STATE OF ILLINOIS
ILLINOIS HUMAN RIGHTS COMMISSION:

QUARTERLY NEWSLETTER

APRIL—JUNE

JUNE 29, 2023

Inside this issue:

A Note from the Executive Director Tracey B. Fleming

Dear Friends,

This quarter's newsletter is being published on the back end of a very eventful and positive spring for the Human Rights Commission.

I would like to begin by acknowledging and celebrating Governor JB Pritzker's appointment of Jacqueline Y. Collins to serve as a Human Rights Commissioner. More about her background and illustrious career can be found within this newsletter, but I will simply say we are delighted for her presence and engagement in our work.

I would also like to congratulate Jennifer S. Nolen, who has been an attorney with the Commission for the past two years, on making the transition to the ranks of Administrative Law Judge. We are excited for this opportunity to enhance our capacity to continue to adjudicate cases here in as legally sound and expedient manner as possible.

The Commission participated in a number of significant ways during the just-completed legislative session. The first of these included testifying about our agency budget, which was approved as part of the FY 2024 Budget for the State of Illinois. We also were honored to work with Rep. Eva-Dina Delgado, Sen. Ram Villivalam and numerous legislative co-sponsors, as well as staff from the Department of Human Rights, to advocate for the passage of HB 2829. HB 2829 proposes, among other things, to update language within the Human Rights Act and expand language access support for those before the Commission.

With continued participation and leadership from our commissioners and collaboration with our colleagues at the Department of Human Rights, we have engaged with numerous groups about the Human Rights Act and the work of the Commission in the past quarter. We are also excited to participate in events like the Chicago Pride Parade 2023, the Illinois State Fair, and more. If you would be interested in having the Commission participate in an event, please contact us at hrc.news@illinois.gov.

As we approach the end of Fiscal Year 2023, we look forward to the issuance of our FY 2023 Annual Report and the opportunity to discuss in greater detail the continued efforts of the Commission to promote freedom from unlawful discrimination as defined by the Illinois Human Rights Act. To keep up on happenings at the Commission, please visit our website at https://hrc.illinois.gov and follow us on Facebook at https://www.facebook.com/IllinoisHRC/.

The Commission welcomes new Commissioner Jacqueline Collins. Commissioner Collins has served the 16th District in Springfield as a State Senator, where she was a member of the Governor's Racial Profiling Task Force, a Chairperson of the Criminal Law, Financial, Transportation Committee, and Assistant Majority Leader. Prior to her time in Springfield, Collins was an Emmy Award finalist for CBS-TV as a videotape news editor. She has been awarded the Outstanding Public Service Award by the Greater Auburn Gresham Development Corporation in 2022 and the Rev. Dr. Martin L. King Jr. and President Lyndon B. Johnson Faith and Politics Awards in 2014. Commissioner Collins received a Bachelor of Arts from Northwestern University, Master of Science from Spertus College, master's degrees in Public Administration and Theological Studies from Harvard University, and a Juris Doctorate from Loyola University.

Commissioner Jacqueline Collins

The Commission marched in the 2023 Chicago Pride Parade with our sister agency, the Department of Human Rights. Pictured are DHR Director Jim Bennett, Executive Director Tracey Fleming, and Chair Mona Noriega.

Edward Coles Fellowship

The Commission warmly welcomes our Summer 2023 Coles Fellows:

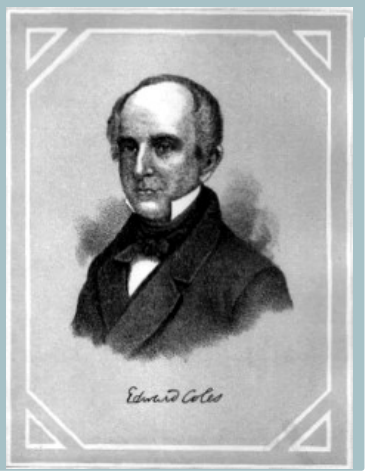
Clea Braendel, University of Illinois College of Law

Elizabeth Lerum, Chicago-Kent College of Law

Celeste Shen, Northwestern Pritzker School of Law

For more information on our Coles Fellowship program, please visit:

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



Case Note: *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784 (10th Cir. 2020)

Kai Hoyer, Coles Fellow

In *Exby-Stolley v. Board of County Commissioners*, 979 F.3d 784 (10th Cir. 2020), the Tenth Circuit held in a 7-6 *en banc* decision that a plaintiff does not need to show that she suffered an adverse employment action to establish a failure-to-accommodate claim under the Americans with Disabilities Act ("ADA"), 42 U.S.C.S. § 12101 *et seq*.

