STATE OF ILLINOIS
ILLINOIS HUMAN RIGHTS COMMISSION:

QUARTERLY NEWSLETTER

OCTOBER—DECEMBER

December 30, 2021

Inside this issue:

A Note from the Chair Mona Noriega

As we begin to close out 2021, despite the challenges the year has presented, Commissioners and staff have managed to continue to deliver quality and timely service to all who call, email, or visit our offices in person, with inquiries and/or complaints of discrimination.

Commissioners and staff remain responsive to the Governor's Gubernatorial Disaster Proclamation that allows for work-from-home, while maintaining staggered, in-office schedules; emergency rules for electronic filing; and virtual Commission meetings. Our goal continues to be to provide a neutral forum for resolving complaints of discrimination efficiently and in an environment that is safe for Commissioners, staff and complainants.

With safety protocols in place, Commissioners continue to educate the public, in particular students, of the civil rights protections available under the Human Rights Act and the process for filing a charge of discrimination with the Illinois Department of Human Rights and the Human Rights Commission. This fall, the Commission participated in a number of public education and outreach activities with students. Commissioner Barbara Barreno-Paschall spoke with University of Chicago students at its Careers in Law Program regarding the Commission, the Illinois Human Rights Act, and her career path; was a guest speaker during a UIC Law Fair Housing Legal Clinic class; and participated in an Employment and Labor Career Panel for students at the University of Illinois College of Law.

On behalf of Commissioners and staff, we wish all a safe and prosperous New Year and look forward to serving the residents of and visitors to the State of Illinois in 2022—see you next year.

A Note from the Executive Director Tracey B. Fleming

Dear Friends,

As the calendar changes to months ending in "-er", I believe it is both natural and generally healthy to take stock of what has happened over the course of the year.

In 2021, the Illinois Human Rights Commission (Commission) has evolved both its processes and procedures to continue to serve the public and all those who have participated in proceedings at the Commission or who have made inquiries about the Commission and its work.

- The Commission has continued to issue high-quality decisions by our Administrative Law Judges, and by our Commissioners on Requests for Review, Contested Matters and other matters.
- We've increased knowledge about the Illinois Human Rights Act (the "Act") through the efforts of our Commissioners and staff, and cooperatively with our partners throughout State government. Our website, our Lunch and Learn series, our quarterly newsletters and our social media presence have all been important parts of this work.
- We've endeavored to make our process more accessible to all who might wish to take advantage of the protections afforded under the Act. This has involved increasing use of telephonic or virtual proceedings for routine matters, expanding access to information in languages other than English, and more.
- We have continued to prioritize diversity in our staff, and worked diligently to maintain and even increase our diversity while being judicious with public resources.
- We have worked collaboratively with partners in State government to serve the public and our own staff.

The Commission will soon be issuing our FY2021 Annual Report, which will be available on our website by December 31, 2021, where we will further discuss our accomplishments and priorities for the future.

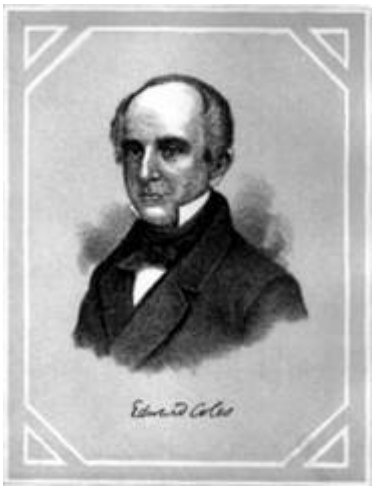
As we enter the 42nd year of the existence of the Illinois Human Rights Act and the Commission, I am grateful for the dedicated efforts of the Commissioners and staff. I thank them as I do all of the members of the public for your investments in and support for our work.

Have a wonderful and safe beginning to the New Year.

