STATE OF ILLINOIS
ILLINOIS HUMAN RIGHTS COMMISSION:

QUARTERLY NEWSLETTER

JANUARY—MARCH

March 29, 2023

Inside this issue:

A Note from the Executive Director Tracey B. Fleming

Dear Friends,

Welcome to this first quarterly newsletter for 2023. It is chock full of what we hope is interesting and useful information about the Illinois Human Rights Act, the work of the Commission and our Commissioners and Staff.

With the turn of the calendar, the Office of the General Counsel led a comprehensive effort to review and update our public-facing publications and presentations to, among other things, reflect new changes to the Illinois Human Rights Act which took effect on January 1. If you would like to learn more about the new protections afforded under the Act, please visit our website at https://hrc.illinois.gov where you can always find up-to-date information on recent changes to the Act, our procedures, and upcoming events and activities.

Beginning in January, we have also found ourselves part of a new legislative session. We have been honored to have an opportunity to testify before both the Illinois House and Senate on various topics and engage with members of both chambers about a variety of topics, including Governor Pritzker's proposed budget for the Commission for fiscal year 2024. In a change from recent years, with the continued evolution of COVID-19 mitigation practices, we have been happy that many of these engagements have been able to be held in-person in both Chicago and Springfield.

The Commission has also continued to expand access to supportive resources for individuals needing language support (including American Sign Language) in our Administrative Law Section proceedings and as part of our Settlement Conferences here. This work will continue and expand.

I would like to close with a word of gratitude for former Commissioner Robert A. Cantone for his service to the Illinois Human Rights Commission, which concluded in January of this year. For over twelve years, beginning as a part-time Commissioner and concluding as one of our initial cadre of seven, full-time Commissioners, Bob has been a valued and productive colleague participating in decisions on hundreds, if not thousands, of matters during his distinguished tenure.

We are grateful for his service and friendship and wish him and his family all the best in the future.

Commission Reflections

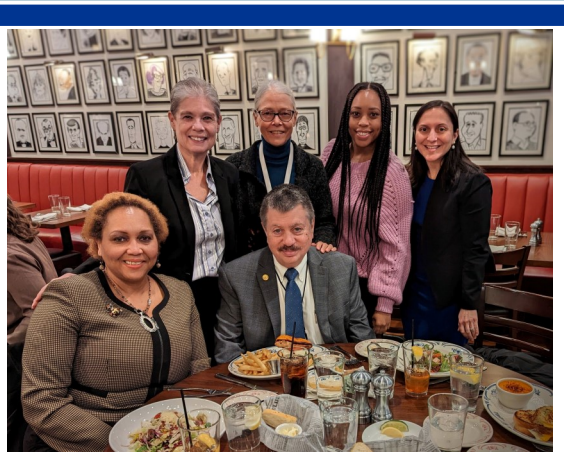
As I reach my two-year anniversary with the Human Rights Commission as a Commissioner in March, I am honored to share my reflections on my experience. I had previously been the Director of the Department of Human Rights, the Commission's sister agency that investigates claims of discrimination. The Commission in turn adjudicates claims of discrimination, and both agencies together enforce the Illinois Human Rights Act.

I have found being a Commissioner a rewarding experience in so many ways. It's been a privilege to serve with such hardworking staff and Commissioners in achieving the primary goal of the Commission of making impartial determinations on unlawful discrimination claims. Also, the resilience of the Commission during the pandemic to quickly adopt technology and continue to adjudicate claims speaks volumes about the leadership and creativity of our team during a crisis – and made my virtual onboarding very exciting! Looking forward, I am eager to continue to engage the community in our outreach to colleges/universities and other excellent programming such as our Lunch and Learn series.

Again, as the Commission continues to bring justice to the great people of Illinois, it is indeed an honor to be an enforcer of the Act.

Warmest regards,

Commissioner Janice Glenn



Celebrating Commissioner Robert Cantone's years of service are Commissioner Janice Glenn, Chair Mona Noriega, Commissioner Elizabeth Coulson, former Commissioner LeDeidre Turner, and Vice Chair Barbara Barreno-Paschall.