Laurie Exby-Stolley, a health inspector for Weld County, Colorado, broke her right arm while on the job. Her injury resulted in her undergoing prolonged treatment, including two surgeries. Eventually, Exby-Stolley resigned from her position because of her injury. She sued the county, alleging that they failed to accommodate her disability in violation of the ADA, resulting in her losing her job. At trial, the district court instructed the jury that the plaintiff must prove that she was discharged or suffered an adverse action. The jury ruled in favor of the county, finding that while the plaintiff had a disability, she did not suffer an adverse action as she voluntarily resigned.

On appeal, the appellate panel affirmed the ruling in a 2-1 decision. While acknowledging that the phrase "adverse employment action" does not appear in the failure-to-accommodate statutory provision, 42 U.S.C.S. § 12112(b)(5)(a), the panel majority reasoned that the requirement was well established by precedent. In 2020, the Tenth Circuit agreed to rehear the case *en banc* to determine whether the district court erred in instructing the jury that an adverse employment action is a requisite element of a failure-to-accommodate claim.

The *Exby-Stolley* majority first looked to the statutory provision creating the failure-to-accommodate cause of action, which states that disability discrimination includes "not making reasonable accommodations to the known … limitations of an otherwise qualified individual." *Id.* The court noted that the ADA does not include any requirement that a failure-to-accommodate plaintiff must prove that she suffered an adverse employment action. The court explained that adding a requirement to a *prima facie* case of failure to accommodate was "an impermissible method of interpreting" the statute.

The majority then reviewed controlling circuit precedent, finding it did not support the adverse-employment-action requirement. According to the majority, circuit precedent repeatedly laid out the *prima facie* case for failure-to-accommodate claims without mentioning the requirement. The majority explained that these were comprehensive and exhaustive articulations of the *prima facie* case. The court reasoned that the adverse-action requirement was not omitted as an oversight, but rather omitted intentionally, indicating that it is not a requisite element of such claims.

The *Exby-Stolley* majority then distinguished between disparate-treatment claims and failure-to-accommodate claims, noting that while disparate-treatment claims are about policing behavior, failure-to-accommodate claims are about compelling behavior. Accordingly, while disparate-treatment claims require an adverse action, failure-to-accommodate claims do not. The majority further argued that the adverse-employment-action requirement would undermine the ADA's remedial pur-

Case Note: *Exby-Stolley,* cont.

poses, explaining that the "reasonable accommodations" framework is intended to ensure that those with disabilities have the same workplace opportunities as those without disabilities. Requiring that plaintiffs suffer an adverse action to bring a failure-to-accommodate claim, the court reasoned, is contrary to this purpose.

To round out its analysis, the majority reviewed the Equal Employment Opportunity Commission's ("EEOC") guidance on failure-to-accommodate claims and precedent from other circuits. The majority noted that neither the EEOC's guidance nor the "overwhelming majority" of other circuits have incorporated the adverse-employment-action requirement into failure-to-accommodate claims. The majority concluded that instructing the jury that failure-to-accommodate claims required an adverse employment action was improper and remanded this case for a new trial.

The decision spurred a lengthy dissent authored by Judge McHugh. While the dissent attacked the majority opinion from multiple angles, the brunt of the argument revolved around the "regard to" clause of the ADA. 42 U.S.C.S. § 12112(a). This clause states that disability discrimination must be with "regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id*. Because § 12112(b) is meant to construe § 12112(a), the dissent reasoned that the examples of discrimination from subsection (b) must satisfy every aspect of subsection (a), including the "regard to" clause. Accordingly, failure-to-accommodate claims require some adverse action beyond the failure to accommodate to satisfy the "regard to" clause.

Notwithstanding the impassioned dissent, the court ultimately decided that failure-to-accommodate claims do not require an adverse employment action. Although the case was very narrowly decided, the decision is on firm footing for now, as the Supreme Court declined to review the case. *Exby-Stolley* clarifies for both workers with disabilities and their employers that their right to an accommodation is a freestanding one that does not require an additional adverse action.

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

Case Note: *Bless v. Cook County Sheriff's Office*, 9 F.4th 565 (7th Cir. 2021)

Cherie Zhang, Coles Fellow

In *Bless v. Cook County Sheriff's Office*, the Seventh Circuit affirmed an order of summary judgment for the employer, Cook County Sheriff's Office, in a political retaliation and reverse race discrimination lawsuit.

