STATE OF ILLINOIS
ILLINOIS HUMAN RIGHTS COMMISSION:

QUARTERLY NEWSLETTER

JULY—SEPTEMBER

September 29, 2022

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A Note from the Executive Director Tracey B. Fleming

Dear Friends,

Last month, I had the pleasure of marking two years of service as Executive Director of the Illinois Human Rights Commission.

While I won't go into all the ways that I am appreciative, suffice it to say that this has been a wonderful opportunity to participate in the sharing of knowledge about the Illinois Human Rights Act and to play a small role in building upon the foundation of hard work, sound legal decisions and thoughtful service of current and prior Commissioners and staff of the Commission.

I am delighted to briefly introduce our newest Commissioner, Demoya R. Gordon. Commissioner Gordon was appointed by Governor JB Pritzker on September 5, 2022, and she will be based in our Springfield office. I encourage you to read more about her background and valuable expertise on our website at www.illinois.gov/ihrc, but we are glad for her addition to our Commissioner ranks.

We have continued to fill several critical staff vacancies—in some cases accrued over the course of years—here at the Commission. I would be remiss if I didn't welcome new colleagues in both our Chicago and Springfield offices: Office Associate Jessica Torres, Office Specialist Taylor Pierson, Administrative Law Judge Kathleen McGee, and our new General Counsel, David R. Larson, have all joined the Commission since June 2022 and are already adding substantially to our capability to serve the people of the State of Illinois.

Beyond our public meetings and the decisions promulgated through our Administrative Law Section and our Request for Review processes, the Commission has been delighted to engage with the public in several direct ways, including through our participation in the 2022 Illinois State Fair.

We were also excited to collaborate recently with our colleagues from the Illinois Department of Human Rights in participating in both a recent Community Resource Fair and 2022 Labor Rights Week events hosted by the Mexican Consulate in Chicago. As an agency, we are grateful to our staff and especially to our Commissioners for their leadership and participation in the above events.

As you review this newsletter, if you haven't done so already, I would encourage you to bookmark our website, www.illinois.gov/ihrc for up-to-the-minute information about the work of the Commission and information on pertinent events and opportunities to engage with us.

All the best for a safe and productive autumn.

Case Note: *Howard v. HMK Holdings, LLC*, 988 F.3d 1185 (9th Cir. 2021)

Gavin Scott, Coles Fellow

In *Howard v. HMK Holdings, LLC*, the Ninth Circuit held as a matter of first impression that the Fair Housing Amendments Act of 1988 ("FHAA") does not impose standalone liability for a landlord's failure to engage in an interactive process with a tenant who requests a reasonable accommodation for their disability.

The Howards were renting a house in Los Angeles on a month-to-month basis when the landlord ("HMK") proposed a new lease that would increase rent by over $1200. When the Howards did not timely respond to the proposed lease, HMK sent a Notice to Quit. The Howards asked for a two-month extension because Glenn Howard was in an unstable medical condition from a brain tumor. HMK granted that extension and said it would not do it again. As that extension was ending, the Howards asked for another one and offered to pay the increased rental rate. HMK did not respond and instead filed a complaint for unlawful detainer to recover possession of the house.

Based on these events, the Howards filed suit arguing that HMK had violated the FHAA. The Howards argued that HMK refused Glenn's reasonable accommodation request and that, regardless of the reasonableness of the accommodation, HMK violated the FHAA by not engaging in an interactive process. The lower court granted summary judgment in favor of HMK after it found: (1) that the Howards failed to show that the extension was necessary, and (2) that there is no independent liability for failing to engage in the interactive process. The Howards then appealed this decision to the Ninth Circuit Court of Appeals.

After affirming the lower court's decision that the accommodation was not necessary, the Ninth Circuit turned to the question of standalone liability for failure to engage in an interactive process. It started with the text. The Howards grounded their discrimination claim on 42 U.S.C. § 3604(f)(3)(B), which defines discrimination as "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." The court found that it could not impose liability for failure to engage in an interactive process because neither this definition nor any other language in the statute or relevant regulations mentions an "interactive process".

