IN THE
SUPREME COURT OF ILLINOIS
Case No. 121048

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

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT, PATRICIA ROZSAVOLGYI

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ORAL ARGUMENT REQUESTED

STATEMENT OF POINTS AND AUTHORITIES

NATURE OF THE ACTION

Plaintiff's four-count Complaint alleges civil rights violations in employment for refusal to accommodate a known disability, (SR-0011-0012), disparate treatment on the basis of disability discrimination, (SR-0012-0013), unlawful retaliation, (SR-0013-0015), and hostile work environment on the basis of disability discrimination, (SR-0015-0016). All of Plaintiff's claims are brought under the provisions of the Illinois Human Rights Act, 775 ILCS 5/1-101, *et. seq.*, ("IHRA").

In response to Plaintiff's complaint, Defendant filed an Amended Answer with six Affirmative Defenses. (SR-0024-SR-0042). Relevant here, Defendant's Third, Fourth, and Fifth Affirmative Defenses are brought pursuant to the Local Government and Governmental Employees Tort Immunity Act, 745 ILCS 10/1, *et. seq.*, ("TIA"), §§ 3-108, 2-201, and 2-103, respectively. (SR-0038-0040). In a series of interlocutory rulings, the trial ultimately court struck Defendant's Third, Fourth, and Fifth Affirmative Defenses, (SR-0003), and certified three questions, pursuant to Illinois Supreme Court Rule 308(a), for interlocutory consideration by the Illinois Appellate Court for the Second District. (SR-0001-SR-0002). The instant appeal respectfully questions the correctness of the Appellate Court's answer to the Third Certified Question, which is as follows:

Third Certified Question (SR-0001 – SR-0002)

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 holding 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?"

Second District Appellate Court's Answer to Third Certified Question

The majority held that "the Tort Immunity Act applies to actions under the Human Rights Act; the City thus 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 Tort Immunity Act 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 (2nd) 150493, at *¶¶ 2, 97.

As to the Third Certified Question, Hon. Justice McLaren dissented stating: (1) the Third Certified Question was improper under Illinois Supreme Court Rule 308(a) because there was no reasonable grounds for difference of opinion; (2) the IHRA's inclusion of municipal corporations within its definition of "employer" evidences that the legislature intended public employers to be given the same rights as employers in the private sector; and (3) the TIA cannot apply to Plaintiff's claims because Plaintiff's claims are based on contract. *Rozsavolgyi*, 2016 IL App (2nd) 150493, at *¶¶ 127, 130.

ISSUES PRESENTED FOR REVIEW

1. Whether the Third Certified Question was proper under Illinois Supreme Court Rule 308(a).

2. Whether the Illinois Appellate Court for the Second District was correct in finding that the TIA applies to actions brought under the IHRA.

3. Whether the Illinois Appellate Court for the Second District was correct in rejecting 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), which held that the TIA does not apply to constitutional claims.

4. Whether the TIA is constitutional if it impairs constitutional rights.

5. Whether the Illinois Appellate Court for the Second District was correct in finding that the City can assert immunity with respect to Plaintiff's requests for "damages," but not to her requests for "equitable relief."

   a. Whether the remedies available under the IHRA, 775 ILCS 5/8A-104, constitute "damages" or "equitable relief."

STATEMENT OF JURISDICTION

This appeal comes pursuant to the Second District's July 6, 2016, Illinois Supreme Court Rule 316 Certificate of Importance on the Third Certified Question, which has been timely submitted to the Illinois Supreme Court for consideration.

STATUTES INVOLVED

Pertinent provisions of Illinois Human Rights Act compared to pertinent provisions of Illinois Tort Immunity Act:

- 775 ILCS 5/1-102(F) compared with 745 ILCS 10/1-204 and 745 ILCS 10/8-101(c). (See appendix).
- 775 ILCS 5/2-101(B)(1)(c) and 775 ILCS 5/2-101(B)(2) compared with 745 ILCS 10/1-206. (See appendix).
- 775 ILCS 5/2-102(A) compared with 745 ILCS 10/2-109, 745 ILCS 10/2-202 and 745 ILCS 10/2-201. (See appendix).
- 775 ILCS 5/7A-102(G)(1) compared with 745 ILCS 10/8-101. (See appendix).
- 775 ILCS 5/8A-104 compared with 745 ILCS 10/2-101. (See appendix).

Other pertinent statutes:

- 745 ILCS 10/1-210. (See appendix).
- 745 ILCS 10/2-103. (See appendix).
- 745 ILCS 10/3-108. (See appendix).
- 775 ILCS 5/8-111(c). (See appendix).

STATEMENT OF FACTS

The Parties

Plaintiff was employed by the Defendant as a property maintenance compliance officer from March 16, 1992, until she was involuntarily terminated by her employer on July 14, 2012. (SR-0024-SR-0025). Defendant was an "Employer" under the IHRA, (SR-0025), and a "Local Public Entity" under § 1-206 of the TIA. (SR-0038).

Plaintiff's Claims

Plaintiff alleges that, as of July 2012, she had a medical history of unipolar depression, anxiety, panic attacks, and partial hearing loss. (SF-0007, ¶ 9). Plaintiff alleges that her medical conditions did not prevent her from performing the duties and responsibilities of her position. (SR-0007, ¶ 11). However, Plaintiff, when provoked, was more likely to react strongly but never in a physical manner. (SR-0007-0008, ¶ 11). Plaintiff sometimes speaks loudly or in a fast-paced manner because of her medical conditions, especially when she is provoked or agitated. (SR-0007-0008, ¶ 11). Yet, Plaintiff alleges that she did not violate any Defendant Code of Conduct. (SR-0007-0008, ¶ 11).

Plaintiff also alleges that certain members of her staff and co-workers engaged in an intentional pattern and practice of creating a hostile and offensive work environment in an effort to agitate, embarrass, humiliate, degrade, harass, discriminate and provoke Plaintiff. (SR-0008, ¶ 13). Plaintiff alleges that this was a purposeful effort to cause her emotional distress and to get her into trouble with management by responding in kind and obtain her termination, either voluntarily or involuntarily. (SR-0008, ¶ 13). As a result of Plaintiff's co-workers' conduct, Plaintiff sustained further emotional harm, aggravation

to her medical conditions, which impacted her ability to concentrate and focus at work. (SR-0009, ¶ 15). Because of the hostile work environment, Plaintiff suffered from multiple symptoms of depression, including, but not limited to, fatigue, sadness, helplessness, irritability, restlessness, anxiousness, sleep disorders, eating disorders, body aches, loss of interest in activities, headaches, difficulty concentrating, loss of focus, memory issues, and a loss of hope that her work environment would ever change for the better. (SR-0009, ¶ 15). Plaintiff also alleges that because of her co-workers' conduct, she was diagnosed as being in the throes of a depressive disorder and a panic disorder. (SR-0009, ¶ 16).

Plaintiff further alleges that at or near the time she was terminated from her employment for making a statement to a co-worker using the word "idiots," (SR-0009, ¶ 16), Plaintiff was at her wits end and depressed because of the hostile work environment she endured. (SR-0009, ¶ 17). Had management taken reasonable steps to prevent this, Plaintiff would not have been in such a vulnerable condition. (SR-0009, ¶ 17). Plaintiff also claims that she was discriminated against because she had a history of the aforesaid medical conditions, (SR-0010, ¶ 19), and that Defendant asked the Union to "guarantee" that Plaintiff was not a threat to commit physical violence in the workplace, even though there was never any evidence that she was such a threat. (SR-0010, ¶ 19). In response, the Union president accurately represented to Defendant that Plaintiff's counselors and doctors did not deem her to be a physical threat, but that the Union could never "guarantee" that anyone would never commit an act of physical violence in the workplace. (SR-0010, ¶ 19). Defendant then made the decision to terminate Plaintiff's

employment as an act of unlawful disability discrimination and unlawful retaliation. (SR-0010, ¶ 20).

Defendant's Answer and Affirmative Defenses

Defendant answered Plaintiff's Complaint, denied many material allegations against it, and asserted six affirmative defenses. (SR-0024-0048). The affirmative defenses pertinent to this appeal are Defendant's Third, Fourth, and Fifth affirmative defenses. Defendant's Third, Fourth, and Fifth affirmative defenses asserted various immunities under the TIA. Defendant's Third affirmative defense alleged that the City was entitled to § 3-108 immunity for its alleged failure to supervise Plaintiff's co-workers and workplace environment. (SR-0038-0039). Defendant's Fourth affirmative defense alleged that the decisions of the City's supervisory and managerial personnel "to take appropriate action" with respect to Plaintiff's request to stop the harassment by her non-supervisory co-workers involved a determination of policy or exercise of discretion under the City's policies, entitling the City to § 2-201 immunity. (SR-0039-0040). Defendant's Fifth affirmative defense asserted that the City was entitled to § 2-103 immunity for failing to enforce the law, specifically, the IHRA. (SR-0040).

The Underlying Trial Court Orders

On April 22, 2015, the trial court granted Plaintiff's motion to strike as to Defendant's Third, Fourth, and Fifth, TIA affirmative defenses. (SR-0003). Over Plaintiff's objections, however, on April 29, 2015, the trial court entered an order finding, in part, that the April 22, 2015, interlocutory order involved questions of law as to which there were substantial grounds for difference of opinion and that an immediate appeal from said orders may materially advance the termination of the litigation pursuant to Rule

308(a). (SR-0001-0002). The trial court then certified three questions, and appeal was considered by the Illinois Appellate Court for the Second District of Illinois over Plaintiff's objections. (SR-0001-0002).

The Appellate Court's Decision

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

> The Tort Immunity Act applies to actions under the Human Rights Act; the City thus 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 Tort Immunity Act 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 (2nd) 150493, at *¶¶ 2, 97.

Additionally, as to this question, Hon. Justice McLaren dissented stating: (1) the Third Certified Question was improper under Illinois Supreme Court Rule 308(a) because there was no reasonable grounds for difference of opinion; (2) the IHRA's inclusion of municipal corporations within its definition of "employer" evidences that the legislature intended public employers to be given the same rights as employers in the private sector; and (3) the TIA cannot apply to Plaintiff's claims because Plaintiff's claims are based on contract. *Rozsavolgyi*, 2016 IL App (2nd) 150493, at *¶¶ 127, 130. On May 18, 2016, Plaintiff petitioned the Appellate Court for Rehearing on the Third Certified Question and submitted an Application for Certificate of Importance pursuant to Supreme Court Rule 316. On July 6, 2016, the Appellate Court denied Plaintiff's Petition, but certified the Third Certified Question pursuant to Supreme Court Rule 316 to the Illinois Supreme Court for consideration, whereupon the instant appeal is had.

STANDARD OF REVIEW

The granting of a certificate of importance pursuant to Illinois Supreme Court Rule, ("SCR"), 316 very clearly involves judicial investigation and action. *MacLachlan v. McLaughlin*, 126 Ill. 427, 431 (1888). Therefore, in reviewing a question certified by a certificate of importance, the Supreme Court is not confined to the views expressed in the Appellate Court. *Newman v. Newman Clock Co.*, 268 Ill. 418, 425 (1915). Thus, questions certified to the Appellate Court on a SCR 308(a) appeal are reviewed by the Supreme Court *de novo*. *Simmons v. Homatas*, 236 Ill.2d 459, 466 (2010). Review of an interlocutory appeal under Illinois Supreme Court Rule 308 is ordinarily limited to the question certified by the circuit court. *Townsend v. Sears, Roebuck & Co.*, 227 Ill.2d 147, 153 (2007). Questions of fact should not be answered on a 308(a) interlocutory appeal. *Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill.2d 45, 58 (2007). Additionally, the reviewing court "should not expand upon the question to answer other issues that might have been included." *McMichael v. Michael Reese Health Plan Foundation*, 259 Ill.App.3d 113, 116 (1st Dist. 1994).

ARGUMENT

The Third Certified Question

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 holding 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?"

The Second District's Answer to the Third Certified Question

The Tort Immunity Act applies to actions under the Human Rights Act; the City thus 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 Tort Immunity Act 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 (2nd) 150493, at *¶¶ 2, 97.

Requested Relief

This Honorable Court should vacate the Second District Appellate Court's answer to the Third Certified Question because the question is improper under Illinois Supreme Court Rule, ("SCR"), 308(a). In the alternative, if this Court finds that the Third Certified Question was properly certified under SCR 308(a), this Court should answer the question in the negative. More specifically, this Court should find that the Tort Immunity Act, ("TIA"), does not apply to civil actions brought under the Illinois Human Rights Act,

("IHRA"), and that the Second District's prior precedence was not impliedly rejected by this Court and still remains good law, particularly as it relates to "civil rights violations" under the IHRA.

I. THE THIRD CERTIFIED QUESTION SHOULD NEVER HAVE BEEN ANSWERED ON THE MERITS BECAUSE THE QUESTION WAS IMPROPER UNDER SCR 308(a).

Illinois Supreme Court Rule 308(a) provides in pertinent part:

> When the trial court, in making an interlocutory order not otherwise appealable, finds that the order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, the court shall so state in writing, identifying the question of law involved. Ill. Sup. Ct. R. 308(a).

Rule 308(a) is an exception to the general rule that only final orders from a court are subject to appellate review. *Morrissey v. City of Chicago*, 334 Ill.App.3d 251, 257 (1st Dist. 2002). Rule 308, governing permissive interlocutory appeals, was intended to be used sparingly; it was not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation. *Id.* Thus, appeals under Rule 308 should be limited to "exceptional" circumstances and the Rule should be strictly construed and sparingly exercised. *Id.* at 258. Therefore, if a question certified by the trial court for immediate appellate review regarding an interlocutory order calls for a hypothetical answer with no practical effect, the Appellate Court should refrain from answering it. *People ex rel. Bd. of Trustees of Chicago State Univ. v. Siemens Bldg. Technologies, Inc.*, 387 Ill.App.3d 606, 611 (1st Dist. 2008), citing Ill. Sup. Ct. R. 308(a). In the same way, a reviewing court should decline to issue advisory opinions on moot or abstract questions. *In re Commitment of Hernandez*, 239 Ill.2d 195, 201 (2010).

Here, the Second District should never have answered the Third Certified Question because as this Court said in *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill.2d 460, 469 (1998), "although the matter is framed as a question of law, we believe that any answer here would be advisory and provisional, for the ultimate disposition *** will depend on resolution on a host of factual predicates." In this regard, the first provisional question that would need to be addressed before a sound answer could be had on the Third Certified Question is whether the local governmental entity can overcome its presumed liability by sustaining its immunity defense. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 345 (1998) (local governmental entities are liable in tort or otherwise on the same basis as any private employer, unless it can sustain its immunity defense). The answer to that preliminary question, alone, involves an entire host of factual predicates. See e.g., *Morrissey*, 334 Ill.App.3d at 255 (refusing to answer 308(a) certified question because it inappropriately called the court to make factual determinations because immunity under the TIA operates as an affirmative defense, which must be properly raised and proven by the public entity first before a determination can be made as to whether it precludes a plaintiff's right to recover damages). Thus, the Second District's answer should be vacated as being an improper advisory opinion without practical effect on Plaintiff's claims.

Another provisional question this reviewing Court must answer in addressing the Third Certified Question is what is the basis of the IHRA claim? In this case, Plaintiff's claims are brought pursuant to Article II of the IHRA, which has its own set of definitions and prohibitions pertaining strictly to issues of "employment." 775 ILCS 5/2-101, *et. seq.* As it specifically relates to IHRA Article II claims, as Hon. Justice McLaren

notably pointed out in his dissent, the Illinois Legislature has specifically mandated that "the State and any political subdivision, municipal corporation, or other governmental unit or agency, without regard to the number of employees, is deemed an 'employer,' which must not engage in employment related civil rights violations." 775 ILCS 5/2-101(B)(1)(c); *Rozsavolgyi*, 2016 IL App (2nd) 150493, at *¶ 130; 775 ILCS 5/2-102(A). This explicit statutory language providing that municipal "employers" can be held liable for Article II claims may not necessarily hold true for other IHRA Articles because liability under other Articles may not be contingent upon the acts of municipal "employers." See, [Article III - real estate transactions; Article IV - financial credit; Article V - public accommodations; Article VA - elementary, secondary and higher education; and Article VI - "additional civil rights violations," which encompass retaliation, aiding and abetting, coercion, interference, and other civil rights violations based on other enumerated Illinois Acts]; See also, *Blount v. Stroud*, 232 Ill.2d 302, 325-26 (2009), citing 775 ILCS 5/1-103(D) (the term "civil rights violation" under the IHRA has a particular and limited meaning, which shall be limited to only those specific acts as set forth within the IHRA).

Furthermore, given the breadth of the IHRA, it certainly is within the realm of possibility that civil rights claims brought under any number of these IHRA Articles could be "based on contract" or seek relief "other than damages," which are just a few circumstances which would foreclose TIA applicability. See, 745 ILCS 10/2-101. Thus, given the general wording of the Third Certified Question, neither the Second District Appellate Court nor this Court are in a position to make an unqualified statement regarding whether or not TIA applies, in general, to any and all civil rights violations

under these numerous Articles as defined by the IHRA. Clearly, the question posed is simply too overboard and subject to categorical differentiations. See, *Lawndale Restoration Ltd. Partnership v. Acordia of Illinois, Inc.*, 367 Ill.App.3d 24, 27-28 (1st Dist. 2006) (refusing to answer certified question which was general, overbroad, did not materially advance the ultimate termination of the litigation, and had little to do with the vitality of the plaintiff's claims). Thus, the Second District's answer should be vacated as being an improper advisory opinion without practical effect on Plaintiff's claims.

Another important preliminary question that must be answered before tackling the merits of the Third Certified Question is how is the local public entity responsible under the IHRA? Here, specifically within an IHRA Article II "Employment" claim, the only potential defendant can be the employer, City of Aurora. With the exception of claims for sexual harassment, the IHRA Article II statutory language clearly shows that individuals cannot be liable on Article II claims like those brought by Plaintiff within her Complaint at Counts I, II, and IV. Compare 775 ILCS 5/2-102(A) with 775 ILCS 5/2-102(D). Thus, with the exception of sexual harassment, no "public employee" serving in a position involving the determination of policy or the exercise of discretion can be named in a IHRA § 2-102(A) claim and the City cannot rely upon a combination of 745 ILCS 10/2-201 and 745 ILCS 10/2-109 to claim an exemption under TIA. [Compare 745 ILCS 10/2-201 with 775 ILCS 5/2-102(A)]. The reason is because whether a local public entity is immunized by the TIA is dependent upon the acts and omissions of the entity's employees. 745 ILCS 10/2-109. In contrast, liability under § 2-102(A) of the IHRA does not at all depend upon the acts or omissions of individual employees because that section explicitly provides a direct cause of action against the municipal employer itself, which is

the actor committing the unlawful conduct. 775 ILCS 5/2-102(A); 775 ILCS 5/2-101(B)(1)(c); See e.g., *Smith v. Waukegan Park Dist.*, 231 Ill.2d 111, 118 (2008) (it is the employer who 'acts' within the meaning of § 2-109 of the TIA in a discharge action); *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12, 22 (1998) (general agency principles are not implicated when it is the employer, itself, who acts). Thus, the Second District's answer should be vacated as being an improper advisory opinion without practical effect on Plaintiff's claims.