Robert Bless was employed by the Cook County Sheriff's Office ("Sheriff's Office") from 1996 to 2013. It is the Sheriff's Office's policy that its employees request authorization before engaging in secondary employment. After earning his law degree in 2004, Bless duly submitted the required forms and received approval for his lawyer job from 2004 through 2008. Due to a September 2008 car accident, Bless was placed on disability leave and began receiving temporary disability benefits. Soon after the accident, Bless ran as a Republican for a McHenry County Commissioner seat and won the election in November 2008.

In early 2009, the Cook County Department of Risk Management discovered that Bless was driving his car to work as an attorney and County Commissioner even though he was classified as "Injured on Duty" and had a driving restriction. An internal investigation by the Office of Professional Review ("OPR") ensued. During an interview, Bless told the investigators that he had submitted the request forms. However, OPR found no such records for Bless from January 31, 2009, to December 9, 2010. The OPR then brought administrative charges against Bless in May 2011. In May 2013, after hearing evidence on the charges, the Merit Board decided that Bless had engaged in unauthorized secondary employment, violated driving restrictions, and lied to investigators about submitting secondary employment requests. For those reasons, the Sheriff's Office fired Bless.

After his termination, Bless sued his employer, Sheriff Thomas Dart (Democrat), and other county employees, alleging political retaliation and race discrimination against him as a White Republican. The district court granted summary judgment in favor of the defendants. The issue before the Seventh Circuit was whether the plaintiff had carried his burden of establishing a *prima facie* case for his claims.

For the political retaliation claim, the Seventh Circuit found that Bless failed to demonstrate the causal relationship between the termination and the alleged protected activities. Although Bless argued that the timing of the termination raised an inference of retaliation, the court reasoned that his action in continuing to collect disability benefits while working two other jobs without authorization constituted a significant intervening event that broke the causation chain.

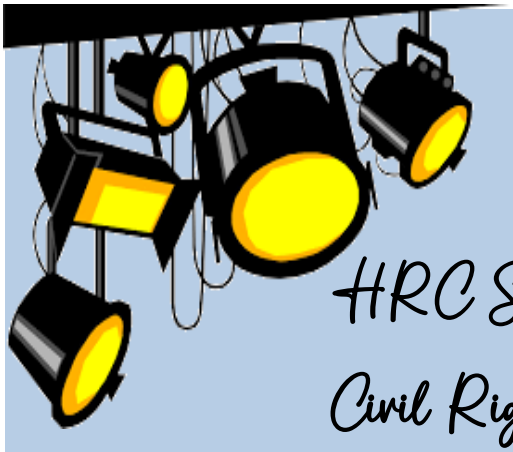
Regarding the discrimination claim, the Seventh Circuit reiterated that the protections of Title VII, which prohibit employment discrimination based on race, color, religion, sex, and national origin, are not limited to members of historically discriminated-against groups. A White plaintiff can also bring a discrimination lawsuit under Title VII. However, the court stressed that the Seventh Circuit applies a modified *McDonnell Douglas* burden-shifting framework in the context of reverse discrimination claims. *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 804 (1973). Generally, in order to establish a *prima facie* case of race discrimination, the plaintiff must prove that (1) he falls within a protected class; (2) he was performing his work satisfactorily; (3) he was subjected to an adverse action; and (4) the employer treated a similarly situated employee outside his protected class more favorably under similar circumstances. *Formella v. Brennan*, 817 F.3d 503, 511 (7th Cir. 2016). A White plaintiff, however, must also provide evidence that "background circumstances exist to show an inference that the employer has a reason or inclination to discriminate invidiously against whites or evidence that there is something 'fishy' about the facts at hand." *Id.*

Case Note: *Bless,* cont.

