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.
	)	
CITY OF AURORA,	)	
	)	
Cross-Appellant,	)	
	)	
v.	)	
	)	
PATRICIA ROZSAVOLGYI,	)	
	)	
Cross-Appellee.	)	

REPLY BRIEF OF DEFENDANT-APPELLEE/CROSS-APPELLANT
CITY OF AURORA

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT

Had the General Assembly intended to create IHRA civil rights violations for an employer's failure to (1) reasonably accommodate disabled employees by taking "appropriate action" to stop nonsupervisory harassment, and (2) take reasonable corrective measures of nonsupervisory harassment based on "disability," it would have done so by legislative amendment. This Court cannot rewrite the IHRA's unambiguous statutory text to make it consistent with its ideas of orderliness and public policy. See *Henrich v. Libertyville High Sch.*, 186 Ill.2d 381, 394-395 (1998).

The General Assembly has not amended the IHRA civil rights violations for "reasonable accommodation" and "harassment" to include disabled employees. Accordingly, Plaintiff's count I and IV claims may form elements of proof for her "discrimination" claim in count II, but they cannot constitute independent IHRA civil rights violations absent legislative amendment.

Thus, judgment for the City on counts I and IV will simply affirm that "[t]he responsibility for the justice or wisdom of legislation rests upon the legislature." See *id.*

A. Plaintiff's Revised First Certified Question Should Be Rejected

This Court should decline to address Plaintiff's revised first certified question (at Pl.'s Br. p. 27) for three reasons.

First, Plaintiff's objections (at p. 26-27) to the first certified question are easily resolved by answering the certified question's "alternative" question of whether counts I and IV of the complaint state cognizable civil rights violations under section 2-102(A) of the IHRA. This is a question of law resolved on the pleadings. (Def.'s Br. p. 14). It is the question answered by the trial court, appellate court, and the parties herein. It resolves the

propriety of the underlying interlocutory order. It should be a relatively straight-forward question of statutory interpretation answering whether the IHRA expressly makes independent civil rights violations for "reasonable accommodation" and "harassment" based on "disability."

Second, Plaintiff's proposed question is confusing. It also erroneously assumes that the complaint alleges a "knowing creation or allowance of a hostile work environment" and a "reasonable accommodation." Like the complaint, the nature of the "requests" are vague and indeterminate.

Third, Plaintiff's proposed question demonstrates that counts I & IV are impermissible duplicate claims seeking a multiple recovery for the same injury. It shows that the proofs for both claims are the same; *i.e.*, (a) Defendant's actual awareness of (b) nonsupervisory harassment amounting to a hostile work environment, and (c) Defendant's failure to take reasonable corrective measures, (d) despite Plaintiff's requests. It further shows that the damages are the same; *i.e.*, the personal injury resulting from nonsupervisory harassment. Accordingly, even if the count I and IV claims are cognizable, and not otherwise duplicative of the count II discrimination claim, they are duplicative of each other, and would result in an impermissible multiple recovery for the same injury.

B. Section 2-102(A) Does Not Authorize An Independent Civil Rights Violation For "Reasonable Accommodation" of Disabled Employees

Plaintiff (at p. 28-29) and Intervenor (at p. 18-19) argue that section 2-102(A)'s "terms, privileges or conditions of employment" language provides the required textual authority for an implicit, unexpressed, independently cognizable "reasonable accommodation" claim. This argument must be rejected for a number of reasons.

First, the IHRA's text clearly and unambiguously makes repeated distinctions between its civil rights violations for "reasonable accommodation" and its civil rights violations for "discrimination" in "terms, privileges or conditions." See (Def.'s Br. p. 49-53); e.g., compare 775 ILCS 5/3-102.1(B) with 775 ILCS 5/3-102.1(C)(2). That the General Assembly enacted the amendments establishing the civil rights violations for "reasonable accommodation" *despite* the pre-existing civil rights violations for "discrimination" further defeats this specious construction. See (Def.'s Br. p. 50).

Accordingly, the IHRA's clear and unambiguous text demonstrates that the IHRA civil rights violations for "reasonable accommodation" and "discrimination" are two different things. This is consistent with the general legislative approach to expressly establish separate and distinct civil rights violations for "reasonable accommodation" and "discrimination." See (Def.'s Br. p. 52, citing 42 U.S.C.A § 12112(b)(5)(A) and CAL GOV. CODE § 12940 (a), (k), (m) and (n)). It is also consistent with the case law, which treats "reasonable accommodation" and "discrimination" as two different things. See, e.g., *Olin Corp. v. Fair Employment Practices Comm'n*, 34 Ill.App.3d 868, 879-884 (5th Dist. 1976), aff'd on other grounds by 67 Ill.2d 466 (1977); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410-412 (1979); *infra* p. 8-9.

Plaintiff does not dispute that the IHRA's text unambiguously makes clear distinctions between its civil rights violations for "reasonable accommodation" and "discrimination." Instead, Plaintiff argues (at p. 38) that this Court should find an ambiguity, when none exists, because "by finding that § 2-102(A) is ambiguous … the purpose of the IHRA … is better served because legitimate discrimination claims will not be siphoned off or cut out."