Case Note: *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, 947 F.3d 301 (5th Cir. 2020)

Gavin Scott, Coles Fellow

In *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, a culinary staffing corporation, White Glove Staffing, Inc. ("White Glove"), contracted with Methodist Hospitals of Dallas and Dallas Methodist Hospitals Foundation, Inc. (collectively "Methodist") to provide temporary kitchen staff. Methodist's catering coordinator allegedly told White Glove that Methodist's chef "only really want[ed] to work with Hispanics." When White Glove began staffing Methodist, it sent an African American prep cook to Methodist. After the prep cook worked four shifts, Methodist's catering coordinator told White Glove, "[the chef] wanted only Hispanics. That's what Chef wanted…I don't want anybody else out here…We went over this. I don't know why you're sending out other people." White Glove said it informed Methodist that it employed people of "all different backgrounds," that it would try to accommodate the request, and that it would be difficult to do so given the timing. White Glove ultimately sent the same prep cook to Methodist the next day. Three hours into that shift, a junior chef with Methodist told the White Glove staffer, "[w]e don't need you anymore today." Afterwards, Methodist's catering coordinator called White Glove and told it that Methodist "wanted to cancel everything" and that "the whole deal was off." White Glove tried to meet to work out an agreement, but Methodist declined. White Glove brought suit alleging discrimination under 42 U.S.C.S. §1981, among other claims. The District Court granted Methodist's motion to dismiss on the discrimination claim for lack of standing because White Glove was a corporation without a racial identity.

The Fifth Circuit reversed the District Court's ruling on the motion to dismiss and found that White Glove could assert a §1981 claim. In doing so, it acknowledged the Supreme Court's assertion in *Vill. Of Arlington Heights v. Metro Hous. Dev. Corp.* that "a corporation…has no racial identity and cannot be the direct target of…discrimination." 429 U.S. 252, 263 (1977). However, the court distinguished it as dicta in a Fourteenth Amendment case that did not address standing in the statutory context. The court looked to decisions from the First, Second, Third, Fourth, Fifth, Ninth, and D.C. Circuits, which have all found that corporations can have standing under §1981 in certain circumstances.

Several of these circuit court decisions are limited in a way that makes them distinguishable from this case. The Second and Third Circuits specified that corporations can have standing when the corporation is minority-owned and/or minority-operated. *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706–07 (2d Cir. 1982); *McClain v. Avis Rent A Car Sys., Inc.*, 648 F. App'x 218, 222 n.4 (3d Cir. 2016). Likewise, the Fifth Circuit has previously found that a corporation was a racial minority in a case dealing with "a 100% African American-owned body shop." *Body By Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017). The Fourth Circuit also said that it believed the Supreme Court would find a corporation has standing if it was established to advance minority interests. *Carnell Const. Corp. v. Danville Redev. & Hous. Auth*., 745 F.3d 703, 715 (4th Cir. 2014).

Because White Glove was not minority-owned, minority-operated, or established to advance minority interests, Methodist argued that White Glove lacked an imputed racial identity and thus lacked standing under the decisions by the Second, Third, Fourth, and Fifth Circuits. The court disagreed. It read those cases as holding that imputed racial identity is sufficient but not necessary to establish standing. It particularly relied on the D.C. Circuit's decision in *Gersman v. Group Health Ass'n* in reaching this result. 931 F.2d 1565 (D.C. Cir. 1991) *vacated on other grounds*, 502 U.S. 1068 (1992), *aff'd on reh'g*, 975 F.2d 886 (D.C. Cir. 1992). The *Gersman* court stated, "[r]ather than as-

Case Note: *White Glove Staffing, Inc.,* cont.

sume that racial identity is a predicate to discriminatory harm, we might better approach the problem by assuming that, if a corporation can suffer harm from discrimination, it has standing to litigate that harm." *Id.* at 1568.

Methodist argued that *Gersman* was distinguishable because the alleged discrimination here was directed towards the prep cook rather than White Glove. The court rejected this as another variation of the racial identity requirement because it would require courts to determine whether the target of the alleged discrimination was sufficiently "affiliated" with the corporation.

The court then applied the Supreme Court's *Lexmark* test for statutory standing, which asks: (1) whether the plaintiff falls within the statute's "zone of interests" and (2) whether the plaintiff's alleged injuries were "proximately caused by violations of the statute." *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129, 132, 134 (2014). The court found that White Glove's claim satisfied the first prong because it alleged Methodist infringed on White Glove's right to contract because of the prep cook's race, which was sufficiently related to the purpose of the statute. The court then held that Methodist waived its argument to the second element. Even if it had not, Methodist ending negotiations because White Glove sent a non-Hispanic prep cook to work was a "sufficiently close connection" to satisfy the second prong according to the court. In doing so, the court found that White Glove had standing under §1981 and reversed the lower court's decision.