Another important question that must be addressed first is whether the actions for which Defendant is accused of committing would actually qualify it for immunity as a matter of law under certain immunity provisions within the TIA. While the TIA generally makes no distinction between negligent acts and willful and wanton acts, certain immunities are subject to certain exceptions. See, *Johnson v. King*, 55 Ill.App.3d 336, 340 (1st Dist. 1977). Thus, in order to know one way or another whether the TIA can apply to IHRA claims, it must first be ascertained under which section TIA immunity is being asserted. This, in and over itself, evidences the overbreadth of the Second District's answer to this Third Certified Question. For sake of argument, however, in the instant action, Defendant's Third, Fourth, and Fifth affirmative defenses were premised on TIA § 3-108 (failure to supervise), § 2-201 (discretionary acts), and § 2-103 (failure to enforce law). Based on these three TIA sections, it is clear that the nature of Plaintiff's IHRA claims, as a matter of law, do not qualify Defendant for immunity.

For example, TIA § 3-108 explicitly excepts immunity for acts that are willful and wanton. 745 ILCS 10/3-108 (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). Section 10/1-210 of the TIA defines "willful and wanton" conduct as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intention, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1-210; See also, 745 ILCS 10/3-108 (recognizing an exception for willful and wanton conduct). In this regard, this Court has variously defined willful and wanton conduct as that "committed under circumstances exhibiting a reckless disregard for the safety of others;" [*Schneiderman v. Interstate Transit Lines, Inc.*, 394 Ill. 569, 583 (1946)], "conduct [which] tended to show such a gross want of care and regard for the rights of others as to justify the presumption of willfulness;" [*Lake Shore & Michigan Southern Ry. Co. v. Bodemer*, 139 Ill. 596, 607 (1892)], "conduct [which] imports consciousness that an injury may probably result from the act done and a reckless disregard of the consequences;" [*Brown v. Illinois Terminal Co.*, 319 Ill. 326, 331 (1925)], and "conduct where the act was done with actual intention or with a conscious disregard or indifference for the consequences when the known safety of other persons was involved and the knowledge concerning other persons was actual or constructive; [*Myers v. Krajefska*, 8 Ill.2d 322, 328-29 (1956)]. See, *Spring v. Toledo, Peoria & Western R. Co.*, 69 Ill.2d 290, 293-94 (1977) (collecting cases defining "willful and wanton" conduct). Although the question of whether a public employee's actions amounts to willful and wanton conduct is generally a question of fact, a court may hold, as a matter of law, that an action is willful and wanton when no other contrary conclusion

can be drawn. *Mack Industries, Ltd. v. Village of Dolton*, 2015 IL App (1st) 133620, at *¶ 41.

Here, this Court should determine, as a matter of law, that the very nature of Plaintiff's IHRA claims for unlawful discrimination in violation of her constitutional rights, particularly Plaintiff's claims for hostile work environment, and retaliation presumes "willful and wanton" conduct, which forecloses immunity under TIA § 3-108. See e.g., *Smith v. City of Chicago*, 143 F. Supp. 3d 741, 760 (N.D. Ill. 2015) (allegations of African-American and Hispanic male plaintiffs that city police officers conducted stops and frisks without any reasonable factual or legal basis, but rather stopped them based on their race and national origin, that some of those stops results in arrests, and that during stops, officers used threatening language, racial epithets, and/or physical force, sufficient stated that the officers acts willful and wantonly, as required to survive a motion to dismiss state-law tort claims based on official immunity under TIA); *Bohacs v. Reid*, 63 Ill.App.3d 477, 480 (2nd Dist. 1978) (conduct may be willful and wanton without deriving from negligence and a defendant's violation of a plaintiff's constitutional rights can constitute willful and wanton conduct because it is an intentional act); *Murray v. Chi. Youth Ctr.*, 224 Ill.2d 213, 237 (2007) (willful and wanton conduct can involve circumstances where defendant acts with a conscious and deliberate disregard for the rights of others); See, *Green v. Cox*, 2014 WL 7145397, at *2 (S.D. Ill. 2014), citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986) and *Zarnes v. Rhodes*, 64 F.3d 285, 290 (7th Cir. 1995) (acts of negligence do not violate the Constitution, and thus, cannot lead to a civil rights case).

With regards to TIA § 2-201, immunity is foreclosed by ministerial acts. *Trtanj v. City of Granite City*, 379 Ill.App.3d 795, 804 (5th Dist. 2008) citing 745 ILCS 10/2-201 (a local public entity is not immune from liability under the TIA § 2-201 for the performance of ministerial tasks). Ministerial acts are those acts which a person performance on a given state of facts in a prescribed manner, ***in obedience to the mandate of legal authority***, and without reference to the official's discretion as to the propriety of the act. *Snyder v. Curran Tp.*, 167 Ill.2d 466, 474 (1995) (emphasis added). In other words, following the law is a ministerial act. See e.g., *Weiler v. Village of Oak Lawn*, 86 F. Supp. 3d 874, 885 (N.D. Ill. 2015) (Village manager was not engaged in determination of policy, as required to be entitled to immunity from suit under § 2-201 of the TIA, when he proposed to village board of trustees that it eliminate village Department of Business Operations, and therefore, village was not entitled to immunity from suit if manager proposed elimination of Department and reorganization of Department's work responsibilities had a retaliatory motive); See also, *Valentino v. Vill. of S. Chi. Heights*, 575 F.3d 664, 679 (7th Cir. 2009) (mayor who fired an employee after she exposed corrupt practices in the mayor's office was not immune from retaliatory discharge under § 2-201 of the TIA, because the mayor failed to establish that he had made a policy decision). Here, the very nature of Plaintiff's IHRA claims spell out that Defendant was not acting with discretion in the determination of policy when it is alleged to have discriminated and retaliated against her. In fact, it is not cognizable that Defendant could have acted with such discretion because the IHRA specifically mandates that employers, like Defendant, are not to unlawfully discriminate against their

employees. 775 ILCS 5/2-102(A). There is no room for discretion when it comes to IHRA claims. Therefore, TIA § 2-201 immunity cannot apply.

TIA § 2-103 immunity is also foreclosed here as a matter of law because Plaintiff's allegations do not rest on whether Defendant failed to adopt or failed to enforce a law. Rather, Plaintiff's IHRA allegations are premised on whether Defendant intentionally discriminated against Plaintiff under the IHRA, which explicitly requires local public entities not to discriminate. 775 ILCS 5/2-102(A). Thus, given that the nature of IHRA claims is the assertion that a defendant failed to comply with its provisions, it cannot be immune from liability under § 2-103 of the TIA. See, *Vill. of Itasca v. Vill. of Lisle*, 352 Ill.App.3d 847, 859-860 (2nd Dist. 2004) (finding village not immune from liability under § 2-103 where the issue was whether village had complied with the law, not whether it had enforced the law). Thus, in light of all the foregoing, the Third Certified Question was improperly certified and the Second District's overbroad answer to the Third Certified Question must be vacated as being an improper advisory opinion without practical effect on Plaintiff's claims.

II. IF THE MERITS OF THIRD CERTIFIED QUESTION WERE PROPERLY CONSIDERED UNDER SCR 308(A), THE THIRD CERTIFIED QUESTION SHOULD HAVE BEEN ANSWERED IN THE NEGATIVE.

In the alternative, if the Third Certified Question was properly considered on the merits, it should have been answered in the negative for the following reasons:

a) The Third Certified Question should have been answered in the negative because the plain language of the TIA and IHRA clearly show that the TIA does not apply to IHRA claims.

In construing a statute, a court is not at liberty to depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that the legislature

did not express. *Lulay v. Lulay*, 193 Ill.2d 455, 466 (2000); *People v. Larson*, 379 Ill.App.3d 642, 652 (2nd Dist. 2008) (it is not the court's role to rewrite the statute according to preferences); *Harshman v. DePhillips*, 218 Ill.2d 482, 512 (2006) (a court cannot restrict or enlarge the meaning of an unambiguous statute). Additionally, courts cannot construe a statute in such a way as to render it meaningless. *Brucker v. Mercola*, 227 Ill.2d 502, 543 (2007). Therefore, where a statute's words are plain and unambiguous, courts should not search for legislative intent that is not readily apparent. *In re Marriage of O'Neill*, 138 Ill.2d 487, 502 (1990). In other words, a court must interpret and apply statutes in the manner in which they are written and a court must not rewrite statutes to make them consistent with the court's idea of orderliness. *Harshman*, 218 Ill.2d at 512.

The plain language of the IHRA provides that the class of "employers" subject to its provisions include "[t]he State and any political subdivision, municipal corporation, or other governmental unit or agency, without regard to the number of employees." 775 ILCS 5/2-101(B)(1)(c); See also, *Lott v. Governors State Univ.*, 106 Ill.App.3d 851, 855 (1st Dist. 1982) (finding that the State and its agencies are "employers" as defined by § 2-101(B)(1)(c) of the IHRA and that the State, as an employer, is capable of committing a civil rights violation; thereby subjecting itself to the procedures set out in the IHRA); See also, 775 ILCS 5/2-102(E) (public employers are the only "employers" subject to this section, which makes it illegal for a public employer to prohibit an employee from taking time off for the practice of religious beliefs and making up the lost time by working alternative hours); Compare, 775 ILCS 5/2-101(B)(2) (defining that an "employer" does

not include "any religious corporation, association, educational institution, society, or non-profit nursing institution...").

Given that the plain language of the IHRA clearly differentiates what entities are and are not considered "employers," it is clear that municipalities, like the Defendant City, are explicitly subject to the Act. This clear language that municipalities can be liable under the IHRA for civil rights violations is further evidenced by the fact that the legislature recently amended the IHRA to direct the Department of Human Rights to investigate claims brought against municipalities and then notify complainants that they could sue in circuit court. 775 ILCS 5/7A-102(D)(3), (D)(4), (F)(2) (P.A. 95-243, H.B. 1509, eff. Jan. 1, 2008). If the legislature, which is presumed to know the state of the law, intended to retain application of TIA immunity on municipal corporations, it would be illogical to require the Department to now mislead complainants by telling them that they may file suit in circuit court against a local public entity that cannot actually be sued because of the TIA. It is therefore clear that the plain language of the IHRA seeks to hold municipalities liable for civil rights violations under the Act. *Township of Jubilee v. State*, 960 N.E.2d 550 (Ill. 2011) (courts are obliged to construe statutes to avoid absurd, unreasonable, or unjust results).

Additionally, it is also apparent from the plain language of both the TIA and the IHRA that IHRA claims are not barred by the TIA because the TIA requires that all actions be filed within one year of injury, but the IHRA requires that all actions first exhaust its administrative remedies, which statutorily allows the Department 365 days to complete its investigation. Compare, 745 ILCS 10/8-101(a) (no civil action...may be commenced in any court against a local entity...for any injury unless it is commenced

within one year from the date that the injury was received or the cause of action accrued) with 775 ILCS 5/7A-102(G)(1) (the Department has 365 to complete its investigation of a properly filed Charge of civil rights violation); 775 ILCS 5/8-111(c) (all claims for "civil rights violations" must be brought pursuant to the IHRA); *Castaneda v. Human Rights Com.*, 175 Ill. App. 3d 1085, 1086 (1st Dist. 1988) (requiring a plaintiff to first exhaust administrative remedies under the IHRA). In light of this, every IHRA case against a municipality, which is expressly allowed under 775 ILCS 5/2-101(B)(1), would be late and barred by the TIA's statute of limitations because it had to first go through the administrative process. This, too, is an absurd result which would improperly render the IHRA meaningless. Thus, based on the plain and unequivocal language of the statutes, alone, the Third Certified Question must be answered in the negative.

b) The Third Certified Question should have been answered in the negative because numerous persuasive foreign authority have answered the same question in the negative.

The Third Certified Question presents a question of first impression in Illinois. See, *Family Life Church v. City of Elgin*, 561 F. Supp. 2d 978, 992 (N.D. Ill. 2008) (Illinois courts have not yet decided whether a later-enacted Illinois Act, which explicitly applies the Act to State and local governments should be barred by the TIA). In addressing questions of first impression in this State, courts have routinely held that it is proper to consider out-of-state authority addressing the same issue. See, *Hawthorne v. Vill. of Olympia Fields*, 328 Ill.App.3d 301, 316 (1st Dist. 2002) (where there is a lack of Illinois authority, it is proper for this Court to consider out-of-state authority addressing the same issue); *Cooper v. Hinrichs*, 10 Ill.2d 269, 275 (1957) (it is well settled that in the absence of an Illinois determination on a point of law, the courts of this state will look

to other jurisdictions as persuasive authority, for which persuasive authority is entitled to respect).

With regards to the Third Certified Question at issue here, numerous other jurisdictions have answered this very question in the negative. For example, the court in the Minnesota case *Davis v. Hennepin County*, 559 N.W.2d 117 (Minn. Ct. App. 1997), was faced with the exact question presented here, which was whether or not statutory governmental immunity operated to bar claims brought under the Minnesota Human Rights Act, Minn. Stat. § 363A.01, *et. seq.*, to which the *Davis* court answered, "no." *Davis*, 559 N.W.2d at 117. Plaintiff suggests that this Court should similarly answer the Third Certified Question in the same way because the statutory schemes of both the Illinois and Minnesota's anti-discrimination and statutory immunity laws are virtually identical.

More specifically, the Minnesota Human Rights Act, ("MHRA"), was enacted to "secure for persons in this state, freedom from discrimination in employment because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and age." Compare, Minn. Stat. § 363A.02 (a)(1) with 775 ILCS 5/1-102(A). The MHRA legislature further recognized that "such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. § 363A.02 (b). Additionally, the MHRA, like the IHRA, is a remedial statute that should be liberally construed in order to accomplish its purpose for securing for persons, freedom from discrimination. Compare, Minn. Stat. § 363A.02, subd. 1(a), *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 795 (Minn. 2013), with *Arlington Park Race Track Corp. v.*

Human Rights Com'n, 199 Ill.App.3d 698, 703 (1st Dist. 1990) (as a remedial statute, the IHRA should be liberally construed to effectuate its purpose), *Castaneda*, 132 Ill.2d at 318 (in analyzing the IHRA, a court should look to the evil that the legislature sought to remedy or the object it sought to attain in enacting the legislation); 775 ILCS 5/1-102(F) (IHRA purpose to secure and guarantee the rights established by §§ 17, 18, and 19 of Article I of the Illinois Constitution of 1970).

In the same way, Minnesota's statutory immunity and Illinois' Tort Immunity Act also share similar policy considerations. Compare, *Gleason v. Metropolitan Council Transit Operations*, 563 N.W.2d 309, 320 (Minn. Ct. App. 1997) (statutory immunity is narrowly construed because it is the exception to the general rule of governmental liability) with *Barnett v. Zion Park Dist.*, 171 Ill.2d 378, 396 (1996) (the TIA provides exceptions to the general rule of municipal liability and because the Act is in derogation of common law, it must be strictly construed against the public entity involved). Given these vast similarities between the two States' Acts, this Court should rely heavily on the *Davis* opinion and utilize the analysis presented by that Court as sound persuasive authority in determining that the Third Certified Question should be answered in the negative.

In addition to the Minnesota decision, the Tennessee Supreme Court has also tackled this exact question head on in the case *Sneed v. The City of Red Bank, Tennessee*, 459 S.W.3d 17, 21 (Sup. Ct. Tenn. 2014). The specific question presented before that Court was whether the Governmental Tort Liability Act, ("GTLA"), T.C.A. § 29-20-101, *et. seq.*, applied to claims brought against a municipality pursuant to the Tennessee Human Rights Act, ("THRA"), T.C.A. § 4-21-101, *et. seq*. The plaintiff there sued his

municipal employer, the City of Red Bank, under the THRA asserting a claim for age discrimination. *Id.* at 17. Interlocutory appeal was had pursuant to Tennessee Rule of Appellate Procedure 9—which is similar to Illinois Supreme Court Rule 308(a)—and the Tennessee Court of Appeals found that the GTLA applies to THRA claims because the THRA applies to both governmental and non-governmental entities. *Id.* at 22. The Tennessee Supreme Court, however, reversed the Appellate Court's holding and found that the THRA removed governmental immunity and authorized THRA claims against governmental entities because the THRA was a separate statute creating its own separate remedy against governmental entities, which thereby waived statutory immunity under the GTLA. *Id.* at 27, citing *Eason v. Memphis Light, Gas & Water Div.*, 866 S.W.2d 952, 955 (App. Ct. Tenn. 1993) (inclusion of state or political/civil subdivision in THRA definition of "employer" evidences a clear legislative intent to place governmental employers in the same standing as private employers).

The Court went on further to state that "the definition [of 'employer' within the THRA] evinces an unmistakable legislative intent to remove whatever immunity a governmental entity may have had under the GTLA." *Id.* at 27, citing *Rooks v. Chattanooga Elec. Power Bd.*, 738 F. Supp. 1163 (E.D. Tenn. 1990) and *Johnson v. South Cent. Human Resource Agency*, 926 S.W. 2d 951, 953 (Ct. App. Tenn. 1996). Additionally, the Tennessee Supreme Court further reasoned that a basic statutory construction of both the GTLA and THRA evidences that the GTLA cannot control THRA claims because the proof required to establish a tort claim is vastly different from the proof required to establish a *prima facie* case of discrimination. *Id.* at 28 (collecting cases comparing *prima facie* elements of tort versus discrimination claims). The same is

analysis holds true here in Illinois. As stated above, the plain language of the IHRA clearly and explicitly includes municipal entities, like the City, within its definition of "employer" subject to the Act.

Like the Court in *Sneed* determined, this evidences an unmistakable legislative intent here to remove whatever immunity the City may have had under the TIA. This is further illustrated by the fact that the Illinois Legislature is presumed to know the state of the law when it enacts new statutes and based on the reasoning in *Sneed*, the fact that the Illinois Legislature enacted the IHRA approximately 15 years after enacting the TIA and included within its definition of "employer," governmental entities, clearly shows that the Legislature explicitly intended for governmental employers to be placed in the same standing as private employers subject to the IHRA. *State v. Mikusch*, 138 Ill.2d 242, 254 (1990). What's more is that the Illinois Legislature, recently in 2015, amended and enhanced the IHRA's list of exemptions at 775 ILCS 5/2-104, and did not exempt claims for damages against local public entities. See P.A. 99-152, H.B. 3122. Thus, given that courts have been holding local public entities liable for decades under the IHRA, it is clear that the Legislature did not intend to limit local public entities' exposure to all relief available under the IHRA by virtue of any immunity or exemption for claims for damages. *Williams v. Crickman*, 81 Ill.2d 105, 111 (1980) (the Legislature is presumed to know the construction that a statue has been given, and by reenactment is assumed to have intended for the new statute to have the same effect); *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill.2d 1, 21 (1997) (when the Legislature amends a statute, but does not alter a previous interpretation by this Court, we assume that the Legislature intended for the amendment to have the same interpretation previously given); *Charles v.*

Seigfried, 165 Ill.2d 482, 492 (1995) (where the Legislature has acquiesced in a judicial construction of the law over a substantial period of time, the court's construction becomes part of the fabric of the law, and a departure from that construction by the court would be tantamount to an amendment of the statute itself and the power to make such amendments does not lie with the courts).