EDWARD COLES FELLOWSHIP

ILLINOIS HUMAN RIGHTS COMMISSION

SUMMER 2022



When

Begins June 6, 2022
8-10 weeks

Where

Virtual and IHRC Office

James R. Thompson Center, 100 W. Randolph Street, Chicago

https://www2.illinois.gov/sites/ihrc/about/Pages/Coles.aspx

We are a quasi-judicial state agency, hearing complaints and administrative appeals regarding discrimination and retaliation in employment, housing, financial credit, public accommodations, and education.

FEATURING

Cutting Edge Topics in Civil Rights Law

Order Drafting

Writing Sample

Commission Panel Exposure

Legal Analysis

Mentor Program

State/Federal Court Visits

Outreach

To apply for Summer 2022:

Sign up to interview at the Midwest Public Interest Law Career Conference— mpilcc.org

OR

Please email a resume, cover letter, transcript, and writing sample to: Erica Seyburn,

Assistant General Counsel at
HRC.internships@illinois.gov

Deadline: January 28, 2022

We are seeking law students with strong writing skills and a commitment to public service.

Case Note: *Rizo v. Yovino*

950 F.3d 1217 (9th Cir. 2020)

Katherine Hanson, Coles Fellow

In its February 2020 *en banc* decision in *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020), the Ninth Circuit determined that an individual's prior pay is neither job-related nor a "factor other than sex" under the Equal Pay Act. The Equal Pay Act, 29 U.S.C. § 206(d)(1), prohibits sex-based wage disparity for equal work performed under similar working conditions and which requires equal skill, effort, and responsibility. The Act provides four exceptions as affirmative defenses: payments pursuant to a seniority system, merit system, a quantitative or qualitative production-based system, or "a differential based on any other factor other than sex."

After serving Fresno County for three years as its sole female math consultant, Aileen Rizo discovered that she earned significantly less than all of her male counterparts despite her superior education and experience. Rizo brought claims under the Equal Pay Act, Title VII, and the California Fair Employment and Housing Act. Fresno County moved for summary judgment on the claims under the Equal Pay Act, stating that its policy relied upon prior pay to determine salary. The district court denied the motion.

In the court below, both parties relied upon *Kouba v. Allstate Insurance Co.,* 691 F.2d 873 (9th Cir. 1982)—which ruled that prior pay, in combination with other factors and used reasonably to effectuate business policy, serves as an affirmative defense for employers under the Act. The district court determined that *Kouba* did not resolve the issue. The *Rizo* court reviewed the lower court's decision *en banc* to reconsider *Kouba*, and to address issues in prior case law: some courts applied Title VII's *McDonnell Douglas* burden-shifting scheme to claims under the Act.

In its analysis the *Rizo* court limited "any factor other than sex" to job-related factors and examined prior pay across circuits. The court recognized the Second, Fourth, and Tenth Circuits' positions that only job-related factors support the exception. *Rizo* identified the Seventh Circuit's interpretation—that any "factor other than sex" serves as a nearly limitless "catch-all"—as an outlier. The court also rejected the Eighth Circuit's "business freedoms" case-by-case analysis as overbroad and deferential to market forces.

Rizo reasoned that America's history of pervasive sex-based wage discrimination bars employers from using prior pay to show that sex was not a factor in the wage differential. Thus, the court concluded, "prior pay, alone or in combination with other factors," is not a job-related "factor other than sex" under the Act. *Rizo* then overruled *Kouba*, stating that permitting prior pay in combination with other factors as an exception conflicts with the Act. The court added that *Kouba's* "reasonable use" of prior pay clashes with the strict liability framework of the Equal Pay Act and conflates Title VII and the Act. The court also found *Kouba's* "business reasons" to be capricious and in conflict with jurisprudence.

Before *Rizo*, circuits generally agreed that prior pay served as a "factor other than sex" under the Act. As *Rizo* noted, some circuits limited prior pay as a defense only in consideration of other business-related factors. In contrast, the Seventh Circuit interpreted prior pay as a "factor other than sex" that does not require business-relatedness. Thus, by overruling *Kouba*, edifying distinctions between Title VII and Equal Pay Act frameworks, and ruling that prior pay is not a job-related "factor other than sex" under the Equal Pay Act, *Rizo* widens the circuit split over the use of prior pay as an affirmative defense.