This argument is for the legislature. See *Bd. of Educ. of Roxana Cmty. Sch. Dist. No. 1 v. Pollution Control Bd.*, 2013 IL 115473, ¶ 25 ("The responsibility for the wisdom of legislation rests with the legislature, and courts may not rewrite statutes to make them consistent with the court's idea of orderliness and public policy."). If the legislature wants employers to provide "reasonable accommodation" for all, some, or none of the IHRA's protected classes, it must do so by legislative amendment. This Court cannot, under the guise of statutory construction, rewrite the IHRA's unambiguous statutory text to make it consistent with Plaintiff's idea of orderliness and public policy. See *id.*

Moreover, Plaintiff concedes (at p. 31-34) that "reasonable accommodation" is separate and distinct from "discrimination" in order to avoid our alternative argument against multiple recovery/duplicate claims. This concession indisputably shows that section 2-102(A)'s civil rights violation for "discrimination" cannot authorize the distinctly different civil rights violation for "reasonable accommodation."

Furthermore, Plaintiff's reliance (at Pl.'s Br. p. 35-36) on the federal ADA case law distinguishing "reasonable accommodation" claims from "discrimination" claims fortifies our point. The "reasonable accommodation" and "discrimination" claims are different. This is why the statutory text must expressly authorize both claims.

Unlike the ADA, the IHRA's text does not expressly authorize "reasonable accommodation" as a separate form of "unlawful disability discrimination." (Def.'s Br. p. 51-52). Given the clear textual difference between the IHRA and ADA, this Court should hold that (1) the IHRA does not authorize an independently cognizable civil rights violation for "reasonable accommodation" of disabled employees under its prohibition of "unlawful

disability discrimination," and (2) the ADA case law is unhelpful in answering this question of statutory construction.

Alternatively, if section 2-102(A)'s civil rights violation for "discrimination" implicitly authorizes an unexpressed, independent civil rights violation for "reasonable accommodation," such a "reasonable accommodation" claim should logically follow the employee's traditional burdens of proof for a "discrimination" claim. See, e.g., *Willis v. Conopco, Inc.*, 108 F.3d 282, 284-287 (11th Cir. 1997). This would require that the employee (1) prove a "materially adverse tangible employment action," and (2) show that an employer's mere articulation of a legitimate, non-discriminatory reason for the adverse employment action is pretextual. See (Def.'s Br. p. 70-71).

Thus, if Plaintiff claims that she was terminated because of the City's failure to provide a "reasonable accommodation," the City may defend the "reasonable accommodation" claim *solely* by articulating a legitimate, non-discriminatory reason for the termination, which Plaintiff must then prove is pretextual. But if Plaintiff claims that the mere failure to provide a reasonable accommodation, standing alone, forms a cognizable injury notwithstanding the lawfulness of the termination, the City may defend the reasonable accommodation claim by arguing that Plaintiff has not proven a materially adverse tangible employment action. See, e.g., *Hoffelt v. Ill. Dep't of Hum. Rights*, 367 Ill.App.3d 628, 633-634 (1st Dist. 2006); (Def.'s Br. p. 73).

Second, Plaintiff's construction ignores that section 1-103(D) of the IHRA unambiguously provides that an IHRA "'Civil rights violation' includes and s*hall be limited to only those specific acts set forth* in Section[] 2-102 … of this Act." See 775 ILCS 5/1-103(D) (emphasis added). Accordingly, an IHRA civil rights violation cannot

include an implicit or unexpressed "reasonable accommodation duty" under section 2-102 of the IHRA. See *id.* Rather, to constitute an IHRA "civil rights violation," those "specific acts" forming the purported "reasonable accommodation duty" must be "set forth in Section 2-102." See *id.*; *Blount v. Stroud*, 232 Ill.2d 302, 326 (2009) ("This definition makes plain that a "civil rights violation," for purposes of the Act, is limited to civil rights violations arising under the enumerated sections of the Act, and does not include a civil rights violation as defined by, or arising under, federal law.").

For instance, section 2-102(J) expressly includes those specific acts set forth to establish an IHRA "civil rights violation" for "reasonable accommodation." See 775 ILCS 5/2-102(J). But section 2-102(J) expressly limits its "civil rights violation" to "pregnancy." See *id.* If the General Assembly wants to expressly set forth those specific acts establishing a "civil rights violation" for "reasonable accommodation" of disabled employees, it must do so by legislative amendment.

Intervenor argues (at p. 23-25) that the preamble enacting section 2-102(J) demonstrates the legislative intent to provide an independent IHRA civil rights violation for "reasonable accommodation" of disabled employees. But Intervenor ignores our arguments (at Def.'s Br. p. 54) that the preamble cannot demonstrate the legislative intent when section 2-102(A) was enacted, create an ambiguity in an unambiguous statute, or establish an independent IHRA civil rights violation. See *Triple A Services, Inc. v. Rice*, 131 Ill.2d 217, 227 (1989); *Roth v. Yackley*, 77 Ill.2d 423, 428 (1979).

Similarly, Plaintiff argues (at p. 37) that an individual legislator's statements during the house debates on the amendment enacting section 2-102(J) of the IHRA show that the amendment was intended to "clarify" that pregnant employees should receive the same

"reasonable accommodation" as disabled employees. While this Court cannot resort to the legislative history to create an ambiguity when the statutory text is clear and unambiguous, see (Def.'s Br. p. 18), it is logically difficult to perceive how the floor statements of an individual legislator about a different legislative provision some 35 years later can help us understand whether the legislature intended to implicitly establish an unexpressed, independent civil rights violation for "reasonable accommodation" of disabled employees when it enacted section 2-102(A) of the IHRA in 1980. See *Roth*, 77 Ill.2d at 428; *People v. R.L.*, 158 Ill.2d 432, 442 (1994) ("courts generally give statements by individual legislators in a floor debate little weight when searching for the intent of the entire legislative body. Such statements by themselves do not affirmatively establish the intent of the legislature.").

