STATE OF ILLINOIS
ILLINOIS HUMAN RIGHTS COMMISSION:

QUARTERLY NEWSLETTER

JULY—SEPTEMBER

July—September 2021 | September 30, 2021

Inside this issue:

A Note from the Chair Mona Noriega

Thanks to my predecessor James Ferg-Cadima, my transition to fill the appointed, not yet confirmed role of Chair of the Illinois Human Rights Commission was an easy transition. Former Chair Ferg-Cadima left me plenty of organized notes and files, and Executive Director Tracey Fleming and General Counsel Kelleye Chube have delivered the most robust training I have ever had the pleasure to experience. Best of all though is the pleasure of having a fully staffed and highly qualified cadre of Commissioners who have shown themselves to be diligent in delivering on the obligations of adjudicating complaints of discrimination as well as reaching out to the public. Pictured below are Commissioners Kouri, Cantone, Glenn, and Barreno-Paschall and Executive Director Fleming speaking with hundreds of attendees at the Illinois State Fair. From June through September the Commissioners have maintained a robust schedule of reviewing numerous requests for review, motions and other matters. In August I was excited to experience the Appellate Court's affirmation of the Commission's decision in *Hobby Lobby Stores, Inc. v. Sommerville.* The decision affirmed the Commission's decision that Hobby Lobby violated the Illinois Human Rights Act ("Act") and the State of Illinois' commitment to protect civil rights for transgender persons in Illinois, and in particular equal access to restrooms. It is an honor and a privilege to have the opportunity to help enforce the Act, as Chair of the Commission, and I eagerly look forward to our collective work to better serve all State of Illinois residents.

Lieutenant Governor Juliana Stratton

Left to Right: Comm. Stephen Kouri II, Comm. Robert Cantone, Comm. Janice Glenn, Comm. Barbara Barreno-Paschall and Executive Director Tracey Fleming

Illinois Department of Aging Director Paula Basta (right) and a colleague

A Note from the Executive Director Tracey B. Fleming

Dear Friends,

The Commission has been extremely busy this summer. While we have all had to deal with the enduring reality of COVID-19 and the challenges posed by the pandemic, our work has continued unabated as we build capacity and provide greater flexibility to those who engage with us.

On the topic of building capacity, I would like to welcome new HRC Chief Fiscal and Human Resources Officer, Claudia Ortega. Claudia joins us from the Office of the Executive Inspector General (OEIG) where she previously served in roles of increasing responsibility, culminating in service as the agency's Chief Administrative Officer. We are delighted to have her join the Commission at such a critical time.

I would like to applaud the judges and staff of the Administrative Law Section for their efforts to provide additional flexibility to litigants to appear for status updates virtually. While this supplement to our existing process was necessitated by the continuation of the pandemic, we believe this provides benefits to the parties appearing before the Commission beyond the current health emergency. Our website has been updated with additional details on this exciting process.

When I arrived at the Human Rights Commission, I learned with great pleasure about the Commission's "Lunch and Learn" sessions hosted by our Office of the General Counsel. These sessions are intended to provide knowledge on topics pertaining to the Act to lawyers and non-lawyers alike. If this newsletter was forwarded to you and you would like to receive the notices on these and other Commission events directly, please visit the Contact Us page on our website: Illinois.gov/ihrc.

On a personal note, I have *somehow* concluded my first year with the Commission. While I don't wish to be overly dramatic, I think it is safe to say it has been more eventful than I could have imagined! I am honored to extend my abiding gratitude to each of our Commissioners—both past and present—as well as to each member of the Commission staff for their diligent attention to our work and their service to those who live and work in our great State.

Until next time, be well and be safe.

A Note from the Administrative Law Section

New Case Management and Status Procedures for Chicago:

A new case management procedure has been in operation since February in Chicago ALS cases. Instead of numerous ongoing status hearings, a set period for discovery is calendared, with a short, written "Discovery Report" due mid-way through. The "Final Status Hearing" is primarily dedicated to discussing either a briefing schedule for a dispositive motion or to bracket Public Hearing dates. During the discovery period, the parties are directed to file motions regarding issues that arise as soon as they become ripe. Briefing schedules and decisions are sent by mail, avoiding unnecessary statuses.

In addition, Chicago ALS is moving to the use of WebEx video conferencing technology to allow the parties and counsel remote access to status hearings. This technology allows ALJs to conduct virtual "status calls" that closely mirror the experience of in-person status calls without the need to travel or appear in close contact with others.

Public Hearings:

Public Hearings have resumed in Chicago as of June 2021. (Springfield has continued public hearings throughout the pandemic.) Recent Chicago public hearings have been conducted in large conference room spaces in the Thompson Center, which are equipped with video technology to allow remote participation where it is authorized by the presiding ALJ.