Case Note: *Equal Employment Opportunity Commission v. Catastrophe Management Solutions*

852 F.3d 1018 (11th Cir. 2016)

Jennifer Anton, Coles Fellow

In *E.E.O.C. v. Catastrophe Mgmt. Sol.*, 852 F.3d 1018 (11th Cir. 2016), the Eleventh Circuit confirmed that locs[1] and other hairstyles are not protected traits under Title VII of the Civil Rights Act of 1964.

Chastity Jones, a black job applicant, completed an online employment application for a customer service position at Catastrophe Management Solutions ("CMS"). When she arrived at her interview, she dressed in a blue business suit and wore her hair in short locs. CMS had a "race-neutral" grooming policy, which required that hairstyles "reflect a business/professional image" and noted that "no excessive hairstyles or unusual colors are acceptable." Jeannie Wilson, Human Resources manager, told Jones that CMS could not hire her "with the [locs]" because "they tend to get messy." Wilson told Jones that a previous male applicant had to cut his locs for the job, and Jones informed Wilson that she would not cut her hair. Wilson then rescinded Jones's job offer, and Jones filed suit alleging that CMS's grooming policy violated Title VII. The district court dismissed the complaint because "Title VII prohibits discrimination based on [only] immutable characteristics, such as race, color, or national origin."

The issue before the *Catastrophe* court was whether Title VII protections of hair texture apply to hairstyles that are closely associated with ethnic groups. To begin its analysis, the *Catastrophe* court noted that discrimination based on hair texture is prohibited by Title VII, as it has been recognized as an immutable characteristic. *See Jenkins v. Blue Cross Mut. Hosp. Ins., Inc.,* 538 F.2d 164, 168 (7th Cir. 1976) (en banc) (holding that denying a promotion to a black employee because she wore her hair in a natural Afro was racial discrimination). The *Catastrophe* court then noted that hairstyles, on the other hand, are mutable characteristics, even when they are closely associated with particular ethnic groups. *See Rogers v. Am. Airlines, Inc.,* 527 F.Supp. 229, 232 (S.D.N.Y. 1981) (holding that grooming policy prohibiting an all-braided hairstyle was not racial discrimination because hairstyle is a mutable characteristic).

The EEOC argued that when black persons "choose to wear and display their hair in its natural texture in the workplace, rather than straightening it or hiding it, they are often stereotyped as not being . . . assimilated into the corporate and professional world of employment."[2] Furthermore, the EEOC argued that prohibiting locs in the workplace "constitutes race discrimination because [locs] are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."

The *Catastrophe* court was unpersuaded. To explain its analysis, the *Catastrophe* court relied on two cases, both of which held that Title VII protects only immutable traits.

First, in *Willingham v. Macon Tel. Publ'g Co.,* 507 F.2d 1084 (5th Cir. 1975), a male job applicant was denied a position because his hair was too long. The employer's grooming policy prohibited the wearing of long hair only by men, so the applicant filed a sex discrimination charge under Title VII. The Fifth Circuit held that Title VII protects against employer discrimination only based on immutable char-

Case Note: *Equal Employment Opportunity Commission v. Catastrophe Management Solutions (*continued*)*

acteristics, such as race and national origin. Thus, if an employer has a different hiring policy for men and another for women, it is unlawful only if the distinction is based on a "fundamental right." If the policy distinguishes on some other ground, such as "grooming or length of hair, [it] is related more closely to the employer's choice of how to run his business."