Third, Plaintiff's construction contradicts "this court's well-established rule that statutes creating a new liability must be strictly construed in favor of persons sought to be subjected to its operation." See *Nowak v. City of Country Club Hills*, 2011 IL 111838, ¶ 27 (internal alterations, quotations omitted). Like the remedial statute in *Nowak*, the IHRA indisputably creates a new liability that is in derogation of the common law. See *id.*; *JPMorgan Chase Bank, N.A. v. Earth Foods, Inc.*, 238 Ill.2d 455, 463 (2010) ("Even if a statute has remedial features but is in derogation of the common law, it will be strictly construed when determining what persons come within its operation."); *Acme Fireworks Corp. v. Bibb*, 6 Ill.2d 112, 119 (1955) ("Should a statute under examination be both remedial and penal, it will be construed with at least a reasonable degree of strictness so as to not include anything beyond the immediate scope and object, even though it be within its spirit. This bars adding anything to the statute by inference or intendment.").

Accordingly, this Court should not construct the IHRA as implicitly creating a new liability that imposes an affirmative duty of "reasonable accommodation" for disabled employees when this liability is not expressly set forth in the IHRA's operative text. See *id.*

Fourth, Illinois courts and the United States Supreme Court have invalidated regulations which impose the affirmative duty of "reasonable accommodation" as inconsistent with, and not authorized by, a statutory "discrimination" provision. E.g., *Olin*, 54 Ill.App.3d at 879-884 (invalidating regulation imposing "reasonable accommodation" for religion under Illinois civil rights statutory "discrimination" provision); *Davis*, 442 U.S. at 410-412 (holding that (1) Rehabilitation Act provision prohibiting "discrimination" against an "otherwise qualified handicapped individual" in federally funded programs "solely by reason of his handicap" did not compel college to undertake "affirmative efforts to overcome the disabilities caused by handicaps," and (2) agency regulation imposing "reasonable accommodation" under the statutory "discrimination" provision was invalid).

As the appellate court in *Olin* explained, "reasonable accommodation" is "something new and entirely different from discrimination as contemplated by the drafters of the statute." *Olin*, 34 Ill.App.3d at 879.

Generally speaking, a "discrimination" statutory provision requires that employers treat different employees alike, but it does not require that employers undertake affirmative efforts to treat different employees differently because of their differences, even if such differential treatment may promote equal opportunity. See *id.*; *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-431 (1971) ("Congress did not intend by Title VII … to guarantee a job to every person … the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group.

Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.").

As Plaintiff admits (at p. 28-29), "reasonable accommodation" requires that employers make *changes* to the employer's *ordinary* "terms, privileges or conditions of employment" for the specific benefit of disabled employees. See *Vande Zande v. State of Wis. Dept. of Admin.*, 44 F.3d 538, 542 (7th Cir. 1995) ("It is plain enough what 'accommodation' means. The employer must … consider changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work."). Hence, "reasonable accommodation" does not treat different employees alike, but it treats different employees differently because of their differences. See *id.*; *Davis*, 442 U.S. at 410-411. Thus, by definition, "reasonable accommodation" cannot reasonably constitute "discrimination" with respect to "terms, privileges or conditions of employment." See *id.* Accordingly, "if [an agency] has attempted to create such an obligation itself, it lacks the authority to do so." See *id.* at 411-412.

Cases like *Griggs*, *Davis*, and *Olin* were decided before the General Assembly enacted section 2-102(A) of the IHRA. The General Assembly was presumably aware of such cases, but it declined to expressly set forth a statutory provision for "reasonable accommodation" of disabled employees. Accordingly, the Joint Rules cannot impose the "new and entirely different" affirmative duty of "reasonable accommodation" under the IHRA's "discrimination" provision. See *Olin*, 54 Ill.App.3d at 879. "Consequently, to the extent that the Joint Rules might be interpreted as creating a civil rights violation for behavior which would not constitute a violation under the Act, the rules would be unenforceable." *Harton v. City of Chicago*, 301 Ill.App.3d 378, 390-391 (1st Dist. 1998).

Intervenor argues (at p. 23) that the General Assembly has acquiesced to the Joint Rules. But if the Joint Rules are an unreasonable construction invalid at their inception, they cannot be given effect by alleged legislative acquiescence. E.g., *Boaden v. Dep't of Law Enforcement*, 171 Ill.2d 230, 239 (1996). Intervenor also ignores that the case law invalidating similar regulations *pre-existed* the enactment of section 2-102(A) of the IHRA *and* the Joint Rules. Moreover, Intervenor erroneously *assumes* that the Joint Rules construct an independent IHRA civil rights violation, instead of merely providing guidance to the IHRA's definition of "disability." See (Def.'s Br p. 55-56).

If the Joint Rules are construed as creating an independent civil rights violation for "reasonable accommodation" of disabled employees, they are unenforceable. But if they are construed as a threshold inquiry into whether an employee is "disabled," which is a necessary precondition to establishing a predicate civil rights violation for "unlawful disability discrimination," they may be valid. See, e.g., *Harton*, 301 Ill.App.3d at 390-392.