This case was a matter of first impression for the Fifth Circuit on a legal issue the Supreme Court has never addressed—corporate standing for §1981 racial discrimination claims. In *White Glove*, the Fifth Circuit follows other circuits in recognizing that corporations suffer harm from discrimination and holding that §1981 provides them relief when they are proximately injured by violations of that law.

Helpful Links

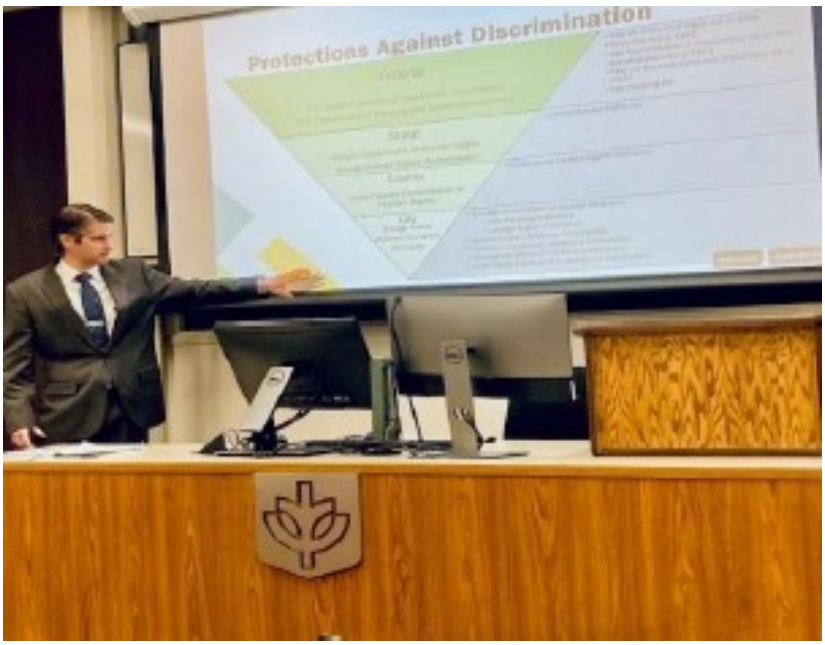
Illinois Human Rights Act https://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2266&ChapterID=64

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

IHRC website https://hrc.illinois.gov/

IHRC events (including Lunch and Learn) https://hrc.illinois.gov/about/events.html

Commission Outreach



General Counsel David Larson presented an overview of the Illinois Human Rights Act and the Commission at DePaul University College of Law on March 1, 2023.

Chair Mona Noriega and Commissioner Janice Glenn at an outreach event at Lincoln Land Community College, Department of Social Science and Business on March 15, 2023.

Case Note: *Demkovich v. St. Andrew the Apostle Parish*, 3 F.4th 968 (7th Cir. 2021)

Kevin Scott, Coles Fellow

The First Amendment's Religion Clauses protect the "free exercise" of religion and prohibit the government from making laws "respecting an establishment of religion." From these rights flow doctrines related to the separation of church and state, which, among other things, creates strong protections against government involvement in the internal affairs of religious organizations. Because Title VII of the Civil Rights Act of 1964 and other statutes that regulate employment relations are largely applicable on their face to religious organizations, a clash between civil law and faith was all but inevitable. Recognizing the tension between the religious autonomy and the commands of Title VII, the circuit courts uniformly recognized that the First Amendment required some sort of carve-out to employment discrimination laws in the religious employment context. This carve-out came to be called the ministerial exception, so called because the earliest cases dealt with ministers, but it is applicable to other employees who hold positions of religious importance as well.

As confirmed and articulated by the Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), the ministerial exception prohibits employment discrimination suits by ministerial employees against the religious organizations that employ them. Whether an employee is ministerial depends on the circumstances of their employment, but as the Supreme Court recently explained in *Our Lady of Guadalupe v. Morrissey-Berru*, 140 S.Ct. 2049 (2020), the essential inquiry is "what an employee does" (i.e., the religious nature of their duties).