Second, in *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), a bilingual Mexican American employee was fired for speaking Spanish to a co-worker on the job in violation of his employer's English-only policy. The employee filed a discrimination charge, alleging that his termination was based on his national origin in violation of Title VII. The court held that even though "the Spanish language . . . is to [Mexican Americans] what skin color is to others" national origin is not equated with "the language that one chooses to speak." Rather, Title VII focuses on discrimination based on matters that "are beyond the victim's power to alter," which are immutable traits.

The *Catastrophe* court further held that even though locs are a "natural outgrowth" of the texture of black hair, it does not make them an immutable trait. And thus, CMS did not discriminate on the basis of race. The United States House of Representatives passed the Create a Respectful and Open Workplace for Natural Hair ("CROWN") Act in September 2020. The Act prohibits discrimination based on natural and protective hairstyles that are associated with black persons in the workplace and in public schools. Leah Rodriguez, *8 States Across the US That Have Banned Black Hair Discrimination,* Global Citizen, (March 5, 2021), https://www.globalcitizen.org/en/content/hair-discrimination-crown-act-states/. Even if the CROWN Act fails to pass at the federal level, support for the Act is growing among the states. As of July 2021, 12 states have passed legislation to ban hair discrimination in the workplace and public schools. Boulevard, 12 *States Have Passed The Crown Act to Legalize Black Hair In 2021,* (July 3, 2021), https://www.joinblvd.com/blog/crown-act-day-2021. Thus, while hairstyles may still be considered mutable characteristics, persons with locs and other protective hairstyles will still find statutory protections in a growing number of states.

[1] In its complaint, the EEOC defined dreadlocks ("locs") as "a manner of wearing hair that is common for black people and suitable for black hair texture. [Locs] are formed in a black person's hair naturally, without any manipulation, or by manual manipulation of hair into larger coils." Use of the term "locs" is more appropriate than "dreadlocks" because "dread" has a negative connotation due to the hairstyle's history. As Gabrielle Kwarteng explained, "the modern understanding of dreadlocks is that the British, who were fighting Kenyan warriors . . . came across the warriors' locs and found them 'dreadful,' thus coining the term 'dreadlocks.'" Gabrielle Kwarteng, *Why I Don't Refer to My Hair as 'Dreadlocks'*, Vogue, (July 16, 2020), https://www.vogue.com/article/locs-history-hair-discrimination.

[2] Hair discrimination not only occurs in the workplace but also in schools. For example, in August 2018, a 6-year-old child was sent home because his locs violated school policy; in December 2018, a teenager was forced to cut his locs to continue participating in his wrestling match; in January 2020, a teenager was suspended for the length of his locs. D. Sharmin Arefin, *Is Hair Discrimination Race Discrimination?,* (April 17, 2020), https://www.americanbar.org/groups/business_law/publications/blt/2020/05/hair-discrimination/.

Case Note: *Peterson v. Linear Controls, Inc.*

757 F. App'x 370 (5th Cir. 2019)

Katherine Plaster, Coles Fellow

In *Peterson v. Linear Controls, Inc.,* David Peterson, a Black offshore electrician, alleged that he was subjected to different terms and conditions of employment and harassment because of his race in violation of Title VII. Peterson alleged that he and other Black employees were forced to work outdoors and were not permitted water breaks while White employees were permitted to work indoors with air conditioning and water breaks. 757 F. App'x 370, 372 (5th Cir. 2019), *pet. dismissed*, 140 S. Ct. 2841 (2020) (Mem.). Further, he alleged that his supervisor referred to him using the n-word, and that he was written up after being late to a meeting while other non-Black employees who were also late were not written up. *Id.*

To make a prima facie case of individual disparate treatment discrimination, plaintiffs need to prove that they suffered an adverse employment action. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The Fifth Circuit, relying on its holding from *McCoy v. City of Shreveport,* 492 F.3d 551, 559–60 (5th Cir. 2007), held that the term "adverse employment action" should be strictly construed "to include only 'ultimate employment decisions' such as 'hiring, granting leave, discharging, promoting, or compensating.'" *Peterson*, 757 F. App'x at 373. The court held that Peterson failed to prove that he faced an adverse employment action because the difference in working conditions and discipline were not ultimate employment decisions. *Id.*