Several other states have similarly answered this question in the negative. For example, in the Massachusetts case of *Bain v. City of Springfield*, 424 Mass. 758, 763 (1997), the Massachusetts Supreme Court determined that given the plain language of the Massachusetts antidiscrimination law and its inclusion of governmental entities within its definition of "employer," (G.L. c. 151B, § 1(1) & (5)), government employers are treated exactly the same under G.L. c. 151B as are private employers and the Massachusetts Tort Claims Act, G.L. c. 258 § 4, does not apply to claims brought under the antidiscrimination statute. *Id.*; See also, *Mission Consol. Independent Sch. Dist. v. Garcia*, 253 S.W. 3d 653, 655 (Sup. Ct. Tex. 2008), (collecting cases for the proposition that Texas Commission on Human Rights Act, ("TCHRA"), claims are not barred by Texas Tort Claims Act because TCHRA's definition of "employer" includes "a county, municipality, state agency, or state instrumentality," which evidences that the legislature consented to suits against the government under the TCHRA); *Luboyeski v. Hill*, 117 N.M. 380, 383 (Sup. Ct. New. Mex. 1994) (finding New Mexico Tort Claims Act did not override or supersede plaintiff's sexual harassment claim brought under New Mexico Human Rights Act because Human Rights Act included within its definition of "person" the "state and all of its political subdivisions").

California has also rendered its opinion on this issue in the case of *Snipes v. City of Bakersfield*, 145 Cal. App. 3d 864 (5th Dist. 1983), disapproved on other grounds by *State of California v. Superior Court*, 105 Cal. App. 4th 1008 (2003). In that case, the plaintiff brought suit under California's Fair Employment and Housing Act, ("FEHA"), Gov. Code § 12900, *et. seq. Snipes*, 145 Cal. App. 3d at 861. The question presented was whether claims under FEHA were subject to the claim-presentation requirements of California's Tort Claims Act, Gov. Code § 810, *et. seq. Id.* at 865. The court found that because the FEHA encompassed a comprehensive administrative scheme for combating employment discrimination within specific time limitations, and because the definition of "employer" under FEHA included "the state or any political or civil subdivision thereof and cities," these factors indicated that the legislature intended to exempt actions under FEHA from the general Tort Claims Act requirements. *Id.* The Court further held that this was true despite the fact that the Tort Claims Act did not except FEHA claims within its list of specific exceptions under § 905. *Id.* at 868-869. The Court further recognized the merits of the plaintiff's argument that the Tort Claims Act could not apply because FEHA claims do not seek "money or damages," as contemplated by the Tort Claims Act. *Id.* at 869.

In the same way, Kansas has also similarly held that statutory immunity does not operate to bar civil rights claims. In the case *State ex. rel. Franklin v. City of Topeka*, 266 Kan. 385, 387 (Sup. Ct. Kan. 1998), the Kansas Supreme Court was tasked with determining whether the plaintiff's claim for race discrimination under Kansas Act Against Discrimination, ("KAAD"), K.S.A. [44-1001], *et. seq.*, was barred by the Kansas Tort Claims Act, K.S.A. [75-6101], *et. seq.* The Court found that the plaintiff's race

discrimination claim against her City employer was not barred because the definition of "employer" within the KAAD expressly made the State liable for acts of discrimination in its employment practices. *Id.* at 388. The Court went on further to state that even though employment discrimination was not one of the exceptions expressly identified in the Tort Claims Act, the KAAD nonetheless imposed upon the State a legal duty to refrain from employment discrimination and that the discretionary function exception with the Tort Claims Act was not applicable where there was a legal duty. *Id.* at 391.

Like so many other states, Oklahoma is no different. In the case *Duncan v. City of Nichols Hills*, 913 P.2d 1303, 1304 (Sup. Ct. Okla. 1996), the Oklahoma Supreme Court held that claims brought under Oklahoma's antidiscrimination statute, 25 O.S.1991, § 1901, including those claims for handicap discrimination in the context of employment, are not subject to the notice provisions of the Oklahoma Governmental Tort Claims Act, ("GTCA"), 51 O.S.1991, § 151, *et. seq.* There, the court was faced with the question of "whether a claimant who files a civil action for employment discrimination by reason of physical handicap, under 25 O.S.1991, § 1901, must comply with the notice of claim provisions contained in the GTCA, 51 O.S.1991, § 157." *Id.* at 1305. That court found that the two statutes were irreconcilable. *Id.* The court also noted that the definition of "person" under the antidiscrimination statute included the "state, or any governmental entity or agency." *Id.* at 1308, citing 25 O.S.1991, § 1201(5). The court further reasoned that the GTCA could not apply to actions brought under the antidiscrimination laws because the State's legislature was bound to provide protection equal to or greater than the protection provided by the federal civil rights provisions. *Id.* relying on *Felder v. Casey*, 487 U.S. 131 (1988) (condition the right to recover for civil rights violations upon

compliance with state rules designed to minimize government liability are inconsistent with the remedial objectives of the federal civil rights law). Therefore, the later enacted antidiscrimination statute's limitations provisions were controlling over plaintiff's claims against a public entity employer. *Id.* at 1310.

Additionally, not only are these numerous analogous out-of-state decisions addressing the same issue entitled to respect, but so are the decisions of the administrative authorities charged with administering the specific law. For example, in *In re Matter of Leslie Smith and Cook County Dep. of Corr.*, Charge No. 1982 CF 1564, 1985 ILHUM LEXIS 2, at 5-6 (1985), the Commission found that the IHRA specifically states that municipal corporations are liable for any violation of the Act and, accordingly, the TIA does not apply in an IHRA case. In fact, in its decision, the Second District in answering the first two certified questions, relied heavily on the decisions of the Illinois Human Rights Commission and the Department's *amicus* brief. These decisions, as the Second District stated, are entitled to "significant weight." *Rozsavolgyi*, 2016 IL App (2nd) 150493, at *¶ 45. Thus, based on all the foregoing and as contemplated by so many other jurisdictions, the plain language of the IHRA, which includes within its definition of "employer," municipal entities like the City, clearly evidences that TIA immunity is waived when it comes to IHRA claims. *Township of Jubilee*, 960 N.E.2d at 558 (courts are obliged to construe statutes to avoid absurd, unreasonable, or unjust results).

Thus, it is readily apparent that the nationwide rule of law on this issue is that municipal statutory immunity cannot operate to bar constitutionally derived statutory state law civil rights claims. This is understandably so given that common sense necessarily leads to the conclusion that the government should be held accountable for

unlawfully discriminating against its citizens because how uniquely amiss it would be if the government, itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for injury it has begotten. *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651 (1980) (finding that municipalities have no immunity from liability under the Civil Rights Act flowing from its constitutional violations); See also, U.S. Const. amend. XIV, § 1 (forbidding states from denying any person within its jurisdiction the equal protection of the laws); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (the equal protection clause keeps governmental decision makers from treating differently persons who are in all relevant respects alike). Therefore, there is no logical reason why Illinois should deviate from this well-settled nationwide holding. Therefore, the Third Certified Question should be answered in the negative.

c) The Third Certified Question should have been answered in the negative because if the TIA applies to IHRA claims, the TIA is unconstitutional.

As it relates to the constitutional protections embodied within the IHRA, the Second District's prior precedence in *Streeter v. County of Winnebago*, 44 Ill.App.3d 392, 394-95 (2nd Dist. 1976), *Firestone v. Fritz*, 119 Ill.App.3d 685, 689 (2nd Dist. 1983), and *People ex rel. Birkett v. City of Chicago*, 325 Ill.App.3d 196, 202 (2nd Dist. 2001), which held that the Tort Immunity Act does not bar actions for constitutional violations, should be upheld because rejecting such precedence renders the TIA unconstitutional in the face of IHRA constitutional claims. In other words, the rejection of the Second District's prior precedence inadvertently allows the TIA unfettered access to infringe

upon those fundamental constitutional rights embodied in the IHRA. *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill.App.3d 878, 880 (1st Dist. 1983) (the IHRA is the procedural vehicle for enforcing the constitutional right to be free from unlawful discrimination); *Rozsavolgyi*, 2016 IL App (2nd) 150493, at *¶ 111 (claims under the Human Rights Act are constitutionally grounded and/or derived); *Folbert v. Dep. of Human Rights*, 303 Ill.App.3d 13, 21 (1st Dist. 1999) (a fundamental constitutional right involves a suspect or quasi-suspect class, such as those based on race, sex, age, or any classification that infringes on fundamental constitutional rights). Allowing the TIA broad reign over IHRA claims renders the TIA unconstitutional because the TIA, more specifically TIA § 1-204 and its inclusion of constitutionally based claims within its definition of "injury," cannot survive strict scrutiny in the face of the IHRA's constitutional protections. *People v. R.L.*, 158 Ill.2d 432, 438 (1994) (a law will not survive strict scrutiny unless it is necessary to promote and is narrowly tailored to serve a compelling state interest). While there is no exact definition of a "compelling state interest," it is one of the highest order and is only found in rare cases. *Listecki v. Official Comm. Of Unsecured Creditors*, 780 F.3d 731, 745 (7th Cir. 2015).

The law in this State is well-settled that the IHRA embodies a strong public policy to eradicate unlawful discrimination based on a fundamental constitutional right. See, *Arlington Park Race Track Corp.*, 199 Ill.App.3d at 703; *Castaneda v. Illinois Human Rights Com'n*, 132 Ill.2d 304, 318 (1989). Given the IHRA's strong constitutional interests in protecting fundamental constitutional rights, the question of whether IHRA constitutional claims are TIA § 1-204 immunized "injuries" necessarily hinges on whether the TIA's interests are compelling enough to overcome the fundamental

constitutional rights embodied in the IHRA. In this regard, the Illinois Supreme Court in *Sylvester v. Chi. Park Dist.*, 179 Ill.2d 500, 508-509 (1997), which discussed the purpose of the 1986 amendments to the TIA, recognized that prior to 1986, the legislature was concerned about local public entities' difficulties in being able to afford liability insurance coverage. *Id.* Thus, to make liability insurance coverage more affordable to local public entities, the legislature expanded the immunities prescribed under the TIA, which incorporated the inclusion of constitutional claims arising under both state and federal law under § 1-204. *Id.*; P.A. 84-1431.

Keeping in mind that the TIA's purpose is to alleviate financial burdens on governmental entities, (*Bloomingdale v. C.D.G. Enters.*, 196 Ill. 2d 484, 489-90 (2001) (by enacting the TIA, the legislature sought to prevent the diversion of public funds from their intended purpose to the payment of damage claims)), the Supreme Court of the United States of America has explicitly held that legislative enactments, whose purpose is to alleviate financial burdens, is not a compelling interest to overcome a fundamental right to be free from unlawful discrimination. See, *Sherbert v. Verner*, 374 U.S. 398, 406-408 (1963) (interest in avoiding financial burden upon Unemployment Compensation Trust Fund is not compelling to overcome fundamental right to be free from religious discrimination protected under the South Carolina Constitution). Further, as the *Davis* court so aptly observed, the anti-discrimination statute and statutory immunity cannot be reconciled because it arbitrarily distinguishes between the rights of people discriminated against by the government versus those subject to discrimination in the private sector, which offends the broad prohibition against arbitrary classifications embodied in the discrimination statute. *Davis*, 559 N.W.2d at 122; See also, *Best v. Taylor Mach. Works*,

179 Ill.2d 367, 396 (1997) (the hallmark of an unconstitutional classification is its arbitrary application to similarly situated individuals without adequate justification or connection to the purpose of the statute).

Additionally, as Hon. Justice McLaren correctly stated in his dissent, the Supreme Court in *Bloomingdale v. C.D.G. Enters.*, 196 Ill. 2d 484 (Ill. 2001), did not explicitly hold that the TIA applies to *all* non-tort actions against a government. *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 129, citing *Raintree Homes*, 209 Ill.2d 248, 259 (2004). This is especially true here because the instant action presents a clear example of why TIA "injuries" cannot include infringements upon fundamental constitutional rights. Thus, this Court should expressly limit TIA § 1-204's definition of "injury" to not include infringements upon those fundamental constitutional rights protected by the IHRA. This Court should also uphold the Second District's prior precedence confirming the outer limits of the TIA's reach as it concerns IHRA protected fundamental constitutional rights, and answer the Third Certified Question in the negative. Finding in this way reconciles the conflict between the TIA and IHRA produces the most harmonious result so that both statutes are given effect and neither are rendered unconstitutional. See, *Wade v. City of North Chicago Police Pension Bd.*, 226 Ill.2d 485, 510 (2007) (courts have a duty to construe enactments by the General Assembly so as to uphold their validity if there is a reasonable way to do so); *Durica v. Commonwealth Edison Co.*, 2015 IL App (1st) 140076, at *¶ 32, citing *Land v. Bd. of Educ. of the City of Chicago*, 202 Ill.2d 414, 422 (2002) (recognizing the principle of statutory construction that all provisions are to be given effect if reasonably possible, the court will interpret a statute in a manner that reconciles any apparent conflicts).

d) The Third Certified Question should have been answered in the negative because the TIA cannot apply to contract actions.

Hon. Justice McLaren sets forth within his dissent that Plaintiff's IHRA claims essentially arise out of her contractual employment relationship with the City; and therefore, her IHRA claims constitute a breach of contract action excluded from the TIA's scope. See, *Rozsavolgyi*, 2016 IL App (2d) 150493, at *¶ 130. Justice McLaren's argument finds support in the fact that it is well-settled in this State that the existing laws and statutes of this State become implied terms of all Illinois contracts, as a matter of law. See, *Mitchell Buick & Oldsmobile Sales v. McHenry Sav. Bank*, 235 Ill.App.3d 978, 985 (2nd Dist. 1992); *In re Estate of Dierkes*, 191 Ill. 2d 326, 337 (2000). Thus, the statutory provisions of the IHRA and Plaintiff's right to be free from unlawful discrimination and unequal terms, privileges, and conditions of employment are implicitly incorporated into her employment contract. See, *McInerney v. Charter Golf*, 176 Ill. 2d 482, 487 (1997) (employment relationship is governed by the law of contract, and existence of an employment contract, express or implied, is essential to employer-employee relationship). Given that Plaintiff's right to be free from unlawful discrimination is based, in part, on her employment contract implied in law, the law is clear that the TIA does not apply to actions "**based on** contract." 745 ILCS 10/2-101(a) (emphasis added); See e.g., *American Ambassador Cas. Co. v. City of Chicago*, 205 Ill.App.3d 879, 886 (1st Dist. 1990) (finding TIA did not immunize city from liability for theft of vehicle from police impound lot because police department was constructive bailee of automobile); *Woodfield Lanes, Inc. v. Village of Schaumburg*, 168 Ill.App.3d 763, 769 (1st Dist. 1988) (finding TIA inapplicable to breach of contract implied in law action where Village's

legal duties were embodied by local ordinance and the failure of the Village to meet its legal duties pursuant to the ordinance renders its enrichment unjust); *Aikens v. Morris*, 145 Ill.2d 273, 278 (1991) (the TIA is in derogation of the common law and must be strictly construed against the local public entity). Therefore, given that the TIA explicitly carves out an exception for contract-based actions and given that case law establishes that even employee-at-will employment relationships are founded on contract, which implicitly incorporates Illinois statutory law, the Third Certified Question should be answered in the negative.

e) The Third Certified Question should have been answered in the negative because the TIA cannot apply to IHRA discharge claims.

In *Smith v. Waukegan Park Dist.*, 231 Ill.2d 111, 118 (2008), the Supreme Court held that §§ 2-109 and 2-201 of the TIA did not provide immunity for a retaliatory discharge claim based upon the exercise of workers' compensation rights. More specifically, the *Smith* court plainly held that the TIA could not apply because it was the employer, directly, that was the actor in a discharge case. *Smith*, at 118. The Second District Appellate Court decision in *Collins v. Bartlett Part Dist.*, 2013 IL App (2d) 130006, expanded the *Smith* holding in the context of common law retaliatory discharge actions. More specifically, the *Collins* court found that there was no difference between a common law retaliatory discharge claim and a retaliation claim under the Illinois Workers' Compensation Act. *Id.* at ¶ 64. In a similar case, albeit a Rule 23 decision, the Second District, relying on the reasoning in *Smith*, found that the TIA similarly does not operate to bar other statutory-based retaliatory discharge actions, such as those brought under the Illinois Whistleblower Act. *Nason v. Rockford Park Dist.*, 2014 IL App (2d) 130364-U, at ¶ 33. The rulings in *Smith*, *Collins* and *Nason* show that regardless of the

context in which employment discharge actions arise, whether based on common law or statute, the employer is always the actor and therefore, cannot assert immunity under TIA. Thus, there is no reason why discharge claims under IHRA § 2-102(A), where the employer is the only actor, should be barred by the TIA. As such, Plaintiff's claims under the IHRA cannot be barred by the TIA because only the employer is responsible and there is no applicable TIA exemption. Therefore, the Third Certified Question should be answered in the negative and/or vacated as an improper advisory opinion without practical effect on Plaintiff's claims.

f) The Third Certified Question must be vacated because the IHRA provides a comprehensive scheme for equitable and make-whole relief.

All the relief available under the IHRA, 775 ILCS 5/8A-104, is considered "equitable relief," thereby making the Second District's answer that Plaintiff cannot recover "damages" moot. See, 775 ILCS 5/8A-104(J) (IHRA remedies include awarding "make-whole" relief); *Watson v. Potter*, 2002 U.S. Dist. LEXIS 16743, 2002 WL 31006129, at *13 (N.D. Ill. 2002) (equitable relief is also referred to as make-whole relief); *In re Consolidated Objections to Tax Levies of School Dist. No. 205*, 193 Ill.2d 490, 500 (2000) (the TIA does not bar claims for equitable relief); *Foster v. Costello*, 2014 U.S. Dist. LEXIS 64189, 2014 WL 1876247, at *39 (N.D. Ill. 2014) (finding plaintiff's claim for reinstatement could proceed, which is consistent with the TIA's allowance for equitable remedies); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) (finding that both back pay and front pay are equitable remedies, which can only be awarded after a victim of discrimination has been actually or constructively discharged); *Rogers v. Loether*, 467 F.2d 1110, 1121 (7th Cir. 1972) (finding back pay is

restitution, which is an equitable remedy because the retention of wages, which would have been paid but for the statutory violation is considered "ill-gotten gains" and ultimate payment restores the situation to that which would have existed had the statute not been violated); *Raintree Homes, Inc.*, 209 Ill.2d at 258 (finding claims for restitution are excluded from the TIA by the first sentence of § 2-101).

Further, as it relates to the IHRA's remedies for pain and suffering and emotional distress, these remedies have been interpreted as being noneconomic restitution within the provision of "actual damages" under 775 ILCS 5/8A-104(B). See, *Village of Bellwood Board of Fire & Police Commissioners v. Human Rights Commission*, 184 Ill.App.3d 339 (1st Dist. 1989); See also, *Gambino v. Blvd. Mortg. Corp.*, 398 Ill.App.3d 21, 61 (1st Dist. 2009) (compensatory damages are those which are awarded to a person as compensation, indemnity or restitution for a wrong or injury sustained by him). If it is clear that the recovery of pecuniary losses will not compensate the complainant for all "actual" damages, the IHRC will award an amount of money that is adequate to make up for the humiliation and embarrassment caused by the civil rights violation. *In re Smith & Cook County Sheriff's Office*, Charge No. 1982CF1564, 1985 ILHUM LEXIS 2 (Oct. 31, 1985). Additionally, it should be clarified and confirmed that attorneys' fees are explicitly excluded under the TIA. See, 745 ILCS 10/9-101(d); See, *Yang v. City of Chi.*, 195 Ill.2d 96, 105 (2001) (attorneys' fees are not the amount of money founded on an injury that was proximately caused by a wrongful act or omission of a local public entity and § 9-101's definition of "tort judgment" does not include attorneys' fees). Therefore, the Third Certified Question must be vacated.