But *Hosanna-Tabor* and *Our Lady of Guadalupe* dealt with tangible employment actions, like termination; the Court limited its analysis to these sorts of employment actions, and declined to exhaustively state the types of claims the ministerial exception precludes. Because of that, a split has developed among the circuits as to whether the ministerial exception also categorically bars claims challenging a hostile work environment or other intangible employment actions. The Seventh Circuit, sitting *en banc*, took up this question in the case of *Demkovich v. St. Andrew the Apostle Parish* and joined the Tenth Circuit in holding that it does.

In *Demkovich*, the plaintiff was a music director at a Catholic church who alleged he was discriminated against by the church's priest, his supervisor. He alleged a pervasive pattern of verbal harassment by the priest, disparaging his sexual orientation and weight, and he was ultimately fired

HRC Spotlight on Civil Rights History

January 3, 1957 The first Asian-American U.S. Representative, Dalip Singh Saund, began his service in the House of Representatives. He was an immigrant from India who started his life in America as a farmer during the Great Depression, and later became a state judge in 1952, despite facing a barrage of discrimination during the election over his ethnicity.

January 13, 1958 In *One, Inc. v. Olesen*, 355 U.S. 371 (1958), the U.S. Supreme Court reversed a lower court's ruling that the LGBT magazine "One: The Homosexual Magazine" violated obscenity laws. It was the first U.S. Supreme Court ruling to deal with homosexuality and the first to address free speech rights concerning homosexuality.

Case Note: *Demkovich,* cont.

when he married his partner. After this, he sued the church under Title VII, the Americans with Disabilities Act (ADA), the Illinois Human Rights Act, and the Cook County Human Rights Ordinance for discrimination based on his sex, sexual orientation, marital status, and disability. After the district court granted the church's motion to dismiss his termination-based claims, finding he was a ministerial employee, Demkovich filed an amended complaint that reframed his suit as a hostile work environment case. The church moved to dismiss again, asserting the ministerial exception barred these claims, too.

The district court found the ministerial exception only categorically extended to suits challenging tangible employment actions. In contrast, where intangible actions are challenged, it found courts should engage in a fact specific analysis to determine whether allowing the suit to proceed would violate the Constitution's religion clauses. Applying this case-by-case balancing, the district court dismissed the claims based on sex, sexual orientation, and marital status, but allowed the ADA claim to proceed. This was primarily because the church had not offered a religious justification to defend against the ADA claim as it had with the others.

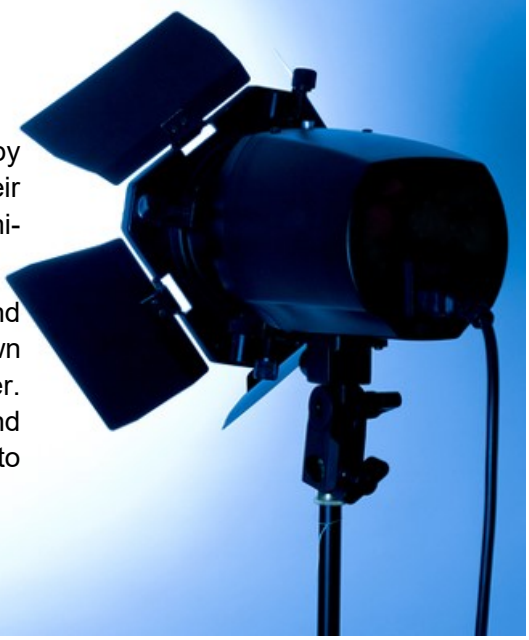
The church moved for an interlocutory appeal to address the question of whether the ministerial exception bars all hostile environment claims by ministerial employees. After a divided panel answered the question in the negative, the Seventh Circuit granted rehearing *en banc* and disagreed, finding a categorical bar to hostile environment claims by ministerial employees and dismissing Demkovich's case.

The court began by considering the Supreme Court's religion cases, including *Hosanna-Tabor* and *Our Lady of Guadalupe*, and interpreted these cases as establishing a preference for courts to avoid, rather than intervene, "when adjudicating disputes involving religious governance." The court observed that from this rejection of "civil intrusion into the religious sphere," the church autonomy doctrine developed to ensure "independence in matters of faith and doctrine" and matters of a church's internal governance. Then, after summarizing the Supreme Court's rationale for the ministerial exception under both the Establishment Clause and the Free Exercise Clause, the Seventh Circuit distilled two principles. First, the court stated that the logic behind the ministerial exception was not limited to cases involving termination, finding the "protected interest . . . covers the entire

HRC Spotlight on Civil Rights History

January 29, 2009 The Lilly Ledbetter Fair Pay Act was signed into law by President Barack Obama. The Act requires employers to ensure that their pay practices are non-discriminatory. It also addresses when pay discrimination charges can be filed with the EEOC.