The court also rejected Peterson's harassment claim, explaining that the harsher treatment of Black employees was not sufficiently severe or pervasive to affect a term, condition, or privilege of employment. *Id*. at 374. The court determined that the alleged harsher job assignments occurred for just ten days out of Peterson's six-year tenure; thus, the treatment was not sufficiently pervasive. *Id*. at 374. The incident was also not sufficiently severe. Id. While the court, citing *Harvill v. Westward Communications, LLC*, 433 F.3d 428, 435 (5th Cir. 2005), acknowledged that a single "egregious incident" can alter the terms and conditions of employment and that the allegations were "disturbing given the racial makeup of Linear Controls' workforce and the allegation that a supervisor referred to Peterson as the n-word," it ruled that the period of harsher treatment was not an egregious incident because outdoor work fell within Peterson's job description. *Peterson*, 757 F. App'x at 375.

The Fifth Circuit affirmed the dismissal of all of Petersons claims, and Peterson filed a Petition for a Writ of Certiorari on the question of which employment practices can form the basis of a Title VII claim. Petition for a Writ of Certiorari at *2, *Peterson v. Linear Controls, Inc.,* 140 S. Ct. 2841 (2020) (No. 18-1401), 2019 WL 2024844, at *2. In July 2020, the parties in *Peterson* settled, and the Petition was dismissed. *Id.*

A circuit split exists on the interpretation of "adverse action," or what constitutes an impermissible employment practice, in individual disparate treatment cases. In June 2021, the Supreme Court denied certiorari in *Cole v. Wake County Board of Education*, a Fourth Circuit case on the meaning of "adverse action." 834 F. App'x 820 (4th Cir. 2021), cert. denied, 2021 WL 2302100 (Mem). *Peterson and Cole* demonstrate some of the variety in circuits' interpretation of "adverse employment action." While the Third, Fifth and Eighth Circuits favor a narrow "ultimate employment action" standard as was applied in *Peterson*, the First, Seventh, Ninth, Tenth, Eleventh and D.C. Circuits consider a broader range of employer actions, such as the unequal assignment of work or unequal requirement to use a grievance procedure, as adverse actions. Merrick T. Rossein, *Employment Discrimination Law and Litigation* § 2:6

Case Note: *Peterson v. Linear Controls, Inc.* (continued)

(2020). The Second and Sixth Circuits take the intermediate view that an adverse employment action is one that has a "materially adverse" impact on the terms and conditions of employment. *Id.* Despite two recent petitions for certiorari in *Peterson and Cole,* the Supreme Court has not shown willingness to provide uniform guidance on what constitutes an "adverse employment action" in status discrimination cases. So, employers and potential plaintiffs must continue to be aware of the patchwork of different adverse employment action doctrines between the circuits.

Helpful Links

Illinois Human Rights Act https://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=2266&ChapAct=775%c2%a0ILCS%c2%a05/&ChapterID=64&ChapterName=HUMAN+RIGHTS&ActName=Illinois+Human+Rights+Act/

IHRC Rules and Regulations https://www.ilga.gov/commission/jcar/admincode/056/05605300sections.html

IHRC website https://www.illinois.gov/ihrc

IHRC events (including Lunch and Learn) https://www2.illinois.gov/sites/ihrc/about/Pages/Events.aspx