CONCLUSION

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

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

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

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

Respectfully submitted,

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One of Plaintiff's Attorneys

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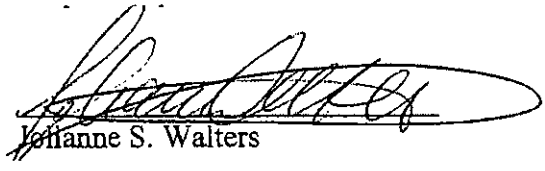
CERTIFICATION OF COMPLIANCE

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, and the certificate of service, is 40 pages.



Joanne S. Walters

PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies as true that he served the forgoing Response Brief of Plaintiff-Appellee Patricia Rozsavolgyi upon:

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

by electronic service with return receipt requested and by placing one (1) copies of the same into an envelope correctly addressed as aforesaid and bearing sufficient postage prepaid and depositing same in the U.S. Mail in Carol Stream, Illinois, before 5:00 p.m. on August 19, 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,	)	Second District,
	)	No. 15-0493
v.	)	
	)	There Heard on Appeal
CITY OF AURORA,	)	from The Circuit Court for the
	)	Sixteenth Judicial Circuit,
Defendant-Appellee.	)	Kane County, Illinois,
	)	No. 2014 L 49
	)	
	)	Hon. Thomas Mueller,
	)	Judge Presiding.

TABLE OF CONTENTS TO APPENDIX

Compare:

IHRA – 775 ILCS 5/1-102(F) – Declaration of Policy. "Implementation of Constitutional Guarantees.

It is the public policy of this State: To secure and guarantee the rights established by Sections 17, 18 and 19 of Article I of the Illinois Constitution of 1970.

With:

TIA – 745 ILCS 10/1-204 – "Injury"

"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.

TIA – 745 ILCS 10/8-101(c) - Limitation

(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.

Also compare:

IHRA – 775 ILCS 5/2-101(B)(1)(c) – Definitions. "Employer."

(1) "Employer" includes:

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

IHRA – 775 ILCS 5/2-101(B)(2) – Definitions. "Employer."

(2) "Employer" does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who

rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.

With:

TIA – 745 ILCS 10/1-206 – Local Public Entity.

"Local public entity" includes a county, township, municipality, municipal corporation, school district, school board, educational service region, regional board of school trustees, trustees of schools of townships, treasurers of schools of townships, community college district, community college board, forest preserve district, park district, fire protection district, sanitary district, museum district, emergency telephone system board, and all other local governmental bodies. "Local public entity" also includes library systems and any intergovernmental agency or similar entity formed pursuant to the Constitution of the State of Illinois or the Intergovernmental Cooperation Act[1] as well as any not-for-profit corporation organized for the purpose of conducting public business. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.

Also Compare:

IHRA – 775 ILCS 5/2-102(A) - Civil Rights Violations-Employment

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.

With:

TIA – 745 ILCS 10/2-109 – Acts or Omissions

A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.

and

TIA – 745 ILCS 10/2-202 – Execution or Enforcement of Law

A public employee is not liable for his act or omission in the execution or enforcement of any law unless such act or omission constitutes willful and wanton conduct

and

TIA – 745 ILCS 10/2-201 – Determination of Policy or Exercise of Discretion

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

Also compare:

IHRA – 775 ILCS 5/7A-102(G)(1) - Procedures.

(G) Time Limit. (1) When a charge of a civil rights violation has been properly filed, the Department, within 365 days thereof or within any extension of that period

agreed to in writing by all parties, shall issue its report as required by subparagraph (D). Any such report shall be duly served upon both the complainant and the respondent

With:

TIA – 745 ILCS 10/8-101– Limitation

(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.

Also compare:

IHRA – 775 ILCS 5/8A-104 – Relief; Penalties.

Upon finding a civil rights violation, a hearing officer may recommend and the Commission or any three-member panel thereof may provide for any relief or penalty identified in this Section, separately or in combination, by entering an order directing the respondent to:

(A) Cease and Desist Order. Cease and desist from any violation of this Act.

(B) Actual Damages. Pay actual damages, as reasonably determined by the Commission, for injury or loss suffered by the complainant.

(C) Hiring; Reinstatement; Promotion; Backpay; Fringe Benefits. Hire, reinstate or upgrade the complainant with or without back pay or provide such fringe benefits as the complainant may have been denied.

(D) Restoration of Membership; Admission To Programs. Admit or restore the complainant to labor organization membership, to a guidance program, apprenticeship training program, on the job training program, or other occupational training or retraining program.

(E) Public Accommodations. Admit the complainant to a public accommodation.

(F) Services. Extend to the complainant the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent.

(G) Attorneys Fees; Costs. Pay to the complainant all or a portion of the costs of maintaining the action, including reasonable attorney fees and expert witness fees incurred in maintaining this action before the Department, the Commission and in

any judicial review and judicial enforcement proceedings. Provided, however, that no award of attorney fees or costs shall be made pursuant to this amendatory Act of 1987 with respect to any charge for which the complaint before the Commission was filed prior to December 1, 1987. With respect to all charges for which complaints were filed with the Commission prior to December 1, 1987, attorney fees and costs shall be awarded pursuant to the terms of this subsection as it existed prior to revision by this amendatory Act of 1987.

(H) Compliance Report. Report as to the manner of compliance.

(I) Posting of Notices. Post notices in a conspicuous place which the Commission may publish or cause to be published setting forth requirements for compliance with this Act or other relevant information which the Commission determines necessary to explain this Act.

(J) Make Complainant Whole. Take such action as may be necessary to make the individual complainant whole, including, but not limited to, awards of interest on the complainant's actual damages and backpay from the date of the civil rights violation. Provided, however, that no award of prejudgment interest shall be made pursuant to this amendatory Act of 1987 with respect to any charge in which the complaint before the Commission was filed prior to December 1, 1987. With respect to all charges for which complaints were filed with the Commission prior to December 1, 1987, make whole relief shall be awarded pursuant to this subsection as it existed prior to revision by this amendatory Act of 1987.

With:

TIA – 745 ILCS 10/2-101 – Construction/Other Relief.

Nothing in this Act affects the right to obtain relief other than damages against a local public entity or public employee.

TIA – 745 ILCS 10/1-210 – "Willful and Wanton Conduct."

"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.

TIA – 745 ILCS 10/2-103 – Adoption or Failure to Adopt Enactment; Failure to Enforce Law

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.

TIA – 745 ILCS 10/3-108 – Willful and Wanton Conduct Concerning Supervision of an Activity or Use of Property

(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.

IHRA – 775 ILCS 5/8-111(c) – Court Proceedings.

(C) Judicial Enforcement.

(1) When the Commission, at the instance of the Department or an aggrieved party, concludes that any person has violated a valid order of the Commission issued pursuant to this Act, and the violation and its effects are not promptly corrected, the Commission, through a panel of 3 members, shall order the Department to commence an action in the name of the People of the State of Illinois by complaint, alleging the violation, attaching a copy of the order of the Commission and praying for the issuance of an order directing such person, his or her or its officers, agents, servants, successors and assigns to comply with the order of the Commission.

(2) An aggrieved party may file a complaint for enforcement of a valid order of the Commission directly in Circuit Court.

(3) Upon the commencement of an action filed under paragraphs (1) or (2) of subsection (B) of this Section the court shall have jurisdiction over the proceedings and power to grant or refuse, in whole or in part, the relief sought or impose such other remedy as the court may deem proper.

(4) The court may stay an order of the Commission in accordance with the applicable Supreme Court rules, pending disposition of the proceedings.

(5) The court may punish for any violation of its order as in the case of civil contempt.

(6) Venue. Proceedings for judicial enforcement of a Commission order shall be commenced in the circuit court in the county wherein the civil rights violation which is the subject of the Commission's order was committed.

2016 IL App (2d) 150493
No. 2-15-0493
Opinion filed April 27, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PATRICIA ROZSAVOLGYI,	)	Appeal from the Circuit Court
	)	of Kane County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14-L-49
	)	
THE CITY OF AURORA,	)	Honorable
	)	Thomas E. Mueller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court, with opinion.
Justice Zenoff concurred in the judgment and opinion.
Justice McLaren concurred in part and dissented in part, with opinion.

OPINION

¶ 1 Plaintiff, Patricia Rozsavolgyi, has a medical history of unipolar depression, anxiety, panic attacks, and partial hearing loss. Her employer of 20 years, the City of Aurora (the City), terminated plaintiff's employment after she made a statement to a coworker in which she used the word "idiots." Plaintiff sued the City, alleging violations of the Illinois Human Rights Act (Human Rights Act) (775 ILCS 5/1-101 *et seq.* (West 2014)), including refusal to accommodate, disparate treatment, retaliation, and hostile work environment. Following several interlocutory trial court orders, the City petitioned for leave to appeal under Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) (permissive interlocutory appeals), asking that we answer the following certified questions:

(1) Does section 2-102(A) of the Human Rights Act prohibit "disability harassment" as a civil rights violation? Alternatively, do counts I (refusal to accommodate) and IV (hostile work environment) of plaintiff's complaint state cognizable civil rights violations under that section?

(2) If section 2-102(A) permits a cause of action for disability harassment, does the provision in section 2-102(D) of the 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" (775 ILCS 5/2-102(D) (West 2014)) similarly apply to a cause of action for disability harassment brought under section 2-102(A)? If yes, does the employee or the employer bear the burden of alleging and proving that the employer: (a) is 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* [1] affirmative defense to a hostile-work-environment harassment claim brought under section 2-102(A)?

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[1] With respect to claims brought pursuant to Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e *et seq.* (2012)), where the harassing employee is a supervisor, but the harassment does not result in tangible employment action, an employer may raise the *Faragher-Ellerth* affirmative defense that: (1) it 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 *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

(3) Does the Local Government and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/1-101 *et seq.* (West 2014)) apply to a civil action under the Human Rights Act where the plaintiff seeks damages, reasonable attorney fees, and costs? If yes, should this court modify, reject, or overrule its holdings, in *People ex. rel. Birkett v. City of Chicago*, 325 Ill. App. 3d 196, 202 (2001), *Firestone v. Fritz*, 119 Ill. App. 3d 685, 689 (1983), and *Streeter v. County of Winnebago*, 44 Ill. App. 3d 392, 394-95 (1976), that "the Tort Immunity Act applies only to tort actions and does not bar actions for constitutional violations" (*Birkett*, 325 Ill. App. 3d at 202)?

¶ 2 We granted the petition, and, for the reasons set forth herein, we answer the certified questions as follows: (1) section 2-102(A) of the Human Rights Act 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 Human Rights Act 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 Tort Immunity Act applies to actions under the Human Rights Act; the City thus 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 Tort Immunity Act applies only to tort actions and does not apply to constitutional claims and, thus, we do not follow that precedent.

¶ 3 I. BACKGROUND

¶ 4 A. Plaintiff's Complaint

¶ 5 Plaintiff sued the City on January 22, 2014. She had worked for the City from 1992 to July 13, 2012, most recently as a property maintenance compliance officer (reporting to Dave

Dykstra and Mark Anderson). Plaintiff alleged that she had a medical history of unipolar depression, anxiety, panic attacks, and partial hearing loss, which together constituted a "disability" under section 1-103(I) of the Human Rights Act (775 ILCS 5/1-103(I) (West 2014)). Her conditions did not prevent her from performing her job duties. However, when she was provoked, she was particularly likely to react strongly, though never in a physical manner. Plaintiff would speak loudly or in a fast-paced manner, especially when provoked or agitated.

¶ 6 Plaintiff further alleged that she notified the City of her medical conditions, asking it to take them into consideration in her requests and attempts to maintain a reasonable and professional work environment. The City "failed and refused to take any action." According to plaintiff, her coworkers engaged in an intentional pattern and practice to "agitate, embarrass, humiliate, degrade, harass, discriminate and provoke" her, creating a hostile and offensive work environment. This conduct included name-calling (*e.g.*, cuckoo, Shutter's Island, prostitute, bitch, ignorant, nuts, crazy, weird, whacko), notes, spitting on her car window, and creating false rumors. Plaintiff alleged that this was a purposeful effort to cause her emotional distress and agitate her. She also alleged that certain staff and coworkers falsely claimed that plaintiff was a physical threat even though she was not, and never had been, violent.

¶ 7 Plaintiff alleged that she repeatedly complained to the City (specifically, to Dykstra and Anderson) and her union representative, but they "failed and refused to take any action" to stop the behavior. As a result, plaintiff sustained further emotional harm and aggravation of her medical conditions. Also, the behavior impacted her ability to concentrate at work. She suffered from depression, including fatigue, sadness, helplessness, irritability, restlessness, anxiety, sleep disorders, and body aches.

¶ 8 The City asked the union president to guarantee that plaintiff would not engage in physical violence in the workplace and the union responded that plaintiff's counselors and doctors did not deem her to be a physical threat but that the union could never guarantee that anyone would never commit an act of physical violence in the workplace.

¶ 9 As of July 2012, a counselor had diagnosed plaintiff as being in the throes of depressive and panic disorders. On July 3, 2012, plaintiff made a statement to a coworker, using the word "idiots." The City then terminated her employment. Plaintiff alleged that other employees had used far worse words and had not been disciplined. She argued that, if the City had taken reasonable steps to prevent the harassment, she would not have been in a vulnerable position. Also, the City perceived plaintiff as being a risk or a threat to her coworkers and she was discriminated against based on this and her medical history.

¶ 10 Plaintiff's four-count complaint alleged: (1) refusal to accommodate; (2) disparate treatment; (3) retaliation; and (4) hostile work environment. She sought back pay, front pay, the value of lost benefits, compensatory damages, reinstatement with full seniority, attorney fees, and the costs of her suit.[2]

¶ 11 In answers to interrogatories, plaintiff responded that she never filed a harassment complaint pursuant to the City's anti-harassment policy[3] or initiated with the City's human

[2] Plaintiff first filed her discrimination charge with the Department of Human Rights (Department). Because the Department did not complete its investigation of her case within 365 days from the date she filed her charge, it issued a notice authorizing plaintiff to file a civil action in the appropriate circuit court as of November 18, 2013. 775 ILCS 5/7A-102(G) (West 2014).

[3] The policy provides that: "If an employee feels that he/she has experienced or witnessed harassment, the employee is to immediately report the act of harassment to his/her Immediate

resources department a request for a reasonable accommodation under the City's reasonable-accommodations policy.[4] However, she stated that she made numerous oral complaints to the City about the harassment. In count I, she alleged that she reasonably communicated to the City that she was seeking an accommodation due to her medical conditions and that she made repeated requests to management to take action to stop the harassing and demeaning conduct. According to plaintiff, she and her union representative were told that plaintiff had to "live with it," "deal with it," and "ignore it." They were also told, "I don't think that's harassment" and "do what you gotta do."

¶ 12 B. The City's Answer and Affirmative Defenses

¶ 13 The City admitted that, prior to July 2012, it had received documentation that reflected that plaintiff had been diagnosed with unipolar depression, anxiety, panic attacks, and partial hearing loss. However, it denied most of plaintiff's allegations, including that her medical conditions constituted a disability or that they caused her difficulty at work.

¶ 14 The City also raised several affirmative defenses: (1) lack of subject matter jurisdiction (all counts); (2) the existence of a policy prohibiting discrimination, harassment, and retaliation

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Supervisor, Division Director, Department Head, Corporation Counsel or Director of Human Resources." The policy does not specify that the report must be in writing.

[4] That policy provides that, pursuant to the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 *et seq.* (2012)), 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 herein." The policy does not specify that the request be in writing.

on the basis of disability (per its collective bargaining agreement with the union and its employee handbook) and plaintiff's failure to pursue corrective opportunities thereunder, to request an accommodation, or to report any harassment; and the lack of any harassment by any supervisory or managerial employee, and the City's lack of knowledge about any harassment by nonsupervisory, nonmanagerial coworkers (counts I and IV); (3) supervisory immunity under section 3-108 of the Tort Immunity Act (745 ILCS 10/3-108 (West 2014)) (counts I and IV); (4) discretionary immunity under section 2-201 of the Tort Immunity Act (745 ILCS 10/2-201 (West 2014)) (counts I and IV); (5) plaintiff's injuries were caused by the adoption of, or failure to adopt, an enactment under section 2-103 of the Tort Immunity Act (745 ILCS 10/2-103 (West 2014)) (all counts); and (6) preemption by the Illinois Workers' Compensation Act (820 ILCS 305/5(a) (West 2014) (counts I and IV). The City asked that the court strike and/or dismiss the counts in plaintiff's complaint.

¶ 15 B. Trial Court Orders

¶ 16 On October 17, 2014, the trial court struck and dismissed counts I and IV of plaintiff's complaint, finding that disability *harassment* (as opposed to disability *discrimination*) was not a civil rights violation under the Human Rights Act. On January 23, 2015, however, the court granted plaintiff's motion to reconsider, reinstated counts I and IV, and gave the City leave to file amended affirmative defenses. On April 22, 2015, the trial court denied plaintiff's motion to strike the City's first and second affirmative defenses (subject matter jurisdiction and existence of employer policy), but granted the motion to strike the third, fourth, fifth, and sixth affirmative defenses (raising the tort immunity and workers' compensation statutes).

¶ 17 On April 29, 2015, the court entered an order finding that its 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 ultimate termination of the litigation. Ill. S. Ct. R. 308 (eff. Jan. 1, 2015). It certified the questions noted above.

¶ 18 On June 23, 2015, we granted the City's petition for leave to appeal.[5]

¶ 19 II. ANALYSIS

¶ 20 A. Standard of Review

¶ 21 An interlocutory appeal pursuant to Rule 308 is ordinarily limited to the question certified by the trial court, which, because it must be a question of law, is reviewed *de novo*. *Thompson v. Gordon*, 221 Ill. 2d 414, 426 (2006). Similarly, we review *de novo* statutory construction issues (*Boaden v. Department of Law Enforcement*, 171 Ill. 2d 230, 237 (1996)), and the question whether a pleading is substantially insufficient in law (*Powell v. American Service Insurance Co.*, 2014 IL App (1st) 123643, ¶ 13).

¶ 22 B. Principles of Statutory Construction

¶ 23 Our primary objective in construing a statute is to ascertain and give effect to the legislature's intent. *MidAmerica Bank, FSB v. Charter One Bank, FSB*, 232 Ill. 2d 560, 565 (2009). The plain language of a statute is the most reliable indication of legislative intent. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). "[W]hen the language of the statute is clear, it must be applied as written without resort to aids or tools of interpretation." *Id.* The statute should be read as a whole and construed "so that no term is rendered superfluous or meaningless." *In re Marriage of Kates*, 198 Ill. 2d 156, 163 (2001). We do not depart from the plain language of a statute by reading into it exceptions, limitations, or conditions that

[5] Further, we subsequently granted the Department's motion for leave to file an *amicus curiae* brief in support of plaintiff.

conflict with the legislative intent. *Harrisonville Telephone Co. v. Illinois Commerce Comm'n*, 212 Ill. 2d 237, 251 (2004).