February 1, 1960 A group of four freshmen from the Agricultural and Technical College of North Carolina began a sit-in movement in downtown Greensboro, nonviolently protesting against a segregated lunch counter. The Greensboro Four's sit-in grew in size in the following weeks and spread to other cities. After months of protests, dining facilities began to desegregate throughout the country.



Case Note: *Demkovich,* cont.

employment relationship, including hiring, firing, and supervising in between." Second, the court stressed the importance of avoiding the "harms—civil intrusion and excessive entanglement—that the ministerial exception prevents."

With respect to the church autonomy doctrine, the court expressed concern over allowing challenges to "a religious organization's independence in its ministerial relationships," and saw little difference between the freedom of a religious organization to choose and discharge its ministers, central to *Hosanna-Tabor*, and the freedom to decide how to supervise and direct its ministers. The court stated "[i]t would be incongruous if the independence of religious organizations only mattered at the beginning (hiring) and the end (firing) of the ministerial relationship, and not in between (work environment)." Accordingly, the court found the priest's "supervision" of Demkovich (i.e., the disparaging remarks about his sexuality) squarely within the interests the doctrine of church autonomy protects and rejected the distinction between tangible and intangible employment actions. Applying the ministerial exception in the way the court understood the Supreme Court to have done, there was no need for the church to offer a religious justification for the priest's conduct; Demkovich's ministerial status alone acted as a complete defense.

The court went on to explain why it thought allowing hostile environment claims by ministerial employees would also violate the Free Exercise Clause and the Establishment Clause's prohibition of excessive entanglement between church and state. The court observed a host of free exercise issues implicit in adjudicating hostile environment claims between two ministers. For example, to determine whether the work environment would be pervaded by hostility would require an impermissible inquiry into the appropriateness of church disciplinary decisions and the ways in which ministers communicate. Similarly, the court found the line drawing implicit in distinguishing "discipline from discrimination" would require courts to engage in a problematic evaluation of doctrinal justifications for the challenged conduct and would have a chilling effect on religious speech in the religious workplace. Echoing this concern "as to whether each act was based in Church doctrine or simply secular animus," the court found the very process of making such determinations would always excessively entangle the courts with religion.

HRC Spotlight on Civil Rights History

March 4, 1877 The first Latinx person to serve in Congress, Romualdo Pacheco, started his service in the U.S. House of Representatives. Prior to being elected to Congress, he worked as a rancher, California Superior Court judge, and governor of California before being elected to the House of Representatives. He was an expert with the lasso, and to this day remains the only governor to have ever lassoed a grizzly bear.

March 15, 1933 This day marks the birth date of Ruth Bader Ginsburg, the second woman to serve on the U.S. Supreme Court. Before being nominated to the Supreme Court, she was a leading figure in gender-discrimination litigation, founding the American Civil Liberties Union's Women's Rights Project, authoring dozens of law review articles and Supreme Court briefs, and arguing six cases before the Supreme Court (and winning five of them).

Case Note: *Demkovich,* cont.

Finally, under either clause, "procedural and practical problems abound when probing a minister's work environment." The court expressed concern over "a protracted legal process pitting church and state as adversaries." Because the church would likely have to defend itself on the grounds that it exercised reasonable care in attempting to prevent or correct harassment in the workplace, a court would have to closely scrutinize its internal policies and actions. While acknowledging a certain intrusion inherent in the threshold inquiry of whether an employee is ministerial, the court asserted that "discovery to determine who is a minister differs materially from discovery to determine how that minister was treated." Again, the process of inquiry and the often-subjective judgements that would be required, to the court, necessitated this expansion of the ministerial exception to hostile environment cases. The court concluded by acknowledging the important interests protected by anti-discrimination statutes. Nonetheless, in the words of *Hosanna-Tabor*, it found "the First Amendment has struck the balance for us."