Yet if the statutory basis for the "reasonable accommodation duty" arises from the IHRA's definition of "disability," it cannot create an independent IHRA civil rights violation. See *id.*; *Rozsavolygi v. City of Aurora*, 2016 IL App (2d) 150493, ¶ 61. The IHRA's definition of "civil rights violation" does not include the IHRA's definition section. 775 ILCS 5/1-103(D). Accordingly, the failure to provide a "reasonable accommodation" would only mean that the employee may be a qualified disabled employee under the IHRA. See *Harton*, 301 Ill.App.3d at 390.

Fifth, Plaintiff and Intervenor fail to cite a single case directly supporting their argument that section 2-102(A)'s "terms, privileges or conditions" language authorizes an independent civil rights violation for "reasonable accommodation." As the appellate court

correctly recognized (at ¶ 59), "No case has squarely addressed this issue, but case law has assumed that employers have a duty to reasonably accommodate a disability."

But those cases assumed the "duty" by citing the Joint Rules without considering whether they may validly impose an independent IHRA civil rights violation. See, e.g., *Owens v. Dep't of Human Rights*, 356 Ill.App.3d 46, 53 (1st Dist. 2005). Moreover, the case law assuming the "duty" is easily reconciled with the case law holding that "reasonable accommodation" is merely a threshold element of the *prima facie* case for "unlawful disability discrimination." See (Def.'s Br. p. 55-56).

Harton is instructive. First, it holds that an employee "who cannot, by reason of a physical condition, perform the duties of the job in question *even with accommodation* is not handicapped within the meaning of the [IHRA]." *Harton*, 301 Ill.App.3d at 390 (emphasis added). Second, it expressly rejects the contention that the Joint Rules impose a *per se* civil rights violation when an employer fails to investigate the possibility of accommodating a disabled employee. See *id.* at 390-391.

Harton recognizes that the mere failure to investigate a possible accommodation, standing alone, may not violate the IHRA when the employee cannot prove that s/he can perform the job with an accommodation or show that the employer's legitimate, nondiscriminatory reason for the adverse employment action is mere pretext. See *id.* at 391-392. Accordingly, *Harton* holds that "reasonable accommodation" is not an independent civil rights violation, but an element which may prove "a predicate civil rights violation." *Id.* at 392.

Plaintiff improperly cites (at p. 34) the agency decision overturned by *Harton* to support her argument that "'failure to accommodate' claims can be brought as independent

civil rights violations." *Harton* rejected this agency interpretation because it was erroneous and invalid expansion of the IHRA, "creating a civil rights violation for behavior which would not constitute a violation under the Act …." *Id.* at 391.

Sixth, notwithstanding the questions of statutory interpretation and separation of powers, there are compelling public policy reasons to have the General Assembly determine whether it wants to enact an independent civil rights violation for "reasonable accommodation" of disabled employees.

Like the IHRA's definition for religion, see 775 ILCS 5/2-101(F), the General Assembly may incorporate "reasonable accommodation" under its definition of "disability." While this approach would not make the failure to provide "reasonable accommodation" an independent civil rights violation, it would encourage employers to provide "reasonable accommodation" because doing so could avoid a potential civil rights violation for "unlawful disability discrimination." See *Harton*, 301 Ill.App.3d at 391-392.

Alternatively, the General Assembly may either impose strict liability for failing to provide a "reasonable accommodation" or provide the employer with affirmative defenses. It may impose strict liability for failing to independently investigate the possibility of an accommodation or not. It may want employees to follow an employer's reasonable accommodation policy as a necessary precondition to establishing IHRA liability. It may expressly enumerate which accommodations are "reasonable" and which are not.

These are judgments for the legislature, and not the courts. They should involve fact-finding hearings, balancing competing interests, and public debate. They should not be decided by the courts or administrative agencies.

Accordingly, there is no statutory basis to bring the count I reasonable accommodation claim as an independent IHRA civil rights violation. Therefore, the claim must be dismissed with prejudice.

C. Count I Fails to Allege a Legally Cognizable Reasonable Accommodation

Plaintiff makes two arguments (at p. 44-47) in response to our argument (at Def.'s Br. p. 56-61) that count I fails to allege a legally cognizable reasonable accommodation claim. First, Plaintiff asserts (at p. 44) that this issue goes beyond the scope of the certified question. Second, Plaintiff argues (at p. 45-47) that a claim alleging the mere failure to engage in the interactive process is a legally cognizable reasonable accommodation claim.

As to the first argument, whether count I alleges a legally cognizable reasonable accommodation claim falls within the scope of the certified question and this Court's review of the "whole case" pursuant to Supreme Court Rule 316. See (Def.'s Br. p. 4). The sole question to be answered is whether a request to stop nonsupervisory harassment is a reasonable accommodation for disabled employees. This is a question of law resolved on the pleadings. See (*id.* p. 14); e.g., *Siefkin v. Village of Arlington Heights*, 65 F.3d 664, 666-667 (7th Cir. 1995) (affirming motion to dismiss ADA reasonable accommodation claim for failing to state a cognizable reasonable accommodation).