¶ 24 If the words used in a statute are ambiguous or if the meaning is unclear, a court may consider the legislative history as an aid to construction. *Armstrong v. Hedlund Corp.*, 316 Ill. App. 3d 1097, 1106 (2000). A statute is ambiguous if it is capable of two reasonable and conflicting interpretations. *Tri-State Coach Lines, Inc. v. Metropolitan Pier & Exposition Authority*, 315 Ill. App. 3d 179, 190 (2000). Our supreme court has instructed that, "[i]f the language of a statute is susceptible to two constructions, one of which will carry out its purpose and another which will defeat it, the statute will receive the former construction." *Harvel v. City of Johnston City*, 146 Ill. 2d 277, 284 (1992). A court should not construe a statute in a manner that would lead to consequences that are absurd, inconvenient, or unjust. *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 513-14 (1998). Further, a court should avoid an interpretation of a statute that would render any portion of it meaningless or void. *McNamee v. Federated Equipment & Supply Co.*, 181 Ill. 2d 415, 422 (1998).

¶ 25 C. Human Rights Act Framework

¶ 26 The Human Rights Act expressly implements the guarantees provided by article I, sections 17, 18, and 19, of the Illinois Constitution (Ill. Const. 1970, art. I, §§ 17, 18, 19). 775 ILCS 5/1-102(F) (West 2014). The statute provides a comprehensive scheme 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."

(Emphases added.) 775 ILCS 5/1-102(A) (West 2014). The Human Rights Act is remedial legislation. *Arlington Park Race Track Corp. v. Human Rights Comm'n*, 199 Ill. App. 3d 698, 703 (1990). Accordingly, we liberally construe it to effectuate its purposes. *Id.*

¶ 27 Sections 2-102 and 6-101 of the Human Rights Act set forth what constitute civil rights violations in employment. Section 2-102(A) provides that it is a civil rights violation "[f]or 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." (Emphases added.) 775 ILCS 5/2-102(A) (West 2014). Other subsections of section 2-102 prohibit: employers' restrictions on use of a language in communications unrelated to the employee's duties (775 ILCS 5/2-102(A-5) (West 2014)), employment agency discrimination (775 ILCS 5/2-102(B) (West 2014)), labor organization discrimination (775 ILCS 5/2-102(C) (West 2014)), sexual harassment by various entities/persons, including employers and employees (775 ILCS 5/2-102(D) (West 2014)), public employers' restrictions on employees' practice of their religious beliefs (775 ILCS 5/2-102(E) (West 2014)), age discrimination by employers or labor organizations with respect to selection for or conduct of apprenticeship or training programs (775 ILCS 5/2-102(F) (West 2014)); certain immigration-related practices (775 ILCS 5/2-102(G) (West 2014)); pregnancy discrimination and refusals of pregnancy-related requests for reasonable accommodations (775 ILCS 5/2-102(I), (J) (West 2014)); and the failure to post notices concerning employees' rights under the statute (775 ILCS 5/2-102(K) (West 2014)). The statute also prohibits retaliation against a person because he or she has opposed, *inter alia*, unlawful discrimination or sexual harassment, because

he or she has filed a charge, or because he or she has requested a reasonable accommodation. 775 ILCS 5/6-101(A) (West 2014).

¶ 28 "Unlawful discrimination" is defined as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, *disability*, military status, sexual orientation, pregnancy, or unfavorable discharge from military service as those terms are defined in this Section." (Emphasis added.) 775 ILCS 5/1-103(Q) (West 2014). "Disability," in turn, is defined, in part, as "a determinable physical or mental characteristic of a person *** which may result from disease, injury, congenital condition of birth or functional disorder" and "is unrelated to the person's ability to perform the duties of a particular job or position." 775 ILCS 5/1-103(I)(1) (West 2014).

¶ 29 The term "harassment" explicitly appears in the Human Rights Act in the employment context only with respect to "sexual harassment," which is defined as "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.*" (Emphasis added.) 775 ILCS 5/2-101(E) (West 2014). Similarly, the term "hostile or offensive working environment" explicitly appears only in this context. The Human Rights Act explicitly prohibits sexual harassment. It provides that it is a civil rights violation "[f]or 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." 775 ILCS 5/2-102(D) (West 2014); see also *Sangamon County Sheriff's Department v. Human Rights Comm'n*, 233 Ill. 2d 125, 138-41 (2009) (employers are strictly liable for sexual harassment by supervisory employees, even where the supervisory worker has no authority to affect the terms and conditions of the complaining employee's employment and regardless of whether the employer was aware of the harassment or took measures to correct it).

¶ 30 D. First Certified Question

¶ 31 The first certified question asks: "Does section 2-102(A) of the 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 that section?" For clarity and to more accurately reflect the parties' arguments, we address whether the following claims are cognizable under the statute: (1) hostile-work-environment disability harassment (count IV); and (2) refusal to provide reasonable accommodation (count I).

¶ 32 (1) Hostile-Work-Environment Disability Harassment

¶ 33 In count IV, plaintiff alleged that the City violated her civil rights by failing to take actions to stop the harassment/hostile work environment based upon her disability. This claim relies on section 2-102(A).

¶ 34 As noted above, although the Human Rights Act explicitly references disability *discrimination* (in section 2-102(A)), it does not, with respect to employment, explicitly refer to disability *harassment*. Rather, it explicitly makes only *sexual* harassment a civil rights violation. 775 ILCS 5/2-102(D) (West 2014); see also 775 ILCS 5/5A-102 (West 2014) (prohibiting sexual harassment in education, but not referring to disability harassment in that

context).[6] Also, in the statute's declaration of policy, the General Assembly explicitly recognized the public policies to secure freedom from unlawful discrimination (in section 1-102(A)) and, separately, freedom from sexual harassment in employment and education (in section 1-102(B)).[7]

¶ 35 The City contends that the Human Rights Act unambiguously reflects that discrimination and (only sexual) harassment are separate and distinct civil rights violations. It further asserts that, had the General Assembly intended to prohibit a hostile work environment based on disability (*i.e.*, disability harassment), it would have done so by making disability harassment a separate civil rights violation, just as it did for sexual harassment. (In 1983, the General Assembly amended the Human Rights Act to add a provision addressing "sexual harassment" under sections 2-102(D) (in employment) and 5A-102(A) (in education). Pub. Act 83-89 (eff. Jan. 1, 1984 (amending section 2-102); Pub. Act 83-91 (eff. Jan. 1, 1984) (amending section

[6] However, by rule, the Department and the Human Rights Commission (Commission) have proscribed national-origin harassment. 56 Ill. Adm. Code 5220.900 (1986).

[7] In the same provision, the legislature also listed as public policies: freedom from employment discrimination based on citizenship status (775 ILCS 5/1-102(C) (West 2014)); freedom from discrimination based on familial status in real estate transactions (775 ILCS 5/1-102(D) (West 2014)); public health, welfare, and safety (775 ILCS 5/1-102(E) (West 2014)); implementation of the aforementioned constitutional guarantees (775 ILCS 5/1-102(F) (West 2014)); equal opportunity and affirmative action by the State (775 ILCS 5/1-102(G) (West 2014)); and freedom from unfounded charges of discrimination, sexual harassment in employment or education, and employment discrimination based on citizenship status (775 ILCS 5/1-102(H) (West 2014)).

5A-102).) Alternatively, the City contends that the General Assembly could have amended section 2-102(A) to expressly clarify that unlawful discrimination includes harassment/hostile work environment, but it did not do so.

¶ 36 Pointing to foreign authority, the City contends that there is a well-recognized distinction between discrimination and harassment. See *Roby v. McKesson Corp.*, 219 P.3d 749, 762 (Cal. 2009) (noting the distinction in California's civil rights statute; discrimination involves explicit changes in the terms, conditions, or privileges of employment—changes involving official action taken by the employer; harassment, in contrast, focuses on situations where the workplace's social environment becomes intolerable because the harassment communicates an offensive message to the harassed employee).

¶ 37 Plaintiff and the Department respond that a disability harassment claim is legally cognizable as a civil rights violation under the "terms, privileges or conditions of employment" prong of section 2-102(A) of the Human Rights Act. In support, they point to: (1) case law that recognized harassment/hostile work environment claims before the enactment of section 2-102(D); (2) Commission interpretations; and (3) longstanding case law addressing *racial* harassment claims (which they note would not constitute viable civil rights violations if the City's argument were correct).

¶ 38 We turn first to the cases upon which plaintiff and the Department rely. In *Old Ben Coal Co. v. Human Rights Comm'n*, 150 Ill. App. 3d 304, 309 (1987), the Fifth District held that, even before the 1983 amendment that added section 2-102(D) to the Human Rights Act, the statute prohibited sexual harassment *as a form of sex discrimination.* It noted that, although a statutory amendment creates a presumption that the legislature intended to *change* the law, the presumption may be rebutted by demonstrating that the amendment reflects the legislature's

intent to *clarify* the law as it previously existed. *Id.* at 306. After concluding that the statute was subject to differing interpretations, the court determined that the presumption was rebutted because: (1) the legislative history reflected that both proponents and opponents of the amendment considered sexual harassment to be a form of sex discrimination and that an amendment was necessary to *clarify* the prohibition; (2) federal decisions interpreting Title VII, although considering a statute that did not contain a separate amendment specifically addressing sexual harassment, did "not dissuade" the court from finding support therein in the cases' rationale that "terms, conditions, or privileges of employment" is an expansive concept that includes sexual harassment; (3) the Commission's interpretation of the statute, under which it considered sexual harassment allegations prior to the amendment, should be accorded significance; and (4) the interpretation of sexual harassment as a form of sex discrimination with respect to the "terms, privileges or conditions of employment" (775 ILCS 5/2-102(A) (West 2014)) was consistent with the Human Rights Act's purpose to secure freedom from sex discrimination in connection with employment. *Old Ben Coal*, 150 Ill. App. 3d 304 at 308-09; see also *Board of Directors, Green Hills Country Club v. Human Rights Comm'n*, 162 Ill. App. 3d 216, 221 (1987) (Fifth District, relying on *Old Ben Coal*, further held that, prior to effective date of section 2-102(D), employers were strictly liable for sexual harassment by supervisory personnel regardless of whether they knew of such conduct).

¶ 39 Similarly, in *Village of Bellwood Board of Fire & Police Commissioners v. Human Rights Comm'n*, 184 Ill. App. 3d 339, 351 (1989), the First District upheld the Commission's determination that a racially charged atmosphere in a police department "amounted to racial harassment, and thus, constituted discrimination based on race within the meaning of the [Human Rights Act]." (Racial harassment, like disability harassment, is not explicitly

addressed in the statute.) Noting that the former employee had been continuously subjected to racially derogatory comments and that his supervisors were aware of the problem but did nothing to correct it, the court noted that "this is exactly the type of racial harassment which the [Human Rights Act] seeks to prevent." *Id.* at 350-51 (further noting that racial harassment involves more than a few isolated incidents of harassment; it must be severe and pervasive[8]); see also *ISS International Service System, Inc. v. Human Rights Comm'n*, 272 Ill. App. 3d 969, 975 (1995) (assessing national origin harassment allegations as discrimination claim under section 2-102(A)); *Hautpave*, Ill. Hum. Rts. Comm'n Rep. 1980SF0097 (Jan. 6, 1984) (assessing racial discrimination in the form of racial harassment); *Korshak*, Ill. Hum. Rts. Comm'n Rep.

[8] Likewise, to create a hostile work environment, the misconduct "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.' " *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)). The work environment "must be hostile or abusive to a reasonable person and the individual alleging sexual harassment must have actually perceived the environment to be hostile or abusive." *Trayling v. Board of Fire & Police Commissioners of the Village of Bensenville*, 273 Ill. App. 3d 1, 12 (1995) (sexual harassment case). A court examines all of the circumstances in determining whether an environment is hostile or abusive, including factors such as the " 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Crittenden v. Cook County Comm'n on Human Rights*, 2012 IL App (1st) 112437, ¶ 55 (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993)).

1980CF1267 (June 11, 1982) (religious harassment constitutes discrimination on basis of religion).

¶ 40 In response, the City contends that *Old Ben Coal* was overruled *sub silentio* by two subsequent supreme court decisions: *Board of Trustees of Southern Illinois University v. Department of Human Rights*, 159 Ill. 2d 206, 213 (1994) (assessing whether an academic program at a public institution of higher learning constitutes a public place of accommodation such that Commission had jurisdiction to hear discrimination complaint, and holding that it did not; court noted that its conclusion was bolstered by the 1983 enactment of section 5A-102, which conferred on the Department jurisdiction over sexual harassment in higher education; addition of article 5A reflected the legislature's understanding that, until its passage, Department had no jurisdiction over institutions of higher education; thus, since 1983, Department had jurisdiction over higher education, but only as to a "very distinct" type of claim: sexual harassment), and *Sangamon County*, 233 Ill. 2d at 138-41 (based on its finding that statute was unambiguous and consideration of the public policy reasons supporting employer liability, holding that an employer is strictly liable under section 2-102(D) for hostile-environment sexual harassment by its supervisory employee, even where that employee has no authority to affect the terms and conditions of the complaining employee's employment and regardless of whether the employer was aware of the harassment or took measures to correct it; rejecting suggestion to look to federal case law, which uses a narrow definition of a supervisor). However, we find these cases inopposite. *Board of Trustees* addressed the Department's jurisdiction to hear racial discrimination claims against a public university and whether a public university was subject to the statute. The court, in *dicta*, stated that its conclusion that academic programs were not "accommodations" under the statute was "bolstered" by the 1983 amendment that specifically

conferred on the Department jurisdiction over claims of sexual harassment in higher education, but the court did not address whether sexual harassment was a civil rights violation before the amendment. *Board of Trustees*, 159 Ill. 2d at 213. As the Department notes, the question in *Board of Trustees* was *who* was subject to the Human Rights Act, not *what* was prohibited by it. Further, the question whether racial harassment claims were cognizable under the statute was not before the court. Similarly, *Sangamon County* provides no guidance here because it did not address the issue in this case; it involved discrimination by a supervisory employee, which is not at issue here. *Sangamon County*, 233 Ill. 2d at 138-41.

¶ 41 The City contends that, unlike Title VII, which does not expressly distinguish between harassment and discrimination, the General Assembly's 1983 amendment reflects its intent to create a separate and distinct cause of action only for sexual harassment and to expand the scope of an employer's liability for a supervisor's harassment by imposing strict liability for any supervisory sexual harassment, without regard to whether it culminates in tangible employment action or the supervisor has authority over the victim's terms, privileges, or conditions of employment. The City also urges that the decision to expand beyond sexual harassment the Human Rights Act's protection against harassment in the workplace rests with the legislative branch, not the judicial branch.

¶ 42 We reject the City's arguments. We find the statute ambiguous. The ambiguity stems from the statute's prohibition in section 2-102(A) of unlawful discrimination with respect to the terms, privileges, or conditions of employment, which can reasonably be read to include harassment on the basis of an enumerated characteristic. Indeed, in *Old Ben Coal*, the Fifth District held as much with respect to sexual harassment prior to the legislature's enactment of section 2-102(D). *Old Ben Coal*, 150 Ill. App. 3d at 309. Also, the statute does not explicitly

state that sexual harassment is the only type of harassment that constitutes a civil rights violation. However, another reading of the Human Rights Act is that the enactment of section 2-102(D) effectuated a change of existing law to add sexual harassment as an additional civil rights violation, to the (implicit) exclusion of other types of harassment.

¶ 43 Having determined that the statute is ambiguous, we turn to statutory-construction aids. In our view, they support an expansive reading of section 2-102(A), such as the approach taken in *Old Ben Coal*, and lead to the conclusion that disability harassment is a cognizable civil rights violation under section 2-102(A).

¶ 44 First, we consider the Human Rights Act's purposes. One of them is to "secure for all individuals *** the freedom from discrimination against any individual because of his or her *** physical or mental disability *** in connection with employment." 775 ILCS 5/1-102(A) (West 2014). It also implements several constitutional guarantees, including section 19 of article I, which provides: "All persons with a physical or mental handicap *** shall be free from discrimination unrelated to ability in the hiring and promotion practices of an employer" (Ill. Const. 1970, art. I, § 19). 775 ILCS 5/2-102(F) (West 2014). Reading section 2-102(A) to prohibit disability harassment undoubtedly comports with these purposes.

¶ 45 Turning to a second statutory-construction aid, the type of legislation, we note that the Human Rights Act constitutes remedial legislation, which is liberally construed to effectuate its purposes. *Arlington Park Race Track*, 199 Ill. App. 3d at 703. Broadly construing the phrase "terms, privileges or conditions of employment" in section 2-102(A) to prohibit a hostile work environment based on disability is clearly consistent with the statute's purpose to effectuate the right of every disabled person to be free from workplace discrimination. We find additional support for this conclusion in the fact that the Commission, which, jointly with the Department,

is the agency charged with enforcing the Human Rights Act (*Boaden v. Department of Law Enforcement*, 171 Ill. 2d 230, 261 (1996)), has defined harassment "as any form of behavior which makes a working environment so hostile and abusive that it constitutes a different term and condition of employment based on a discriminatory factor." *Hines*, Ill. Hum. Rts. Comm'n Rep. 1988CN0644, at *3 (May 28, 1996) (finding that the employee established verbal harassment on the basis of race). The Commission has also noted in its decisions that, though there is no case law on the issue of disability harassment, "there is no logical reason why the [Human Rights] Act should tolerate workplace harassment based on a handicap when it does not tolerate harassment based on any other protected classification. [Citation.] Therefore, Complainant's handicap harassment claims should be analyzed in the same manner as the racial and gender harassment claims." *Gonzalez*, Ill. Hum. Rts. Comm'n Rep. 2006CF2012, at *8 (Aug. 23, 2010); see also 56 Ill. Adm. Code 5220.900 (1986) (proscribing national origin harassment). We place significant weight on these interpretations. See *Wanless v. Human Rights Comm'n*, 296 Ill. App. 3d 401, 403 (1998) (Commission's interpretation of the Human Rights Act is "accorded substantial weight and deference" by reviewing courts because its interpretation "flows directly from its expertise and experience with the statute that it administers and enforces").

¶ 46 Furthermore, we note that federal law, which we routinely consult and rely upon in this area (see *Valley Mould & Iron Co. v. Illinois Human Rights Comm'n*, 133 Ill. App. 3d 273, 279 (1985)), has been interpreted in a similar fashion. In *Meritor Savings Bank*, 477 U.S. at 66, the Supreme Court held that the creation of a hostile work environment through *harassment* is a form of proscribed *discrimination* under Title VII. The Court determined that the phrase "terms, conditions, or privileges of employment," which appears in both Title VII and the

Human Rights Act, reflects a legislative intent to encompass the full spectrum of discriminatory treatment in employment. *Id.* at 64. It also noted that EEOC guidelines, which it found instructive, defined sexual harassment as a form of sex discrimination. *Id.* at 65. The Court further noted that the guidelines had drawn on case law that held that Title VII hostile-work-environment claims could be brought in the contexts of race, religion, and national origin; thus, reading the statute to proscribe a hostile environment based on discriminatory sexual harassment was consistent with the case law. *Id.* at 66.[9]

¶ 47 We reject the City's argument that Title VII case law is unhelpful because that statute does not explicitly and separately address sexual harassment, as the Human Rights Act does. This argument is unavailing because the Title VII case law interprets the phrase "terms,

[9] Title VII does not address disability; however, the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 *et seq.* (2012)) does by prohibiting certain employers from discriminating against individuals on the basis of their disabilities. 42 U.S.C. § 12112(a) (2012). That statute also contains the phrase "terms, conditions, and privileges of employment" (42 U.S.C. § 12112(a) (2012)). Several federal circuit courts of appeals expressly recognize hostile-work-environment claims for disability harassment. *Lanman v. Johnson County, Kansas*, 393 F.3d 1151, 1155 (10th Cir. 2004); *Shaver v. Independent Stave Co.*, 350 F.3d 716, 719 (8th Cir. 2003); *Flowers v. Southern Regional Physician Services Inc.*, 247 F.3d 229, 233 (5th Cir. 2001); *Fox v. General Motors Corp.*, 247 F.3d 169, 176 (4th Cir. 2001). Several other federal reviewing courts have assumed that such a cause of action is authorized by the ADA, without deciding the issue. See, *e.g.*, *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75, 89 (1st Cir. 2006); *Silk v. City of Chicago*, 194 F.3d 788, 803-04 (7th Cir. 1999); *Walton v. Mental Health Ass'n of Southeastern Pennsylvania*, 168 F.3d 661, 666-67 (3d Cir. 1999).

privileges or conditions of employment," which, again, is also contained in section 2-102(A) of the Human Rights Act.

