broadly because: (1) the circuit court struck the immunities based solely on the precedent indicating that the TIA never applies to non-tort actions, constitutional claims, and IHRA civil rights violations; (2) this matter and other litigation may involve other issues concerning the general applicability of the TIA to the IHRA (*e.g.*, other immunities, the statute of limitations, and the payment of IHRA claims/judgments); and (3) "a certified question of law ... is not intended to address the

application of the law to the facts of a particular case." See *Razavi v. Walkuski*, 2016 IL App (1st) 151435, ¶ 8. Once the Appellate Court resolved the purely legal question of whether the TIA can ever provide immunity from IHRA claims, it did not abuse its discretion by remanding the case to the trial court for it to determine whether the immunities pled by the City barred Plaintiff's IHRA claims. See *id.*

Fourth, this Court can easily dispose of the procedural objection by modifying the certified questions to correct any impropriety or considering the propriety of the underlying order striking the City's tort immunities. See Ill. S. Ct. R. 366(a)(5). Plaintiff and Intervenor invite this Court to consider whether the City's immunities bar Plaintiff's IHRA claims. See (Pl.'s Br. p. 15-20) (IDHR Br. p. 21-25). Plaintiff's motion to strike the affirmative defenses also "admits all well-pleaded facts constituting the defense, together with all reasonable inferences which may be drawn therefrom, and raises only a question of law as to the sufficiency of the pleading." *Raprager v. Allstate Ins. Co.*, 183 Ill.App.3d 847, 854 (2nd Dist. 1989) (cites omitted). Consequently, Plaintiff admits that there is no factual issue precluding the City's immunities, and allows this Court to decide as a matter of law whether the immunities bar Plaintiff's IHRA claims.

IV. THE TORT IMMUNITY ACT APPLIES TO PLAINTIFF'S IHRA CLAIMS

Plaintiff and Intervenor make four primary arguments to support their contention that the General Assembly intended to exclude IHRA claims from the TIA. First, the IHRA imposes duties and liability on municipal corporations by including them under its definition of "Employer." See (Pl.'s Br. p. 21-22). Second, the "history" of the TIA shows an intent to exclude "non-tort" "civil rights violations." See (IDHR's Br. p. 16-20). Third, Plaintiff's IHRA claims are based on a theory of implied in law "contract" exempt from

the TIA. See (Pl.'s Br. p. 36-37). Fourth, applying the TIA to Plaintiff's IHRA claims "arbitrarily" denies remedies to constitutional violations or impairs the IHRA's intended scope of remedial relief. See (Pl.'s Br. p. 32-35, 38-39); (IDHR Br. p. 20-21).

Plaintiff and Intervenor ignore the TIA's plain language and this Court's precedents constructing the TIA. Thus, the City sets forth its argument that the TIA clearly does not except IHRA claims before addressing the abovementioned arguments requesting this Court to read into the TIA exceptions, limitations, or conditions that conflict with the express legislative text and this Court's construction of the TIA.

A. <u>The Plain Language Of The TIA Clearly Does Not Except IHRA Claims.</u>

This Court has frequently discussed the applicable principles governing its construction of the TIA, but they bear repeating given Plaintiff/Intervenor's arguments conflating the existence of a duty with the inapplicability of an immunity and their request for this Court to depart from the plain language of the TIA by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. This Court set forth the applicable principles as follows:

> [T]he tort liability of a local public entity or employee is expressly controlled both by the constitutional provision [Ill. Const. 1970, art. XIII, § 4] and by legislative prerogative as embodied in the Tort Immunity Act.
>
> The purpose of the Tort Immunity Act is to protect local public entities and public employees from liability arising from the operation of government. By providing immunity, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims. * * * The existence of a duty and the existence of an immunity ... are separate issues. Once a court determines that a duty exists, it then addresses whether the governmental unit or employee is immune from liability for a breach of that duty. *** [T]o determine whether that entity is liable for the breach of a duty, we look to the Tort Immunity Act, not the common law.
>
> * * *

> When a court finds, on the facts of a particular case, that the General Assembly has granted a public entity immunity from liability, the court may not then negate that statutory immunity by applying a common law exception to a common law rule. Doing so would violate not only the Illinois Constitution's provision governing sovereign immunity, but also the Constitution's separation of powers clause, which provides that no branch of government shall exercise powers properly belonging to another.
>
> * * *
>
> The legislature has recognized exceptions to its grants of immunity and enumerated these exceptions in the plain language of the Act. *** We will not adopt the legislative prerogative to insert such an exception ***.

Village of Bloomingdale v. CDG Enterprises, Inc., 196 Ill.2d 484, 489-495 (2001) (cites and quotes omitted).

The City does not dispute that it may owe certain duties as an employer under the IHRA. Yet the existence of any such duties does not determine whether the City may be entitled to immunity from monetary damages for breach of said duties. See *id.* at 490. Rather, to determine whether the City may be entitled to immunity for breach of a duty under the IHRA, this Court must look to the TIA, and not the common law or the IHRA. See *id.* Hence, we turn to the pertinent text of the TIA.

Section 1-204 provides that the definition of "injury" under the TIA "includes any injury alleged in a civil action, whether based upon the Constitution of the United States or the Constitution of the State of Illinois, and the statutes or common law of Illinois or of the United States." 745 ILCS 10/1-204; see also 745 ILCS 10/9-101(d) (defining "Tort judgment" as "a final judgment founded on an injury, as defined by this Act, proximately caused by a negligent or wrongful act or omission of a local public entity or an employee of a local public entity while acting within the scope of his employment."). Similarly, "section 8-101 of the [TIA], which establishes the statute of limitations for civil actions against local governments, includes 'any action, whether based upon the common law or

statutes or Constitution of this State.'" *In re Marriage of Murray*, 2014 IL App (2d) 121253, ¶ 41 (quoting 745 ILCS 10/8-101 (West 2012)).

Section 2-101 of the TIA, which governs the construction of the TIA and expressly excludes certain claims from immunity, provides that:

> Nothing in this Act affects the right to obtain relief other than damages against a local public entity or public employee. Nothing in this Act affects the liability, if any, of a local public entity or public employee, based on:
>
> a). Contract;
>
> b). Operation as a common carrier; and this Act does not apply to any entity organized under or subject to the "Metropolitan Transit Authority Act", approved April 12, 1945, as amended;
>
> c). The "Workers' Compensation Act", approved July 9, 1951, as heretofore or hereafter amended;
>
> d). The "Workers' Occupational Diseases Act", approved July 9, 1951, as heretofore or hereafter amended;
>
> e). Section 1-4-7 of the "Illinois Municipal Code", approved May 29, 1961, as heretofore or hereafter amended.
>
> f). The "Illinois Uniform Conviction Information Act", enacted by the 85th General Assembly, as heretofore or hereafter amended.

745 ILCS 10/2-101; see *In re Consolidated Objections to Tax Levies of School Dist. No. 205*, 193 Ill.2d 490, 500 (2000) ("[S]ection 2-101 applies to the entire [TIA] ***.").

Clearly, the General Assembly has not expressly provided an exception for liability under the IHRA pursuant to section 2-101 of the TIA; nor has the General Assembly provided that claims based on the IHRA or Illinois Constitution are except from the TIA's definition of injury under section 1-204 of the TIA. Had the General Assembly intended to exclude the IHRA from the TIA's immunities, it would have explicitly stated so in section 2-101 of the TIA. See *Epstein*, 178 Ill.2d at 374 (holding that the TIA's supervisory immunity bars liability under the Structural Work Act because the General Assembly did not except the claim under section 2-101 of the TIA); *In re Marriage of Murray*, 2014 IL App (2d) 121253, ¶ 40-49 (applying 2-201 tort immunity to Withholdings Act penalty

claims because section 2–101 of the TIA does not explicitly exclude the statutory claim); see also *Aldridge*, 179 Ill.2d at 152 (*expressio unius*).

In *Epstein*, this Court rejected a virtually identical argument that "the [TIA] never applies to bar a Structural Work Act claim." See 178 Ill.2d at 374. This Court reviewed the plain language of section 2-101 of the TIA to conclude that it provides exceptions for liability under the workers compensation act and other expressly enumerated statutory claims, but it "nowhere makes an exception for liability under the Structural Work Act or for construction activities." See *id.* at 377. This Court also rejected an argument that section 3-108 immunity applied only to recreational and scholastic activities and not construction activities because the plain language did not contain any such exceptions or limitations. See *id.* at 376-377. Consequently, this Court held that "none of the asserted exceptions or limitations exist." *Id.* at 377.

This Court should use the same statutory construction it employed in *Epstein* because "The [TIA] ... nowhere makes an exception for liability under the [IHRA] or for [civil rights/constitutional claims]." *See id.*

Furthermore, Illinois appellate courts unanimously hold that the TIA applies to a cause of action for disability employment discrimination claim brought under section 2-102(A) of the IHRA or article I, section 19 of the Illinois Constitution. See *Melvin v. City of West Frankfort*, 93 Ill.App.3d 425 (5th Dist. 1981) (holding that the TIA barred the plaintiff-amputee's action for "attendant remedies including his enforced hiring, back wages and other contingent employment benefits," but did not affect his declaratory judgment action that the city's refusal to hire him based on his disability was

unconstitutional); *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 115.[1] Illinois appellate courts have also unanimously applied similar statutory constructions of the State's Sovereign Immunity Act to various IHRA claims. See *Watkins v. Office of State Appellate Defender*, 2012 IL App (1st) 111756; *Lynch v. Dep't of Transp.*, 2012 IL App (4th) 111040.

Plaintiff's brief (at p. 22-32) relies extensively and exclusively on non-binding out-of-state authority. See *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 82 ("decisions from other state courts … are not binding on this court ***."). In contrast to other states, our courts have, consistent with the Illinois Constitution provisions for sovereign immunity and separation of powers, strictly complied with a statutory construction requiring the General Assembly to specifically and expressly assert its legislative prerogative to insert exceptions to its grants of sovereign immunity. See *Village of Bloomingdale*, 196 Ill.2d at 489-495.

Thus, this Court should reject the argument that the TIA never applies to IHRA claims because it is clearly contrary to the TIA's plain language and this Court's precedent.

B. The IHRA's Definition of Employer Does Not Preclude the TIA.

The contention that the General Assembly intended by implication to preclude the TIA's applicability to the IHRA through the IHRA's inclusion of local public entities as potentially liable employers mistakenly conflates the existence of a duty under the IHRA with the existence of an immunity for breach of said duty under the TIA. See *Village of Bloomingdale*, 196 Ill.2d at 490. Once this Court determines that a duty exists under the

[1] There is now a conflict as to whether the TIA bars remedies of reinstatement, back wages and other contingent employment benefits. Compare *Melvin*, 93 Ill.App.3d at 431-433 (applying TIA to request for enforced hiring, back wages and other contingent employment benefits) and *Halleck v. County of Cook*, 264 Ill.App.3d 887, 890-892 (1st Dist. 1994) (applying TIA to request for reinstatement, lost wages and fringe benefits) with *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 110 (not applying TIA to request for back pay, front pay, lost benefits, or reinstatement). See *infra* p. 36-37.

IHRA, it must then address whether the governmental unit is immune from liability for breach of that duty by looking to the TIA. See *id.*

Plaintiff's construction also voids or renders superfluous the plain language and purpose of sections 1-204 and 2-101 of the TIA. It would mean that local governments could never be immune from a statutory cause of action unless the individual statute specifically stated that it did not preclude the TIA, which would defeat the TIA's very purpose and result in the exact opposite construction that this Court's precedents have given to the TIA. See *id.*

For instance, there would be no need to expressly exclude workers compensation claims from the TIA if municipal liability under the workers compensation act precludes by implication the TIA from such claims. Accordingly, this Court rejected a similar argument when it applied the TIA to workers compensation retaliatory discharge claims in *Boyles v. Greater Peoria Mass Transit Dist.* See 113 Ill.2d 545, 553-554 (1986) (rejecting the argument that "public policy precludes insulating the transit district from punitive damages, [because] the express language of the [TIA] indicates to the contrary" by not exempting the claim from sections 2-101 and 2-102 of the TIA).

This Court also implicitly rejected this construction in *Epstein*, which applied the TIA to Structural Work Act claims even though local governments could be liable under the Structural Work Act. See 178 Ill.2d at 374-377. It was expressly rejected by the aforementioned appellate court decisions applying government immunity statutes to the IHRA. See, e.g., *Lynch*, 2012 IL App (4th) 111040, ¶ 25 ("Plaintiffs contend the legislature waived sovereign immunity ... by including the State in [the IHRA's] definition of

"employer" ... making the State eligible to be sued by its employees for violations of the [IHRA]. *** We disagree.").

The "preemption by implication" argument also ignores that this Court's construction of the TIA and Illinois Constitution reject "preemption by implication" in favor of requiring the General Assembly to expressly exercise its prerogative to specifically except statutory governmental immunity. See *Village of Bloomingdale*, 196 Ill.2d at 489-495. Given the absence of a more specific conflicting governmental immunity in the IHRA, "the TIA governs whether and in what situations local governmental units ... are immune from civil liability." See *Epstein*, 178 Ill.2d at 375.

Therefore, this Court should "not adopt the legislative prerogative to insert such an exception" to the TIA where the General Assembly clearly has not expressly and specifically recognized exceptions for IHRA claims. See *Village of Bloomingdale*, 196 Ill.2d at 494-495.

C. <u>The "History" of the TIA Cannot Exclude the IHRA From the TIA.</u>

Intervenor admits (at p. 19) that the TIA's plain language encompasses IHRA claims. ("To be sure, § 1-204 of the [TIA] suggests a statutory reach beyond tort claims."). Intervenor, however, requests (at p. 19) that this Court draw from the "history" of the TIA to read into it an exception for statutory civil rights claims. ("[T]he previously discussed history and purposes underlying the [TIA] show that the statute should not be construed so broadly as to bar statutory civil rights claims created by the [IHRA].").