Plaintiff's second argument—that (1) the employee does not have to initially request a reasonable accommodation, but can make any unreasonable request to trigger the so-called interactive process, and (2) the employer can be strictly liable for failing to engage in the interactive process, even when the employee has not requested a reasonable accommodation—has zero support in the law, which explains her dearth of authority.

Harton rejected this argument. 301 Ill.App.3d at 390-391. The federal appellate courts unanimously hold that the employer's failure to engage in the interactive process is not an independent or *per se* violation under the ADA. *Willis*, 108 F.3d at 284-286; *Rehling v. City of Chicago*, 207 F.3d 1009, 1015-1017 (7th Cir. 2000); *Cannice v. Norwest Bank Iowa N.A.*, 189 F.3d 723, 727 (8th Cir. 1999); *Walter v. United Airlines, Inc.*, 232 F.3d 892 (4th Cir. 2000); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 193–194 (3d Cir. 2009); *Noll v. Int'l Bus. Mach. Corp.*, 787 F.3d 89, 98 (2nd Cir. 2015).

The correct statement of the law is that: "When a request is patently unreasonable, the employer has no duty to investigate it or begin the interactive process. The same is true if the request does not make a sufficiently specific demand." *Hargett v. Florida Atl. Univ. Bd. of Tr.*, __ F.Supp.3d __, 2016 WL 6634912, * 9 (S.D. Fl. Nov. 8, 2016) (internal citations omitted); see *Truger v. Dep't of Human Rights*, 263 Ill.App.3d 851, 861 (2nd Dist. 1997) ("An employer's duty to accommodate does not attach until the employee asserts that she would have performed the essentials of a job if afforded a reasonable accommodation. In addition, the employee has the burden of asserting the duty and showing the accommodation was requested and necessary for adequate job performance.") (internal citations omitted).

To hold otherwise would make employers liable for the failure of an interactive process regardless of whether the employee had a documented medical condition for an accommodation, the employee could perform the job with an accommodation, or the accommodation was reasonable. See *Rehling*, 207 F.3d at 1015-1016. This not only fails to serve the IHRA's purpose, it elevates the interactive process requirement to an end in itself. See *id.* It impermissibly shifts the burden of the employee's *prima facie* case for

"unlawful disability discrimination" onto the employer. See *Willis*, 108 F.3d at 286. It subjects the employer to countless unfounded charges of unlawful discrimination, while needlessly increasing the cost and scope of litigation by allowing the employee to identify the reasonable accommodation through discovery instead of pleading a reasonable accommodation that may plausibly subject the employer to IHRA liability.

Plaintiff's argument also leads to "impractical or absurd results." See *Nowak*, 2011 IL 111838, ¶ 21. For instance, let's assume a clerical employee makes the following passing remark: "Typing this brief on a tight deadline is stressing me out. I need a vacation." In Plaintiff's world, this would trigger IHRA liability. The employer would need to investigate the possibility of a "reasonable accommodation" for the clerk's "stress" because s/he "requested" the "accommodation" of a "vacation." The employer would need to do all of this even if it had a "reasonable accommodation policy." The employer's failure to do so would be an IHRA civil rights violation, even if the clerk had no medical documentation, could do the job without an accommodation, or couldn't do the job even with an accommodation.

Plaintiff does not dispute that her sole requested accommodation — "to take appropriate action to make the [alleged] harassing and demeaning conduct stop" — has been deemed patently unreasonable by the unanimous consensus of the federal courts. See (Def.'s Br. p. 57); *Hargett*, __ F.Supp.3d __, * 10 (citing cases). Accordingly, "the employer has no duty to investigate it or begin the interactive process." See *id.* at * 9.

Therefore, count I must be dismissed with prejudice because Plaintiff fails to allege a legally cognizable reasonable accommodations claim as a matter of law.

D. The IHRA's Existing Text Is Unambiguous: Section 2-102(A) of the IHRA Does Not Authorize Count IV's "Disability Harassment" Claim As An Independent Civil Rights Violation

Plaintiff and Intervenor argue that (1) section 2-102(A) of the IHRA authorizes count IV's "disability harassment" claim as an independent civil rights violation, and (2) the IHRA's text is ambiguous because section 2-102(D) is not an independent civil rights violation for "sexual harassment," but instead merely "clarifies" and "expands the scope" of "sexual harassment" claims which may be brought as "sex discrimination" claims under section 2-102(A) of the IHRA. See (Pl.'s Br. p. 39-44; IDHR's Br. p. 26-31).

Plaintiff and Intervenor focus exclusively on the case law and the effect of cases like *Old Ben Coal*, *Bellwood*, *Sangamon*, *SIU*, and the inapposite federal case law. But they ignore the IHRA's clear and unambiguous text, which must be this Court's sole concern. See *Sangamon County Sherriff's Dep't v. Ill. Human Rights Com'n*, 233 Ill.2d 125, 136 (2009) ("Where the statutory language is clear and unambiguous, it is unnecessary to turn to other tools of construction.").

Plaintiff and Intervenor admit that the IHRA's "sexual harassment" amendments created a new liability which expanded the scope of IHRA liability, but only for "sex." See (Pl.'s Br. p. 43-44; IDHR's Br. p. 31).

Nor do Plaintiff and Intervenor dispute the following propositions:

The IHRA's text clearly and unambiguously makes repeated distinctions between its civil rights violations for "discrimination" and "harassment." See (Def.'s Br. p. 61-62).

The IHRA's text clearly and unambiguously limits its civil rights violation for "harassment" to "sexual harassment."