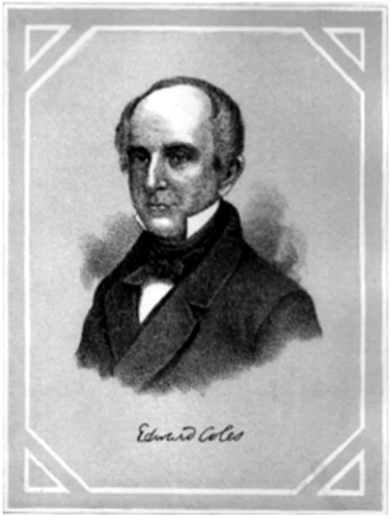
The court then looked to other circuits, which the Howards argued supported their position. The court found that the Third and Sixth Circuits declined to read an "interactive process" requirement into the FHAA. The First and Seventh Circuits analyzed a failure to engage in an interactive process in FHAA cases, but they used that analysis only insofar as it shed light on one of the elements. Neither of those courts found that a failure to engage in an interactive process created an independent basis for liability.

Case Note: *Howard,* cont.

The Howards argued that the Americans with Disabilities Act ("ADA") and Rehabilitation Act supported their position. However, the court found these other statutes to be irrelevant because they were not sufficiently similar to the FHAA to import their meanings into the FHAA. Furthermore, even if they were relevant, the court found that those laws did not create standalone liability for failure to engage in the interactive process and did not require any interactive process under the FHAA. The Howards also asserted that the failure to engage in an interactive process absolved the plaintiff of their need to show necessity such that the plaintiff need only show that a reasonable accommodation would have been available. The court disagreed. It found instead that the interactive process requirement, even in the ADA, only took effect once the need for the accommodation had been established. Thus, the necessity requirement cannot be ignored and summary judgment for HMK was affirmed.

Ultimately, this case stands for the proposition that the FHAA only provides relief for refusals to make reasonable and necessary accommodations. Landlords are under no duty to discuss with tenants accommodations that are not otherwise required by law.

Edward Coles Fellowship



The Commission applauds our Summer 2022 Coles Fellows for their excellent work this summer. Thank you, Kai Hoyer, Jake Marshall, Gavin R. Scott, Kevin Scott, and Xinyi (Cherie) Zhang, for all of your contributions to this agency!

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

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

Case Note: *Peltier v. Charter Day Sch., Inc.,* 37 F.4th 104 (4th Cir. 2022)

Jake Marshall, Coles Fellow

In *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104 (4th Cir. 2022), the Fourth Circuit held in an *en banc* decision that a North Carolina charter school is a state actor that can be held liable under the Equal Protection Clause of the Fourteenth Amendment, and that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.,* covers sex-based dress codes.

In 2016, the parents of three female students at Charter Day School (CDS) filed suit against the school and its for-profit charter management corporation, Roger Bacon Academy, Inc. (RBA), in North Carolina. CDS is a public charter school in Brunswick County, North Carolina, which receives 95% of its funding from public sources and "emphasize[s] traditional values" in its curriculum and operations. As a component of this traditional philosophy, CDS maintains a gendered dress code, under which female students must wear a skirt, jumper, or "skort." Boys must wear shorts or pants and are forbidden from wearing jewelry. According to the founder of CDS and RBA, the policy is needed to "preserve chivalry," under which girls are "regarded as a fragile vessel" who must be treated "courteously and more gently than boys."

The plaintiffs alleged that the skirt requirement violated both the Equal Protection Clause and Title IX. They argued that the policy was rooted in discriminatory gender stereotypes and harmed female students by sending "the message that girls should be less active" and are "more delicate than boys." They claimed that girl students avoided physical activity because of their skirts, and even felt uncomfortable during emergency drills that required them to crawl and kneel on the floor, "fearing that boys will tease them or look up their skirts."