Of course, this Court "must not depart from the plain language of the [TIA] by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent." See *Barnett*, 171 Ill.2d at 388. Because the TIA's plain language

unambiguously extends to "any injury alleged in a civil action, whether based upon ... the Constitution of the State of Illinois, and the statutes ... of Illinois," 745 ILCS 10/1-204, and "nowhere makes an exception for liability under the [IHRA] or for [civil rights violations," see *Epstein*, 178 Ill.2d at 377, it is unnecessary to resort to the "history" of the TIA to ascertain the legislative intent or depart from the plain language by reading into it conflicting exceptions, limitations, or conditions based on its analysis of the "history" or purpose of the TIA. See *Barnett*, 171 Ill.2d at 388. Thus, Intervenor's construction excluding IHRA claims by reading into the TIA "historical" "exceptions, limitations or conditions that conflict with the express legislative intent" in the TIA's plain language must be rejected on its face. See *id.*

Intervenor's "history" argument is also seriously flawed. At the outset, Illinois statutory civil rights employment disability discrimination claims did not exist when this Court abolished the common law doctrine of sovereign immunity in 1959, and when the General Assembly enacted the TIA in 1965. See *Melvin*, 93 Ill.App.3d at 429-431 (discussing legislative history of Illinois disability discrimination claims). Hence, the TIA's "history" cannot be reasonably read to exclude statutory civil rights claims which did not exist when the TIA was initially enacted.

Intervenor also ignores that the General Assembly specifically amended section 1-204's definition of injury in 1984 to expressly include civil actions based on the Illinois Constitution following the Second District's decision in *Firestone v. Fritz*, 119 Ill.App.3d 685, 689 (2nd Dist. 1983). See Pub. Act 84–1431, art. 1, § 2 (eff. Nov. 25, 1986 (amending Ill.Rev.Stat.1985, ch. 85, ¶ 1–204)); *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 114 (criticizing the precedent excluding constitutional claims from the TIA as "problematic

because they were decided before or overlooked the amendment of section 1-204's definition of injury to add claims brought under the 'Constitution of the State of Illinois.'").

Even if the pre-amendment statutory history could demonstrate an intent to exclude statutory civil rights claims, the amendment clearly shows the opposite intent to include such statutory or constitutional claims. See *id.*; *People v. Hicks*, 119 Ill.2d 29, 34 (1987) ("an amendatory change in the language of a statute creates a presumption that it was intended to change the law as it theretofore existed.").

Because local governments would not be empowered to pay or levy taxes for judgments/settlements of statutory civil rights or constitutional claims under Article 9 of the TIA if the General Assembly excluded such claims from the TIA's definition of injury, see 745 ILCS 10/9-101, *et seq.*, the General Assembly clearly wanted to avoid the tremendous public policy consequences of the statutory construction resulting from *Firestone* and like precedents.

Moreover, Intervenor's construction was rejected by this Court's application of the TIA to a non-tort, quasi-contract claim in *Village of Bloomingdale*, 196 Ill.2d at 500-501. It was implicitly rejected by this Court in *Raintree Homes, Inc. v. Village of Long Grove*. See 209 Ill.2d 248, 261 (2004) ("[We] do not adopt or approve of the appellate court's reasoning that the [TIA] categorically excludes actions that do not sound in tort."). This construction has also been criticized and rejected by the Illinois appellate courts. See *In re Marriage of Murray*, 2014 IL App (2d) 121253, ¶ 40; *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 112-114; *Melvin*, 93 Ill.App.3d at 431-433.

To the extent Intervenor's construction is based on the TIA's title or its "history" *before* the adoption of the 1970 Illinois Constitution, this Court has rejected those

rationales too. See *Michigan Ave. Nat. Bank v. County of Cook*, 191 Ill.2d 493, 506 (2000) ("Official headings or titles are of use only when they shed light on some ambiguous word or phrase within the text of the statute, and they cannot undo or limit that which the text makes plain.") (internal quotes omitted); *Village of Bloomingdale*, 196 Ill.2d at 498-499 (rejecting malicious motive exception to absolute statutory immunity because it was based on precedent "that originated *before* the 1970 Constitution.") (original emphasis).

Furthermore, the express purpose of the TIA — "to protect local public entities and public employees from liability arising from the operation of government" and "to prevent the diversion of public funds from their intended purpose to the payment of damage claims" — demonstrates an intent to protect local public entities and public employees from IHRA damages liability. See *Village of Bloomingdale*, 196 Ill.2d at 493 (citing 745 ILCS 10/1-101.1(a)). This purpose is consistent with the TIA's history, serves as the core reason for its enactment, and is wholly consistent with the General Assembly's intent to impose statutory duties upon local governments under the IHRA while also limiting the statutory remedies for a breach of said duties to only injunctive or declaratory relief. See *id.*

Therefore, this Court should reaffirm the principle that the TIA does not apply only to common law tort actions.

D. Plaintiff's IHRA Claims Are Not Based On "Contract" Exempt From the TIA.

Plaintiff argues (at p. 36-37) that her IHRA "civil rights violation" claims are exempt from the TIA because they are "essentially" claims "based on contract" insofar as the IHRA's statutory duties are 'contracts implied by law' "implicitly incorporated into her employment contract." This argument should be rejected for three primary reasons.

First, Plaintiff's claims are clearly based on liability allegedly imposed under the IHRA, and not whether there is a "contract" between Plaintiff and the City. She alleges a "civil rights violation" for unlawful disability discrimination under the IHRA, meaning her causes of action "include[] and shall be limited to only those specific acts set forth in Section[] 2-102 ... of this Act." See 775 ILCS 5/1-102(D). She seeks "make whole relief" consisting of actual damages, emotional distress, and the like. Her statutory civil rights claims are akin to § 1983 "constitutional torts" claims. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 709 (1999) ("[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort."). The IHRA claims are statutory "tort" claims for retaliatory discharge and negligent supervision that have not been expressly exempted from the TIA.

Because the General Assembly has not specifically exempted IHRA claims from the TIA, this Court cannot negate that statutory immunity by reading exceptions into the TIA based on a common law theory of implied contract. See *Village of Bloomingdale*, 196 Ill.2d at 494. Indeed, Plaintiff's construction continues to mistake the distinction between a duty and a statutory immunity by excluding the immunity solely because of a duty implied in law, which is contrary to the TIA's purpose and this Court's construction of the TIA. See *id.* at 490.

Perhaps Plaintiff could have sued the City for breach of contract. See, e.g., *Corluka v. Bridgford Foods of Illinois, Inc.*, 284 Ill.App.3d 190, 195-196 (1st Dist. 1996) (holding that the IHRA does not preempt a breach of contract claim, even if it may rise from same core of operative fact as an IHRA civil rights violation, because "a breach of contract claim is a separate and distinct claim from that of retaliatory discharge, whose genesis is in tort law."). Plaintiff could have sued her union for refusing to arbitrate her termination. See

Boyles, 113 Ill.2d at 555 (recognizing same). Of course, "an award of compensatory damages in tort may provide the plaintiff in the present case with a broader recovery than is possible in an action for contract damages under the collective-bargaining agreement." See *id.*; 22 Am.Jur.2d Damages § 196 (2d Ed. 1965) ("[R]ecovery for mental anguish is not, as a general rule, allowed in actions for breach of contract"). Because Plaintiff wanted to obtain "a broader recovery than is possible in an action for contract damages," she sued under the IHRA. Now she must overcome the TIA to recover such damages.

Second, this Court implicitly rejected Plaintiff's argument in *Boyles* and *Village of Bloomingdale*. In *Boyles*, this Court applied the TIA to a workers compensation retaliatory discharge claim despite the statutory prohibition against retaliation and the TIA's express exclusion of liability based on the workers compensation act. See 113 Ill.2d at 553-554. In so doing, this Court recognized that "a suit for retaliatory discharge is an action in tort, independent of an employee's contract or collective-bargaining agreement." See *id.* at 554. If the workers compensation act's anti-retaliation provision is not an implied contract exempt from the TIA, then Plaintiff's IHRA claims, which are not expressly exempt from the TIA, should not be an implied contract exempt from the TIA too. See *id.*

In *Village of Bloomingdale*, this Court applied the TIA to "an action for "quasi-contract" *** [which] exists independent of any agreement or consent of the parties *** [and] is an obligation created by law." See 196 Ill.2d at 500 (cites omitted). If a "quasi-contract implied in law" is not exempt from the TIA, then Plaintiff's theory of "contract implied in law" based on a statute not specifically exempt from the TIA should be rejected too. See *id.*

Third, Illinois appellate courts have unanimously rejected Plaintiff's "fanciful" construction because "[t]wisting the relationship of the litigants into a contractual one would contradict the spirit of the [TIA] ... for the sole purpose of avoiding the statutory bar intended by the legislature." See *Melvin*, 93 Ill.App.3d at 432; *Halleck*, 264 Ill.App.3d at 890-892 (rejecting the plaintiff's argument that the TIA did not apply because his retaliatory discharge claim arose out of a "contractual relationship" and sought "contract" damages of reinstatement, lost wages and fringe benefits).

Therefore, this Court should resist Plaintiff's request to twist the nature of her claim for the sole purpose of avoiding the statutory immunities intended by the legislature.

E. Applying The TIA To Plaintiff's IHRA Claims Is Not Unconstitutional, Nor Is It Inconsistent With The IHRA's Statutory Relief.

Plaintiff argues (at p. 32-35) that applying the TIA to her IHRA claims is unconstitutional because it "infringe[s] upon those fundamental constitutional rights embodied in the IHRA." Similarly, Intervenor contends (at p. 20) that the TIA conflicts with the legislative intent to permit various remedies under the IHRA. Both arguments must be rejected for three primary reasons.

First, Plaintiff's IHRA claims are not "constitutional" claims because the plain language of the constitutional provision pertains only to "the hiring and promotion practices of any employer" and not to "cases involving termination and discharge from employment." See Ill. Const. 1970, art. I, § 19; *Yount v. Hesston Corp.*, 124 Ill.App.3d 943, 949 (2nd Dist. 1984) (dismissing disability termination claim because the constitutional provision does not prohibit same). Because Plaintiff's claims allege "termination and discharge from employment," and not unlawful "hiring and promotion practices," they fall outside the scope of the constitutional provision. See *id.*

Second, this Court has repeatedly rejected the argument that the TIA unconstitutionally impairs an injured person's remedies. Accord *Michigan Ave. Nat. Bank*, 191 Ill.2d at 519-520 ("[P]assage of the [TIA] constituted an exercise by the General Assembly of its broad power to determine whether a statute that restricts or alters an existing remedy is reasonably necessary to promote the general welfare.").

Simply put, the TIA's immunity from monetary damages removes a remedy, which is distinct from the underlying "right" and wholly consistent with the General Assembly's constitutional authority to provide by law exceptions to the abolition of sovereign immunity. See *id.*; Ill. Const. 1970, art. XIII, § 4. Because the General Assembly has expressly provided immunity from a claim based on the Illinois Constitution under the TIA, a judicial construction denying that statutory immunity would actually violate, not vindicate, the Constitution by infringing upon the legislative prerogative to insert exceptions to sovereign immunity. See *Village of Bloomingdale*, 196 Ill.2d at 489-495.

Had Plaintiff sought declaratory or injunctive relief (*e.g.*, any permanent or preliminary injunction) to vindicate her rights under the IHRA, the TIA would not have barred such claims. See *In re Consolidated Objections*, 193 Ill.2d at 500-501 (holding that the phrase "relief other than damages" in section 2-101 of the TIA excludes actions seeking "injunctive relief").

The Appellate Court, however, erroneously held that the TIA did not apply to Plaintiff's "equitable relief" of reinstatement, back pay, front pay, and lost benefits. Such "make whole" relief is the "damages" remedy of lost wages or other "equitable damages" barred by the TIA, and not the "injunctive relief" or "restitution" excluded from the TIA. See *id.*; *Raintree Homes*, 209 Ill.2d at 256-260 (distinguishing between equitable damages

and restitution, while holding that the TIA applies to the former but not the latter); *Village of Bloomingdale*, 196 Ill.2d at 500-501 (applying TIA to "equitable relief" of quasi-contract "damages" claim); *Melvin*, 93 Ill.App.3d at 431-433 (applying TIA to request for enforced hiring, back wages and other contingent employment benefits); *Halleck*, 264 Ill.App.3d at 890-892 (applying TIA to request for reinstatement, lost wages and fringe benefits); *ISS Intern. Serv. Sys., Inc. v. Ill. Human Rights Com'n*, 272 Ill.App.3d 969, 980-981 (1st Dist. 1995) (describing an IHRA back pay award as actual damages); *Pechan v. DynaPro, Inc.*, 251 Ill.App.3d 1072, 1080 (2nd Dist. 1993) (describing back pay as "an action for damages.").[2]

The Appellate Court appeared to conflate "equitable relief" with "injunctive relief," or it erroneously construed this Court's abovementioned precedents to hold that the TIA does not apply to all "equitable relief" even when such relief amounts to the "damages" remedy. Because this aspect of the Appellate Court's decision conflicts with this Court's abovementioned precedents, the majority of Illinois appellate court decisions on this issue, and the TIA's plain language and purpose, this Court should specifically hold that the TIA applies to all of Plaintiff's requested "damages" relief.

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[2] The remedies of reinstatement, back pay, front pay, and lost employment benefits can only be recovered for a wrongful termination. See *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659-660 (7th Cir. 2001). Counts II and III are wrongful termination claims. If counts I and IV allow recovery for the termination, they are duplicative of count II and would allow more than one recovery for the same injury. See *Neade v. Portes*, 193 Ill.2d 433, 445 (2000) ("While pleading in the alternative is generally permitted, duplicate claims are not permitted in the same complaint."); *Saichek v. Lupa*, 204 Ill.2d 127, 140 (2003) (Illinois law prohibits more than one recovery for a single injury). Hence, counts I and IV should be dismissed because the requested relief is either barred by the TIA or they are duplicative claims seeking more than one recovery for a single injury.