Section 2-102 of the IHRA does not expressly set forth those specific acts amounting to a "hostile work environment" or "harassment" for "disability harassment" so that "disability harassment" can constitute an independently cognizable IHRA "civil rights violation." See 775 ILCS 5/1-103(D); compare 775 ILCS 5/2-102(A) with 775 ILCS 5/2-101(E) and 775 ILCS 5/2-102(D).

The *expressio unius* canon of construction applies to preclude non-sexual harassment claims under the IHRA regardless of whether section 2-102(D) of the IHRA is construed as an amendment clarifying or changing the pre-existing law.

Instead, Plaintiff and Intervenor want this Court to rewrite the IHRA's unambiguous text to make it consistent with their idea of orderliness and public policy. To do so, they rely on the appellate courts' decisions in *Old Ben Coal* and *Bellwood*, which are distinguishable for several reasons.

First, both cases involve conduct which *preceded* the enactment of the IHRA's sexual harassment amendments. Before the IHRA's sexual harassment amendments, it was unclear whether a "harassment" claim could be brought under section 2-102(A). After the IHRA's sexual harassment amendments, the General Assembly clearly provided that only "sexual harassment" claims may be brought under section 2-102 of the IHRA.

Old Ben Coal expressly recognized that its construction was limited to "sexual harassment" claims which were brought before the passage of section 2-102(D). *Old Ben Coal Co. v. Ill. Human Rights Comm'n,* 150 Ill.App.3d 304, 308 (5th Dist. 1986). Thus, it should not be precedent for the proposition that non-sexual harassment claims arising after the enactment of section 2-102(D) are authorized by section 2-102(A) of the IHRA.

If the General Assembly wants to "clarify" that *other* "harassment" claims can be brought under section 2-102 of the IHRA, it must do so by legislative amendment. In so doing, the legislature may "expand the scope" of IHRA liability by imposing: (a) strict liability for supervisory "harassment;" (b) liability for "harassment" by members of the same protected class; and (c) liability for nonsupervisory "harassment." It may "expand" the scope of IHRA "harassment" liability to all, some, or none of the IHRA protected classes. These are judgments best left to the legislature, and not the courts.

Second, *Bellwood* is actually a "discrimination" claim involving a materially adverse tangible employment action (*i.e.*, discharge), and not a "harassment" claim based solely on allegations of a "hostile work environment." *Village of Bellwood Bd. of Fire and Police Comm'rs v. Human Rights Comm'n*, 184 Ill.App.3d 339, 349-350 (1st Dist. 1989). The record is unclear whether *Old Ben Coal* also involves a materially adverse tangible employment action.

As we previously argued (at Def.'s Br. p. 69-73), if a "hostile work environment" culminates in a materially adverse tangible employment action like a discharge, it may be brought as a "discrimination" claim under section 2-102(A) of the IHRA. But if the employer can merely articulate a legitimate, non-discriminatory reason for the materially adverse tangible employment action, the employee must then prove this reason is pretextual. If the alleged "hostile work environment" does not culminate in a materially adverse tangible employment action, the employee cannot prove "discrimination" or obtain IHRA relief for the injury caused by the "hostile work environment."

Applying these principles to the case at bar, the alleged nonsupervisory "harassment" might be relevant to proving count II's "unlawful discrimination" claim, but

it cannot stand alone as an independent IHRA civil rights violation. To hold otherwise would allow Plaintiff to recover for the non-cognizable injury of "harassment" without proving an essential element of "discrimination" (*i.e.*, a materially adverse tangible employment action).

Third, both cases do not involve "disability harassment." Neither case can stand for the proposition that "disability harassment" claims are independently cognizable under section 2-102(A) of the IHRA. Unlike claims for sexual and racial harassment, Plaintiff and Intervenor have not pointed to any evidence showing that "disability harassment" claims were considered to be cognizable under a "discrimination" provision before the General Assembly enacted sections 2-102(A) or 2-102(D) of the IHRA.

Despite their lack of evidence, Plaintiff and Intervenor want this Court to believe that the legislature specifically intended for "disability harassment" claims to be brought under section 2-102(A). But if this was true, then the General Assembly would have included "disability" when it enacted its civil rights violations for "harassment." It did not. And if the General Assembly enacted section 2-102(D) to both clarify and narrowly expand the scope of IHRA liability for just sex discrimination/harassment claims, it begs the question why it did not similarly do so for all of the other protected classes.

The answer to this question should be left to the legislature. There is no need for us to guess the legislative intent when the IHRA's text is clear and unambiguous.

Fourth, *Bellwood* and *Old Ben Coal* are appellate court decisions that must give way to this Court's construction in *SIU* and *Sangamon*. See (Def.'s Br. p. 62-68).

If *Bellwood* holds that racial "hostile work environment" claims can be brought as an independently cognizable civil rights violation under the IHRA, its holding is severely

undermined by this Court's subsequent decision in *SIU*, which held that: (1) a racial hostile classroom environment claim is not cognizable under the IHRA; (2) the IHRA's sexual harassment amendments changed the law; and (3) the IHRA's sexual harassment amendments are limited to sexual harassment. See *Bd. of Tr. of S. Ill. Univ. v. Dep't of Human Rights*, 159 Ill.2d 206, 213 (1994).