The court further illustrated several ways to satisfy this additional prong. First, evidence that members of one race were all fired or replaced by members of the supervisor's race may satisfy this prong. *Hague v. Thompson Distrib. Co.,* 436 F.3d 816, 822 (7th Cir. 2006). Second, evidence that the employer was under pressure from affirmative action plans, customers, public opinion, the Equal Employment Opportunity Commission, a judicial decree, or was simply "imbued with belief in 'diversity'" may satisfy this prong. *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 542 (7th Cir. 2005). Third, a gross disparity in qualifications might also be such evidence. *Id.*

Bless first tried the *Hague* argument, pointing out that several people involved in his firing were outside his protected class. The court dismissed this argument, finding that there were other White employees heavily involved in Bless's investigation. Further, Bless attempted to present potential comparators as evidence that there was something "fishy." He argued that Hubert Thompson, an African American employee, was treated more favorably – Thompson was found to have been working one unauthorized job and lied to investigators while subjected to a ten-day suspension. Again, the court rejected this argument and found Thompson's situation materially different from Bless's. Namely, Thompson only worked one secondary job and was not collecting disability benefits at the time. The court also found the comparison to other proffered employees tenuous. In distinguishing the comparators, the court stressed that the standard for a similarly situated employee is that he must be "directly comparable to the plaintiff in all material respects." Thus, the court concluded that there was no evidence from which a jury could infer that race was a factor in the decision to fire Bless, affirming the district court's decision.

Looking forward, the court will likely continue to apply a modified *McDonnell Douglas* framework in reverse discrimination cases, even though some other circuits have chosen not to require additional evidence for "background circumstances." *Bass v. Bd. of County Com'rs, Orange County, Fla.*, 242 F.3d 996 (11th Cir. 2001), vacated and superseded on denial of reh'g en banc on other grounds, 256 F.3d 1095 (11th Cir. 2001); *Iadimarco v. Runyon*, 190 F.3d 151 (3d Cir. 1999). For plaintiffs in the Seventh and D.C. Circuits, "where 'reverse discrimination' is the exception, white plaintiffs must show more than the mere fact that they are white before an adverse employment action against them will raise an inference of discrimination." *Mastro v. Potomac Elec. Power Co.,* 447 F.3d 843 (D.C. Cir. 2006).



HRC Spotlight on Civil Rights History

April 2, 1917: Jeannette Rankin, the first woman to serve in the U.S. House of Representatives, was sworn in. She was a suffrage activist who successfully lobbied her home state of Montana to grant women the right to vote in 1914, six years before the Nineteenth Amendment was passed.

April 15, 1947: On this day in history, Jackie Robinson broke the color barrier as the first Black player in Major League Baseball history when he made his debut with the Brooklyn Dodgers. He went on to win the Rookie of the Year award that same season and the National League Most Valuable Player award in 1949. The MLB retired his number 42 across the entire league in 1997. In 2004, the MLB designated April 15 as "Jackie Robinson Day," a yearly tradition where all players wear number 42 to honor his legacy.

May 3, 1948: In *Shelley v. Kraemer*, 334 U.S. 1 (1948), the U.S. Supreme Court held that restrictive housing covenants based on race were unenforceable. Before this case was passed, people of color were often prohibited from buying or occupying homes in many White-dominated neighborhoods due to these covenants.

May 17, 2004: Massachusetts became the first state to legalize gay marriage, after the Massachusetts Supreme Judicial Court decided that excluding same-sex couples from marriage is unconstitutional, and rejected civil unions for same-sex couples as a satisfactory alternative. On this date, the state began issuing marriage licenses to same-sex couples.

Commissioners Elizabeth Coulson and Janice Glenn presented an overview of the Illinois Human Rights Act to students at North Park University on April 19, 2023.

On June 22, 2023, the Mexican American Legal Defense and Educational Fund (MALDEF) posthumously awarded the Honorable Manuel Barbosa with a Lifetime Achievement—Excellence in Legal Service Award. Barbosa served as the first Chairman of the Illinois Human Rights Commission when it was created in 1980 and served for 18 years. In 2019 Barbosa was appointed again to serve on the Human Rights Commission.

Pictured here at MALDEF's awards gala are Commissioner Janice Glenn, Executive Assistant Denise Hutton, Chair Mona Noriega, and Executive Director Tracey Fleming.

The Commission's website offers helpful information to litigants, including an updated glossary of Commission terms. Please visit our website at https://hrc.illinois.gov/process/glossary.html