The district court granted summary judgment to the plaintiffs on the Equal Protection claim against CDS but not against RBA, and granted summary judgment to the defendants on the Title IX claim. Although a Fourth Circuit panel initially reversed all counts, that decision was later vacated and an *en banc* rehearing granted.

On rehearing, the court first considered whether the defendants could be held liable under the plaintiff's 42 U.S.C. § 1983 claim, which imposes liability on any state actor who deprives someone of their rights under the Constitution.

The court found that North Carolina's charter schools are state actors because the state statute that authorized their creation delegates to public charter schools the state's constitutional obligation to provide free, public education. Unlike private schools, North Carolina charter schools' curriculums are regulated by the state and receive the vast majority of their funding from public sources. Although the defendants pointed to the fact that students are not compelled to attend CDS, the court held that "*no* public school" can violate its students' constitutional rights, even if students can choose to attend another school. To adopt CDS's position, according to the court, would allow North Carolina to outsource its educational obligation to charter operators and then ignore their "blatant, unconstitutional discrimination."

Case Note: *Peltier*, cont.

The court also contrasted CDS from the school in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), a case relied upon by the defendants and the dissenting judges. In *Rendell*, the Supreme Court held that a private school with state contracts, which provided education to maladjusted high school students, was not a state actor for the purposes of a § 1983 claim because its activities were not traditionally the "exclusive prerogative of the state." But unlike that school, CDS does not merely operate on state contracts, but provides a standard education to any public-school eligible student under authority granted by statute. Because North Carolina has a constitutional obligation to provide public education, and its statutes make charter schools a "component unit" of that obligation, CDS must comply by the same constitutional requirements as the state itself.

However, the court ruled that RBA was not a state actor because it has no direct relationship with the state, is not a party to the charter agreement between the state and CDS, and merely has a contract with CDS to manage its daily operations. In other words, RBA's conduct is not attributable to the state in the same way as CDS's, and it cannot be held liable under § 1983.

The court next examined CDS's policy under the heightened level of scrutiny applied to sex-based classifications, intermediate scrutiny, and found that CDS had not demonstrated that its dress code serves important governmental objectives because its stated reasons were rooted merely in stereotypes about the abilities and proper place in society for girls. Because CDS's dress code had the "express purpose of telegraphing to children that girls are 'fragile,'" it facially violated the Equal Protection Clause.

Lastly, the court turned to the plaintiffs' Title IX claim. The court held that both defendants could be held liable under the statute, because Title IX applies to all actors who receive government money, either directly in the case of CDS or through an intermediary in the case of RBA.

The court then ruled that Title IX does cover sex-based dress codes such as CDS's. The defendants claimed that because the U.S. Department of Education had rescinded regulations governing dress codes, the court should infer that the agency does not consider dress codes to be covered by the statute. In so stating, the defendants relied on the deference articulated in *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), that is accorded to an agency's interpretation of a statute it administers when the language is ambiguous. The court disagreed, noting that Title IX was structured to prohibit a broad range of conduct with a narrow set of explicitly listed exceptions. Because Title IX does not list dress codes as an exception, the statute "unambiguously encompasses" such policies by its plain text, and there is no need to resort to *Chevron* deference.

Having determined that a cause of action existed, the court then remanded the Title IX claim for an evidentiary hearing to determine whether CDS's dress code "operates to exclude the plaintiffs from participation in their education, to deny them its benefits, or otherwise to discriminate against them based on their sex." If the policy harms girl students in these ways, then it inherently treats them worse than boys for the purposes of a Title IX discrimination claim.

Case Note: *Peltier*, cont.