Assuming the court is right about that—the impassioned dissenting opinion offers serious arguments to claim they were not—that balance carries grave implications. Far from a niche issue impacting members of the clergy, the ministerial exception sweeps broadly as a whole swath of the American workforce. This is particularly true in the context of religious schools where, following the Supreme Court's ruling in *Our Lady of Guadalupe*, any teacher with a modicum of religious duties faces the prospects of having their employment discrimination protections snatched away by the ministerial exception. It must be remembered that *Demkovich* is not limited to LGBT discrimination. A categorical bar, as the dissent vividly illustrated, would leave no recourse under Title VII for a black employee who finds a noose on their desk, so long as the employer has given them enough religious duties to place them within the exception. And it cannot be ignored that *Demkovich* imposes a significant barrier to addressing the pervasive issue of sexual misconduct within religious organizations.

Supporters of religious autonomy will view *Demkovich* as a victory. Those who experience its consequences will beg to differ. Unless and until the issue comes before the Supreme Court, ministerial employees' protections against some of the most devastating forms of discrimination will depend on a simple factor: where they live.

HRC Spotlight on Civil Rights History

February 25, 1982 Wisconsin became the first state in the nation to make it illegal for state or private businesses to discriminate based on sexual orientation in employment and housing.

March 28, 1898 The Supreme Court decided *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), which held that birthright citizenship should extend to all people born on U.S. soil, regardless of their parents' ancestry. This decision, which came during a period when anti-Chinese sentiment ran high in national politics and the 1882 Chinese Exclusion Act was still in effect, came after Wong was denied reentry to the United States due to his race despite having been born in San Francisco.

Lunch and Learn Series in Review

On January 25, 2023, the Commission hosted a Lunch and Learn CLE presentation, "The Bermuda Triangle: FMLA, ADA, and Workers' Comp in 60 Minutes." Attorney Noah A. Frank, Associate General Counsel at Enlivant, led the discussion on employers' responsibilities and employee coverage under FMLA, ADA, and Worker's Compensation laws. Among several topics raised in this presentation, Attorney Frank thoroughly discussed reasonable accommodations, the basics of compensation, types of benefits, eligibility, and best practices in each topic area.

On February 21, 2023, the Lunch and Learn CLE was, "Understanding the New Source of Income Protection: Illinois Fair Housing Update." Attorney Maya Ziv-El, Prairie State Legal Services, and Attorney Mary Rosenberg, Access Living of Metropolitan Chicago, shared an overview of the new source-of-income law, anticipated issues and landlord defenses, and enforcement options for the Fair Housing Act. The presentation also included shared concerns for ongoing and current controversies with respect to housing discrimination and suggested remedies.

On March 23, 2023, the Commission's Lunch and Learn CLE presentation was titled, "Is Disability a Part of Diversity? Attorneys with Disabilities Respond." Administrative Law Judge Azeema N. Akram presented remarks on the number of adults in the United States who have a disability, employment rates for people with and without disabilities, and the reasons for the staggering difference between the number of attorneys who have self-disclosed their disability to their employer and those who have self-disclosed to the American Bar Association. She moderated discussion with the following panelists: Rachel M. Arfa, Esq., Commissioner, Mayor's Office for People with Disabilities; Brandy L. Johnson, Esq., Partner, Early & Miranda, P.C.; and Andrew Webb, Esq., Staff Attorney, Civil Rights Team, Equip for Equality. Each of the attorneys discussed their personal experiences, which included misunderstandings others have about their disabilities, what accommodations they use and how they navigate various barriers, how and when they disclose their disabilities to employers/clients/opposing counsel/judges, and best practices for interacting with attorneys with disabilities.

Please visit our website for our filing procedures

hrc.illinois.gov

LUNCH AND LEARN CLE

CLE Credit:

One hour of general CLE credit for Illinois attorneys

12:00 PM—1:00 PM

Lunch and Learn via Webex

https://hrc.illinois.gov/about/events.html

Upcoming Lunch and Learn CLEs

Date	Topic	Presenter
April 19, 2023	2023 Fair Housing Update	Allison K. Bethel, Esq., Clinical Professor of Law, Director Fair Housing Legal Clinic, University of Illinois Chicago School of Law
May 17, 2023	TBD	Brianna Hill, Staff Attorney Cristina Kinsella, Staff Attorney Equip for Equality

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