Commission Rules and Regulations:

We are working on suggestions regarding updates for the Commission's Rules and Regulations. In particular, our rules should address the use of remote-access technology. The Illinois Supreme Court Rules could serve as a model. They permit the use of remote-access technology in both evidentiary and non-evidentiary proceedings, with approval of the presiding judge. A higher burden and greater safeguards are required to support remote participation in an evidentiary proceeding than in a non-evidentiary proceeding. The Rules authorize remote participation for any or all case participants, including the judge, parties, lawyers, and/or court reporters.

Standard Discovery Requests:

We are exploring a new discovery procedure that will obligate the parties to exchange certain documents and information automatically at the outset of the case. It will be in the form of standard interrogatories and requests for documents. These expected disclosures should greatly assist the pro se litigant and lessen the necessity of filing motions to compel. The Circuit Court has similar rules. (E.g., Ill. Sup. Ct. R. 222 and Ill. Sup. Ct. R. 213)

Appearances:

Litigants and counsel are advised to make sure the contact information listed on the Appearance filed with the Commission is current. **Please include your email address and current telephone number on your appearance.**

Case Note: *Hobby Lobby Stores, Inc. v. Sommerville*

2021 IL App (2d) 190362 (August 13, 2021)

In a case of first impression in Illinois, the Second District Illinois Appellate Court upheld the Illinois Human Rights Commission's ruling that an employer violated the Illinois Human Rights Act by denying a transgender woman the use of the women's bathroom.

Meggan Sommerville, who was designated as male at birth, was hired by Hobby Lobby in July 1998. In 2007, Sommerville began transitioning from male to female, and in July 2010, she obtained a court order legally changing her name, and a new Illinois driver's license and Social Security card with her new name, identifying her as female. Hobby Lobby changed her personnel records to reflect her female identity, but refused to let her use the women's bathroom at the store. In December 2013, Hobby Lobby installed a unisex bathroom at the store, still refusing to let Sommerville use the women's bathroom.

Sommerville filed a complaint with the Commission alleging that she had been discriminated against on the basis of her gender identity in violation of Articles 2 (as an employee) and 5 (as a customer) of the Act. The Commission ruled in Sommerville's favor, found that she had suffered and continued to suffer emotional distress by being forced to either use the men's bathroom or the bathrooms in nearby businesses, and awarded her $220,000 in damages.

The Appellate Court observed that "sex" is defined by the Act as "the status of being male or female," and is thus a state of being that may be subject to change. A person's sex is not an immutable characteristic based on anatomy, birth certificates, or genetics, but rather is a legal status whose determination can be based on a number of factors, including an individual's gender identity. The Appellate Court agreed with the Commission that Sommerville's sex is "unquestionably female," based on her transition, her appearance and comportment as a woman, and the recognition of her being female by the state and federal government and Hobby Lobby itself. Thus, Hobby Lobby violated the Act by treating Sommerville differently from all other women who worked or shopped at its store.

The Appellate Court found that Hobby Lobby's installation of a unisex bathroom was "irrelevant to the main issue in this case, which is whether Hobby Lobby violated Sommerville's civil rights in denying her, but not other women, access to the women's bathroom." The Appellate Court stated that if every employee and customer could use either the unisex bathroom or the bathroom corresponding to their sex, but Sommerville's choices were limited to the unisex bathroom or a bathroom that did not correspond to her sex, Hobby Lobby was acting discriminatorily.

In response to Hobby Lobby's argument that the damages award was excessive, the Appellate Court found that Sommerville had provided evidence of substantial mental and emotional distress on a daily level for over five years and that the Commission did not abuse its discretion in determining the amount of damages. The Appellate Court then ordered the case remanded back to the Commission for a determination of any additional damages from continuing violations and attorney fees that might be due.

Hobby Lobby has filed a timely Petition for Leave to Appeal with the Illinois Supreme Court.

Case Note: *State v. Arlene's Flowers, Inc.*

441P.3d1203 (Wash.2019)

Katherine Plaster, Coles Fellow

In *State v. Arlene's Flowers, Inc.,* two men, Robert Ingersoll and Curt Freed attempted to purchase floral arrangements for their wedding from Arlene's Flowers. The owner of Arlene's Flowers, Barronelle Stutzman, denied service to the couple, stating that making floral arrangements for a same-sex wedding would violate her Christian faith.