The *Peltier* court's ruling was accompanied by concurrences and dissents. Judge Quattlebaum's dissent stressed that the majority opinion goes against a trend of finding that privately-run schools are not state actors, and will stifle innovation in education. Judge Wilkinson's dissent went further, justifying the use of "chivalry" as a guiding philosophy in educational and stressing the importance of student and parent choice in selecting schools with differing policies. Both concurrences stressed the harm that gendered dress codes can inflict on girls, as well as boys, and pushed against the dissenting policy arguments.

The variety of opinions in *Peltier* suggests that any future litigation on this issue will be hotly contested. *Peltier* is the first case where an appellate court considered whether public charter schools are covered by Title IX, but given that charter school enrollment continues to increase – and that schools in general are increasingly the site of ideological conflicts ranging from transgender rights to religious freedom – it is likely not the last.

ILLINOIS STATE FAIR

IHRC Commissioners and staff hosted an informational booth at the Illinois State Fair on August 14, 2022, Veterans & Gold Star Families Day.

Commission staff Denise Hutton and Samantha Judd, Commissioner Steve Kouri II

Commission Administrative Law Judge Mike Robinson, Chief Administrative Law Judge Brian Weinthal, Executive Director Tracey Fleming

Case Note: *Chambers v. District of Columbia*, 35 F.4th 870 (D.C. Cir. 2022)

Kai Hoyer, Coles Fellow

In *Chambers v. District of Columbia*, the D.C. Circuit determined *en banc* in a 7-4 decision that a discriminatory job transfer or denial of a transfer request is actionable under Title VII of the Civil Rights Act of 1964 even if the employee cannot show that the transfer or denial caused "objectively tangible harm."

Mary Chambers worked as a clerk and later as a Support Enforcement Specialist and investigator at the District of Columbia's Office of the Attorney General for more than 20 years. Chambers, claiming that she had a larger caseload than her colleagues, requested multiple transfers to other units in the Office, but her requests were denied each time. Chambers filed a charge of sex discrimination with the Equal Employment Opportunity Commission, alleging that the District of Columbia permitted similarly situated male employees to transfer to other departments. In 2014, she filed suit against the District, alleging unlawful sex discrimination and retaliation.

The lower court granted summary judgment to the District, holding that Chambers failed to show that the denial of her transfer request caused objective material harm. The appellate panel, bound by the Circuit's previous decision in *Brown v. Brody*, 199 F.3d 446 (D.C. Cir. 1999), affirmed the lower court's decision. The *Brown* court, citing *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998), and several decisions from other circuits, held that the denial or forced acceptance of a job transfer is actionable under Title VII only if the employee suffered "objectively tangible harm." Thus, the denial of a lateral transfer, i.e., one that does not affect the plaintiff's pay or benefits, is not actionable absent a showing of some tangible harm. Accordingly, the *Chambers* panel concluded that the lower court was correct to grant summary judgment to the District. However, the panel expressed dismay with *Brown*, arguing that the "objectively tangible harm" requirement lacked a textual basis in Title VII, and urged the full court to rehear the case. In 2021, the D.C. Circuit agreed to rehear the case *en banc* to reconsider whether *Brown's* "objectively tangible harm" requirement was consistent with Title VII's prohibition on employment discrimination.

The *Chambers* court began its analysis by looking to the "ordinary meaning" of Section 703(a)(1) of Title VII, which makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion sex or national origin." 42 U.S.C.S § 2000e-2. First, the court found that a transfer or rejection of a transfer request is "undoubtedly" included in the "terms, conditions, or privileges of employment." Further, the court held that the wording of the statute did not distinguish between "economic" and "noneconomic" discrimination or "tangible" and "intangible" discrimination. Accordingly, the *Chambers* court concluded that refusing an employee's request for transfer based on a protected class constitutes employment discrimination within the ordinary meaning of Section 703(a)(1). *Brown's* requirement of "objectively tangible harm", according to the *Chambers* court, was "a judicial gloss that lack[ed] any textual support."