¶ 48 The third statutory-construction aid we turn to is legislative history. The legislative history of section 2-102(D) reflects that the provision was added to the statute to *clarify* existing practices *and* to *narrowly expand* the available protections (the latter with respect to same-sex harassment and male victims, which are not alleged here). It clearly did not effect a change in the law by creating a new cause of action. See *Old Ben Coal*, 150 Ill. App. 3d at 307 (coming to the same conclusion: "both proponents and opponents of the amendment considered sexual harassment to be prohibited by the *** Human Rights Act as a form of sex discrimination and that the amendment was needed only to *clarify* this proscription" (emphasis added)). During the House debates, the sponsor, Representative Currie, responded as follows to the question whether sexual *harassment* cases had "currently" been considered sex *discrimination* cases by the Department and the Commission:

> "Presently, the [Department] understands that it may interpret its authority to deal with sex discrimination to include instances of sex harassment. The [Department] supports this Bill, as does the Commission, on the grounds that there is some ambiguity in that decision. It's based on council's opinion. Councils can change. Only through that opinion is the Department able to establish rules and regulations. *It would become much clearer if we were to establish this program in the state statutes themselves.* In addition, same sex harassment or harassment when the victim is a male can clearly not be covered under an interpretation of sex discrimination prohibition which the Department presently uses for these cases." (Emphasis added.) 83d Ill. Gen. Assem., House Proceedings, Mar. 23, 1983, at 55 (statements of Representative Currie).

Later in the proceedings, she stated that the Department took the position that passage of the amendment would "*clarify* and specify its authority." (Emphasis added.) *Id.* at 56. Furthermore, Representative Mays, an opponent, related a conversation with a Department representative who was asked if a case had ever come before the Commission that the Department refused to handle; Mays related that the Department responded to that in the negative but that the Department surmised that, as to an employer who harassed both male and female employees, a claim could not be brought as discrimination. *Id.* at 56-57. These excerpts reflect that the enactment of section 2-102(D) was a clarification of the law with respect to the issue before us.

¶ 49 The City points to the legislative history of article 5A of the Human Rights Act, which addresses elementary, secondary, and higher education. During the House debates on section 5A-102, which prohibits sexual harassment in education, Representative Koehler stated:

> "[This amendment] amends the Illinois Human Rights Act to include sexual harassment in higher education as a civil rights violation. Under the Human Rights Act, 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." 83d Ill. Gen. Assem., House Proceedings, May 5, 1983, at 33-34 (statements of Representative Koehler).

Although the statement appears to somewhat conflict with the legislative history of section 2-102(D), we do not place much weight on it, because it addresses a different section of the statute than the one at issue here and does not specifically address whether harassment claims were already being heard under article 5A, as sexual-harassment employment claims were.

¶ 50 In summary, we conclude that the presumption that the 1983 amendment changed the law has been rebutted. We further hold that section 2-102(A) prohibits disability harassment. Accordingly, we answer the first part of the first certified question in the affirmative.

¶ 51 (2) Reasonable Accommodation

¶ 52 In count I, plaintiff alleged that the City violated her civil rights by failing to provide a reasonable accommodation for her disability after she asked it to take appropriate action to stop her nonsupervisory coworkers' harassment. This part of the first certified question asks if such a claim is cognizable under section 2-102(A) of the Human Rights Act. The City argues that: (1) the Human Rights Act does not expressly impose such a duty on employers and should not be read to do so; and (2) a failure to provide a reasonable accommodation should be part of a *prima facie* case for unlawful disability discrimination, not a separate and distinct civil rights violation. For the following reasons, we conclude that a reasonable-accommodation claim is cognizable as a separate claim under section 2-102(A).

¶ 53 Preliminarily, we note again that the Human Rights Act is a remedial statute that is liberally construed to effectuate its purposes. *Arlington Park Race Track*, 199 Ill. App. 3d at 703. Also, "[a]n agency may adopt a rule and regulate an activity only insomuch as a statute empowers the agency to do so. [Citation.] An administrative rule unauthorized by statute is invalid, and we must strike it down." *Illinois Bell Telephone Co. v. Illinois Commerce Comm'n*, 362 Ill. App. 3d 652, 656 (2005); see 775 ILCS 5/8-102(E) (West 2014). Where the legislature has charged an agency with administering and enforcing a statute, we " 'give substantial weight and deference' " to its resolution of any ambiguities in the statute. *Illinois Bell Telephone Co.*, 362 Ill. App. 3d at 656 (quoting *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 95 Ill. 2d 142, 152 (1983)). This is so because the agency's

interpretation "flows directly from its expertise and experience with the statute that it administers and enforces." *Wanless*, 296 Ill. App. 3d at 403. Where a statute is ambiguous, "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, *** the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). "A court will not substitute its own construction of a statutory provision for a reasonable interpretation adopted by the agency charged with the statute's administration." *Church v. State*, 164 Ill. 2d 153, 162 (1995).

¶ 54 (i) Duty to Provide a Reasonable Accommodation

¶ 55 The duty to reasonably accommodate disabled employees is explicitly imposed only by administrative regulation. By joint rule, the Commission and the Department require that employers provide reasonable accommodations for "known physical or mental limitations of otherwise qualified disabled applicants or employees," unless the accommodations are prohibitively expensive or would unduly disrupt ordinary business conduct. 56 Ill. Adm. Code 2500.40(a) (2009). The employee seeking an accommodation has the burden to apprise the employer of his or her condition and submit any necessary medical documentation. 56 Ill. Adm. Code 2500.40(c) (2009); see also *Truger v. Department of Human Rights*, 293 Ill. App. 3d 851, 861 (1997) ("employee has the burden of asserting the duty and showing the accommodation was requested and necessary for adequate job performance"). "Once an employee requests an accommodation, it becomes the burden of the employer to show that there is no possible reasonable accommodation or that the employee would be unable to perform the job even with the accommodation." *Department of Corrections v. Human Rights Comm'n*, 298

Ill. App. 3d 536, 542 (1998). An 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." 56 Ill. Adm. Code 2500.40(a) (2009). The duty to accommodate does not require an employer to reassign or transfer an employee whose disability precludes him or her from performing the employee's present position. *Fitzpatrick v. Human Rights Comm'n*, 267 Ill. App. 3d 386, 392 (1994).

¶ 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" (emphasis added) (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)).

¶ 57 In adding section 2-102(I) of the Human Rights Act to address *pregnancy*-related accommodations, the General Assembly expressly found: "Employers are familiar with the reasonable accommodations framework. *Indeed, employers are required to reasonably accommodate people with disabilities.* Sadly, many employers refuse to provide reasonable accommodations or decline to extend workplace injury policies to pregnant women." (Emphasis added.) Pub. Act 98-1050, § 5(4) (eff. Jan. 1, 2015).

¶ 58 The City argues that plaintiff cannot state a cognizable civil rights violation in her reasonable-accommodation count, because the Human Rights Act unambiguously does not *expressly* impose on employers a duty to provide reasonable accommodations to disabled employees. If there is no statutory basis for the alleged duty, the regulations cannot create such a duty; rather, the better approach, the City urges (and as discussed in the next section), is to treat

a failure to provide a reasonable accommodation as an element of the *prima facie* case for plaintiff's claim in count II, for disability discrimination based on disparate treatment. Under the City's reading, if the General Assembly had intended to make an employer's failure to reasonably accommodate a disability an independent civil rights violation, then it would have enacted a statutory amendment expressly stating so, just as it did with respect to pregnant employees and real estate transactions. By example, the City notes that the General Assembly specifically amended the Human Rights Act to add sections 2-102(J) and 3-102.1(C), despite the existence of statutory provisions that already made it a civil rights violation to discriminate in the "terms, privileges or conditions of employment" on the basis of pregnancy or to commit unlawful discrimination in the "terms, conditions or privileges of a real estate transaction." 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). Citing case law that stands for the proposition that a statutory amendment creates a presumption that the legislature intended to change the law (*People v. Hicks*, 119 Ill. 2d 29, 34 (1987)), the City argues that these amendments reflect the General Assembly's determination that a failure to provide a reasonable accommodation is a distinct species of civil rights violation that must be specifically enumerated in order to be proscribed. It also suggests that its reading is logical because a reasonable-accommodation obligation essentially changes the "terms, privileges or conditions of employment" by imposing on an employer an affirmative duty to treat different employees differently due to their unique needs. Employers have no notice, the City asserts, that the Human Rights Act obligates them to develop reasonable-accommodation practices for employees' disabilities. It also notes that the Human Rights Act's definition of religion expressly states that an employer must provide a reasonable accommodation. 775 ILCS 5/2-101(F) (West 2014). Finally, the City notes that

the Human Rights Act's definition of unlawful discrimination does not require a reasonable accommodation, in contrast to the ADA, which does so in a comparable definition. See 42 U.S.C. § 12112(a), (b)(5)(A) (2012) (defining "discriminate against a qualified individual on the basis of disability" to include the failure to provide reasonable accommodation).

¶ 59 No case has squarely addressed this issue, but case law has assumed that employers have a duty to reasonably accommodate a disability. See, *e.g.*, *Truger*, 293 Ill. App. 3d at 861 (referring to "an employer's duty to accommodate" a disability, without deciding whether duty is statutorily imposed); *Fitzpatrick v. Human Rights Comm'n*, 267 Ill. App. 3d 386, 392 (1994) (same and further holding that such duty extends only to accommodating a disabled employee in his or her present position); *Illinois Bell Telephone Co. v. Human Rights Comm'n*, 190 Ill. App. 3d 1036, 1050 (1989) (referring to duty to accommodate, without deciding whether duty is statutorily imposed). In addition, there is case law specifically citing or applying the regulations, which were initially promulgated in 1982. 6 Ill. Reg. 11489 (eff. Sept. 15, 1982); see, *e.g.*, *Brewer v. Board of Trustees*, 339 Ill. App. 3d 1074, 1080 (2003) (further noting that disability discrimination includes failure to reasonably accommodate), *abrogated on other grounds by Blount v. Stroud*, 232 Ill. 2d 302 (2009); *Department of Corrections*, 298 Ill. App. 3d at 541-43 (noting that, once the employee requests accommodation, it becomes the employer's burden to show that there is no possible reasonable accommodation or that the employee would be unable to perform job even with accommodation; holding that failure to provide reasonable accommodation violated the statute); *Whipple v. Department of Rehabilitation Services*, 269 Ill. App. 3d 554, 559 (1995) (citing regulations for proposition that an employer can rebut a discrimination charge by showing that the claimant was unqualified even with accommodation).

¶ 60 We find the statute ambiguous, defer to the Commission, and hold that the regulations are a valid exercise of its power to interpret the Human Rights Act and, further, that a reasonable accommodation claim may be brought as a separate claim under section 2-102(A). We find unconvincing the City's argument that the General Assembly's amendment of the Human Rights Act to add the pregnancy-accommodation provision and its failure to similarly add a disability-accommodation provision reflects that no such duty exists with respect to disability. Although the duty exists only via regulation, we note that the regulations have been in effect for over 30 years without specific action by the General Assembly. Thus, for over three decades, employers have been on notice of their obligations with respect to disabled employees. We find additional support for our conclusion in the fact that, in enacting the pregnancy-accommodation provision, the General Assembly expressly found: "Employers are familiar with the reasonable accommodations framework. *Indeed, employers are required to reasonably accommodate people with disabilities.*" (Emphasis added.) Pub. Act 98-1050, § 5(4) (eff. Jan. 1, 2015). The General Assembly's acknowledgement, in the legislative findings, of a reasonable-accommodation duty and its enactment of pregnancy-related protections reflect, in our view, its approval of the Commission's reasonable-accommodation regulations.

¶ 61 We also reject the City's argument that the fact that the Human Rights Act's definition of "religion" contains a reasonable-accommodation requirement but the disability provisions do not evinces the legislature's determination that no accommodation duty exists with respect to disabled employees. The City elsewhere contends that the only civil rights violations are those expressly stated in section 1-103(D), which defines "civil rights violation" to include only those set forth in specific sections of the statute. 775 ILCS 5/1-103(D) (West 2014) (specifying, *inter alia*, sections 2-102, 2-103, 2-105, and 3-102.1). The definition of "religion" is contained in section

2-101, a provision that is *not* included in the definition of "civil rights violation." Thus, the City's argument, that a "civil rights violation" must be expressly noted in section 1-103(D), fails.

¶ 62 Finally, we similarly reject the City's argument that a reasonable-accommodation obligation changes the "terms, privileges or conditions of employment." This position is illogical. Taking reasonable steps to place a disabled person in a position to perform his or her job *without* discrimination does not change the terms, privileges, or conditions of that person's employment *on the basis of* discrimination. See 775 ILCS 5/2-102(A) (West 2014) (prohibiting actions with respect to the conditions of employment on the basis of unlawful discrimination).

¶ 63 (ii) *Prima Facie* Case

¶ 64 The City next contends that a failure to provide a reasonable accommodation should be part of a *prima facie* case for unlawful discrimination (pointing again to count II of plaintiff's complaint, where she alleges disparate treatment), not a separate, distinct, or independent civil rights violation. It contends that, by pleading refusal to accommodate (count I), disparate treatment (count II), and hostile work environment (count IV), plaintiff is seeking a triple recovery for the same alleged discriminatory acts.[10] Plaintiff's position is that a failure to provide a reasonable accommodation is a *separate* disability discrimination theory. For the following reasons, we conclude that a reasonable-accommodation claim is a distinct action that may be separately/alternatively pleaded.

¶ 65 Counts I, II, and IV each allege adverse employment consequences, and each is based on a different theory. In count I, the refusal-to-accommodate claim, plaintiff alleged that: she was qualified to perform and adequately performed her job; her medical conditions (unipolar depression, anxiety, panic attacks, and partial hearing loss) constituted a disability under the

[10] Count III is a retaliation claim, which is not relevant to this certified question.

statute; plaintiff communicated to the City that she sought a reasonable accommodation for her disability; the City had a duty to engage in the interactive process; the City dismissed plaintiff's request; and the City denied her request without making an individualized assessment; and, as a result, she sustained damages. In count II, the disparate-treatment claim, plaintiff alleged that: her medical conditions constituted a disability under the statute; she was qualified for and adequately performed her job; the City terminated her employment because she was disabled; other individuals who did not have such a disability were assigned her duties; other employees were not terminated for behavior similar to or worse than that for which plaintiff was terminated; plaintiff's disability was a substantial and motivating factor in the City's decision to terminate plaintiff; the City would not have terminated her absent consideration of her disability; and the termination constituted intentional disability discrimination in violation of the statute. In count IV, the hostile-work-environment claim, plaintiff alleged that: her medical conditions constituted a disability under the statute; the work environment created by her coworkers substantially interfered with her work performance and created an intimidating, hostile, and offensive work environment; the City was aware of the environment but failed to take action to make the conduct cease and desist; the environment aggravated her medical conditions; and, as a result, plaintiff sustained damages.

¶ 66 In analyzing employment discrimination actions under the Act, courts use the analytical framework contained in decisions addressing Title VII and other federal statutes. *Zaderaka v. Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989). Within this framework, a plaintiff can prove discrimination in one of two ways: (1) through direct evidence; or (2) through the indirect method of proof. *Lalvani v. Human Rights Comm'n*, 324 Ill. App. 3d 774, 790 (2001).

¶ 67 In the indirect method, the plaintiff uses the framework for Title VII claims set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283 (7th Cir. 1996) (*McDonnell Douglas* method is used to *indirectly* establish discrimination). First, the plaintiff must establish a *prima facie* case of discrimination, which will give rise to a rebuttable presumption that the employer unlawfully discriminated. Next, to rebut the presumption, the employer must articulate a legitimate and nondiscriminatory reason for its action. If the employer meets its burden of production, the presumption of unlawful discrimination falls. Then, the plaintiff must prove by a preponderance of the evidence that the employer's reason was simply a pretext for unlawful discrimination. *Peck v. Department of Human Rights*, 234 Ill. App. 3d 334, 336-37 (1992). "The *indirect* method is a formal way of analyzing a discrimination case when a certain kind of circumstantial evidence—evidence that similarly situated employees not in the plaintiff's protected class were treated better—would permit a jury to infer discriminatory intent." (Emphasis added.) *Smith v. Chicago Transit Authority*, 806 F.3d 900, 905 (7th Cir. 2015).

¶ 68 In contrast, the *direct* method refers to "anything *other than* the *McDonnell Douglas* indirect approach." (Emphasis in original.) *Id.* at 904. To *directly* prove discrimination, the employee may present direct evidence of an employer's discriminatory intent or relevant circumstantial evidence (*e.g.*, suspicious timing, ambiguous statements, treatment of other employees in the protected class) pointing to a discriminatory reason for the employer's action. *Id.* at 905. Once the employee directly establishes that in making its decision the employer substantially relied on a prohibited factor, the burden of proof, not merely of production, shifts to the employer to show that it would have made the same decision even if the prohibited factor had not been considered. *Lalvani*, 324 Ill. App. 3d at 790. The *indirect* method is relevant here.

¶ 69 Returning to the indirect method, to establish a *prima facie* case of disability discrimination, as set forth in *McDonnell Douglas*, a plaintiff must demonstrate that: (1) he or she is disabled as defined in the Act; (2) his or her disability is unrelated to the plaintiff's ability to perform the functions of the job he or she was hired to perform; and (3) an adverse job action was taken against the plaintiff because of the disability. *Department of Corrections v. Human Rights Comm'n*, 298 Ill. App. 3d 536, 540 (1998). However, to prove a failure to accommodate a disability, a plaintiff must show that: (1) he or she is a qualified individual with a disability; (2) the employer was aware of the disability; and (3) the employer failed to reasonably accommodate the disability. See, *e.g.*, *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 224 (7th Cir. 2015); *cf. Robinson v. Village of Oak Park*, 2013 IL App (1st) 121220, ¶ 36 (separately assessing religious-discrimination and reasonable-accommodation claims; stating that reasonable accommodation claim is established by first showing three-part *prima facie* case: (1) a religious practice/belief that conflicts with an employment requirement; (2) communication by the employee to the employer of the need to observe the religious practice/belief; and (3) adverse employment action because of the employee's religious practice/belief; further noting that, if employee establishes *prima facie* case, the burden shifts to employer to show either that reasonable accommodation was offered or that any accommodation would result in undue hardship).[11]

¶ 70 Generally, employment discrimination claims assert either disparate treatment or disparate impact. *Peyton v. Department of Human Rights*, 298 Ill. App. 3d 1100, 1108 (1998).