Ingersoll, Freed, and the State of Washington filed suit against Stutzman and Arlene's Flowers under the Washington Law Against Discrimination (WLAD), which prohibits discrimination based on sexual orientation in public accommodations. In her defense, Stutzman asserted that her denial of services to Ingersoll and Freed was protected by the freedoms of religion, speech, and association in the Washington and federal constitutions. The trial court found for the plaintiffs and the Supreme Court of Washington affirmed the trial court's ruling. Stutzman petitioned the United States Supreme Court for a *writ of certiorari*, which was granted. The Supreme Court vacated the original judgment and remanded it for further consideration in light of its decision in *Masterpiece Cakeshop*, a similar case involving a bakery that refused to sell a wedding cake to a same-sex couple due to the owner's religious beliefs. *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018).

On remand, the Supreme Court of Washington held that *Masterpiece Cakeshop* did not impact its original decision in Arlene's *Flowers*. The court explained that in *Masterpiece Cakeshop*, the Supreme Court ruled in favor of the bakery owner on the narrow grounds that the Colorado Civil Rights Commission, the agency responsible for the neutral adjudication of the state antidiscrimination statute, failed to adjudicate neutrally because two commissioners made disparaging comments about the bakery owner's religion and the Commission did not treat similarly situated parties equally. In contrast to *Masterpiece Cakeshop*, the court in *Arlene's Flowers* scoured the record for signs of bias and found none; thus, there was no reason for the court to alter its original opinion.

The court reiterated that Stutzman's refusal to sell floral arrangements for a same-sex wedding violated WLAD's prohibition on sexual orientation discrimination in public accommodations. Stutzman argued that she did not discriminate on the basis of sexual orientation, but rather marital status, a class not protected under WLAD public accommodations provision. The court disagreed, citing numerous precedent cases rejecting the "status/conduct distinction" in discrimination claims.

The court also rejected Stutzman's numerous constitutional defenses. Stutzman argued that making floral arrangements is an artistic expression protected by freedom of speech. However, the court ruled that making floral arrangements is conduct, not speech, and that it did not fall under the "inherently expressive" conduct exception because making or refusing to make floral arrangements was not likely to convey any message to the public.

Stutzman also argued that her refusal to serve Ingersoll and Freed was protected by her constitutional right to free association. The court disagreed, stating that the Supreme Court has never recognized commercial enterprises that serve the general public as "expressive associations" for the purpose of First Amendment rights.

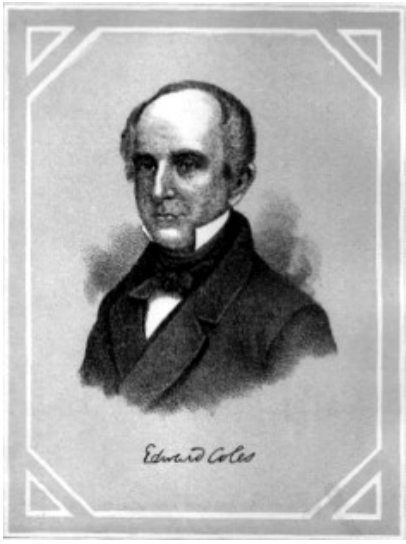
Further, Stutzman asserted that WLAD triggered strict scrutiny under the First Amendment free exercise of religion clause because it exempted religious organizations but not private businesses. The court disagreed.

(continued on page 6)

Case Note: *State v. Arlene's Flowers, Inc. (continued)*

The court explained that WLAD would burden religion and therefore trigger strict scrutiny if it allowed businesses to discriminate based on non-religious reasons but not religious reasons. However, that was not the case here, as WLAD does not allow businesses to discriminate for any reason. Since WLAD does not trigger strict scrutiny, it is subject to rational basis review and meets the standard because it is rationally related to the government's interest in ensuring equal access to public accommodations.

After the Supreme Court of Washington ruled in favor of the plaintiffs for the second time, Stutzman filed another petition for *writ of certiorari*, which was denied in July 2021. *Arlene's Flowers, Inc. v. Washington*, No. 19-333, 2021 WL 2742795, at *1 (U.S. July 2, 2021). Despite media coverage portraying *Masterpiece Cakeshop* as a major victory for religious freedom and a blow to LGBTQ rights, *Arlene's Flowers* and the subsequent denial of *certiorari* indicate just how narrow the ruling in *Masterpiece Cakeshop* was. Although Justices Thomas, Alito, and Gorsuch would have granted the petition for *certiorari*, for now, the principle remains that "while ... religious and philosophical objections [to gay marriage] are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." *Arlene's Flowers*, 441 P.3d at 1215 (citing *Masterpiece Cakeshop*, 138 S. Ct. at 1727).



Edward Coles Fellowship

The Commission warmly thanks our four Summer 2021 Coles Fellows: Jennifer Anton, Annesley Clark, Katherine Hanson, and Katherine Plaster. We are proud to showcase their case notes, which was but one of the many writing and research projects they worked on this summer, in our newsletters.