Term	Definition
Administrative Law Judge (ALJ)	A hearing officer who presides over a case, takes testimony, rules on questions of evidence, and makes factual and legal determinations.
Charge	A written statement alleging a violation of the Illinois Human Rights Act that is filed with the Department. If timely filed, the Department investigates whether there is substantial evidence to support the charge.
Commissioner	A governor-appointed official who votes to decide matters in cases heard before a panel or en banc.
Complaint	A written statement that is filed to start a case with the Commission's Administrative Law Section. The complaint will generally state the nature of the alleged violation and the desired relief.
Complainant	A person who files a complaint or a request for review with the Commission.
Department of Human Rights (the Department or DHR)	The investigatory agency that accepts or initiates charges alleging violations of the Illinois Human Rights Act and determines whether there is substantial evidence of a violation to warrant filing a complaint with the Commission.
En Banc	A French phrase meaning "in the bench" or "full bench," that refers to meetings when all seven commissioners sit together rather than a panel of three.
Exceptions	A written request that a panel review the ALJ's ROD to determine if it was correct.
Final Order and Decision (FOD)	The written decision that ends a case at the Commission.
Human Rights Commission (the Commission or HRC)	The adjudicatory agency that holds hearings and issues decisions on complaints alleging violations of the Illinois Human Rights Act. The Commission also decides requests for review of the Department's decision to dismiss a charge or hold a respondent in default.
Panel	A group of three commissioners assigned to rule on motions, decide requests for review and exceptions, and approve proposed settlements.
Petition for Rehearing	After issuance of a panel decision, a written request that all commissioners re-hear a case.
Petition for Review	A written request that the Illinois Appellate Court review the Commission's FOD to determine if it was correct.
Recommended Liability Determination (RLD)	After a hearing and the submission of briefs, the ALJ's written recommendation that finds a party liable for a violation of the Illinois Human Rights Act and directs the party to file a petition for fees or other further relief. The RLD is subsequently incorporated into the ROD.
Recommended Order and Decision (ROD)	An ALJ's written decision that includes findings of facts and conclusions of law, a discussion of the issues, and the ultimate determination of whether a violation of the Illinois Human Rights Act occurred.
Request for Review	A written request that a panel review the Department's decision to dismiss a charge or hold a respondent in default.
Respondent	An individual, business, or organization against whom a charge or complaint is filed. In a request for review, the Department is the respondent and must defend its decision to dismiss a charge or hold the original respondent in default.
Substantial Evidence	The standard used by the Department to determine whether there is sufficient evidence to allege that respondent committed a violation of the Illinois Human Rights Act.

Lunch and Learn Series in Review

On April 23, 2023, the Commission hosted a Lunch and Learn CLE presentation, "The 2023 Fair Housing Update." Clinical Professor of Law and Director of the Fair Housing Legal Clinic, Allison K. Bethel, University of Illinois Chicago School of Law, led the discussion on changes in fair housing.

On May 17, 2023, the Lunch and Learn CLE was "Introduction to Special Education Rights." Attorneys Jody Bianchini and Cristina Kinsella, Equip for Equality, shared an overview of special education law basics, conflict resolution options, discipline under the IDEA, and why special education matters for court-involved youth.

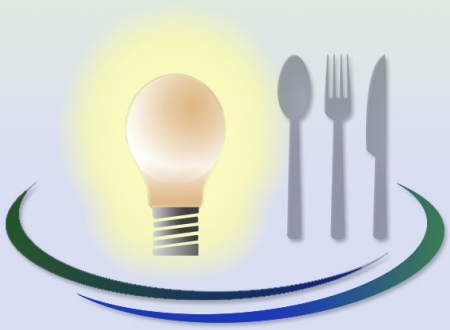
On June 12, 2023, the Commission's Lunch and Learn CLE presentation was titled, "Is Conducting Internal Employee Complaint Investigations." Founder and Managing Partner, Kristen Prinz, The Prinz Law Firm, led a discussion regarding the best approach for conducting a workplace investigation from the perspective of the employer.

HRC Spotlight on Civil Rights History

June 23, 1972: President Richard Nixon signed into law the Education Amendments of 1972, including Title IX, which outlaws the discrimination, denial of benefits, or exclusion of people from educational programs on the basis of their sex.

June 25, 1998: In *Bragdon v. Abbott*, 524 U.S. 624 (1998), the U.S. Supreme Court held that asymptomatic HIV infection could be a disability under the Americans with Disabilities Act. The plaintiff in this case sued her dentist for refusing to operate on HIV-positive patients. The Supreme Court underscored that medical professionals may not refuse HIV-positive patients unless they can provide a health or safety reason for doing so, which is often lacking for people with asymptomatic HIV infections.

June 28, 1970: The Christopher Street Gay Liberation Day March commemorated the one-year anniversary of the Stonewall Uprising. Thousands of members of the LGBT community marched through New York into Central Park, in what is now considered to be America's first gay pride parade.



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

We are taking a break for the summer. The Lunch and Learn CLEs will resume in September.

Please check our website in late August.

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

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