Intervenor argues (at p. 30) that *SIU*'s holdings on this issue are *dictum*. But even if this is true, it is this Court's "judicial *dictum* [which] is entitled to much weight, and should be followed unless found to be erroneous." See *Cates v. Cates*, 156 Ill.2d 76, 80 (1993) (original emphasis). Because Intervenor does not argue that *SIU* erroneously found that the IHRA's sexual harassment amendments both changed the law and limited the IHRA's harassment claims to just sexual harassment, it should be followed. See *id.*

If *Old Ben Coal* holds that section 2-102(D) of the IHRA does not create a new cause of action for sexual harassment, then *SIU* and *Sangamon* clearly undermine its holding. See (Def.'s Br. p. 62-63). Plaintiff, Intervenor, and the appellate court acknowledge this, but they insist that section 2-102(D) did not create a new cause of action for sexual harassment because, by "extending the reach of the statute, it also imposed a new form of liability for this type of discrimination." See, e.g., (IDHR's Br. p. 31).

Expanding the scope of the IHRA to create a new form of liability can only show that "[w]here the legislature has made a material change in a statute … the presumption is that the amendment was intended to change the law." See *SIU*, 159 Ill.2d at 213 (internal quotations omitted). The opposite conclusion is "logical gymnastics." See *Rozsavolygi*, 2016 IL App (2d) 150493, ¶ 122 (McLaren, J., dissenting).

We're not sure how an amendment can both "clarify" pre-existing law and "expand" the pre-existing scope of liability, but not constitute a material change in a statute intended to change the pre-existing law. The "logical gymnastics" required to reach this conclusion used a fundamentally unsound approach that ignored the statute's plain language, and resorted to extrinsic aids of construction "to declare that the legislature did not mean what the plain language of the statute says." See *id.*; *Henrich*, 186 Ill.2d at 391. This was improper. "There is no rule of construction which authorizes a court to declare that the legislature did not mean what the plain language of the statute says." *Id.*

This construction eviscerates the IHRA's express intent to prevent both "unlawful discrimination" and "sexual harassment" as distinctly different, independent civil rights violation. See 775 ILCS 5/1-102(A)-(D), 2-102(A), and 2-102(D). It nullifies the IHRA's "sexual harassment" amendments' statutory text and presumed intent. (Def.'s Br. p. 63). It contradicts the legislative history showing the intent to *include* "sexual harassment" as an independent civil rights violation to address a distinctly different problem than "discrimination." (Def.'s Br. p. 62). It disregards the well-recognized legal distinction between "discrimination" and "harassment." (*Id.* p. 69-71). It overlooks the absence of any evidence showing an intent to include "disability harassment" as a pre-existing form of IHRA liability. (*Id.* p. 73). It elevates the conflicting statements of a single legislator to negate the plain language of the statutory text. (*Id.*). It ignores the legislature's ability to clearly express its intent to clarify pre-existing law in the amendment's statutory text. (*Id.* p. 66-67). It contravenes "this court's well-established rule that statutes creating a new liability must be strictly construed in favor of persons sought to be subjected to its operation." See *Nowak*, 2011 IL 111838, ¶ 27; *supra* p. 7.

Accordingly, the clear and unambiguous text shows that the IHRA makes separate and independent civil rights violations for "discrimination" and "harassment," but limits its civil rights violation for "harassment" to "sexual harassment." Therefore, count IV must be dismissed with prejudice.

E. Plaintiff's Failure To Plead and Prove Her Compliance With The City's Reasonable Corrective Policies Should Bar Her From Recovering IHRA Damages Which She Could Avoided

Plaintiff argues (at p. 47-48) that this issue falls outside the scope of the certified question and involves a factual dispute over whether she complied with the City's policies. Plaintiff also argues (at p. 48-49) that the appellate court's decision in *Pinnacle Ltd. P'ship v. Ill. Human Rights Comm'n*, 354 Ill.App.3d 819, 829 (4th Dist. 2004) permits IHRA recovery for nonsupervisory harassment based on a supervisor's knowledge of the alleged harassment, notwithstanding the employee's failure to utilize the employer's reasonable corrective policies.

As to Plaintiff's first argument, whether the employee must plead and prove her compliance with her employer's corrective policies as a necessary precondition to obtaining IHRA damages is a question of law which implicates the elements of the *prima facie* case in counts I and IV, subject matter jurisdiction over an IHRA claim, or application of the longstanding equitable principle that "a plaintiff should not recover for those consequences of a defendant's act which were readily avoidable by the plaintiff." See *Kelly v. Chicago Park Dist.*, 409 Ill. 91, 98 (1951); (Def.'s Br. p. 77). Accordingly, the issue is within the scope of the certified question and this Court's review of the "whole case." See (Def.'s Br. p. 4).

Even if there is a factual dispute concerning Plaintiff's compliance, this does not preclude this Court from answering the legal question of whether an employee must plead and prove her compliance with her employer's corrective policies before obtaining IHRA damages which were readily avoidable had the employee complied with such policies. Once this Court resolves this legal question, it may remand the case to the circuit court for resolution of any disputed factual issues.