Illinois Human Rights Commission CLEs Presented in 2021

Date	Topic	Presenter
January 26, 2021	The Path of a Discrimination Charge under the Illinois Human Rights Act	Mary M. (Betsey) Madden Illinois Department of Human Rights Kelleye M. Chube Illinois Human Rights Commission
February 25, 2021	Fair Housing and the Pandemic: An Update on the Law and Emerging Issues	Allison K. Bethel UIC John Marshall Law School
March 26, 2021	Aging Workforce	Noah A. Frank Enlivant
April 20, 2021	Illinois Address Confidentiality Program	Jessica O'Leary
May 11, 2021	No Longer Locked Out: The Rights of People with Criminal Records in Real Estate	Ester Franco-Payne and Ryann Moran Cabrini Green Legal Aid
June 23, 2021	Criminal Convictions and Equal Pay and EEO Reporting, Oh My! A Zoo of New Employment Obligations for Illinois Employers	Gray I. Mateo-Harris Fox Rothschild, LLP
September 24, 2021	ADA & Pregnancy in the Workplace	Noah A. Frank Enlivant
October 7, 2021	Civil Rights in the Workplace: Emerging Challenges of the COVID-19 Pandemic for Racial and Religious Minorities	Amrith Kaur Aakre Sikh Coalition
November 18, 2021	Domestic Violence: An Employer's Obligation Once Reported	Jennifer S. Nolen Illinois Human Rights Commission

Please visit our website for more information on our upcoming 2022 schedule.
We will update as information becomes available.

LUNCH AND LEARN CLE

CLE Credit:

One hour of general CLE credit for Illinois attorneys

Lunch & Learn via WebEx

https://www2.illinois.gov/sites/ihrc/about/Pages/Events.aspx

The Health and Wellness of our Guests and Staff is our First Priority!

During the COVID-19 outbreak the Illinois Human Rights Commission will remain open with certain services being provided remotely

The Commission will continue to service the residents of the State of Illinois as follows:

⇒ **Complaint and Request for Review Filing:** Effective April 7, 2020 and throughout the duration of the Gubernatorial Disaster Proclamation all motions, orders, notices and other pleadings required to be served under the Illinois Human Rights Act or the Commission Procedural Rules shall be served by in-person, by first-class U.S. mail, or **by electronic mail.** Commission Procedural Rule Section 5300.30 (a). **For the health and safety of Illinois residents and the Commission staff while COVID-19 protocols are in place filing at the Commission by U.S. Mail or electronically is strongly encouraged.**

⇒ **Filing by U.S. Mail: An item properly received by mail shall be deemed to have been filed on the date specified in the applicable proof of mailing.** Proof of mailing shall be made by filing with the Commission a certificate of the attorney, or the affidavit of a person who is not an attorney, stating the date and place of mailing and the fact that proper postage was prepaid. The certificate or affidavit shall be filed with the Commission at the same time the item to which it refers is filed. **If the certificate or affidavit does not accompany an item filed by mail, an item received by mail shall be deemed to have been filed when postmarked, properly addressed and posted for delivery.** Commission Procedural Rule Section 5300.40(a). Service by mail shall be deemed complete 4 days after mailing of the document, properly addressed and posted for delivery, to the Person to be served. Commission Procedural Rule Section 5300.40(c).

⇒ **Filing Electronically: Filing electronically will be completed by filing all required documents at HRC.NEWS@illinois.gov.** A document submitted by electronic mail shall be considered timely if submitted before midnight (in the commission's time zone) on or before the date on which the document is due, unless it is submitted on a Saturday, Sunday or legal State holiday, in which case, it is deemed filed on the following business day. Filing electronically at the Commission will remain in place while the Gubernatorial Disaster Proclamation is in place.

⇒ **En Banc and Panel Meetings:** Please check the HRC website (www.illinois.gov/ihrc) for details regarding these meetings.

⇒ **ALS Motion Call and Status Hearings:** ALS Motion Calls and Status Hearings will be conducted telephonically or virtually. If you have questions, please contact the Judges' clerk by calling 312-814-6269. The electronic filing system is not intended to handle voluminous filings. If you wish to file a motion with the Administrative Law Section (ALS) with extensive supporting documentation, you can file the motion itself electronically (meeting any applicable deadlines), but you should send hard copies of the supporting documents to the Commission through U. S. mail.

Questions: For any questions please contact the Commission by calling 312-814-6269 or by email at **HRC.NEWS@illinois.gov**

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