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

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

Case Note: *Castleberry v. STI Grp.*

863 F.3d 259 (3d Cir. 2017)

Jennifer Anton, Coles Fellow

In *Castleberry v. STI Grp.*, 863 F.3d 259 (3d Cir. 2017), the Third Circuit held that a supervisor's isolated use of a racial epithet toward an employee constituted "severe" discrimination when the supervisor also threatened the employee's job—ultimately creating a hostile work environment.

Atron Castleberry and John Brown were hired as general laborers and alleged that they were harassed due to their race, namely when someone wrote "don't be black on the right of way" on the sign-in sheets, and later, while working on a fence-removal project, when their supervisor told them that if they "N-word rigged the fence," they would be fired. The plaintiffs reported these incidents to a superior and were later terminated. The district court held that the harassment claims could not survive a motion to dismiss because the harassment was not "pervasive and regular." The Third Circuit reversed and held that the plaintiffs had established a *prima facie* case of racial harassment.

Title VII prohibits discrimination on the basis of race with respect to "terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). An employer discriminates against its employee when it subjects the employee to a hostile work environment through racial harassment. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). For harassment to be actionable, it must be severe or pervasive enough "to alter the conditions of employment and create an abusive working environment." *Id*. (emphasis added). The Supreme Court held that the "mere utterance of an . . . epithet" does not sufficiently affect the conditions of employment. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). The Court reasoned that "isolated incidents" are generally not "severe or pervasive" enough to create a hostile working environment. *Id.* Several years later, however, the Court observed that "isolated incidents" would amount to harassment if "extremely serious." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

The *Castleberry* court distinguished the current case from *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001), where a woman read a sexually explicit comment contained in a job application and two men laughed. The *Castleberry* court noted that the current case was different because, while Breeden "conceded that it did not bother or upset her," the plaintiffs here made no such concession. Furthermore, the *Castleberry* court distinguished this case from *Al-Salem v. Bucks Cnty. Water & Sewer Auth., Civ. A. No.* 97-6843, 1999 WL 167729 (E.D. Pa. 1999), where an employee was called the N-word, but the court found no evidence that he was detrimentally affected. Here, however, the *Castleberry* court held that because the supervisor called the plaintiffs the N-word and threatened to terminate them, there was severe conduct.

The *Castleberry* court noted that other circuits have held that "an extreme isolated act of discrimination [alone] can create a hostile work environment." *See Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264, 281 (4th Cir. 2015) (holding that supervisor's isolated incident of calling

(continued on page 8)

Case Note: *Castleberry v. STI Grp. (continued)*

employee a "porch monkey" was "extremely serious" and created a hostile work environment); *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 577 (D.C. Cir. 2013) (holding that supervisor's single use of the N-word against black employee created a hostile work environment).

Similar to the *Castleberry* court, other circuits have held that a supervisor's use of a racial epithet—without a change in the employee's work condition—is insufficient to create a hostile working environment. S*ee e.g., Smith v. Ill. Dep't of Transportation*, 936 F.3d 554, 561 (7th Cir. 2019) (holding that supervisor calling employee a "stupid ass N-word" did not create a hostile working environment because employee did not prove that supervisor's use of the N-word altered a condition of his employment); *Reynolds v. Fed. Exp. Corp.*, 544 F. App'x 611, 616 (6th Cir. 2013) (holding that supervisor's "one specific incident" of calling employee a "scab N-word" did not create a hostile working environment); *Brown v. LaFerry's LP Gas Co.*, 708 F. App'x 518, 521-22 (10th Cir. 2017) (holding that supervisor who told plaintiff to let a coworker "put [a] collar around [his] neck and walk [him] around with a leash at the Juneteenth Festival . . . like they used to do to slaves back in the day" did not establish a hostile work environment because "a few isolated incidents" are insufficient).

For now, the Supreme Court recently denied *certiorari* of this question. *Collier v. Dallas Cnty. Hosp. Dist.*, No. 20-1004, 2021 WL 1952066 (U.S. May 17, 2021) ("whether and in what circumstances racial epithets in the workplace are 'extremely serious' incidents sufficient to create a hostile work environment under Title VII, rather than nonactionable 'mere utterances'").

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

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**

CLE Credit:

One hour of general CLE credit for Illinois attorneys (pending)

Lunch & Learn via WebEx

To register or learn more about the series, please visit

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

October 7, 2021

Presenter: Amrith Kaur Aakre, Legal Director
Sikh Coalition

Topic: Civil Rights in the Workplace: Emerging Challenges of the COVID-19 Pandemic for Racial and Religious Minorities

November 18, 2021

Presenter: Jennifer Nolen, Assistant General Counsel
Illinois Human Rights Commission

Topic: Domestic Violence: An Employer's Obligation Once Reported

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