But there is no genuine factual dispute. Whether Plaintiff has alleged compliance with the City's corrective policies is resolved by the pleadings. Whether Plaintiff has proved compliance with the City's policies is resolved by Plaintiff's judicial admissions in her answers to interrogatory nos. 20-21, which she cannot subsequently contradict to create a question of fact. See *Van's Material Co., Inc. v. Dep't of Revenue*, 131 Ill.2d 196, 211-212 (1989) (pretrial answers to interrogatories can be binding judicial admissions); *In re Estate of Rennick*, 181 Ill.2d 395, 406-407 (1998). Because Plaintiff's answers to interrogatories are deliberate, clear, unequivocal sworn statements by a party about a concrete fact within her knowledge (*i.e.*, whether she utilized the City's policies), they constitute binding judicial admissions which Plaintiff cannot subsequently controvert to defeat the legal effect of her judicial admissions. See *id.*

As to Plaintiff's second argument, the IHRA's text does not authorize imputing an agent's alleged notice of nonsupervisory harassment to the employer. Unlike the federal civil rights acts, the IHRA's definition of "employer" does not contain language including an employer's agents or servants. (Def.'s Br. p. 76-77). Thus, unlike the federal law, the IHRA does not intend to incorporate agency principles for employer liability.

With respect to IHRA liability for nonsupervisory harassment, the IHRA's text and legislative history clearly show that the General Assembly intended for employer liability to attach only when the employee proved (1) the employer's actual knowledge of the nonsupervisory harassment, and (2) the employee's compliance with the employer's corrective policies. See (Def.'s Br. pp. 75, 77).

The *Pinnacle* case completely ignores the IHRA's text. See *Pinnacle*, 354 Ill.App.3d at 829. Instead, it imputes a midlevel supervisor's knowledge that a nonsupervisory employee is sexually harassing another employee to the employer based solely on its citation to an Illinois Human Rights Commission decision. See *id.* (citing *In re Thorne & Department of Veterans' Affairs*, Ill. Hum. Rts. Comm'n Rep. 1995SF0312, slip op. at 16 (June 27, 1997)).

Our research has not identified the cited *Thorne* decision, but it has identified a decision under the caption "*In the Matter of the Request for Review by: Staci Bundy and Illinois Department of Human Rights*, Ill. Hum. Rts. Comm'n Charge No.: 1995SF0312, 1997 WL 377347 (June 27, 1997)." In that case, the employee was a waitress at a restaurant who made a claim of nonsupervisory harassment under section 2-102(D) of the IHRA. *Id.* at * 1. She reported the harassment to the restaurant's owner, who investigated the complaint and instructed his employees to not harass anyone, but the owner then reduced the employee's hours, told her to stop disrupting his business with her sexual harassment complaints, and advised her to get another job if she didn't want to be touched. *Id.* at * 5. The Commission held that the employer was strictly liable because it directly engaged in sexual harassment or retaliation under the IHRA, but it did not hold that the employer was liable for the nonsupervisory harassment. See *id.*

Accordingly, *Pinnacle* cites no authority for imputing an agent's knowledge of nonsupervisory harassment to the employer. But even if it did, knowledge of nonsupervisory harassment by a corporation's owner or officer is a far cry from imputing a midlevel manager's alleged knowledge of nonsupervisory harassment to the corporation. See, e.g., *Torres v. Pisano,* 116 F.3d 625, 636-637 (2nd Cir. 1997).

While it might be fair "to hold employers responsible for sexual harassment by supervisory employees[,]" see *Sangamon,* 233 Ill.2d at 140, the General Assembly clearly intended to hold employers liable for nonsupervisory harassment only when the employee proved (1) the employer's actual knowledge of the harassment, and (2) the employee's compliance with the employer's reasonable corrective policies. Accordingly, a rule requiring the employee to plead and prove her compliance with the employer's reasonable corrective policies as a necessary precondition to obtaining IHRA damages best effects the IHRA's intent to prevent unlawful discrimination, sexual harassment, and unfounded charges. See (Def.'s Br. p. 78).

Therefore, this Court should hold that Plaintiff's failure to plead and prove her compliance with the City's reasonable corrective policies bars her recovery of IHRA damages which she could have readily avoided.

CONCLUSION

For the foregoing reasons, the City of Aurora respectfully requests that this Honorable Court enter the relief requested on pages 78-79 of its initial brief.

Respectfully submitted,

City of Aurora, Defendant-Appellee-Cross-Appellant

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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 6,967 words.

/s/ Matthew D. Rose
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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies as true that he served the foregoing Notice of Filing together with Defendant-Appellee/Cross Appellant City of Aurora's Reply Brief:

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by serving one copy of same by electronic mail and by placing a copy into an envelope correctly addressed as aforesaid and bearing sufficient postage prepaid and depositing same within the U.S. Mail at 30 N. LaSalle Street, Chicago, Illinois before 5:00 p.m. on March 31, 2017.

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IN THE
SUPREME COURT OF ILLINOIS
Case No. 121048

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

NOTICE OF FILING AND PROOF OF SERVICE

PLEASE TAKE NOTICE that on March 31, 2017, I have electronically filed using the i2File system of the Illinois Supreme Court, the Defendant-Appellee/Cross-Appellant City of Aurora's **Reply Brief** and served one (1) copy of same with each counsel identified below by electronic service with return receipt requested addressed as follows:

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Upon notice of acceptance by the Clerk of the Supreme Court of Illinois, I will re-submit one original and twenty copies of said filing to the Clerk by UPS overnight mail, addressed as above.

Dated: March 31, 2017

***** **Electronically Filed** *****

121048

03/31/2017

Supreme Court Clerk

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