Third, the TIA does not conflict with the legislative intent to permit various types of relief under the IHRA. While the TIA indisputably limits various "make whole" relief permitted under the IHRA, this is not inconsistent with the legislative intent. Legislative intent is foremost demonstrated by the express language of the TIA and the General Assembly's decision to not exempt IHRA claims from the TIA. E.g., *Epstein*, 174 Ill.2d at 374-377. Be that as it may, the IHRA's plain language clearly provides that "the court *may* award to the plaintiff actual and punitive damages, and *may* grant as relief, *as the court deems appropriate*, any permanent or preliminary injunction" or other injunctive relief. See 775 ILCS 5/10-102(C) (emphasis added).

Thus, when the TIA is applicable to an IHRA claim because a local public entity or its employees are potentially liable for damages, the court may *not* award actual and punitive damages; however, it may grant declaratory or injunctive relief. See *id.*; 745 ILCS 10/2-101; *In re Consolidated Objections*, 193 Ill.2d at 500-501; cf. *Henrich*, 186 Ill.2d at 392 (finding no conflict between TIA and School Code immunity because each statute "stands in its own sphere" with the School Code applying to both public and private schools and the TIA applying only to public schools).

Therefore, applying the TIA to Plaintiff's IHRA claims and requested relief (including those remedies erroneously excepted by the Appellate Court) neither violates the Illinois Constitution nor contravenes the legislative intent specifically expressed in the TIA and IHRA.

F. The City's Immunity Defenses Bar Plaintiff's IHRA Claims.

The City raised section 2-103's absolute immunity against all of Plaintiff's claims, section 2-201's absolute immunity against counts I and IV, and section 3-108's qualified immunity against counts I and IV. The City addresses each immunity in turn.

1. Section 2-103 Immunity Bars Plaintiff's IHRA's Claims.

Section 2-103 of the TIA grants a local public entity absolute immunity from liability "for an injury caused by adopting or failing to adopt an enactment or failing to enforce *any law*." See 745 ILCS 10/2-103 (emphasis added); 745 ILCS 10/1-203 (""Enactment" means a constitutional provision, statute, ordinance or regulation."); 745 ILCS 10/1-205 (""Law" includes not only enactments but also the case law applicable within this State as determined and declared from time to time by the courts of review of this State and of the United States."). The immunity "recognizes that officials should be protected when making decisions assessing the public's needs and that such decisions should be made without fear of ... liability or the second-guessing of courts and juries." See *Glenn v. City of Chicago*, 256 Ill.App.3d 825, 843 (1st Dist. 1993) (quotes omitted).

The plain language of § 2-103 immunity clearly extends to the City's alleged failure to adopt, enforce, comply or follow the provisions of the IHRA, Illinois constitutional provisions, IDHR regulations, or the ordinances enacting the underlying collective bargaining agreement and anti-harassment/reasonable accommodations policies, including its failure to adopt or enforce Plaintiff's requested reasonable accommodation. See 745 ILCS 10/2-103; *Doe v. Village of Schaumburg*, 2011 IL App (1st) 093300, ¶ 17 ("The failure to follow the provisions of a statute is, in essence, the failure to enforce the statute."); *Glenn*, 256 Ill.App.3d at 841 ("Generally, municipalities and their employees

are not liable for the failure to enact, enforce or comply with ordinances."); BLACK'S LAW DICTIONARY 549 (7th ed. 1999) (defining "enforce" as "To give force or effect to (a law, etc.); to compel obedience to.").

Accordingly, the majority of Illinois appellate courts have applied § 2-103 immunity to a local public entity's alleged failure to adopt, follow or enforce its compliance with state constitutional and statutory provisions. See, e.g., *O'Fallon Dev. Co. v. City of O'Fallon*, 43 Ill.App.3d 348, 359 (5th Dist. 1976) (applying § 2-103 immunity to the city's "failure to enforce the constitutional and statutory provisions prohibiting the purely private use of public property"); *Jost v. Bailey*, 286 Ill.App.3d 872, 879 (2nd Dist. 1997) (applying § 2-103 immunity for public entity's approval and maintenance of snowmobile path that violated the Snowmobile Act); *Donovan v. Cmty. Unit Sch. Dist. 303*, 2015 IL App (2d) 140704, ¶ 20 (applying § 2-103 immunity for public entity's school reorganization plan that violated the School Code); *Village of Schaumburg*, 2011 IL App (1st) 093300, ¶ 17 (applying § 2-205 immunity for public employee's alleged violation of School Code's reporting duties); *Emulsicoat v. City of Hoopeston*, 99 Ill.App.3d 835, 839-841 (4th Dist. 1981) (applying § 2-205 immunity for public employee's violation of Bond Act); but see *Village of Itasca v. Village of Lisle*, 352 Ill.App.3d 847, 859-860 (2nd Dist. 2004) (*dicta* rejecting the immunity after granting the municipality's 2-615 motion to dismiss).

Applying § 2-103 immunity to a local public entity's alleged statutory violation is consistent with the immunity's plain language, the TIA's purpose, and the distinction between a duty and an immunity. The General Assembly may have intended to impose statutory duties upon local public entities, but it also intended to provide them with immunity from monetary damages for breaching said duties. See *Village of Bloomingdale*,

196 Ill.2d at 490. Reading into the immunity a categorical exception, limitation or condition for a municipality's failure to adopt, follow or enforce its own compliance with any law departs from the statutory text and evokes the defunct common law "malicious motives," "willful and wanton," and "governmental/proprietary" exceptions that this Court has rejected reading into the TIA. See *Village of Bloomingdale*, 196 Ill.2d at 493-494.

Intervenor argues (at p. 24) that "it would be absurd to hold that the failure to enforce the [IHRA] by violating that statute can be a defense to a violation of the [IHRA]." If Intervenor finds the immunity absurd, "the appeal must be to the General Assembly, and not to the court." See *Garner*, 147 Ill.2d at 475-476. Because the General Assembly has expressly provided immunity from monetary damages for the City's alleged failure to adopt or enforce the IHRA, "the only legitimate function of [this Court] is to enforce the law as enacted by the legislature." See *Henrich*, 186 Ill.2d at 391.

Therefore, section 2-103 immunity bars Plaintiff's complaint for IHRA damages.

2. <u>The City's Discretionary Immunity Bars Counts I and IV.</u>

Plaintiff and Intervenor argue that the City's discretionary immunities codified in sections 2-109 and 2-201 of the TIA should be stricken because: (1) the immunities are inapplicable to employer liability for unlawful termination claims, citing *Smith v. Waukegan Park Dist.*, 231 Ill.2d 111, 116-117 (2008); and (2) the IHRA imposes mandatory duties precluding the determination of policy and exercise of discretion required for section 2-201 immunity. See (Pl.'s Br. p. 19 and 38); (IDHR Br. p. 22-23).

The first argument is a red herring because the City did not raise the immunity against the termination claims in counts II and III. The harassment claims in counts I and IV, however, may be distinct from the termination claims because they may impose

liability on public employees or allow Plaintiff to recover different damages. See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 75, n. 12; (IDHR's Br. p. 22, n. 2).

Be that as it may, *Smith* expressly limits its holding to workers compensation retaliatory discharge claims. See 231 Ill.2d at 119 ("Without expressing an opinion on firings in general by public entities, we declare ... public entities possess no immunized discretion to discharge employees for exercising their workers' compensation rights."). By contrast, Illinois appellate courts, federal courts interpreting Illinois law, and the Supreme Court of California have applied the statutory discretionary immunity to wrongful termination claims alleging violations of state civil rights statutes or constitutional provisions. See *Melvin*, 93 Ill.App.3d at 431-432 (applying § 2-201 immunity to public entity's rejection of plaintiff-amputee's application for employment); *Collins v. Bd. of Educ. North Chicago Cmty. Unit Sch. Dist. 187*, 792 F.Supp.2d 992, 999-1000 (N.D. Ill. May 31, 2011) (applying § 2-201 immunity to a retaliatory "failure to hire" claim for exercising free speech rights under the Illinois Constitution); *Caldwell v. Montoya*, 897 P.2d 1320, 1328-1331 (Cal. 1995) (applying California's version of § 2-201 immunity to unlawful discharge claim brought under California's version of IHRA). If this Court finds this precedent persuasive and *Smith* inapposite, the City requests leave to amend its pleadings to raise section 2-201 immunity against counts II and III or for entry of judgment on those claims in the City's favor. See Ill. Sup. Ct. Rs. 362 and 366.

The second argument can be rejected because the determination of (a) whether harassment has occurred, (b) the "appropriate" corrective actions or consequences, and (c) whether the requested accommodation is "reasonable" or not, constitute policy determinations and exercises of discretion by the responsible decision-makers under the

City's anti-harassment and reasonable accommodation policies entitled to section 2-201 immunity. See *Harinek v. 161 N. Clark St., Ltd*, 181 Ill.2d 335, 342-343 (1998) (defining "policy decisions" as "those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests" and "discretionary acts" as "those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner ***."); *Albers v. Breen*, 346 Ill.App.3d 799, 808-809 (4th Dist. 2004) (applying § 2-201 immunity to principal's handling of school bullying even if principal abused his discretion by violating the Confidentiality Act); *Hascall v. Williams*, 2013 IL App (4th) 121131, ¶ 28 (applying § 2-201 immunity because the school's anti-bullying policy "does not mandate a particular response to a specific set of circumstances" and "[t]he determination of whether bullying has occurred and the appropriate consequences and remedial action are discretionary acts"); *Malinski v. Grayslake Cmty. High Sch. Dist. 127*, 2014 IL App (2d) 130685 (following *Albers* and *Hascall* to apply § 2-201 immunity to student's bullying claim); see also *Caldwell*, 897 P.2d at 1331 ("Because of the special needs of government and public service, the Tort Claims Act expressly allows public employees to engage in certain acts and omissions free of suit, even when they might otherwise be liable for causing injury or violating individual rights. Among the statutory protections afforded is the immunity for discretionary acts, which leaves public officials free of unseemly judicial interference against them personally when they debate and render those basic policy and personnel decisions entrusted to their independent judgment.").

Intervenor argues (at p. 23) that the General Assembly has "otherwise provided by [the IHRA]" that § 2-201 immunity is inapplicable because the IHRA imposes statutory

duties through its civil rights violations. Once again, Intervenor mistakes the existence of a duty with the application of an immunity. Even if the IHRA imposes duties to reasonably accommodate disability and take reasonable corrective measures for nonsupervisory disability harassment, the "appropriate" reasonable accommodation and corrective actions are *not* "those which a person performs on a given state of facts in a prescribed manner," but instead involve personnel decisions which require the municipality to balance competing interests and make a judgment call in the exercise of managerial discretion. See *Harinek*, 181 Ill.2d at 342-343; *Albers*, 346 Ill.App.3d at 808-809. Depending on the nature of the requested accommodation or alleged harassment, the employer may take many various actions, including a determination that no "corrective" action is warranted, which involve the determination of policy and exercise of discretion entitled to section 2-201 immunity.

Nor has the General Assembly "otherwise provided by Statute," either within the TIA or the IHRA, to except section 2-201's discretionary immunity from a breach of an IHRA duty. See *Murray v. Chicago Youth Ctr.*, 224 Ill.2d 213, 232 (2007) ("In section 2-201 of the [TIA] the legislature included the prefatory language "Except as otherwise provided by Statute," indicating that section 2-201 immunity is contingent upon whether other provisions, either within the Act or some other statute, creates exceptions to or limitations on that immunity.").

In rejecting an identical argument that section 2-201 immunity was inapplicable because the Confidentiality Act "otherwise provided" for the principal's decision to disclose the plaintiff-student's complaints of bullying to the harassers, the Fourth District correctly construed section 2-201's prefatory language as follows:

> Accepting this argument would mean that public employees could never be immune under section 2-201 from a statutory cause of action, unless the statute specifically stated that it did not override section 2-201. That cannot be right. Plaintiffs' reading would turn section 2-201 from a generally applicable immunity provision into one that applied only if the General Assembly remembered to reincorporate it into each new statute establishing a cause of action. *Albers*, 346 Ill.App.3d at 806-807.

See also *Caldwell*, 897 P.2d at 1329 ("It follows that where the immunity provided by [statute] would otherwise apply, that immunity cannot be abrogated by a statute which simply imposes a general legal duty or liability on persons including public employees. Such a statute may indeed render the employee liable for his violation unless a specific immunity applies, but it does not remove the immunity. This further effect can only be achieved by a clear indication of legislative intent that statutory *immunity* is *withheld or withdrawn* in the particular case.") (original emphasis).

Albers is consistent with this Court's construction of the same prefatory language in *Murray* and the TIA's plain language and purpose to provide immunity from a duty unless the General Assembly has expressly created an exception to the TIA's immunity. Indeed, section 2-201's prefatory language should be construed together with section 2-101 of the TIA, which expressly excepts certain statutory causes of action from the TIA. See *Epstein*, 178 Ill.2d at 377 (reviewing section 2-101 and the entirety of the TIA to conclude that similar prefatory language in section 3-108's immunity did not except the immunity from Structural Work Act claims); *In re Consolidated Objections*, 193 Ill.2d at 500 ("[S]ection 2-101 applies to the entire [TIA] ***.").

Conversely, there is *no* support for a construction of section 2-201's prefatory language as meaning that the legislature has "otherwise provided" an exception to the broad and generally applicable discretionary immunity through the mere existence of a statutory

duty, especially where the statute imposing the duty does not except the statutory immunity and section 2-101 of the TIA does not except the statute imposing the duty.

Therefore, section 2-201 immunity bars counts I and IV. Should this Court find *Smith* inapposite, section 2-201 immunity also bars counts II and III.