Next, the *Chambers* court addressed *Brown's* reliance on *Ellerth* in supporting its "objectively tangible harm" requirement. In *Ellerth*, the Supreme Court held that an employer has no affirmative defense for vicarious liability in a hostile work environment claim when harassment by a supervisor "culminates in a tangible employment action." *Brown* interpreted *Ellerth's "*tangible employment action" requirement in vicarious liability cases as supporting the "objectively tangible harm" requirement in direct liability discrimination cases. However, in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 65 (2006), the Supreme Court clarified that the discussion of "tangible employment actions" in *Ellerth* applied only to vicarious liability hostile work environment claims and that

Case Note: *Chambers,* cont.

"*Ellerth* did not discuss the scope of [Title VII's] general antidiscrimination provision." Accordingly, the *Chambers* court found that *Ellerth* did not support *Brown's* "objectively tangible harm" requirement.

In a lengthy dissent, Judge Katsas, joined by Judges Henderson and Rao, argued that the *Brown* rule was consistent with Supreme Court precedent and necessary to discourage frivolous Title VII claims where only a *de minimis* harm has occurred. These concerns were echoed in a partial dissent by Judge Walker. The *Chambers* majority was unconvinced by this argument, reasoning that *Brown's* "objectively tangible harm" requirement went well beyond only excluding *de minimis* harms.

Notwithstanding the concerns raised by the dissenting judges, the *Chambers* majority ultimately dispensed with *Brown's* "objectively tangible harm" requirement for discriminatory job transfers. This is a major victory for workers in the D.C. circuit, as it relaxes the standard of what constitutes an adverse action under Title VII and makes it easier for plaintiffs to seek redress for discriminatory transfers. Conversely, this is a concerning result for employers in the circuit, who will now have to exercise greater caution regarding employee transfers. It also remains an open question as to what extent *Chambers* applies to other discriminatory employment actions that would have previously been dismissed under the "objectively tangible harm" requirement.

Chambers also highlights the inconsistency between circuits regarding what constitutes an adverse action. For example, the Fifth Circuit only considers "ultimate employment actions" such as hiring, firing, promotions, compensation, or leave to be adverse actions. *McCoy v. City of Shreveport*, 492 F.3d 551, 559 (5th Cir. 2007). The Fourth Circuit, on the other hand, has held that conduct short of ultimate employment decisions can constitute an adverse action. *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 375-76 (4th Cir. 2004). Given the tension between circuits, this issue might reach the Supreme Court in the near future. For now, however, discriminatory transfers are actionable in the D.C. Circuit, even if the plaintiff cannot show an "objectively tangible harm."

Please visit our website for our filing procedures

www.illinois.gov/ihrc

Chicago's Gay Pride Parade, June 26, 2022: Evette Cardona, Commission Chair Mona Noriega, Governor JB Pritzker, Lydia Vega

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://www.illinois.gov/ihrc

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

On August 20, 2022, Fifth District State Representative Lamont J. Robinson hosted a Resource Fair on Chicago's South Side. The Commission shared information on the Illinois Human Rights Act with over 80 attendees, who enjoyed music, free food, activities for kids, and free haircuts and braids, as well as information from government agencies, vaccinations, and much more.

IL Department of Human Rights Deputy Director Alex Bautista, IL State Representative Lamont J. Robinson, IHRC Commissioner Barbara Barreno-Paschall, IHRC Executive Director Tracey Fleming

LUNCH AND LEARN CLE

CLE Credit:

One hour of general CLE credit for Illinois attorneys

12:00 PM—1:00 PM

Lunch & Learn via WebEx

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

Upcoming Lunch and Learn CLE

Date	Topic	Presenter
October 25, 2022	TBD	Michael K. Chropowicz, Senior Associate Michael Best & Friedrich LLP
November 15, 2022	TBD	Natalie C. Chan, Senior Managing Associate Sidley Austin
January 25, 2023	TBD	Noah A. Frank, Associate General Counsel Enlivant

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