[11] *Robinson* cites a Seventh Circuit case using the *McDonnell Douglas* framework for a reasonable-accommodation claim. *Robinson*, 2013 IL App (1st) 121220, ¶ 36 (citing *Equal Employment Opportunity Comm'n v. Ilona of Hungary, Inc.*, 108 F.3d 1569, 1575 (7th Cir. 1997)).

A disparate-treatment claim, which plaintiff seeks to allege in count II, requires a showing "that the employer simply treated some people less favorably than others because of their race, color, religion, sex, or national origin." (Internal quotation marks omitted.) *Id.* Under a disparate-impact theory, which was not alleged by plaintiff here, there must be a showing of "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." (Internal quotation marks omitted.) *Id.* Proof of discriminatory motive is required under a disparate-treatment theory but not a disparate-impact theory. *Id.*

¶ 71 However, a question exists concerning how reasonable-accommodation claims should be treated. There is ADA case law that holds that a "plaintiff need not allege either disparate treatment or disparate impact in order to state a reasonable accommodation claim" (*McGary v. City of Portland*, 386 F.3d 1259, 1266 (9th Cir. 2004)), because a reasonable-accommodation claim asserts solely that an employer has failed to reasonably accommodate the employee's disability, not that the employer treated the employee differently and less favorably than other, nondisabled employees (*Bultemeyer*, 100 F.3d at 1283 ("He is not comparing his treatment to that of any other *** employee. His complaint relates solely to [the defendant's] failure to reasonably accommodate his disability.")). The *McGary* court noted that "the crux of a reasonable accommodation claim is a facially neutral requirement that is consistently enforced" and that the reasonable-accommodation requirement's purpose "is to guard against the façade of 'equal treatment' when particular accommodations are necessary to level the playing field." *McGary*, 386 F.3d at 1267; see also *Riel v. Electronic Data Systems Corp.*, 99 F.3d 678, 681 (5th Cir. 1996) ("By requiring reasonable accommodation, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities."). The

logic behind these holdings is that the *McDonnell Douglas* burden-shifting framework is not appropriate, because it is used to prove *indirectly* that an employer discriminated against an employee, whereas a claim for failing to reasonably accommodate a disability alleges facts that, if proven, *directly* establish a violation of the ADA. *Bultemeyer*, 100 F.3d at 1283. "There is no need for indirect proof or burden shifting," because the employee is not alleging that he or she was treated differently and less favorably than nondisabled employees. *Id.*

¶ 72 Illinois case law has not directly addressed this issue and reflects some confusion as to how to treat such claims. Some cases fit the accommodation issue within the *prima facie* case. See, *e.g.*, *Department of Corrections*, 298 Ill. App. 3d at 541-43 (characterizing the reasonable accommodation regulations as "augment[ing]" the *prima facie* requirements and analyzing accommodation issue in the context of a *prima facie* disability discrimination case); *Whipple v. Department of Rehabilitation Services*, 269 Ill. App. 3d 554, 557-58 (1995) (determining that prior case law did not address how reasonable-accommodation issue fits within framework and concluding that "we would expand the second prong of the" *prima facie* test to incorporate reasonable-accommodation analysis), *abrogated on other grounds by Webb v. Lustig*, 298 Ill. App. 3d 695 (1998); *Milan v. Human Rights Comm'n*, 169 Ill. App. 3d 979, 984 (1988) (holding that *prima facie* case of disability discrimination includes reasonable-accommodation issue, without specifying how it factors into analysis). Other case law recites the *McDonnell Douglas* framework, but reflects an uncertainty as to how the reasonable-accommodation analysis fits within it and/or separately addresses the issue without comment. See, *e.g.*, *Owens v. Department of Human Rights*, 356 Ill. App. 3d 46, 53 (2005) (after finding that claimant was discharged for a nondiscriminatory reason, turning to reasonable-accommodation issue and characterizing it as "a more fundamental issue that we are required to address"); *Truger*, 293 Ill.

App. 3d at 860-61 (reciting framework, concluding that second and third *prima facie* requirements were not met, and then separately addressing several additional issues, including reasonable-accommodation argument, without explaining its import to *prima facie* case or the framework in general); *Illinois Bell Telephone*, 190 Ill. App. 3d at 1050 (after affirming administrative finding that the plaintiff was terminated because of her disability, turning next to separately assess reasonable-accommodation issue).

¶ 73 We find the ADA cases persuasive and hold that a reasonable-accommodation claim constitutes a separate type of disability discrimination claim that is distinct from disparate-treatment and disparate-impact claims. In count I (refusal to accommodate), plaintiff argued that the City failed to consider her accommodation request and denied it without making an individualized assessment. In count II, she alleged disparate treatment, asserting that she was terminated because of her disability. As plaintiff notes, a fact finder could, on the one hand, find that, although the City did not violate its duty to accommodate plaintiff, it nonetheless terminated her employment because of an unlawful motive related to her disability; or, on the other hand, it could find that the City violated its duty to accommodate but did not terminate plaintiff's employment because of an unlawful motive. Thus, the claims are distinct, they involve different facts and considerations, and they are established by different approaches. *Bultemeyer*, 100 F.3d at 1283 (no need for indirect proof or burden shifting to establish failure to reasonably accommodate; alleged facts, if proven, would directly establish violation of ADA).

¶ 74 The cases upon which the City relies do not persuade us to hold otherwise. See *Harton v. City of Chicago Department of Public Works*, 301 Ill. App. 3d 378, 390-92 (1998) (rejecting argument that an employer commits a *per se* civil rights violation when it fails to investigate possibility of accommodation, even if applicant could not have performed job even with

accommodation; commenting that court did "not wish to be interpreted as suggesting that employers should neglect to explore *** reasonable accommodation," because the failure "to do so might well expose an employer to liability under the [Human Rights] Act if it is subsequently determined that a reasonable accommodation would have enabled the applicant to perform the job despite her disability"); *Truger*, 293 Ill. App. 3d at 861 (noting duty to accommodate disability, but holding that the plaintiff's claim failed because she offered no evidence that she asked for a reasonable accommodation or that any type of accommodation would enable her to perform her job); *Whipple*, 269 Ill. App. 3d at 559 (applying regulations to hold, in part, that employer rebutted discrimination charge by showing that the employee was unqualified even with accommodation, *i.e.*, third prong of *prima facie* case not met). These cases do not address the issue before us.

¶ 75 We also reject the City's argument that a reasonable-accommodation claim may not be brought as a separate claim because this would result in double or even triple (as the City alleges here) recovery for the same alleged discriminatory acts. See *Wilson v. Hoffman Group, Inc.*, 131 Ill. 2d 308, 320-22 (1989) ("The law in Illinois is that a plaintiff shall have only one recovery for an injury [citation]; double recovery is a result which has been condemned [citation]."); see also *Kim v. Alvey, Inc.*, 322 Ill. App. 3d 657, 672 (2001) (double recovery is against public policy). The City claims that the only injury asserted here is plaintiff's termination and that she can recover only once for this alleged injury if she proves that the City violated the Act. We cannot question the policy against multiple recovery and we agree, for example, that a successful plaintiff cannot recover two back-pay awards for the same period. However, even if a plaintiff alleges the same injury in multiple counts, which plaintiff here did

not necessarily do,[12] the policy against multiple recoveries does not preclude a plaintiff from asserting alternative theories of recovery in separate counts of a complaint. See *Robinson*, 2013 IL App (1st) 121220, ¶¶ 23-35 (the plaintiff brought separate claims, one alleging religious discrimination and one alleging failure to accommodate her religious beliefs; the reviewing court *separately* analyzed the claims because, although the "two claims are factually related, they are analytically distinct").

¶ 76 Finally, the City asks us to hold as a matter of law that plaintiff's request for appropriate action to stop the harassment was not a request for a reasonable accommodation cognizable under the statute. For two reasons, we decline to address this question. It was not certified by the trial court, and, contrary to the City's assertion, it involves factual considerations that are inappropriate in a Rule 308 appeal.

¶ 77 In summary as to the first certified question, we hold that: (1) section 2-102(A) prohibits hostile-work-environment disability harassment; and (2) reasonable-accommodation claims may be brought as separate claims under that section. We do not address whether plaintiff sufficiently pleaded any of her claims.

¶ 78 E. Second Certified Question

¶ 79 The second certified question[13] asks:

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[12] In count I (refusal to accommodate), plaintiff alleged unspecified damages as a result of the City's refusal to accommodate; in count II (disparate treatment), she alleged termination of employment; and, in count IV (hostile work environment), she alleged interference with her work performance and aggravation of her medical conditions.

[13] The Department does not offer an argument with respect to this question.

If section 2-102(A) permits a cause of action for disability harassment, does the provision in section 2-102(D) "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" (775 ILCS 5/2-102(D) (West 2014)) similarly apply to a cause of action for disability harassment brought under section 2-102(A)? If yes, does the employee or the employer bear the burden of alleging and proving that the employer: (a) is aware of the conduct by its nonmanagerial and nonsupervisory employees; and (b) fails to take reasonable corrective measures? If no, can the employer assert the *Faragher-Ellerth* affirmative defense to a hostile-work-environment harassment claim brought under section 2-102(A)?

¶ 80 (1) Does Section 2-102(D) Apply to Disability Harassment Claims?

¶ 81 In the first part of the second certified question, the issue is whether the parameters in section 2-102(D) apply to disability harassment claims brought under section 2-102(A). For the following reasons, we hold that those parameters apply to such claims.

¶ 82 Again, the statute's plain language is the most reliable indicator of legislative intent. *DeLuna*, 223 Ill. 2d at 59. We resort to statutory-construction aids only when the statute is ambiguous. *Id.* We also place substantial weight on and accord deference to the Commission's interpretation of the statute. See *Wanless*, 296 Ill. App. 3d at 403.

¶ 83 In proscribing *sexual* harassment, section 2-102(D) of the Human Rights Act states that it is a civil rights violation "[f]or 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*." (Emphasis added.) 775 ILCS 5/2-102(D) (West 2014). Thus, in the context of claims of *sexual* harassment, the Human Rights Act provides that, where the offending employee is nonmanagerial and nonsupervisory, such as here, the employer is liable for the sexual harassment *only if it: (1) was aware of the conduct; and (2) failed to take corrective measures. Id.* However, if the offending employee is supervisory, regardless of whether he or she has authority to affect the terms and conditions of the complainant's employment, the employer is strictly liable for the sexual harassment, regardless of whether the employer knew of the conduct. *Sangamon County*, 233 Ill. 2d at 137-39.

¶ 84 Further, although the parties do not address it, we note that, by rule, the Commission and Department have proscribed national origin harassment, including hostile-work-environment harassment. 56 Ill. Adm. Code 5220.900 (1986). In the regulations, they have adopted a standard of employer liability for coworker harassment nearly identical to that for sexual harassment. Compare 56 Ill. Adm. Code 5220.900(d) (1986) ("[w]ith respect to conduct between fellow employees, an employer is responsible for acts of harassment, in the workplace on the basis of national origin, where the employer, its agents or supervisory employees, [(1)] becomes aware of the conduct, and [(2)] fails to take immediate and appropriate corrective action") with 775 ILCS 5/2-102(D) (West 2014) (employer is liable for coworker sexual harassment only if it: (1) was aware of the conduct; and (2) failed to take corrective measures). They have also done the same with respect to supervisory harassment. Compare 56 Ill. Adm. Code 5220.900(c) (1986) (employer is liable "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer

knew or should have known of their occurrence") with 775 ILCS 5/2-102(D) (West 2014) (strict liability regardless of whether the employer knew of the conduct and regardless of whether the offending employee has authority to affect the terms and conditions of the complainant's employment).

¶ 85 The standard for coworker harassment under federal law is similar. Title VII does not require or expect employers "to be aware of every impropriety committed by every low-level employee." *Hall v. Bodine Electric Co.*, 276 F.3d 345, 356 (7th Cir. 2002). Rather, under federal law, when the harassing employee is a coworker, the employer is liable under Title VII "only if it was negligent in controlling working conditions." *Vance v. Ball State University*, 570 U.S. ___, ___, 133 S. Ct. 2434, 2439 (2013). The employer was negligent "if the employer knew or reasonably should have known about the harassment but failed to take remedial action." *Id.* at ___, 133 S. Ct. at 2440-41; *Faragher*, 524 U.S. at 789. In the case of supervisory harassment, the federal standard differs somewhat from that under the Human Rights Act. If the harassing employee was a supervisor and the harassment resulted in tangible employment action, the employer is strictly liable. *Vance*, 570 U.S. at ___, 133 S. Ct. at 2439; *Faragher*, 524 U.S. at 807; *Burlington Industries, Inc.*, 524 U.S. at 765. If the harassing employee was a supervisor, but the harassment did not result in tangible employment action, the employer may raise the *Faragher-Ellerth* affirmative defense that: (1) it 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. *Vance*, 570 U.S. at ___, 133 S. Ct. at 2439; *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Under federal law, a "supervisor" for purposes of vicarious liability under Title VII is an employee who "is empowered by the employer to take tangible employment actions against the victim." *Vance*,

570 U.S. at ___, 133 S. Ct. at 2439. The *Faragher* and *Ellerth* cases involved hostile-work-environment sexual harassment claims. *Id.* at ___ n.3, 133 S. Ct. at 2442 n.3. Several federal courts of appeals have applied the *Faragher-Ellerth* affirmative defense to other types of hostile-work-environment claims. *Id.* at ___ n.3, 133 S. Ct. at 2442 n.3.

¶ 86 Turning to the case before us, the City's position is that section 2-102(D)'s parameters for employer liability should apply to disability harassment claims and that plaintiff must show her affirmative compliance with the City's reporting and corrective policies as a precondition to establishing the City's liability. Plaintiff's position is that section 2-102(D)'s parameters do not apply and that compliance with any City policies is not a precondition, but should be assessed only within the *McDonnell Douglas* framework.

¶ 87 The City notes that section 2-102(D) provides that, in the case of nonsupervisory harassment, an employer is liable only if it: (1) was aware of the conduct; and (2) failed to take reasonable corrective measures. The City does not disagree that claims under the Human Rights Act should be analyzed under the *McDonnell Douglas* burden-shifting framework, but it urges this court to construe the statute to require an employee like plaintiff to show *affirmative compliance* with her employer's reasonable reporting and corrective policies as a *necessary precondition* to establishing liability under the statute. In the City's view, such a bright-line rule is consistent with the Human Rights Act and the General Assembly's purpose in protecting employers from unfounded charges, preventing harassment, promoting conciliation rather than litigation, and ensuring that victims do not profit from their failure to mitigate avoidable consequences.

¶ 88 As support for this position, the City points to the legislative history of section 2-102(D). During the House proceedings, Representative Currie stated, in response to a question about employer liability for nonsupervisory sexual harassment:

> "If the issue is two co-workers, I think the Bill *** 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).

¶ 89 Plaintiff first argues that section 2-102(D)'s parameters should not apply to disability harassment claims under section 2-102(A), because a contrary reading violates statutory-construction rules. Plaintiff suggests that, instead of section 2-102(D)'s provisions, the *McDonnell Douglas* burden-shifting framework adequately governs the parties' respective burdens of proof as to a hostile-work-environment disability claim under section 2-102(A). Specifically, once plaintiff sets forth her *prima facie* case of discrimination based on a hostile work environment, it then becomes the City's burden to articulate a legitimate, nondiscriminatory reason for its actions. Plaintiff suggests that the City could set forth that it had no notice of the harassment or that it took reasonable corrective measures to prevent it. Then, plaintiff notes, she could rebut the City's allegations by showing that its assertion is pretext, such as by showing that the City was aware of the hostile work environment or that plaintiff reported the harassment. Plaintiff urges, however, that this court *not* find that the failure to use an employer's policies is an *absolute bar* to a hostile-work-environment claim. Instead, she suggests that a plaintiff can contest that assertion under the *McDonnell Douglas* framework, under which a plaintiff always maintains the ultimate burden of proof (*e.g.*, to show that, in a case of coworker harassment, the employer was negligent).

¶ 90 Having held above that section 2-102(A) proscribes disability harassment, we conclude that the statute is ambiguous as to whether section 2-102(D)'s parameters for employer liability for

sexual harassment also apply to disability harassment. Thus, we turn to statutory-construction aids.

¶ 91 Assessing the Commission's interpretation and mindful of the policy underlying the statute, we hold that section 2-102(D)'s parameters apply to claims brought under section 2-102(A) for disability harassment. Our reading is consistent with the Commission's interpretation of the statute, under which the Commission promulgated nearly identical parameters for employer liability for national origin harassment. 56 Ill. Adm. Code 5220.900 (1986). Applying section 2-102(D)'s parameters to disability harassment claims will result in consistent treatment of all types of harassment claims under the Human Rights Act, and consistency promotes the policy to secure for all persons freedom from discrimination.

¶ 92 The City urges that we further hold that an employee's failure to use an employer's formal antiharassment policy *absolutely bars* his or her harassment claim. The legislative history the City noted above reflects that using an employer's antiharassment reporting mechanism or policy was contemplated by the General Assembly as a means to finding employer liability. It is unclear to us if it goes as far as the City's reading, *i.e.*, that a failure to use a policy constitutes an absolute bar. Specifically it is unclear if the statute's requirement of employer awareness of harassment contemplates actual *and constructive* notice of the harassment. *Cf. Vance*, 570 U.S. at ___, 133 S. Ct. at 2439 (under Title VII, employer is negligent and thus liable for coworker harassment if it knew *or reasonably should have known of* the harassment and failed to take remedial action). In any event, the certified question asks us to answer only whether section 2-102(D)'s awareness and corrective-measure parameters apply to harassment cases under section 2-102(A). The City's argument addresses an issue beyond that certified for our review. Accordingly, we do not reach it.

¶ 93 (2) Burden of Proving Awareness and Failure to Take Corrective Measures

¶ 94 Given our holding as to the first part of the second certified question—that section 2-102(D)'s parameters apply to disability harassment claims brought under section 2-102(A)—we note that the second part of the second certified question asks: If yes, does the employee or the employer bear the burden of alleging and proving that the employer: (a) is aware of the conduct by its nonmanagerial and nonsupervisory employees; and (b) fails to take reasonable corrective measures? It has been noted that, under the *McDonnell Douglas* framework, the ultimate burden of persuasion always rests with the plaintiff; only the burden of production shifts between the plaintiff and the employer. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510 (1993); see also *Mockler v. Multnomah County*, 140 F.3d 808, 812 (9th Cir. 1998) (under Title VII, the plaintiff must establish employer's knowledge and lack of effectual corrective action). In our view, the statutory language does not suggest any departure from this general rule. Thus, we conclude that the plaintiff bears the burden of proving awareness and failure to take corrective measures.

¶ 95 In summary, as to the second certified question, we hold that the parameters for employer liability under section 2-102(D) of the Human Rights Act apply to disability harassment claims brought under section 2-102(A) and that the employee bears the burden of persuasion with respect to such claims.