3. Section 3-108 Immunity Bars The Negligence Claims In Counts I and IV.

Plaintiff and Intervenor argue that section 3-108 immunity is inapplicable because (1) the immunity excludes "willful and wanton conduct" and (2) the "very nature" of Plaintiff's hostile work environment claim alleges "willful and wanton" conduct. See (Pl.'s Br. p. 18); (IDHR's Br. p. 24). The second part of this argument is wrong.

As to count IV, the Appellate Court correctly concluded that the standard of employer liability in nonsupervisory harassment claims is negligence; *i.e.*, the employer must be aware of the harassment and fail to take reasonable corrective measures. See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 83-85 (citing 775 ILCS 5/2-102(D) and *Vance v. Ball State Univ.*, 570 U.S. ___, 133 S.Ct. 2434, 2439, 2448 (2013)).

With respect to count I, the standard of employer liability is not entirely clear. The standard appears akin to a negligence claim because the plaintiff has "the burden of asserting the duty and showing the accommodation was requested" (see *Truger v. Dep't of Human Rights*, 263 Ill.App.3d 851, 861 (2nd Dist. 1997)), and the employer cannot be held *per se* or strictly liable for merely failing to engage in the interactive process to determine an appropriate reasonable accommodation. See *Harton v. City of Chicago Dep't of Pub. Works*, 301 Ill.App.3d 378, 390-391 (1st Dist. 1998) (holding that administrative rules imposing an independent or *per se* civil rights violation for failing to investigate reasonable disability accommodation was inconsistent with IHRA and unenforceable absent a

predicate civil rights violation of unlawful disability discrimination); see also *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-1017 (7th Cir. 2000) (holding that an employer's failure to engage in the interactive process to determine an appropriate reasonable accommodation is not an independent or *per se* violation under the ADA).

Turning to the application of section 3-108 immunity, Plaintiff admits that: (1) the City was not actually aware of the alleged harassment or requested accommodation before Plaintiff was allegedly "provoked" into committing her act of misconduct resulting in her termination; (2) the City exercised reasonable care by and through its policies to report, prevent and correct the alleged harassment and request a reasonable accommodation for a disability; and (3) Plaintiff never used the City's policies to complain of the alleged harassment or request a reasonable accommodation for her disability.

The admitted existence of the City's anti-harassment and reasonable accommodation policies, in conjunction with Plaintiff's admitted failure to use the policies and the City's lack of actual notice of the nonsupervisory harassment or requested accommodation, indisputably demonstrates that the City did not engage in "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." See 745 ILCS 10/1-210; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (holding that proof of an employer's anti-harassment policy with complaint procedure will typically show that the employer exercised reasonable care to prevent and correct hostile work environment harassment); *Bielema v. River Bend Cmty. Sch. Dist. No. 2*, 2013 IL App (3d) 120808, ¶ 18-19 (no willful and wanton conduct where the public entity takes "any action to remedy the danger" even if "it seems [it] could have done more

... [its] mere ineffectiveness does not show a course of action demonstrating [it] was utterly indifferent to or consciously disregarded the safety of others.").

Accordingly, section 3-108 immunity bars counts I and IV.

V. COUNTS I AND IV OF THE COMPLAINT FAIL TO STATE LEGALLY COGNIZABLE CIVIL RIGHTS VIOLATIONS UNDER SECTION 2-102(A) OF THE IHRA.

Count I alleges that the City committed a "civil rights violation" in employment by failing to provide a "reasonable accommodation" for Plaintiff's "disability" in response to her request "to take appropriate action" to stop her nonsupervisory co-workers' harassment, while count IV alleges that the City committed another "civil rights violation" for the "hostile work environment" created by the nonsupervisory disability harassment. Both counts fail to state valid claims under the IHRA because its unambiguous text shows that the General Assembly has not expressly made as separate, distinct and independent civil rights violations an employer's failure to (a) provide a reasonable accommodation for disability, or (b) take reasonable corrective measures for hostile work environment "disability harassment" by nonsupervisory co-workers.

While the conduct alleged in counts I and IV may form part of Plaintiff's *prima facie* case for unlawful disability discrimination (count II) or retaliation (count III), and Plaintiff may have causes of action for the injuries alleged in counts I and IV under other avenues of law, the separate count I and IV claims do not allege any "specific acts" expressly prohibited as civil rights violations by the IHRA. See 775 ILCS 5/1-103(D) (defining "Civil rights violation" as "includes and *shall be limited to only those specific acts* set forth in Sections 2-102 *** of this Act) (emphasis added); compare 775 ILCS 5/2-102(A) (civil rights violation for unlawful disability discrimination) with 775 ILCS 5/2-

102(D) (civil rights violation for sexual harassment) and 775 ILCS 5/2-102(J) (civil rights violation for pregnancy reasonable accommodation). Therefore, counts I and IV should be dismissed with prejudice because they are not independently cognizable "discrimination" claims under section 2-102(A) of the IHRA.

A. Count I Fails To State A Legally Cognizable Claim Because Reasonable Accommodation For Disability In Employment Is Not An Independent Civil Rights Violation Under the IHRA.

There is no statutory basis to make an employer's failure to provide a reasonable accommodation for an employee's "disability" an independent "civil rights violation" under the IHRA. Section 2-102(A) of the IHRA does not expressly make an employer's purported duty to provide a reasonable accommodation for an employee's disability an independent "civil rights violation." See 775 ILCS 5/2-102(A). By contrast, other sections of the IHRA expressly make an employer's failure to provide a "reasonable accommodation" for "pregnancy" under section 2-102(J) and the failure to provide a "reasonable accommodation" for "disability" in real estate transactions under section 3-102.1(C) as separate and independent civil rights violations. See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 56 ("The *statute* itself expressly imposes a duty to reasonably accommodate only with respect to: (1) "an employee's or prospective employee's *religious* observance or practice without undue hardship on the conduct of the employer's business" (775 ILCS 5/2–101(F) (West 2014)); (2) employees or applicants who are affected by a condition related to *pregnancy* or childbirth (775 ILCS 5/2–102(I) (West 2014)); and (3) in the context of *real estate transactions,* buyers' or renters' disabilities (775 ILCS 5/3–102.1(C) (West 2014)) (original emphasis)).

The General Assembly specifically amended the IHRA to enact its civil rights violations for "reasonable accommodation" under sections 2-102(J) and 3-102.1(C) *despite* the existence of statutory provisions in the IHRA that already made it a "civil rights violation" to discriminate in the "terms, privileges or conditions of employment on the basis of pregnancy" under section 2-102(I) or commit "unlawful discrimination" in "the terms, conditions or privileges of a real estate transaction" under section 3-102(B). See Pub. Act 98–1050 (eff.Jan.1, 2015) (adding 775 ILCS 5/2–102(j)); Pub. Act 86–910 (eff.Sept.1, 1989) (adding 775 ILCS 5/3–102.1).

These amendments demonstrate the General Assembly's recognition that a covered entity's failure to provide a reasonable accommodation is a distinct species of "civil rights violation" because it is in the nature of an "affirmative action" requirement. That the legislature has chosen to impose the affirmative accommodation requirement in certain areas but not others means that "reasonable accommodation" does not fall within the "discrimination" tent; otherwise, there would have been no reason for the amendments which have been made. See *Hicks*, 119 Ill.2d at 34 ("an amendatory change in the language of a statute creates a presumption that it was intended to change the law as it theretofore existed."). Accordingly, Illinois appellate courts have held that the failure to provide a reasonable accommodation is distinct from the general anti-discrimination duty, and cannot constitute an independent civil rights violation absent express statutory authority. See, e.g., *Olin Corp. v. Fair Employment Practices Comm'n*, 34 Ill.App.3d 868, 879-884 (5th Dist. 1976) (constructing IHRA's predecessor statute to hold that: (1) the General Assembly did not intend for employers to take "affirmative action" to reasonably accommodate religious practices under general anti-discrimination duty; and (2) regulation

imposing duty of reasonable accommodation under a duty to not discriminate exceeded the scope of the agency's statutory authority); *Harton*, 301 Ill.App.3d at 390-391 (holding that: (1) Joint Rules regulation purportedly imposing an independent *per se* civil rights violation for failing to investigate reasonable accommodation was inconsistent with IHRA and unenforceable absent a predicate civil rights violation of unlawful disability discrimination; and (2) reasonable accommodation question may be relevant to the employee's proof that she was a qualified disabled person who could perform the duties of a particular job with or without an accommodation).

Additionally, the IHRA's definition of "disability" does not expressly require that an employer reasonably accommodate a disabled employee, which should be contrasted with the IHRA's definition of "Religion" in employment. Compare 775 ILCS 5/1-103(I)(1) (defining "Disability" as "a determinable physical or mental characteristic of a person . . . which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic is unrelated to the person's ability to perform the duties of a particular job or position.") with 775 ILCS 5/2-101(F) ("'Religion' with respect to employers includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to *reasonably accommodate* an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.") (emphasis added).

Furthermore, the IHRA's definition of "unlawful discrimination" in section 1-103(Q) does not expressly require a reasonable accommodation for disability, which should be contrasted with the ADA's definition of the term "discriminate against a qualified individual on the basis of disability." Compare 775 ILCS 5/1-103(Q) ("'Unlawful

discrimination' means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service as those terms are defined in this Section.") with 42 U.S.C.A § 12112(b)(5)(A) ("the term "discriminate against a qualified individual on the basis of disability" includes *** not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.").

Had the General Assembly intended to create a duty to reasonably accommodate disabled employees as an independent civil rights violation, it would have enacted an amendment expressly stating so, just like it did for "pregnancy" under section 2-102(J) of the IHRA. See *Aldridge*, 179 Ill.2d at 151-152 (*expressio unius*); *Hicks*, 119 Ill.2d at 34 (amendment presumes material change in the law); see also CAL GOV. CODE § 12940 (a), (k), (m) and (n) (expressly providing independent civil rights violations in employment for unlawful disability discrimination in "terms, privileges or conditions of employment" under § 12940(a), disability harassment under § 12940(k), reasonable accommodation for disability under § 12940(m), and failure to engage in interactive process for reasonable accommodation under § 12940(n)).

Had the General Assembly intended to create a duty to reasonably accommodate disabled employees under the IHRA's civil rights violation for unlawful disability discrimination in the "terms, privileges or conditions of employment" in section 2-102(A), it would *not* have enacted the amendments to expressly create the independent civil rights

violations for reasonable accommodation under sections 2-102(J) and 3-102.1(C) of the IHRA. See *Aldridge*, 179 Ill.2d at 151-152; *Hicks*, 119 Ill.2d at 34. Instead, it would have enacted an amendment expressly stating so by amending the IHRA's definition of disability just like it did for "Religion" in section 2-101(F) or by amending the definition of "unlawful discrimination" to expressly incorporate a duty to reasonably accommodate disabled employees just like the ADA.

While the Appellate Court recognized that the statutory text does not expressly impose a duty to reasonably accommodate disabled persons as an independent civil rights violation or under the statutory definitions for disability and unlawful discrimination, it found the plain language "ambiguous" because the preamble enacting section 2-102(J) of the IHRA referenced an employer's duty to reasonably accommodate disabled employees and the Joint Rules (56 Ill.Adm.Code § 2500.40, *et seq.*) may explicitly impose a duty to reasonably accommodate disabled persons. See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 55-60. The Appellate Court's statutory construction erred for three primary reasons.

First, when the plain language of the statute is unambiguous, courts cannot resort to other interpretive aids to create an ambiguity. See *Sangamon*, 233 Ill.2d at 136. The IHRA's plain language shows that there is no independent civil rights violation to reasonably accommodate disabled employees. To construe the text as authorizing such a duty would moot, negate, void or render superfluous the express statutory language and legislative intent in specifically amending the IHRA to enact the "reasonable accommodation" civil rights violations in sections 2-102(J) and 3-102.1(C) of the IHRA, eviscerate the IHRA's plain language as informed by the "common sense" *expressio unius* canon (see *Aldridge*, 179 Ill.2d at 151-152), conflict with the Fifth District's well-reasoned

construction in *Olin* that the "affirmative action" duty of reasonable accommodation cannot fall under the general non-discrimination duty contained in the civil rights violation for unlawful discrimination (see 34 Ill.App.3d at 879-884), disregard the General Assembly's response to *Olin* by enacting section 2-101(F) of the IHRA, and ignore the general legislative response to specifically enact distinct and independent civil rights violations for discrimination *and* reasonable accommodation.

Second, with respect to the preamble, this Court has long-recognized that: (1) "a preamble ... may not be used to create an ambiguity in a statute;" (2) the General Assembly cannot enact a duty to reasonably accommodate disabled persons through a preamble because "a preamble is not a part of the act itself;" and (3) courts should not discern prior legislative intent based on the actions of a different legislature. See *Triple A Services, Inc. v. Rice*, 131 Ill.2d 217, 227 (1989) ("A declaration of policy or a preamble is not a part of the act itself. While a policy section, like a preamble, may be used to clarify ambiguous portions of an act, it may not be used to create an ambiguity in a statute or an ordinance.") (cites omitted); *Roth v. Yackley*, 77 Ill.2d 423, 428 (1979) ("[I]t is logically difficult to perceive how the declaration and the amendments by the 80th General Assembly can be simply a clarification of the intent of the 77th General Assembly which originally enacted the statute seven years earlier since only a fraction of the individuals who comprised the General Assembly were the same at both times."). Also, the preamble could be referencing a duty to reasonably accommodate disabled employees under federal law and not the IHRA.

Third, regarding the Joint Rules, this Court has long-recognized that: (1) no deference is owed to an agency's construction of an unambiguous statute, especially where

the agency's construction is erroneous or expands the operation of a statute beyond its text (see *Boaden*, 171 Ill.2d at 239); and (2) "Statutes may not be altered or added to by the exercise of an administrative agency's power to make rules and regulations thereunder." *Harton*, 301 Ill.App.3d at 391. "Consequently, to the extent the Joint Rules might be interpreted as creating a civil rights violation for behavior which would not constitute a violation under the Act, the rules would be unenforceable." *Id.*

If the Joint Rules create an independent civil rights violation to reasonably accommodate disabled employees, the rules would alter, add to, or expand the operation of the IHRA beyond its express text, rendering them unenforceable. See *id.* at 391-392. Alternatively, the Joint Rules may be enforceable if they are construed as pertaining solely to the threshold inquiry of whether the employee has a qualified "disability" that "is unrelated to the person's ability to perform the duties of a particular job or position." See 775 ILCS 5/1-103(Q).

This latter construction — that reasonable accommodation should be considered as a threshold inquiry into whether the plaintiff is a "disabled" employee who can perform the job duties with an accommodation, and not as an independent civil rights violation — is consistent with the plain language of the IHRA and the Joint Rules, the apparent construction given by the Illinois Human Rights Commission, and the construction given by the majority of this State's appellate courts. See 56 Ill.Adm.Code § 2500.40(d) (stating "In response to a discrimination charge involving a refusal to provide an accommodation," which implies that reasonable accommodation may be part of the *prima facie* case in a discrimination charge); *In the Matter of Robert Zimmerman and Illinois Central Gulf Railroad Co.*, Charge No. 1986 CN 3091, 1992 WL 721843, * 7 (IHRC 1992) ("Judge

Argento treated the accommodation question as involving a separate violation of the Human Rights Act. This question is more properly treated, however, as a threshold inquiry into the eligibility of the complainant for protection under the Act."); *Harton*, 301 Ill.App.3d at 390 (holding that the reasonable accommodation question is relevant to determining whether the plaintiff is a qualified individual with a disability who can perform the job duties with or without a reasonable accommodation); *Whipple v. Dep't of Rehab. Serv.*, 269 Ill.App.3d 554, 557 (4th Dist. 1995), overruled on other grounds by *Webb v. Lustig*, 298 Ill.App.3d 695 (4th Dist. 1998) (holding that the reasonable accommodation question should be considered as an element of the plaintiff's *prima facie* case, namely that the "disability" was unrelated to the employee's job duties); but see *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 60 (holding that duty to reasonably accommodate disabled employees is an independent civil rights violation).

Therefore, the IHRA's plain language unambiguously shows that there is no statutory basis for imposing a duty to reasonably accommodate disabled employees as an independent civil rights violation. Consequently, count I should be dismissed with prejudice because it alleges a duty to reasonably accommodate disabled employees as an independent civil rights violation and not as an element of count II's discrimination claim.

B. <u>Plaintiff's Request To Take Appropriate Action To Stop Harassment Is Not A Cognizable Reasonable Accommodation Under The IHRA.</u>

Whether or not the IHRA makes an employer's purported duty to provide a reasonable accommodation an independent "civil rights violation," Plaintiff's alleged request for the City "to take appropriate action" to stop the harassment by her nonsupervisory co-workers cannot constitute a reasonable accommodation for disability as a matter of law.

Illinois courts have not considered whether a request to stop harassment is a cognizable reasonable accommodation for disability under the IHRA, but the federal "courts have found that there exists no authority for the proposition that cessation of harassment is a required reasonable accommodation." Accord *Schwarzkopf v. Brunswick Corp.*, 833 F.Supp.2d 1106, 1123 (D. Minn. 2011) (quotes omitted, citing cases); see *Cannice v. Norwest Bank Iowa*, 189 F.3d 723, 728 (8th Cir. 1999) ("We do not believe, however, that the obligation to make a reasonable accommodation extends to providing an aggravation-free environment."); *Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 581 (3rd Cir. 1998) (holding that transferring an employee away from any co-workers subjecting him to prolonged and inordinate stress was not a reasonable accommodation for the employee's depression and anxiety-related disorders under the ADA); cf. *Oncale v. Sundowner Offshore Serv. Inc.*, 523 U.S. 75, 80 (1998) (recognizing that civil rights laws are not a "general civility code" prohibiting all harassment in the workplace); *Sands v. Runyon*, 28 F.3d 1323, 1331 (2nd Cir. 1994) ("[C]ourts do not possess the power to compel co-workers to like each other.") (quotes omitted); *Bd. of Ed. Downers Grove Sch. Dist. No. 99 v. Fair Employment Practices Comm'n*, 79 Ill.App.3d 446, 456 (2nd Dist. 1979) ("[P]ersonality conflicts do not rise to the level of sex discrimination.").

Additionally, the Joint Rules indicate that Plaintiff's request to take appropriate action to stop co-worker harassment cannot be a request for a reasonable accommodation as a matter of law. See 56 Ill.Adm.Code § 2500.40. According to the Joint Rules, a reasonable "[a]ccommodation 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." 56

Ill.Adm.Code § 2500.40(a). By contrast, "[a]ccommodations of a personal nature [] need not be provided, nor is it necessary to provide any superfluous accommodation []." 56 Ill.Adm.Code § 2500.40(b). Moreover, the Joint Rules provide that:

> It is the duty of the individual seeking an accommodation to apprise the employer ... of the employee's disabling condition and submit any necessary medical documentation. The individual must ordinarily initiate the request for accommodation and must cooperate in any ensuing discussion and evaluation aimed at determining the possible or feasible accommodation. 56 Ill.Adm.Code § 2500.40(c).

Here, Plaintiff's request to take the appropriate action to stop the harassment by her nonsupervisory co-workers cannot be a cognizable reasonable accommodation under the Joint Rules for four primary reasons.

First, the request is clearly different from the types of reasonable accommodations illustrated by 56 Ill.Adm.Code § 2500.40(a). Had Plaintiff requested a "modification of work schedules," such as additional breaks or time-off from work upon providing medical documentation that she was going to be "provoked" by her co-workers' harassment, then she may have stated a legally cognizable reasonable accommodation for her "disability." See 56 Ill.Adm.Code § 2500.40(a). Instead, Plaintiff was merely requesting a "second chance" to control herself from being "provoked" and committing the conduct resulting in her termination, which cannot constitute a reasonable accommodation as a matter of law, even if she was unable to control herself because of her "disability." See, e.g., *Siefkin v. Village of Arlington Heights*, 65 F.3d 664, 666-667 (7th Cir. 1995) (holding that a requested "second chance" "to control a controllable disability" is not a cognizable reasonable accommodation under the ADA); *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352-353 (7th Cir. 1997) (holding that there is no duty to reasonably accommodate a

potentially violent employee under the ADA even if the employee's behavior was precipitated by a mental illness).

Second, Plaintiff's request to take "appropriate action" to stop the alleged harassment is clearly of a personal nature that does not need to be provided. See 56 Ill.Adm.Code § 2500.40(b). What may constitute "appropriate action" to any individual employee is an inherently subjective, amorphous and nebulous standard to impose upon an employer. See *Gaul*, 134 F.3d at 581 (recognizing that the proposed reasonable accommodation to transfer employee whenever he becomes "stressed out" by a co-worker or supervisor is an unduly "amorphous 'standard' to impose on an employer.").

Third, the City need not provide Plaintiff's requested accommodation because it is "superfluous" of the City's reasonable accommodation/anti-harassment policies. See 56 Ill.Adm.Code § 2500.40(b). Had Plaintiff simply utilized the City's policies, the City would have been aware of her need for a potential accommodation and taken the "appropriate action" pursuant to the policies. Given Plaintiff's *admitted* failure to request a reasonable accommodation pursuant to the City's policy and her apparent ability to control herself from being "provoked" by her coworkers without an accommodation until she admittedly failed to do so, the City had no reason to believe that Plaintiff requested or needed a "reasonable accommodation" for her disability. See *Siefkin*, 65 F.3d at 666-667 (plaintiff failed to plead an ADA violation where his employer knew he was a diabetic, but reasonably believed that he was able to control his diabetes without an accommodation).

Fourth, Plaintiff's duties under 56 Ill.Adm.Code § 2500.40(c) should be synonymous or co-extensive with her duty as an employee to utilize and comply with the City's reasonable accommodation/anti-harassment policies. The policies provide the

mechanism for Plaintiff to (a) initiate a request for an accommodation to the City's appropriate supervisory authority, (b) submit the necessary medical documentation, (c) cooperate with her employer in determining the possible accommodation, and (d) determine if the requested accommodation is "reasonable."

The City specifically enacted its policies to prevent and remedy the types of harms which Plaintiff now complains of in this litigation. It would be fundamentally unjust to allow Plaintiff to profit from her failure to utilize the City's preventative and corrective policies. See 56 Ill.Adm.Code § 2500.40(c); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-807 (1998) (cites omitted), where the U.S. Supreme Court recognized that:

> The requirement to show that the employee has failed in a coordinate duty to avoid or mitigate harm reflects an equally obvious policy imported from the general theory of damages, that a victim has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. * * * If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

Because the IHRA seeks to prevent "unlawful discrimination" through the creation of such policies, "unfounded charges" of unlawful discrimination against employers, and litigation through its administrative and conciliation procedures, see 775 ILCS 5/1-102(A) and (H), this Court should draw a clear bright-line rule requiring employees to first utilize their employer's reasonable accommodation policy before filing a charge for unlawful employment discrimination involving the failure to provide a reasonable accommodation. See 56 Ill.Adm.Code § 2500.40(c); cf. *Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms.

Were employer liability to depend in part on an employer's efforts to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation ***.").

Such a clear bright-line rule is consistent with the case law indicating that: (1) "the employee has the burden of asserting the duty and showing the accommodation was requested and necessary for adequate job performance;" and (2) "An employer's duty to accommodate does not attach until the employee asserts that she would have performed the essentials of a job if afforded a reasonable accommodation." See *Truger*, 293 Ill.App.3d at 861. An employee's use of the employer's reasonable accommodation policy: (1) clearly satisfies the employee's burden of showing that the accommodation was requested; and (2) clearly marks the triggering condition for the employer to respond to a requested accommodation or otherwise participate in the so-called interactive process. See *id.* Absent such a bright-line rule, an employee's mere statements that she feels "stressed" or "depressed" could potentially trigger IHRA liability for failing to reasonably accommodate a disability, which would impose an impractical burden on the employer and frustrate the purpose of a reasonable accommodation policy.

Therefore, even if a reasonable accommodation claim may be brought as an independent "civil rights action" under section 2-102(A) of the IHRA, count I should still be dismissed because Plaintiff fails to state a cognizable reasonable accommodation.

C. Count IV Fails To State A Legally Cognizable Claim Because Hostile Work Environment Disability Harassment Is Not An Independent Civil Rights Violation Under The IHRA.

The IHRA clearly makes "sexual harassment" a "civil rights violation" in employment pursuant to section 2-102(D) of the IHRA, but it does not similarly provide

that "disability harassment" is a "civil rights violation." Compare 775 ILCS 5/2-102(A) (civil rights violation for unlawful discrimination based on sex, disability and etcetera) with 775 ILCS 5/2-102(D) (civil rights violation for sexual harassment). Also, section 5A-102 of the IHRA expressly makes "sexual harassment" a "civil rights violation" in education, but it does not make other types of "harassment" a "civil rights violation." See 775 ILCS 5/5A-102. Furthermore, the IHRA's "Declaration of Policy" recognizes separate, distinct and independent intents to secure *both* "freedom from discrimination" and "prevent sexual harassment." See 775 ILCS 5/1-102(A)-(B).

In 1983, the General Assembly specifically amended the IHRA to make "sexual harassment" an independent "civil rights violation" under sections 2-102(D) and 5A-102(A). See Pub. Act 83-89 (amending § 2-102) and Pub. Act 83-91 (amending § 5-102); see also 83d Ill. Gen. Assem., House Proceedings, Mar. 23, 1983, at 54 (statements of Representative Currie) (SR-0074) ("House Bill 235 amends the [IHRA] to include, as a civil rights violation, sex harassment on the job."); 83d Ill. Gen. Assem., House Proceedings, May 5, 1983, at 33–34 (statements of Representative Koehler) ("[This amendment] amends the [IHRA] to include sexual harassment in higher education as a civil rights violation. Under the [IHRA], discrimination on the basis of sex already constitutes a civil rights violation. However, it is important to point out that there is a distinct difference between sex discrimination, which deals with prejudice[,] and sexual harassment, which deals with a hostile environment and repeated torment.").

In *Sangamon*, this Court held that "Section 2-102(D) is unambiguous" in creating a new civil rights violation for sexual harassment in employment. 233 Ill.2d at 137. This Court further found "the federal case law to be unhelpful in interpreting section 2-102(D)"

because its unambiguous text created a new civil rights violation that was distinctly different from the prevailing federal law. See *id.* at 138-139.

In *SIU*, this Court dismissed an IHRA *racial* hostile classroom environment harassment claim partly because the General Assembly unambiguously authorized jurisdiction "only over a very distinct type of claim: sexual harassment." 159 Ill.2d at 213. This Court also held that the amendment enacting the civil rights violation for sexual harassment in higher education "was intended to change the law." *Id.* Even the dissent agreed that the amendment was intended to be an expansion of liability for sexual harassment, which was "a separate and distinct problem from other forms of discrimination." See *id.* at 215-216 (Nickels, J., dissenting).

The General Assembly has not amended section 5A-102 of the IHRA to include other types of harassment claims since this Court's dismissal of the racial harassment claim in *SIU*. See *Henrich*, 186 Ill.2d at 387 ("When this court has interpreted a statute, that interpretation is considered as part of the statute itself unless and until the legislature amends it contrary to the interpretation."). And the IHRA's sexual harassment amendments should be interpreted consistently and with reference to each other. See *id.* at 392 ("Statutes that relate to the same subject matter, passed at the same session of the General Assembly, should be interpreted with reference to each other. A court should not consider such statutes inconsistent if it is possible to interpret them otherwise.").