¶ 96 F. Third Certified Question

¶ 97 The third certified question asks: does the Tort Immunity Act apply to a civil action under the Human Rights Act where the plaintiff seeks damages, reasonable attorney fees, and costs? If yes, should this court modify, reject, or overrule its holdings, in *Birkett*, 325 Ill. App. 3d at 202, *Firestone*, 119 Ill. App. 3d at 689, and *Streeter*, 44 Ill. App. 3d at 394-95, that "the

Tort Immunity Act applies only to tort actions and does not bar actions for constitutional violations" (*Birkett*, 325 Ill. App. 3d at 202)? The City argues that the Tort Immunity Act applies to plaintiff's Human Rights Act claims because they are not claims under the Illinois Constitution. Alternatively, the City contends that we should reject our previous holdings that the Tort Immunity Act applies only to tort actions and does not apply to actions for constitutional violations. For the following reasons, we conclude that the Tort Immunity Act applies to actions under the Human Rights Act. The City can assert immunity with respect to plaintiff's request for damages but not to her request for equitable relief. We acknowledge that the supreme court has impliedly rejected our holdings that the Tort Immunity Act applies only to tort actions and does not apply to constitutional claims. Accordingly, we do not follow that precedent.

¶ 98 (1) Statutory Frameworks

¶ 99 (a) Tort Immunity Act

¶ 100 The 1970 Illinois Constitution abolished the doctrine of sovereign immunity, except as the General Assembly may provide by statute. Ill. Const. 1970, art. XIII, § 4. Thus, the General Assembly is "the ultimate authority in determining whether local units of government are immune from liability." (Internal quotation marks omitted.) *Harris v. Thompson*, 2012 IL 112525, ¶ 16. The Tort Immunity Act's purpose "is to protect local public entities and public employees from liability arising from the operation of government." 745 ILCS 10/1-101.1(a) (West 2014). By providing immunity, the General Assembly sought to prevent public funds from being diverted from their intended purpose to the payment of damages claims. *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001). The Tort Immunity Act

does not create duties but, rather, merely codifies existing common-law duties, to which the delineated immunities apply. *Id.*

¶ 101 The Tort Immunity Act adopts the general principle that local governmental units are liable in tort and other civil actions, but it limits this liability with an extensive list of immunities based on specific government functions. *Barnett v. Zion Park District*, 171 Ill. 2d 378, 386 (1996). The statute is in derogation of the common law and, therefore, must be strictly construed against the public entities involved. *Aikens v. Morris*, 145 Ill. 2d 273, 278 (1991).

¶ 102 Section 2-101 of the Tort Immunity Act states that it does not affect the right to obtain relief, *other than damages*, against a local public entity or public employee. 745 ILCS 10/2-101 (West 2014). Further, the statute expressly states that it does *not* affect the liability of a local public entity or public employee based on: (1) contract; (2) operation as a common carrier; (3) the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2014)); (4) the Workers' Occupational Diseases Act (820 ILCS 310/1 *et seq.* (West 2014)); (5) section 1-4-7 of the Illinois Municipal Code (65 ILCS 5/1-4-7 (West 2014) (municipal liability for damage to property by the removal, destruction, or vacation of any unsafe or unsanitary building)); or (6) the Illinois Uniform Conviction Information Act (20 ILCS 2635/1 *et seq.* (West 2014)). 745 ILCS 10/2-101(f) (West 2014).

¶ 103 Section 2-109 of the Tort Immunity Act provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West 2014). Section 2-201 states: "*Except as otherwise provided by Statute*, a public employee serving in a position involving the determination of policy or the exercise of discretion is *not* liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." (Emphases added.)

745 ILCS 10/2-201 (West 2014). Section 1-204, which defines the term "injury," states, in part, that the term "*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."[14] (Emphases added.) 745 ILCS 10/1-204 (West 2014).

¶ 104 The supreme court has rejected the claim that the Tort Immunity Act "categorically excludes" nontort actions. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) ("we do not adopt or approve of the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort"). But see *Birkett*, 325 Ill. App. 3d at 202 (Tort Immunity Act applies only to tort actions and not constitutional violations); *Firestone*, 119 Ill. App. 3d at 689 (Tort Immunity Act "applies only to tort actions [citations], and does not bar a civil rights action"; count alleged equal protection violations of federal and Illinois constitutions, as well as violation of section 1983); *Streeter*, 44 Ill. App. 3d at 395 (the plaintiffs sought damages for county's vacation of road that they alleged reduced the value of their property without compensation and, separately, they sought compensation for the unconstitutional taking; court held that claim did not allege a tort but was "analogous to a claim for compensation in an eminent domain proceeding"; notice provisions of Tort Immunity Act did not bar the plaintiffs' suit).

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[14] However, the statute does not shield a defendant from a federal claim, such as a section 1983 claim (42 U.S.C. § 1983 (2012)), because the supremacy clause of the United States Constitution provides that federal laws are supreme to state laws. See *Thomas ex rel. Smith v. Cook County Sheriff*, 401 F. Supp. 2d 867, 875 (N.D. Ill. 2005); *Anderson v. Village of Forest Park*, 238 Ill. App. 3d 83, 92 (1992).

¶ 105 (b) Human Rights Act

¶ 106 The Human Rights Act defines "employer" to include: (1) the "State and any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees" (775 ILCS 5/2-101(B)(1)(c) (West 2014)); and (2) any "person" (defined to include "the State of Illinois and its instrumentalities, political subdivisions, [and] units of local government" (775 ILCS 5/1-103(L) (West 2014))) "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" (775 ILCS 5/2-101(B)(1)(b) (West 2014)). Further, in section 2-102(A), the Human Rights Act provides that it is unlawful 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." (Emphasis added.) 775 ILCS 5/2-102(A) (West 2014).

¶ 107 (2) Tort Immunity Act Applies to Claims Under the Human Rights Act

¶ 108 The City argues that the Tort Immunity Act applies to plaintiff's Human Rights Act claims because they are not claims under the Illinois Constitution. Alternatively, it argues that, even if plaintiff's claims are constitutionally based, the Tort Immunity Act applies. The City contends that we should reject our previous holdings that the Tort Immunity Act applies only to tort actions and does not apply to actions for constitutional violations.

¶ 109 Again, in her four-count complaint, plaintiff alleged: (1) refusal to accommodate; (2) disparate treatment; (3) retaliation; and (4) hostile work environment. In each count, she sought back pay, front pay, the value of lost benefits, actual damages, "emotional and other compensatory

damages," reinstatement with full seniority, attorney fees, and the costs of suit. All of those forms of relief are available under the Human Rights Act. 775 ILCS 5/8A-104 (West 2014) (among other forms of relief, the Commission may award: (1) actual damages; (2) hiring, reinstatement or upgrade, back pay, and fringe benefits; (3) restoration of labor organization membership; and (4) attorney fees and costs; further, it may (5) make the complainant whole, including by way of awarding interest); 775 ILCS 5/10-102(C) (West 2014) (circuit court may award: (1) actual and punitive damages; (2) injunctive relief; and (3) attorney fees and costs to a prevailing party other than the State).

¶ 110 The central issue here is whether the Tort Immunity Act applies to plaintiff's claims for damages (*i.e.*, her prayers for "actual damages" and "emotional and other compensatory damages"), not her ability to obtain equitable relief. The statute, as noted above, does not affect the right to obtain relief, *other than damages*, against a local public entity or public employee. 745 ILCS 10/2-101 (West 2014); see, *e.g.*, *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill. 2d 490, 500-02 (2000) (section 2-101 excludes injunctive remedies from the statute). Therefore, the City clearly cannot assert immunity with respect to plaintiff's request for back pay, front pay, lost benefits, or reinstatement. See, *e.g.*, *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) (back pay, front pay, and reinstatement constitute equitable remedies under Title VII); see also *Pals v. Schepel Buick & GMC Truck, Inc.*, 220 F.3d 495, 501 (7th Cir. 2000) ("[f]ront pay and back pay under Title VII and the ADA are 'equitable' matters, but they still are dollar values").

¶ 111 We first conclude that claims under the Human Rights Act are constitutionally grounded and/or derived. As relevant here, the Human Rights Act expressly implements the constitutional guarantee of freedom from disability discrimination in employment (Ill. Const.

1970, art. I, § 19). 775 ILCS 5/1-102(F) (West 2014). The civil rights protected by the Human Rights Act are constitutional rights, and, thus, plaintiff's claims are constitutionally grounded and/or derived; they are not tort actions. See *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 518 (1997) ("An action to redress a civil rights violation has a purpose distinct from a common law tort action," and each type of claim must be separately proved); see also *Yount v. Hesston Corp.*, 124 Ill. App. 3d 943, 947-49 (1984) (the Illinois Constitution does not authorize a private right of action to enforce section 19 of article I; thus the plaintiff could not bring a private action under section 19 for employment discrimination based on disability; the Human Rights Act is the exclusive remedy that the plaintiff could have pursued); *cf. Melvin v. City of Frankfort*, 93 Ill. App. 3d 425, 432 (1981) (holding first that statute that barred disabled applicants from certain firefighter positions with municipalities was unconstitutional under section 19; further holding that Tort Immunity Act immunized city employees with respect to the applicant's claim for damages, because his pleadings raised *constitutional* challenge asserting denial of wages, which "follows the traditional model of a tort claim," not a contractual one, and thus was barred; constitutional provision did not create a contractual right).

¶ 112 Having determined that plaintiff's claims are constitutionally grounded, we next address whether the City may assert immunity as to plaintiff's claims for damages. We answer that question in the affirmative. As noted, the supreme court has rejected the claim that the Tort Immunity Act "categorically excludes" nontort actions. *Raintree Homes*, 209 Ill. 2d at 261 ("we do not adopt or approve of the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort"). However, as noted, there is case law in this district that holds that the Tort Immunity Act applies only to tort claims and does not apply to constitutional claims. See *Birkett*, 325 Ill. App. 3d at 202; *Firestone*, 119 Ill. App. 3d

at 689; *Streeter*, 44 Ill. App. 3d at 395. *Raintree Homes*, in our view, has impliedly rejected our holdings, including, as relevant here, our holdings that constitutional claims and civil rights actions are not subject to the Tort Immunity Act.

¶ 113 Given *Raintree Home*'s pronouncement that the statute generally does not exclude nontort actions, we turn to the provision that answers the precise question before us. As the City notes, section 1-204 of the Tort Immunity Act, which defines the term "injury," states, in part, that the term "*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." (Emphases added.) 745 ILCS 10/1-204 (West 2014); see also 745 ILCS 10/8-101(c) (West 2014) (one-year statute of limitations for a "civil action" under the Tort Immunity Act; "civil action" includes an action based upon the "Constitution of this State"). We agree with the City that the Tort Immunity Act clearly encompasses constitutional claims, including those brought under the Human Rights Act.[15]

¶ 114 In *Birkett*, we quoted this passage from section 1-204, but we rejected the plaintiff's argument that the Tort Immunity Act provided immunity for constitutional causes of action. *Birkett*, 325 Ill. App. 3d at 201-02. We did so without analyzing section 1-204 and apparently based our conclusion concerning constitutional claims on our holding that the statute applies only to tort actions, as the former necessarily flows from the latter. *Id.* at 202 (the statute "applies only to tort actions and does not bar actions for constitutional violations"). *Birkett* cited *Firestone* and *Streeter*, which merely adopted the same erroneous conclusion that the

[15] Of course, the Tort Immunity Act would also apply even if a Human Rights Act claim were not constitutional, but merely statutory, as it also applies to actions based upon "the statutes *** of Illinois." 745 ILCS 10/1-204 (West 2014).

statute is limited to tort claims, and *Anderson v. Village of Forest Park*, 238 Ill. App. 3d 83, 92 (1992), which held that the statute did not apply to a *federal* (*i.e.*, section 1983) claim. Those cases are further 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." See Pub. Act 84-1431, art. 1, § 2 (eff. Nov. 25, 1986 (amending Ill. Rev. Stat. 1985, ch. 85, ¶ 1-204)); see also Stephanie M. Ailor, Notes, *The Legislature Versus the Judiciary: Defining "Injury" Under the Tort Immunity Act*, 57 DePaul L. Rev. 1021, 1051-52 (Summer 2008) (addressing the current discrepancy between the statute and outstanding case law and noting that the problem "arose from a failure to recognize the statutory amendment").

¶ 115 In summary, we hold that the Tort Immunity Act applies to actions under the Human Rights Act. The City can assert immunity with respect to plaintiff's requests for damages but not to her requests for equitable relief. We acknowledge that the supreme court has impliedly rejected our previous holdings that the Tort Immunity Act applies only to tort actions and does not apply to constitutional claims. Accordingly, we do not follow that precedent.

¶ 116

¶ 117 III. CONCLUSION

¶ 118 We have answered the certified questions, and we remand the cause to the trial court for further proceedings.

¶ 119 Certified questions answered; cause remanded.

¶ 120 JUSTICE McLAREN, concurring in part and dissenting in part.

¶ 121 Although I concur with some of what the majority has opined, I must also dissent from portions of the majority opinion.

¶ 122 First, I dissent from the majority's determination that the legislature has created the cause

of action of "disability harassment." The majority correctly relates that the term "harassment" and the phrase "hostile or offensive working environment" explicitly appear in the Human Rights Act in the employment context only in connection with "sexual" harassment. *Supra* ¶ 29. The majority also correctly states that the Human Rights Act: "explicitly prohibits sexual harassment" (*id.*); "does not, with respect to employment, explicitly refer to disability *harassment*" (emphasis in original) (*supra* ¶ 34); and "explicitly makes only *sexual* harassment a civil rights violation" (emphasis in original) (*id.*). From these explicit observations, the majority then concludes that the Act is "ambiguous" and "does not explicitly state that sexual harassment is the only type of harassment claim that constitutes a civil rights violation." *Supra* ¶ 42.

¶ 123 I believe that the majority is not considering the legal maxim of statutory interpretation "*inclusio unius est exclusio alterius*," which provides that the inclusion of one thing implies the exclusion of another; in other words, "where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language." *City of St. Charles v. Illinois Labor Relations Board*, 395 Ill. App. 3d 507, 509-10 (2009). The efficacy of this maxim is demonstrated by the logical gymnastics required by the majority's analysis: while the Human Rights Act "explicitly makes only *sexual* harassment a civil rights violation" (emphasis in original) (*supra* ¶ 34), the Act "does not explicitly state that sexual harassment is the only type of harassment claim that constitutes a civil rights violation" (*supra* ¶ 42). 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.

¶ 124 Additionally, if section 2-102(D) was added as a clarification (see *supra* ¶ 48), it is puzzling why the clarification was made to "*narrowly expand* the available protections" (emphasis in original) (*supra* ¶ 48) and was not all-inclusive, adding hostile-work-environment harassment as

a civil rights violation in regard to all of the enumerated protections. In any event, the fact that this question was certified to this court suggests that the legislative "clarification" is far from clear.

¶ 125 I submit that the answer to the first part of the first certified question should be that there is no statutory cause of action for disability harassment. (However, the complaint stated a cause of action for disability discrimination.) I would thus answer the question with a qualified negative.

¶ 126 I further dissent, for two reasons, from the majority's answer to the third certified question. First, I do not believe that the question is a proper question; second, I believe that the majority's answer is incorrect.

¶ 127 I do not believe that there are reasonable grounds for a difference of opinion as to whether the Tort Immunity Act applies to a Human Rights Act claim. The form of the question implies that we would be effectively overruling three prior decisions of this court. The only reason for us to depart from this line of cases (stretching back almost 40 years) would be the supreme court's overruling of those cases. This has not occurred. Therefore, there is no difference of opinion, and the question is not a proper question to be answered under Rule 308.

¶ 128 The majority references a quote from *Raintree Homes* and claims that, by this, the supreme court impliedly rejected our previous holdings. I disagree. The majority states, "The supreme court has rejected the claim that the Tort Immunity Act 'categorically excludes' non-tort actions. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 261 (2004) ('we do not adopt or approve of the appellate court's reasoning that the Tort Immunity Act categorically excludes actions that do not sound in tort')." *Supra* ¶ 8. The supreme court declined to "adopt or approve" our reasoning; however, the court did not reject our reasoning, nor did it overrule our holdings. It merely affirmed on a different basis. See *Raintree Homes*, 209 Ill. 2d at 261. I interpret the supreme court's statement as a general proposition that did not overrule the

previously cited decisions but merely established an outer limit of the Tort Immunity Act. Additionally, the facts in *Raintree Homes* are not the same, or even substantially the same, as the facts herein; thus, *Raintree Homes* is not controlling. See *Blount v. Stroud*, 232 Ill. 2d 302, 324 (2009) ("the precedential scope of our decision is limited to the facts that were before us."); see also *People v. Trimarco*, 364 Ill. App. 3d 549, 555 (2006) (McLaren, J., dissenting).

¶ 129 The supreme court in *Raintree Homes* also said that "logic" similar to that employed by the majority here was not controlling as well:

> "While the Village correctly asserts that *Village of Bloomingdale* may have implicitly found that the Act applied to some nontort actions specifically at issue in that case, such a holding does not imply that the Act applies to *all* nontort actions against a government, including impact fee refund actions." (Emphasis in original.) *Raintree Homes*, 209 Ill. 2d at 259.

In my opinion, *Raintree Homes* did not address the precedent that the majority here is willing to reject. Even if it did, the court did not reject it with such a broad generalization. I submit that the supreme court might say the same thing quoted above about the majority's implication that, per the *Raintree Homes* generalization, the Tort Immunity Act categorically applies to actions that do not sound in tort.

¶ 130 The second reason for my dissent from the majority's answer to the third certified question is that I believe that the specific inclusion of municipal corporations in the Human Rights Act meant that the legislature intended that public employees be given the same rights as employees in the private sector. The City claims that these are not rights that are set forth in the constitution. I submit that the Human Rights Act was intended to prescribe the forms of relief for what are constitutional rights, and not some brooding omnipresence in the sky. Apparently, the majority

agrees:

> "We first conclude that claims under the Human Rights Act are constitutionally grounded and/or derived. As relevant here, the Human Rights Act expressly implements the constitutional guarantee of freedom from disability discrimination in employment (Ill. Const. 1970, art. I, § 19). 775 ILCS 5/1-102(F) (West 2014). The civil rights protected by the Human Rights Act are constitutional rights, and, thus, plaintiff's claims are constitutionally grounded and/or derived; they are not tort actions. See *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 518 (1997) ('An action to redress a civil rights violation has a purpose distinct from a common law tort action' ***." *Supra* ¶ 15.

I bolster my opinion with the submission that violating the Human Rights Act does not comport with any formulation of reasonable policy or exercise of discretion that the Tort Immunity Act is supposed to protect. The majority concludes that the Tort Immunity Act's definition of injury is the basis for its application to this cause of action. See *supra* ¶ 7. This is incorrect. I submit that the relationship between plaintiff and defendant here is that of employee and employer. I also submit that plaintiff's employment contract implicitly included the Human Rights Act. Plaintiff's right to be free from unlawful discrimination in the "terms, privileges or conditions of employment" (775 ILCS 5/2-102(A) (West 2014)) is based on the fact that she is employed. As such, any injury in this case arose from a breach of contract, not from a tort. The Tort Immunity Act explicitly states that it does not affect the liability of a local public entity or public employee based on contract. See 745 ILCS 10/2-101(a) (West 2014); see also *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 500 (2001). Thus, the Tort Immunity Act does not apply to this contract-based cause of action.