Hence, Plaintiff clearly cannot bring her "hostile work environment" claim based on "disability" under section 2-102(D) of the IHRA because that provision prohibits *only* "sexual harassment," which section 2-101(E) of the IHRA defines as "any conduct of a *sexual nature* when . . . such conduct has the purpose or effect of substantially interfering

with an individual's work performance or creating an intimidating, *hostile or offensive working environment.*" 775 ILCS 5/2-101(E) (emphasis added). The plain language of section 2-102(D) clearly limits the civil rights violation to only sexual harassment, and "[t]here is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute says." See *Henrich*, 186 Ill.2d at 391. Because section 5A-102 of the IHRA is limited only to "sexual harassment" claims, section 2-102(D) must be similarly limited. See *SIU*, 159 Ill.2d at 213.

Had the General Assembly intended to expand the scope of its civil rights violations to disability harassment, it clearly would have done so by enacting an amendment for disability harassment just like it did for sexual harassment in section 2-102(D). See *SIU*, 159 Ill.2d at 213; *Aldridge*, 179 Ill.2d at 151-152. Had the General Assembly intended to prohibit "an intimidating, hostile or offensive working environment" based on disability, it would have amended sections 1-103(Q) or 2-102(A) of the IHRA to expressly clarify that "unlawful discrimination" includes such conduct just like it did under section 2-101(E)(3)'s definition of "sexual harassment." See *Sangamon*, 233 Ill.2d at 137-144; *SIU*, 159 Ill.2d at 213; *Aldridge*, 179 Ill.2d at 151-152; *Hicks*, 119 Ill.2d at 34.

"Simply put, if the legislature wanted to enlarge the reach of the statute to include *any or all* types of harassment beyond sexual harassment, it easily could have done so. It did not." See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 122 (McLaren, J., dissenting) (cites omitted, original emphasis). This should end the matter.

The Appellate Court, however, held that Plaintiff could bring her hostile work environment disability nonsupervisory harassment claim under section 2-102(A)'s general prohibition of "unlawful discrimination" in the "terms, privileges or conditions of

employment." See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 42. To reach this conclusion, the Appellate Court had to find that: (1) the clear textual distinction between the IHRA's express civil rights violation for sexual harassment and the IHRA's general civil rights violation for unlawful discrimination was ambiguous; (2) the sexual harassment amendments were not material changes in the law, but were intended to both clarify that sexual harassment claims can brought as sex discrimination claims under section 2-102(A) while also expanding the scope of liability for sex discrimination/harassment claims; and (3) disability harassment claims can be brought as disability discrimination claims under section 2-102(A), notwithstanding the General Assembly's failure to clarify or expand the scope of disability discrimination claims as including disability harassment claims. The "logical gymnastics" required for the Appellate Court's construction is clearly erroneous for five primary reasons.

First, the pertinent text is unambiguous. "Section 2-102(D) is unambiguous." *Sangamon*, 233 Ill.2d at 137. The General Assembly unambiguously extended the civil rights violation "only over a very distinct type of claim: sexual harassment." See *SIU*, 159 Ill.2d at 213. Thus, the Appellate Court's construction finding the text "ambiguous" conflicts with this Court's constructions in *SIU* and *Sangamon*.

Unlike the federal civil rights acts, the IHRA clearly makes separate, distinct and independent civil rights violations for discrimination and harassment. Compare 775 ILCS 5/2-102(A) and (D) with 42 U.S.C.A § 12112(a); see *Sangamon*, 233 Ill.2d at 138-139 (finding "the federal case law to be unhelpful in interpreting section 2-102(D)" because the statutes are different); see also *Roby v. McKesson Corp.*, 219 P.3d 749, 787 (Cal. 2009) ("Because the FEHA treats harassment in a separate provision, there is no reason to

construe the FEHA's prohibition against discrimination broadly to include harassment.").[3] Yet unlike the City's anti-harassment policy or California's version of the IHRA, the General Assembly chose to make the civil rights violation for harassment "only over a very distinct type of claim: sexual harassment." See *SIU*, 159 Ill.2d at 213; compare 775 ILCS 5/2-102(D) with (SR-0043) and CAL GOV. CODE § 12940(j).

Clearly, the IHRA does not extend its civil rights violation for *sexual harassment* to include any or all types of harassment. See *SIU*, 159 Ill.2d at 213; *Sangamon*, 233 Ill.2d at 137; compare 775 ILCS 5/2-102(A) with 775 ILCS 5/2-102(D). To expand the civil rights violations for sexual harassment or unlawful discrimination to include any or all types of harassment would "rewrite statutes to make them consistent with the court's idea of orderliness and public policy." See *Henrich*, 186 Ill.2d at 394-395.

To say that the civil rights violation for sexual harassment is the same thing as the civil rights violation for unlawful discrimination would: (1) moot, void and render superfluous section 2-102(D) and the IHRA's sexual harassment amendments; (2) eviscerate the clear legislative intent to change the law by creating a new civil rights violation for the distinctly different problem of sexual harassment; (3) conflict with this Court's holdings in *Sangamon* and *SIU* that the sexual harassment amendments were intended to change the law; and (4) ignore that the General Assembly knows how to draft language in an amendatory act expressly stating that it was intending to clarify existing

[3] According to the City's research, the IHRA and the California statute are the only civil rights statutes to expressly provide separate and independent civil rights violations for "discrimination" and "harassment" instead of enacting an amendment to clarify that a discrimination provision includes harassment or allowing the courts to construct the "terms, privileges or conditions" language of a discrimination provision as including a hostile work environment harassment claim. Given the textual similarities, the California precedents should be more persuasive than the "unhelpful" federal case law.

law. See *Premier Prop. Mgmt., Inc., v. Chavez*, 191 Ill.2d 101, 108-109 (2000) (observing that the General Assembly knows how to pass amendments with language expressly stating that the amendment is intended as a clarification of existing law and not as a new enactment by citing 735 ILCS 5/12-112 (West 1998)).

Even if section 2-102(A) may have been ambiguous prior to the enactment of section 2-102(D), the IHRA's sexual harassment amendments clearly show that *only* sexual harassment claims are authorized under the current version of the IHRA. Even if the General Assembly passed section 2-102(D) to "clarify" that sexual harassment claims can be brought as sex discrimination claims, then it should pass another amendment to "clarify" that it intended for disability harassment and other types of harassment to be brought as discrimination claims under section 2-102(A). See *Henrich*, 186 Ill.2d at 394-395 ("Courts have no legislative powers; courts may not enact or amend statutes. A court cannot restrict or enlarge the meaning of an unambiguous statute."); *Chavez*, 191 Ill.2d at 108-109. Even if the General Assembly intended to "*narrowly expand*" the scope of liability for sex discrimination/harassment claims by enacting section 2-102(D), it should pass another amendment demonstrating its intent to expand the liability for disability discrimination claims to include disability harassment claims. See *Henrich*, 186 Ill.2d at 394-395.

Because the statutory language is unambiguous, this Court cannot resort to other aids of construction "to declare that the legislature did not mean what the plain language of the statute says." See *Henrich*, 186 Ill.2d at 391. *Sangamon* clearly demonstrates this principle. Had this Court resorted to the same legislative history as the Appellate Court did herein to create ambiguities in an otherwise unambiguous statute, it should have found that the General Assembly intended for sexual harassment supervisory liability to "depend

on how high a level of supervisor." See 83d Ill. Gen. Assem., House Proceedings, Mar. 23, 1983, at 58 (statements of Representative Currie) (SR-0078). This Court, however, found it unnecessary to resort to the legislative history or read into the statute unexpressed exceptions or limitations because "Section 2-102(D) is unambiguous." *Sangamon*, 233 Ill.2d at 137. The same is true here. It is unnecessary to resort to other aids of textual construction because the statutory text is unambiguous: disability harassment is not an IHRA civil rights violation in employment.

Second, the Appellate Court's reasoning — that "the statute does not explicitly state that sexual harassment is the only type of harassment that constitutes a civil rights violation" (see *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 42) — is the exact opposite inference which should have been drawn given the longstanding "common sense" rule of statutory construction, *expressio unius est exclusio alterius*. See *Aldridge*, 179 Ill.2d at 151-152. The Appellate Court's construction would make virtually every statutory prohibition "ambiguous" where the General Assembly did not explicitly state that an exception to the prohibition did not exist. Instead of allowing the General Assembly to simply express "the learning of common experience that when people say one thing they do not mean something else[,]" the Appellate Court's construction would impose an incredible burden on the General Assembly to identify and explicitly state that it did not mean all of the other possible somethings else which it did not expressly state. See *id.* The Appellate Court's "reasoning" would allow courts to go beyond the plain language of the statute and usurp the legislative province by "clarifying" statutes to make them consistent with the court's idea of orderliness and public policy. See *Henrich*, 186 Ill.2d at 394-395.

Third, even if the statute is ambiguous, the Appellate Court's reasoning uses a very similar "double negative presumption" that was rejected by this Court in *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 26. Like the case at bar, *Nowak* also involved a statute imposing a new liability, meaning it "must be strictly construed in favor of persons sought to be subjected to its operation." *Nowak*, 2011 IL 111838, ¶ 27 (citing *Anderson v. Bd. of Educ. Sch. Dist. No. 91*, 390 Ill. 412, 422 (1945)). As this Court observed in *Nowak*, "The problem with using this double-negative presumption is that it allows courts arbitrarily to assign meaning to a silent statutory text, simply by framing the double negative in a certain way." See *id.* ¶ 26. Here, the Appellate Court just as easily could have reasoned that, because section 2-102(A) of the IHRA did not expressly state its civil rights violation for unlawful disability discrimination did not include disability harassment, this must mean that a disability harassment claim is not cognizable under section 2-102(A). See *id.* Accordingly, this Court rejected such a "double negative presumption" as "not so much an instrument for ascertaining the meaning of a silent statute as it is an instrument for commanding the meaning of a silent statute which, of course, is not the role of the judiciary." See *id.*

Fourth, the Appellate Court's construction either allows Plaintiff to obtain a multiple recovery for the same injury or it fails to appreciate the well-recognized legal distinction between civil rights claims for "discrimination" and "harassment" claims that is expressly embodied in the IHRA's text; *i.e.*, a discrimination claim must involve a materially adverse tangible official employment action, whereas a harassment claim does not. See *Roby*, 219 P.3d at 788 ("[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or

communicated through interpersonal relations in the workplace."); compare 775 ILCS 5/2-102(A) (expressly identifying tangible "official" employment actions such as hiring, promotion, discharge and etcetera) with 775 ILCS 5/2-101(E) (defining sexual harassment as including a hostile work environment) and 775 ILCS 5/2-102(D) (expressly creating civil rights violation for nonsupervisory sexual harassment).

A "discrimination provision addresses only *explicit* changes in the "terms, conditions, or privileges of employment"; that is, changes involving some *official action taken by the employer*." See *Roby*, 219 P.3d at 787-788 (original emphasis, cites omitted); see, e.g., *Hoffelt v. Ill. Dep't of Hum. Rights*, 367 Ill.App.3d 628, 633-634 (1st Dist. 2006) (affirming dismissal of IHRA sex *discrimination* claim for failing to prove a materially adverse tangible employment action beyond alleging "that petitioner was *harassed*.") (added emphasis). Accordingly, employer liability in a "discrimination" claim is contingent upon the employee's proof of a "materially adverse tangible employment action" that amounts to some type of official action taken by the employer. See *Hoffelt*, 367 Ill.App.3d at 633-634 ("In order to be considered to be materially adverse enough to constitute discrimination, an employment action must constitute ... a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indicia that might be unique to a particular situation."); *Vance*, 570 U.S. ___, 133 S.Ct. at 2439 (2013) (observing that federal civil rights law conditions an employer's liability for "harassment" based on whether the harassment culminates in a "tangible employment action" taken by the employer). Consequently, an employer can defend a discrimination charge by merely articulating a legitimate, non-discriminatory reason for the materially

adverse tangible employment action. See *Zaderaka v. Illinois Hum. Rights Comm'n*, 131 Ill.2d 172, 178-179 (1989).

By contrast, a harassment claim may involve conduct that does not amount to a materially adverse tangible official employment action. See *Sangamon*, 233 Ill.2d at 143-144 (finding employer strictly liable for supervisory sexual harassment claim under section 2-102(D) of the IHRA even though the plaintiff did not incur a materially adverse tangible employment action and the supervisor did not have authority over the employee's working conditions); *Ellerth*, 524 U.S. at 761-763 (requiring "a tangible employment action" before imposing vicarious liability in a harassment claim). Thus, an employer may not be able to defend a harassment claim by articulating a legitimate reason for its official action because "harassment often does not involve any official exercise of delegated power on behalf of the employer." See *Roby*, 219 P.3d at 788.

A harassment claim also expands liability beyond the conduct specifically proscribed under a discrimination provision, including a hostile work environment that (a) does not culminate in a materially adverse tangible employment action, (b) is equally offensive to all protected categories, or (c) involves persons belonging to the same protected classes. See *Sangamon*, 233 Ill.2d at 143-144; *SIU*, 159 Ill.2d at 213-216 (recognizing that the IHRA's sexual harassment amendments constituted a material change in the law expanding IHRA liability for sexual harassment); see also 83d Ill. Gen. Assem., House Proceedings, Mar. 23, 1983, at 55 (statements of Representative Currie) (SR-0075) ("Presently *** same sex harassment or harassment when the victim is a male clearly cannot be covered under an interpretation of sex discrimination prohibition.").

The Appellate Court opinion explained away the General Assembly's intent to enact the well-recognized distinctions between discrimination and harassment claims by holding that section 2-102(D) was intended "to *clarify* existing practices *and* to *narrowly expand* the available protections ***. It clearly did not effect a change in the law by creating a new cause of action." See *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 48 (original emphasis). Yet, "if section 2–102(D) was added as a clarification, it is puzzling why the clarification was made to "*narrowly expand* the available protections" and was not all-inclusive, adding hostile-work-environment harassment as a civil rights violation in regard to all of the enumerated protections." See *id.* ¶ 123 (McLaren, J., dissenting) (cites omitted, original emphasis).

Be that as it may, even if we assume the logical absurdity that an amendment to *clarify* existing law can also *expand* the scope of liability under the law and that the Appellate Court's construction does not conflict with this Court's precedents in *SIU* and *Sangamon*, there is no rule of statutory construction that would allow for the expanded scope of liability in *sexual* discrimination/harassment claims to be read into section 2-102(A) to authorize *disability* discrimination/harassment claims which do not involve a materially adverse tangible employment action. Rather, a disability harassment claim may be cognizable under section 2-102(A) *only* if the plaintiff pleads and proves a materially adverse tangible employment action beyond a merely hostile work environment. See, e.g., *Hoffelt*, 367 Ill.App.3d at 633-634.

But if the "harassment" results in a materially adverse tangible employment action, then it is a "discrimination" claim cognizable under section 2-102(A), and allowing employees to bring both claims would result in a multiple recovery for the same injury. If

the employee wants to bring a "harassment" claim to recover damages that are separate and distinct from those related to the materially adverse tangible employment action recoverable in a "discrimination" claim, then with the exception of sexual harassment, the IHRA does not recognize an avenue to recover such damages.

Applying these principles to the case at bar, if count IV seeks recovery for Plaintiff's termination as it purports to do, then count IV's hostile work environment disability harassment claim is duplicative of count II's disability discrimination claim and would allow a double recovery for the same injury. Alternatively, if Plaintiff can plead and prove her count IV claim absent a materially adverse tangible employment action, then it is a non-cognizable claim for an injury that is not recoverable under the IHRA.

Fifth, assuming that the statute was ambiguous, the Appellate Court erred in concluding that the other aids of statutory construction favored its construction. The legislative history, Joint Rules, and Illinois case law are utterly silent on the question of whether *disability* harassment claims (or any harassment claim not involving a materially adverse tangible official employment action) are cognizable under section 2-102(A). The legislative history also clearly reflects that the sponsors of the sexual harassment amendments wanted to *include* sexual harassment as a civil rights violation; *i.e.*, they intended to create a new cause of action adding sexual harassment as an independent civil rights violation. *Supra* p. 62. It was only when Representative Currie was confronted by an opponent that she strategically agreed with the opponent's criticism that the amendment was intended to clarify and narrowly expand the IDHR's questionable authority over sexual harassment claims to defuse any objections to the bill. (SR-0075 to SR-0077). Be that as

it may, the other aids of statutory construction offer little, if any, support for the Appellate Court's construction, while providing ample support for the City's construction.

Therefore, count IV must be dismissed because the unambiguous text of the IHRA shows that the General Assembly did not make "an intimidating, hostile or offensive working environment" based on "disability" an independent "civil rights violation."

VI. PLAINTIFF'S CLAIM MUST BE BARRED BECAUSE SHE CANNOT PROVE THAT SHE USED THE CITY'S POLICIES TO REPORT, CORRECT AND PREVENT THE NONSUPERVISORY HARRASSMENT.

Notwithstanding this Court's resolution of whether counts I and IV state legally cognizable civil rights violations under the IHRA, this Court should absolutely bar Plaintiff from recovering damages resulting from the alleged civil rights violations because of her undisputed failure to utilize the City's reporting, preventative and remedial policies for reasonable accommodation and disability harassment.

Not surprisingly, the parameters of employer liability for reasonable disability accommodation and nonsupervisory disability harassment claims under the IHRA are unclear. The IHRA's text and purpose, other aids of statutory construction (*e.g.*, the legislative history, Joint Rules and federal law) and this State's longstanding recognition "to the equity of the law that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff" (accord *Kelly v. Chicago Park Dist.*, 409 Ill. 91, 98 (1951)), favor the City's construction that an employee must utilize her employer's reporting and remedial policies as a necessary precondition to establishing IHRA liability, and that the employee who fails to do so should not recover monetary damages for the alleged civil rights violations which were readily avoidable had the employee complied with her employer's reporting and corrective policies.

Regarding the reasonable accommodation claim, an employee's burden and duties under the administrative regulation for reasonable disability accommodation (56 Ill.Adm.Code § 2500.40(c)) should be synonymous or coextensive with an employee's duty to utilize and cooperate with an employer's reasonable accommodation reporting and review policy. *Supra* p. 59-61.

As to the nonsupervisory harassment claim, section 2-102(D) of the IHRA clearly provides "that an employer shall be held responsible for sexual harassment of the employer's employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures." See 775 ILCS 5/2-102(D); see also 83d Ill. Gen. Assem., House Proceedings, June 28, 1983, at 176 (statements of Representative Currie) ("The Bill was amended in the Senate to respond to a specific concern of the State Chamber of Commerce by specifying that harassment among co-workers is not a violation against the employer without the employer's knowledge."). By making this liability part of the "civil rights violation," the employee has the burden of proving that "the employer becomes aware of the conduct and fails to take reasonable corrective measures." See *id.*; *Rozsavolgyi*, 2016 IL App (2nd) 150493, ¶ 94 (holding that "the plaintiff bears the burden of proving awareness and failure to take corrective measures.").

The parameters for employer liability in nonsupervisory hostile work environment claims under federal case law is similar: "the employer is liable under Title VII 'only if it was negligent in controlling working conditions.'" See *id.* ¶ 85 (quoting *Vance*, 570 U.S. ___, 133 S.Ct. at 2339-2441). Also, an employer raises an absolute defense to *supervisory* harassment claims that do not culminate in a materially adverse tangible employment action if the employer: (1) exercised reasonable care to prevent and correct the harassment;

and (2) the employee unreasonably failed to take advantage of the preventive or corrective opportunities the employer provided. See *id.* (describing the *Faragher-Ellerth* defense). An employer's promulgation of an anti-harassment policy with a complaint procedure and an employee's failure to use any complaint procedure provided by the employer will "normally suffice" to satisfy both elements of the defense and bar the employee from recovering damages given the employee's "coordinate duty to avoid or mitigate harm." See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. 806-807.

The federal courts, however, appear to be in conflict as to whether an employee's unreasonable failure to utilize or comply with an employer's existing complaint procedure and anti-harassment policy absolutely bars the employee's claim of nonsupervisory, co-worker harassment. See generally 1 EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 5:38 (Nov. 2014). On the one hand, courts hold that an employee's failure to utilize such policies bars the claim because: (1) it is conclusive proof of the employer's lack of notice; and (2) such a rule supports the promulgation and utilization of such policies to prevent harassment, promotes conciliation rather than litigation, and ensures victims do not profit from their failure to mitigate avoidable consequences. See *Kohler v. Inter-Tel Tech.*, 244 F.3d 1167, 1173-82 (9th Cir. 2001). Other courts prefer to apply principles of agency law because the federal statutes define "employer" as including "agents." See *Huston v. Proctor and Gamble Paper Prod. Corp.*, 568 F.3d 100, 106 (3rd Cir. 2009).

While Illinois courts have not yet considered the matter, there is a clear textual distinction between the IHRA and the federal statutes which does not support applying agency principles to the IHRA. Unlike the federal statutes, the IHRA's definition of

"employer" does not include an employer's "agent." Compare 42 U.S.C.A § 12111(5)(A) with 775 ILCS 5/2-101(B)(1).

Be that as it may, the IHRA's text is ambiguous as to what constitutes the employee's proof that (a) the *employer* (b) becomes aware of the conduct and (c) fails to take reasonable corrective measures" and (d) whether an employee's failure to utilize an employer's complaint and antiharassment policy absolutely bars the employee's damages recovery. See 775 ILCS 5/2-102(D) (emphasis added).

The pertinent legislative history is directly on point concerning an employer's liability for nonsupervisory harassment:

> If the issue is two co-workers, I think the [b]ill . . . will make clear that if the company has a policy, a practice, a review process for dealing with complaints of sex harassment, that review policy would have to be instituted before it would be appropriate for the complaint to come before the Commission.

83d Ill. Gen. Assem., House Proceedings, Mar. 23, 1983, at 57-58 (statements of Representative Currie) (SR-0077 to SR-0078).

The General Assembly clearly intended that an employee's failure to utilize the employer's complaint/review procedure and anti-harassment policy deprives the Illinois Human Rights Commission and courts of jurisdiction over a claim for nonsupervisory harassment. Whether this is a matter of subject matter jurisdiction, statutory interpretation concerning proof of the *prima facie* case, or application of the longstanding equitable principle that the plaintiff has a coordinate duty to avoid or mitigate harm, does not matter because the end result is clear: an employee's failure to use the employer's complaint procedure and corrective policies should bar the plaintiff's recovery of IHRA damages.

Such a clear bright-line rule is consistent with: the statutory text requiring the employee to prove the employer's actual awareness of the nonsupervisory harassment and failure to take reasonable corrective measures; the General Assembly's purpose in protecting employers from "unfounded charges," preventing harassment, and promoting conciliation rather than litigation; the legislative history; and the longstanding equitable principle that a plaintiff should not recover for those consequences of defendant's act which were readily avoidable by the plaintiff. It has the practical benefit of being easy to enforce and follow by employers, employees, courts and administrative agencies. The alternative would impose an impractical burden on employers to identify and correct instances of alleged harassment, including potentially imposing liability based solely on an employer's alleged "constructive notice" of the conduct even though the IHRA's text, purpose, intent and legislative history clearly intend to trigger an employer's liability for nonsupervisory harassment only upon the employee's institution of the employer's complaint/review process and proof of the employer's actual awareness of the alleged harassment.

Therefore, this Court should hold that an employee's failure to plead and prove that she utilized and complied with the reporting, preventative and corrective anti-harassment policies promulgated by the employer absolutely bars the employee's recovery of damages resulting from the alleged civil rights violations.

CONCLUSION

WHEREFORE, Defendant-Appellee-Cross-Appellant City of Aurora respectfully requests that this Honorable Court:

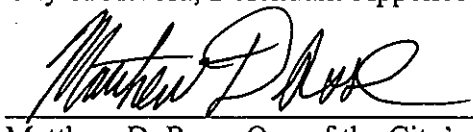
(A) Answer the third certified question in the affirmative and further hold that the City's tort immunity defenses bar Plaintiff's requested damages relief.

(B) Answer the first certified question in the negative and dismiss counts I and IV of the complaint with prejudice.

(C) Hold that Plaintiff's failure to plead and prove that she utilized and complied with the City's anti-harassment/reasonable accommodation policies absolutely bars her from recovering damages resulting from the alleged civil rights violations.

Respectfully submitted,

City of Aurora, Defendant-Appellee-Cross-Appellant

By: 

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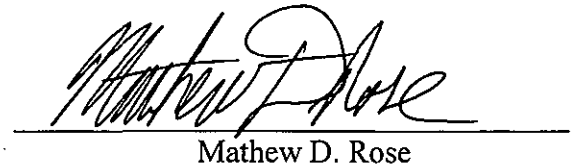
CERTIFICATION OF COMPLIANCE

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, the certificate of service, is 79 pages.



Mathew D. Rose

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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 he served the foregoing Notice of Filing together with Defendant-Appellee/Cross Appellant City of Aurora's Brief-Cross Relief Requested upon:

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by serving one copy of same by electronic mail and by placing a copy into an envelope correctly addressed as aforesaid and bearing sufficient postage prepaid and depositing same within the U.S. Mail at 30 N. LaSalle Street, Chicago, Illinois before 5:00 p.m. on October 28, 2016.

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APPENDIX

IN THE
SUPREME COURT OF ILLINOIS
Case No. 121048

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

TABLE OF CONTENTS TO APPENDIX

D. TIA

E. Other Persuasive Statutes

A. Illinois Constitution

Ill. Const. 1970, art. I, § 19 (West 2014)

> All persons with a physical or mental handicap shall be free from discrimination in the sale or rental of property and shall be free from discrimination unrelated to ability in the hiring and promotion practices of any employer.

Ill. Const. 1970, art. II, § 1 (West 2014)

> The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Ill. Const. 1970, art. XIII, § 4 (West 2014)

> Except as the General Assembly may provide by law, sovereign immunity in this State is abolished.

B. IHRA

775 ILCS 5/1-102(A), (B), (F) & (H) (West 2014)

§ 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.

(B) Freedom from Sexual Harassment-Employment and Elementary, Secondary, and Higher Education. To prevent sexual harassment in employment and sexual harassment in elementary, secondary, and higher education.

* * *

(F) Implementation of Constitutional Guarantees. To secure and guarantee the rights established by Sections 17, 18 and 19 of Article I of the Illinois Constitution of 1970.

* * *

(H) Unfounded Charges. To protect citizens of this State against unfounded charges of unlawful discrimination, sexual harassment in employment and sexual harassment in elementary, secondary, and higher education, and discrimination based on citizenship status in employment.

775 ILCS 5/1-103(D), (I)(1), (O) & (Q) (West 2014)

§ 1-103. General Definitions. When used in this Act, unless the context requires otherwise, the term:

* * *

(D) Civil Rights Violation. "Civil rights violation" includes and shall be limited to only those specific acts set forth in Sections 2-102, 2-103, 2-105, 3-102, 3-102.1, 3-103, 3-104, 3-104.1, 3-105, 3-105.1, 4-102, 4-103, 5-102, 5A-102, 6-101, and 6-102 of this Act.

* * *

(I) Disability. "Disability" means a determinable physical or mental characteristic of a person, including, but not limited to, a determinable physical characteristic which necessitates the person's use of a guide, hearing or support dog, the history of such characteristic, or the perception of such characteristic by the person complained against, which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic:

(1) For purposes of Article 2 is unrelated to the person's ability to perform the duties of a particular job or position and, pursuant to Section 2-104 of this Act, a person's illegal use of drugs or alcohol is not a disability;

* * *

(O) Sex. "Sex" means the status of being male or female.

* * *

(Q) Unlawful Discrimination. "Unlawful discrimination" means discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, pregnancy, or unfavorable discharge from military service as those terms are defined in this Section.

775 ILCS 5/2-101(B), (E) & (F) (West 2014)

§ 2-101. Definitions. The following definitions are applicable strictly in the context of this Article.

* * *

(B) Employer.

(1) "Employer" includes:

(a) Any person employing 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation;

(b) Any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental disability unrelated to ability, pregnancy, or sexual harassment;

(c) The State and any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees;

(d) Any party to a public contract without regard to the number of employees;

(e) A joint apprenticeship or training committee without regard to the number of employees.

* * *

(E) Sexual Harassment. "Sexual harassment" means any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

(F) Religion. "Religion" with respect to employers includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

775 ILCS 5/2-102(A), (D), (I) & (J) (West 2014)

§ 2-102. 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.

* * *

(D) Sexual Harassment. For any employer, employee, agent of any employer, employment agency or labor organization to engage in sexual harassment; provided, that an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures.

* * *

(I) Pregnancy. For an 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 pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth. Women affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, regardless of the source of the inability to work or employment classification or status.

(J) Pregnancy; reasonable accommodations.

(1) If after a job applicant or employee, including a part-time, full-time, or probationary employee, requests a reasonable accommodation, for an employer to not make reasonable accommodations for any medical or common condition of a job applicant or employee related to pregnancy or childbirth, unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer. The employer may request documentation from the employee's health care provider concerning the need for the requested reasonable accommodation or accommodations to the same extent documentation is requested for conditions related to disability if the employer's request for documentation is job-related and consistent with business necessity. The employer may require only the medical justification for the requested accommodation or accommodations, a description of the reasonable accommodation or accommodations medically advisable, the

date the reasonable accommodation or accommodations became medically advisable, and the probable duration of the reasonable accommodation or accommodations. It is the duty of the individual seeking a reasonable accommodation or accommodations to submit to the employer any documentation that is requested in accordance with this paragraph. Notwithstanding the provisions of this paragraph, the employer may require documentation by the employee's health care provider to determine compliance with other laws. The employee and employer shall engage in a timely, good faith, and meaningful exchange to determine effective reasonable accommodations.

(2) For an employer to deny employment opportunities or benefits to or take adverse action against an otherwise qualified job applicant or employee, including a part-time, full-time, or probationary employee, if the denial or adverse action is based on the need of the employer to make reasonable accommodations to the known medical or common conditions related to the pregnancy or childbirth of the applicant or employee.

(3) For an employer to require a job applicant or employee, including a part-time, full-time, or probationary employee, affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to accept an accommodation when the applicant or employee did not request an accommodation and the applicant or employee chooses not to accept the employer's accommodation.

(4) For an employer to require an employee, including a part-time, full-time, or probationary employee, to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known medical or common conditions related to the pregnancy or childbirth of an employee. No employer shall fail or refuse to reinstate the employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, and other applicable service credits upon her signifying her intent to return or when her need for reasonable accommodation ceases, unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer.

For the purposes of this subdivision (J), "reasonable accommodations" means reasonable modifications or adjustments to the job application process or work environment, or to the manner or circumstances under which the position desired or held is customarily performed, that enable an applicant or employee affected by pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth to be considered for the position the applicant desires or to perform the essential functions of

that position, and may include, but is not limited to: more frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest; private non-bathroom space for expressing breast milk and breastfeeding; seating; assistance with manual labor; light duty; temporary transfer to a less strenuous or hazardous position; the provision of an accessible worksite; acquisition or modification of equipment; job restructuring; a part-time or modified work schedule; appropriate adjustment or modifications of examinations, training materials, or policies; reassignment to a vacant position; time off to recover from conditions related to childbirth; and leave necessitated by pregnancy, childbirth, or medical or common conditions resulting from pregnancy or childbirth.

For the purposes of this subdivision (J), "undue hardship" means an action that is prohibitively expensive or disruptive when considered in light of the following factors: (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources, or the impact otherwise of the accommodation upon the operation of the facility; (iii) the overall financial resources of the employer, the overall size of the business of the employer with respect to the number of its employees, and the number, type, and location of its facilities; and (iv) the type of operation or operations of the employer, including the composition, structure, and functions of the workforce of the employer, the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the employer. The employer has the burden of proving undue hardship. The fact that the employer provides or would be required to provide a similar accommodation to similarly situated employees creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer.

No employer is required by this subdivision (J) to create additional employment that the employer would not otherwise have created, unless the employer does so or would do so for other classes of employees who need accommodation. The employer is not required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job, unless the employer does so or would do so to accommodate other classes of employees who need it.

775 ILCS 5/3-102.1(B) & (C) (West 2014)

§ 3-102.1. Disability.

* * *

(B) It is a civil rights violation to alter the terms, conditions or privileges of sale or rental of a dwelling or the provision of services or facilities in connection with such dwelling because of a disability of a person with a disability or a disability of any person residing or intending to reside in that dwelling after it is sold, rented or made available, or a disability of any person associated with that person.

(C) It is a civil rights violation:

(1) to refuse to permit, at the expense of the person with a disability, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises; except that, in the case of a rental, the landlord may, where it is reasonable to do so, condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before modifications, reasonable wear and tear excepted. The landlord may not increase for persons with a disability any customarily required security deposit. However, where it is necessary in order to ensure with reasonable certainty that funds will be available to pay for the restorations at the end of the tenancy, the landlord may negotiate as part of such a restoration agreement a provision requiring that the tenant pay into an interest bearing escrow account, over a reasonable period, a reasonable amount of money not to exceed the cost of the restorations. The interest in any such account shall accrue to the benefit of the tenant. A landlord may condition permission for a modification on the renter providing a reasonable description of the proposed modifications as well as reasonable assurances that the work will be done in a workmanlike manner and that any required building permits will be obtained;

(2) to refuse to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or

(3) in connection with the design and construction of covered multifamily dwellings for first occupancy after March 13, 1991, to fail to design and construct those dwellings in such a manner that:

(a) the public use and common use portions of such dwellings are readily accessible to and usable by persons with a disability;

(b) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by persons with a disability in wheelchairs; and

(c) all premises within such dwellings contain the following features of adaptive design:

(i) an accessible route into and through the dwelling;

(ii) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
(iii) reinforcements in bathroom walls to allow later installation of grab bars; and
(iv) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

775 ILCS 5/5A-102 (West 2014)

§ 5A-102. Civil Rights Violations-Elementary, Secondary, and Higher Education. It is a civil rights violation:

(A) Elementary, Secondary, or Higher Education Representative. For any elementary, secondary, or higher education representative to commit or engage in sexual harassment in elementary, secondary, or higher education.

(B) Institution of Elementary, Secondary, or Higher Education. For any institution of elementary, secondary, or higher education to fail to take remedial action, or to fail to take appropriate disciplinary action against an elementary, secondary, or higher education representative employed by such institution, when such institution knows that such elementary, secondary, or higher education representative was committing or engaging in or committed or engaged in sexual harassment in elementary, secondary, or higher education.

775 ILCS 5/10-102(C) (West 2014)

§ 10-102. Court Actions.

* * *

(C) Relief which may be granted. (1) In a civil action under subsection (A) if the court finds that a civil rights violation has occurred or is about to occur, the court may award to the plaintiff actual and punitive damages, and may grant as relief, as the court deems appropriate, any permanent or preliminary injunction, temporary restraining order, or other order, including an order enjoining the defendant from engaging in such civil rights violation or ordering such affirmative action as may be appropriate. (2) In a civil action under subsection (A), the court, in its discretion, may allow the prevailing party, other than the State of Illinois, reasonable attorneys fees and costs. The State of Illinois shall be liable for such fees and costs to the same extent as a private person.

C. IDHR Regulations

56 Ill.Adm.Code 2500.40 (West 2014)

a) Requirement - Employers and labor organizations must make reasonable accommodation of the known physical or mental limitations of otherwise qualified disabled applicants or employees, unless the employer or labor organization can demonstrate that accommodation would be prohibitively expensive or would unduly disrupt the ordinary conduct of business. Whether an accommodation would be prohibitively expensive or disruptive will involve weighing its cost and inconvenience against the immediate and potential benefits of providing it, when the immediate benefit is facilitation of the disabled person's employment and the potential benefits include facilitating access by other disabled employees, applicants, clients and customers. 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.

b) Exceptions - Accommodations of a personal nature (e.g., eyeglasses or hearing aids) need not be provided, nor is it necessary to provide any superfluous accommodation (e.g., provision of a chauffeur to accommodate a blind person's traveling difficulties). No employer is required to hire two full time employees to perform one job in order to accommodate a disabled individual.

c) Employee's Burden - It is the duty of the individual seeking an accommodation to apprise the employer or labor organization involved of the employee's disabling condition and submit any necessary medical documentation. The individual must ordinarily initiate the request for accommodation and must cooperate in any ensuing discussion and evaluation aimed at determining the possible or feasible accommodations.

d) Employer's or Labor Organization's Burden - 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). In response to a discrimination charge involving a refusal to provide an accommodation, an employer or labor organization must show that the disabled individual would be unqualified even with accommodation, that the accommodation would be prohibitively expensive or would unduly disrupt the conduct of business, or that the accommodation would constitute an exception as described in subsection (b).

D. TIA

745 ILCS 10/1-101.1 (West 2014)

> (a) The purpose of this Act is to protect local public entities and public employees from liability arising from the operation of government. It grants only immunities and defenses.
>
> (b) Any defense or immunity, common law or statutory, available to any private person shall likewise be available to local public entities and public employees.

745 ILCS 10/1-204 (West 2014)

> "Injury" means death, injury to a person, or damage to or loss of property. It includes any other injury that a person may suffer to his person, reputation, character or estate which does not result from circumstances in which a privilege is otherwise conferred by law and which is of such a nature that it would be actionable if inflicted by a private person. "Injury" includes any injury alleged in a civil action, whether based upon the Constitution of the United States or the Constitution of the State of Illinois, and the statutes or common law of Illinois or of the United States.

745 ILCS 10/1-205 (West 2014)

> "Law" includes not only enactments but also the case law applicable within this State as determined and declared from time to time by the courts of review of this State and of the United States.

745 ILCS 10/1-210 (West 2014)

> "Willful and wanton conduct" as used in this Act means 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. This definition shall apply in any case where a "willful and wanton" exception is incorporated into any immunity under this Act.

745 ILCS 10/2-101 (West 2014)

Nothing in this Act affects the right to obtain relief other than damages against a local public entity or public employee. Nothing in this Act affects the liability, if any, of a local public entity or public employee, based on:

a). Contract;

b). Operation as a common carrier; and this Act does not apply to any entity organized under or subject to the "Metropolitan Transit Authority Act", approved April 12, 1945, as amended;

c). The "Workers' Compensation Act", approved July 9, 1951, as heretofore or hereafter amended;

d). The "Workers' Occupational Diseases Act", approved July 9, 1951, as heretofore or hereafter amended;

e). Section 1-4-7 of the "Illinois Municipal Code", approved May 29, 1961, as heretofore or hereafter amended.

f). The "Illinois Uniform Conviction Information Act", enacted by the 85th General Assembly, as heretofore or hereafter amended.

745 ILCS 10/2-103 (West 2014)

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 10/2-201 (West 2014)

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 10/3-108 (West 2014)

(a) 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.

(b) Except as otherwise provided in this Act, neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property unless the employee or the local public entity has a duty to provide supervision imposed by common law, statute, ordinance, code or regulation and the local public entity or public employee is guilty of willful and wanton conduct in its failure to provide supervision proximately causing such injury.

745 ILCS 10/8-101 (West 2014)

(a) No civil action other than an action described in subsection (b) may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued.

(b) No action for damages for injury or death against any local public entity or public employee, whether based upon tort, or breach of contract, or otherwise, arising out of patient care shall be brought more than 2 years after the date on which the claimant knew, or through the use of reasonable diligence should have known, or received notice in writing of the existence of the injury or death for which damages are sought in the action, whichever of those dates occurs first, but in no event shall such an action be brought more than 4 years after the date on which occurred the act or omission or occurrence alleged in the action to have been the cause of the injury or death.

(c) For purposes of this Article, the term "civil action" includes any action, whether based upon the common law or statutes or Constitution of this State.

(d) The changes made by this amendatory Act of the 93rd General Assembly apply to an action or proceeding pending on or after this amendatory Act's effective date, unless those changes (i) take away or impair a vested right that was acquired under existing law or (ii) with regard to a past transaction or past consideration, create a new obligation, impose a new duty, or attach a new disability.

E. Other Persuasive Statutes

42 U.S.C.A § 12111(5)(A) (West 2014)

As used in this subchapter:

* * *

(5) Employer

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

42 U.S.C.A § 12112(a) (West 2014)

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C.A § 12112(b)(5)(A) (West 2014)

(b) Construction

As used in subsection (a) of this section, the term "discriminate against a qualified individual on the basis of disability" includes—

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;

CAL GOV. CODE § 12940(a), (j), (k), (l) & (m) (West 2014)

It is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.

* * *

(j)(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status, to harass an employee, an applicant, an unpaid intern or volunteer, or a person providing services pursuant to a contract. Harassment of an employee, an applicant, unpaid intern or volunteer, or a person providing services pursuant to a contract by an employee, other than an agent or supervisor, shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, unpaid interns or volunteers, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

(2) The provisions of this subdivision are declaratory of existing law, except for the new duties imposed on employers with regard to harassment.

* * *

(k) For an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to

employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.

* * *

(m) For an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in paragraph (1) or (2) of subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship, as defined in subdivision (u) of Section 12926, to its operation.

(n) For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition.