

# 11

## **Rights, Remedies, and Procedures Under Illinois Law**

**KENT SEZER**  
Neal & Leroy, LLC  
Chicago

The author gratefully acknowledges the help of Raymundo Luna, Michael Evans, and Michael Robinson. The views expressed are those of the author and do not necessarily represent the views of the Human Rights Commission or the Department of Human Rights.

**I. [11.1] Scope of Chapter****II. Illinois Antidiscrimination Provisions**

- A. [11.2] Illinois Human Rights Act
- B. [11.3] Statutes Repealed by the IHRA
- C. Other State and Local Causes of Action for Discrimination
  - 1. [11.4] Preemption by the IHRA
  - 2. [11.5] Illinois Constitution
  - 3. [11.6] Retaliatory Discharge
  - 4. [11.7] Traditional Torts
  - 5. [11.8] Local Ordinances
  - 6. [11.9] Equal Pay Act of 2003
  - 7. [11.10] Use of Federal Laws in State Courts
  - 8. [11.11] Civil Rights Act of 2003
  - 9. [11.12] Victims' Economic Security and Safety Act
  - 10. [11.13] Nursing Mothers in the Workplace Act

**III. Coverage of the IHRA**

- A. Entities Forbidden To Discriminate
  - 1. [11.14] Private Employers
  - 2. [11.15] Private Employers with Government Contracts
  - 3. [11.16] Private Individuals
  - 4. [11.17] Public Employers
  - 5. [11.18] Joint Apprenticeship Committees
  - 6. [11.19] Religious Organizations
- B. [11.20] Persons Eligible To File Charges
- C. [11.21] Noteworthy Substantive Issues
  - 1. [11.22] Arrest and Conviction Information
  - 2. [11.23] Marital Status
  - 3. [11.24] Pregnancy Discrimination
  - 4. [11.25] Sexual Harassment
  - 5. [11.26] Age Discrimination
  - 6. [11.27] Handicap Discrimination
  - 7. [11.28] Equal Pay Act
  - 8. [11.29] Federal Preemption
  - 9. [11.30] Speak-English-Only Rules
  - 10. [11.31] Sexual Orientation
  - 11. [11.32] Military Status

**IV. [11.33] Procedure Under the IHRA**

- A. [11.34] Circuit Court Actions by the Attorney General
- B. Department of Human Rights
  - 1. Filing a Charge
    - a. When Must a Charge Be Filed?
      - (1) [11.35] Jurisdictional nature of the filing deadline
      - (2) [11.36] When does the 180-day period start?
    - b. [11.37] What Constitutes a Charge?
    - c. [11.38] Mechanics of Filing a Charge
    - d. [11.39] Dual Filing
  - 2. Processing a Charge
    - a. [11.40] Service of the Charge
    - b. [11.41] Response to Charges
    - c. [11.42] Questionnaires
    - d. [11.43] Position Statements
    - e. [11.44] Mediation
    - f. [11.45] Temporary Injunctive Relief
    - g. [11.46] Expedited Proceedings
    - h. [11.47] Fact-Finding Conferences
    - i. [11.48] Subpoenas
    - j. [11.49] Department Finding
    - k. [11.50] Conciliation
    - l. [11.51] Time Limit on IDHR Proceedings
  - 3. [11.52] Complaints Filed by Complainants
  - 4. Requests for Review
    - a. [11.53] Filing
    - b. [11.54] Investigation File
    - c. [11.55] Content
    - d. [11.56] Consideration
    - e. [11.57] Court Review
    - f. [11.58] Time Limit Considerations
- C. Illinois Human Rights Commission
  - 1. [11.59] Complaint and Answer
  - 2. [11.60] Alternative Hearing Procedure
  - 3. [11.61] Discovery
  - 4. [11.62] Subpoenas on Nonparties
  - 5. [11.63] Motions
    - a. [11.64] Motion Call
    - b. [11.65] Dispositive Motions
    - c. [11.66] Other Motions

6. Interlocutory Appeals
  - a. [11.67] Administrative Law Judge Orders
  - b. [11.68] IHRC Orders
7. [11.69] Prehearing Memorandum
8. [11.70] Hearing
9. [11.71] Proof
10. [11.72] Settlements
11. [11.73] Recommended Order and Decision
12. Review by the IHRC
  - a. [11.74] Copies
  - b. [11.75] Motions at the IHRC Level
  - c. [11.76] Exceptions
  - d. [11.77] Response to Exceptions
  - e. [11.78] Acceptance of the Case
  - f. [11.79] Oral Argument
  - g. [11.80] Rehearing
  - h. [11.81] Judicial Review
  - i. [11.82] Modification of IHRC Orders
- D. [11.83] Enforcement of IHRC Decisions

## **V. Remedies Under the IHRA**

- A. [11.84] Generally
- B. [11.85] Backpay and Reinstatement
- C. [11.86] Actual Damages
- D. [11.87] Costs and Attorneys' Fees
- E. [11.88] Additional Sanctions for Public Contractors

## **VI. [11.89] Effect of IHRA Decisions on Federal Claims**

## **VII. Effect of Other State Proceedings and Laws on IHRA Claims**

- A. [11.90] State Agency Determinations
- B. [11.91] Laws and Regulations

## I. [11.1] SCOPE OF CHAPTER

This chapter discusses the provisions of Illinois law prohibiting discrimination in employment. It focuses primarily on the Illinois Human Rights Act (IHRA), 775 ILCS 5/1-101, *et seq.*, which has been in effect since July 1, 1980, superseding several earlier state statutes regulating this subject. Brief reference is made to a few of the statutes repealed by the IHRA and to the implications of their repeal. Consideration also is given to provisions of the Illinois Constitution and of local government ordinances that may independently support a cause of action for job discrimination.

Major issues of substantive law are largely overlooked in this chapter because they are treated separately in other chapters of the handbook. This chapter, however, does address unusual applications of Illinois law and some aspects of state discrimination law that are nominally the same as federal law, but in which application of state law may result in a different outcome. The chapter also explores the procedures applicable and remedies available under the IHRA, and it discusses recent case law regarding overlapping state and federal causes of action. Finally, there is a discussion of the effect of decisions by other quasi-judicial state agencies on cases brought before the Illinois Department of Human Rights (IDHR) and the Illinois Human Rights Commission (IHRC).

Older decisions of the IHRC are reported in a series cited as “Ill.H.R.C.Rep.” There are 61 volumes in this series, published by Tower Printers (formerly Tower Records of Illinois). These volumes are available for review at the IHRC offices, but they are no longer sold by Tower Printers. Electronic copies of decisions rendered after April 1991 are available online from Lexis ([www.lexis.com](http://www.lexis.com)) and Westlaw ([www.westlaw.com](http://www.westlaw.com)). IHRC decisions (beginning with 2001) are available online at [www.state.il.us/ihr/Decisions.htm](http://www.state.il.us/ihr/Decisions.htm), and decisions disposing of requests for review are available from the IDHR at [www.state.il.us/dhr/Orders/default.htm](http://www.state.il.us/dhr/Orders/default.htm).

There was an earlier reporter service covering Illinois Fair Employment Practices Commission decisions, known as Illinois F.E.P. Reports. It consisted of five volumes, including an index, covering decisions from 1974 through the FEPC’s last year, 1980. Some of the older decisions of the IHRC used FEPC decisions as precedent, but copies of the FEPC volumes are no longer available from the IHRC.

## II. ILLINOIS ANTIDISCRIMINATION PROVISIONS

### A. [11.2] Illinois Human Rights Act

The IHRA is the product of a major reexamination of Illinois civil rights statutes undertaken in 1978 and 1979. The IHRA was intended to update the provisions of its various antecedents, to render them consistent with one another, and to consolidate them into a single source. In its original version, the IHRA passed the Illinois General Assembly in November 1979, was approved by the Governor in December (P.A. 81-1216), and was scheduled to take effect July 1, 1980. Prior to that effective date, in the spring of 1980, a number of amendments were enacted (P.A. 81-1267) that took effect simultaneously with the original Act itself.

The IHRA abolished three former Illinois agencies — the Fair Employment Practices Commission, the Department of Equal Employment Opportunity, and the Commission on Human Relations — and created two new agencies — the IDHR and the IHRC. The IDHR has overall responsibility for administration and enforcement of the IHRA, including the acceptance or initiation of charges alleging unlawful discrimination and the investigation and attempted resolution of those charges. The functions of the IHRC are essentially adjudicatory. Its most important function is to hold hearings and render formal determinations in contested matters filed with it by the IDHR and complainants. In addition, it must approve all settlements in which the parties desire that the IHRC retain jurisdiction for purposes of enforcement of the terms to which they have agreed.

The IHRA prohibits discrimination in employment, real estate transactions, financial credit, and access to public accommodations. It also prohibits sexual harassment of students in institutions of higher education. Its applications to matters other than employment are, of course, beyond the scope of this chapter. The employment provisions are found in Article 2 of the IHRA, 775 ILCS 5/2-101 through 5/2-105.

The IHRA generally defines “unlawful discrimination” as discrimination on the bases of “race, color, religion, national origin, ancestry, age, sex, marital status, handicap, military status, sexual orientation, or unfavorable discharge from military service.” IHRA §1-103(Q). Several of the individual bases are themselves defined. For example, “age” means the chronological age of a person who is at least 40 years old, except with regard to an allegation of discrimination in a training or apprenticeship program. With respect to such allegations, “age” means the chronological age of a person who is at least 18 but not yet 40 years old. IHRA §1-103(A). “National origin” means the “place in which a person or one of his or her ancestors was born.” IHRA §1-103(K). The terms “handicap” and “sexual orientation” are defined at some length in IHRA §§1-103(I) and (O-1) respectively, and are discussed in more detail in §§11.27 and 11.31 (respectively) below. For the most part, the meanings given these terms are consistent with their meanings under analogous federal and other enactments. “Unlawful discrimination” is prohibited in all of the areas covered by the IHRA, including, of course, employment.

The general prohibition against “unlawful discrimination” is supplemented in the employment article with a prohibition against discrimination on the basis of citizenship status. The term is defined in the same way as in the antidiscrimination provisions of the federal Immigration Reform and Control Act of 1986. 8 U.S.C. §1324b. It is also a *per se* violation of the IHRA for an employer to ask for more or different work authorization documents than are required under federal law. IHRA §2-102(G). When this provision of the IHRA was enacted, it was exactly the same as the federal law. On September 30, 1996, however, the federal law was revised to make it illegal to ask for more or different documents only if it is the intent of the employer to discriminate on the basis of national origin or citizenship status. Pub.L. No. 104-208, 110 Stat. 3009 (1996). The IHRA was never amended to track the federal law. Thus, it is unclear whether “document abuse” constitutes a separate violation of the IHRA.

Also limited to the employment sphere is an amendment to the IHRA by P.A. 93-217 (eff. Jan. 1, 2004) that makes it a civil rights violation for an employer to prohibit a foreign language from being spoken by employees in communications that are unrelated to the employees’ duties. 775 ILCS 5/2-102(A-5).

It is illegal to inquire into or to use arrest information or an expunged criminal history record. 775 ILCS 5/2-103. This provision is discussed in more detail in §11.22 below.

Unlike Title VII of the 1964 Civil Rights Act (Title VII), 42 U.S.C. §2000e, *et seq.*, the IHRA specifically prohibits “sexual harassment” in employment as a separate violation. The definition of “sexual harassment” is generally consistent with the standards enunciated in the Title VII cases on the subject. As will be seen in §11.25 below, however, the IHRA makes employers liable for harassment by supervisors in cases in which the federal law would not. Further, as is discussed in §11.14 below, there is no small-employer exemption under the IHRA for allegations of sexual harassment. 775 ILCS 5/2-102(D).

It is a separate violation of the IHRA for a public contractor to fail to comply with its affirmative action obligations. 775 ILCS 5/2-105(C). This provision is explained in more detail in §11.15 of this chapter.

A public employer may not deny an employee’s request to work alternative hours in order to make up time when the employee misses time from work in order to practice religious beliefs. 775 ILCS 5/2-102(E). There is an exception if granting such compensatory time would not be “consistent with the operational needs of the employer.” *Id.*

## **B. [11.3] Statutes Repealed by the IHRA**

Probably the most utilized statute repealed by the IHRA was the Illinois Fair Employment Practices Act (FEPA), Ill.Rev.Stat. (1979), c. 48, §851, *et seq.* The IHRA also repealed the Illinois Age Discrimination Act, Ill.Rev.Stat. (1979), c. 48, §881, *et seq.*, and the Equal Opportunities for the Handicapped Act (EOHA), Ill.Rev.Stat. (1979), c. 38, §65-21, *et seq.* The former statute declared age discrimination in employment unlawful but did not provide a private cause of action or authorize recovery of an aggrieved party’s damages. *Teale v. Sears, Roebuck & Co.*, 66 Ill.2d 1, 359 N.E.2d 473, 3 Ill.Dec. 834 (1976). The EOHA authorized private actions for individual relief but was interpreted so as to substantially limit its scope. *See Lyons v. Heritage House Restaurants, Inc.*, 89 Ill.2d 163, 432 N.E.2d 270, 59 Ill.Dec. 686 (1982). Many of the provisions of the repealed statutes were incorporated virtually verbatim into the IHRA. Accordingly, precedent decided under analogous provisions of those acts would appear to be applicable to proceedings under the IHRA. *See Kenall Manufacturing Co. v. Human Rights Commission*, 152 Ill.App.3d 695, 504 N.E.2d 805, 105 Ill.Dec. 520 (1st Dist. 1987).

## **C. Other State and Local Causes of Action for Discrimination**

### **1. [11.4] Preemption by the IHRA**

Section 8-111(C) of the IHRA provides, “Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.” With very few exceptions, state courts have jurisdiction over IHRA cases only on administrative review. Accordingly, state courts virtually never have original jurisdiction over employment discrimination claims. This means that in most cases there are no other state causes of action for employment discrimination.

It should be noted, however, that as of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would give complainants the option of filing HRA cases directly in circuit court. The new law would apply to charges filed after January 1, 2008.

## 2. [11.5] Illinois Constitution

The Illinois Constitution guarantees the right of all persons in Illinois to be free from certain forms of discrimination in employment. It provides:

**All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer. . . .**

**These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation. ILL.CONST. art. I, §17.**

Unlike the United States Constitution, this provision outlaws discrimination in purely private as well as in public sector employment.

The language of Article I, §17, declaring it to be enforceable without action by the General Assembly, provided a basis for a direct, constitutional cause of action in circuit court prior to the passage of the IHRA. It has been held, however, that when the IHRA applies, it is now the exclusive remedy under state law. *Thakkar v. Wilson Enterprises, Inc.*, 120 Ill.App.3d 878, 458 N.E.2d 985, 76 Ill.Dec. 331 (1st Dist. 1983).

Further, when the IHRA would appear to apply but the General Assembly has created an exemption, there can be no direct cause of action under the Constitution. In *Baker v. Miller*, 159 Ill.2d 249, 636 N.E.2d 551, 201 Ill.Dec. 119 (1994), the plaintiff argued that she could proceed directly to circuit court under Article 1, §17, because her employer had fewer than 15 employees and thus was exempt from coverage under the IHRA. It was her theory that because the IHRA did not apply, she could proceed directly under the Constitution, which has no small-employer exemption. The court held, however, that the framers of the Constitution intended to give the General Assembly the power to create reasonable exemptions to the constitutional cause of action, and the small-employer exemption in the IHRA was intended to be an exemption under both the IHRA and Article 1, §17. Thus, at this point it appears that one may not bring an action directly in circuit court for discrimination under Article 1, §17.

Despite the *Baker* ruling, it is important to keep in mind which causes of actions under the IHRA are also covered under Article 1, §17. Those causes of action exist to implement a preexisting, constitutional right. Although the legislature can make reasonable exemptions, it cannot change those causes of action in a fundamental way. The remaining causes of action under the IHRA are entirely statutory and may be modified or eliminated by the General Assembly without raising constitutional questions.

### 3. [11.6] Retaliatory Discharge

The Illinois Supreme Court ruled in *Mein v. Masonite Corp.*, 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985), that a public policy contained in the IHRA could not give rise to a tort cause of action under the retaliatory discharge exception to the employee-at-will doctrine enunciated in *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978), and *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (1981). Thus a private tort cause of action based on a theory of age discrimination was properly dismissed because the plaintiff had the right to file a charge under the IHRA. An employee who believes that he or she has been discharged because of activity protected by the IHRA does not have a cause of action for retaliatory discharge under *Kelsay* and *Palmateer*. *Talley v. Washington Inventory Service*, 37 F.3d 310, 312 – 313 (7th Cir. 1994).

### 4. [11.7] Traditional Torts

The Illinois Supreme Court has ruled that if behavior toward an employee constitutes a traditional tort such as assault or battery, the employee may file a tort action in circuit court even though the actions of the employer might also be considered sexual harassment in violation of the IHRA. *Maksimovic v. Tsogalis*, 177 Ill.2d 511, 687 N.E.2d 21, 227 Ill. Dec. 98 (1997). The court emphasized that a tort action would be allowed if the fact that the behavior alleged might also be a violation of the IHRA is “incidental.” 687 N.E.2d at 23. On the other hand, if the existence of the tort depends on the duties and prohibitions in the IHRA, the plaintiff’s exclusive remedy will be in front of the IHRC.

Since the *Maksimovic* decision, courts have had occasion to apply its principles to several common-law torts. *See Welch v. Illinois Supreme Court*, 322 Ill.App.3d 345, 751 N.E.2d 1187, 256 Ill.Dec. 350 (3d Dist. 2001) (IHRA preempts claim of tortious interference with contract when plaintiff alleges defendant acted “maliciously” because his actions were motivated by plaintiff’s age and sex); *Veazey v. LaSalle Telecommunications, Inc.*, 334 Ill.App.3d 926, 779 N.E.2d 364, 370, 268 Ill.Dec. 750 (1st Dist. 2002) (IHRA preempts claim of civil conspiracy when alleged “unlawful purpose” of conspiracy is race discrimination); *Sanglap v. LaSalle Bank, FSB*, 345 F.3d 515 (7th Cir. 2003) (IHRA preempts claim of intentional infliction of emotional distress when defendant’s actions are “outrageous” because they are discriminatory). *But see Arnold v. Janssen Pharmaceutica, Inc.*, 215 F.Supp.2d 951 (N.D.Ill. 2002) (fact that extreme and offensive conduct might also constitute sexual harassment does not affect viability of tort claim for intentional infliction of emotional distress); *Haywood v. Lucent Technologies Inc.*, 169 F.Supp.2d 890 (N.D.Ill. 2001) (slander count not preempted in race discrimination case in which, after discharge, employer allegedly told security staff that plaintiff was “unstable”); *Naeem v. McKesson Drug Co.*, 444 F.3d 593 (7th Cir. 2006) (harassing pregnant employee in order to produce emotional reaction gives rise to independent claim for intentional infliction of emotional distress).

### 5. [11.8] Local Ordinances

More than 20 municipalities in Illinois have adopted local ordinances establishing municipal human relations commissions and prohibiting various forms of discrimination within their

boundaries. Many permit complaints of violations to be filed with the local authorities and authorize the imposition of sanctions and/or the award of relief when violations are found.

From its inception, §7-108 of the IHRA has expressly authorized local governments to adopt ordinances protecting civil rights and the IDHR to adopt regulations whereby it may cooperate with local agencies. The language of IHRA §7-108 has suggested that the IHRA was not intended to limit local governments in the types of discrimination their ordinances might regulate; IHRA §7-108(C) authorizes the IDHR, pursuant to its regulations, to transfer a charge to a local agency if the local agency has jurisdiction and the IDHR does not.

Nonetheless, in *Hutchcraft Van Service, Inc. v. City of Urbana Human Relations Commission*, 104 Ill.App.3d 817, 433 N.E.2d 329, 60 Ill.Dec. 532 (4th Dist. 1982), the appellate court ruled that the IHRA preempted application of an Urbana human relations ordinance forbidding discrimination in employment based on personal appearance. The ordinance had been applied by Urbana authorities against a local employer who refused to employ a young man because he wore long hair. The court reasoned that discrimination in employment is a matter of statewide concern that local governments — even home rule units — are free to regulate only to the extent of the prohibitions of the IHRA. The IHRA does not reach personal appearance discrimination. After the Illinois Supreme Court declined to grant leave to appeal the appellate court's ruling, the General Assembly moved to overcome its result by a specific clarification of the IHRA. It enacted an amendment to IHRA §7-108(A) providing that “[t]he provisions of any ordinance enacted by any municipality or county which prohibits broader or different categories of discrimination than are prohibited by this Act are not invalidated or affected by this Act.” P.A. 83-648 (eff. Sept. 23, 1983).

Meanwhile, pursuant to adopted regulations effective February 8, 1982, the IDHR works cooperatively with local human relations agencies. 56 Ill.Admin. Code §2520.630, *et seq.* The regulations contemplate the mutual referral of discrimination charges between the state and local agencies, depending on which has jurisdiction or can best address the subject matter. They also call for joint efforts in training, research, and the like. Because the IDHR is now under an obligation to investigate all charges within a short period of time, it is unlikely that it will defer its investigation of a charge pending an investigation by a local human relations commission.

## **6. [11.9] Equal Pay Act of 2003**

The Equal Pay Act of 2003, 820 ILCS 112/1, *et seq.*, was created by P.A. 93-6 (eff. Jan. 1, 2004). It is one of the first antidiscrimination laws passed by the General Assembly since 1980 that does not use the enforcement mechanisms of the IHRA. At first blush, this new law appears merely to parallel the IHRA's prohibition against paying unequal wages on the basis of sex. There are, however, significant distinctions between the two causes of action:

a. The threshold for jurisdiction is lower. The Equal Pay Act applies to employers who employ 4 or more employees, not 15. 820 ILCS 112/5.

b. Under the Equal Pay Act, it is a *per se* violation to discriminate against an individual for inquiring about or disclosing the wages of other employees. There is no need to prove retaliatory intent. 820 ILCS 112/10(b).

c. The Equal Pay Act is enforced by the Illinois Department of Labor, not the Illinois Department of Human Rights or Illinois Human Rights Commission. 820 ILCS 112/5, 112/15.

d. The statute of limitations is 3 years from the date the employee learns of the underpayment, not 180 days. 820 ILCS 112/30(a).

e. There is a right to file a civil action in circuit court. *Id.*

f. Employers are subject to a civil penalty of up to \$2,500 per violation per employee. 820 ILCS 112/30(c).

g. Employers may have to pay an additional penalty of up to an amount equal to twice the sum of the unpaid wages due the employee if they refuse to obey an order from the Director of Labor. 820 ILCS 112/35(a).

h. Employees who have been discharged in retaliation for asserting their rights under the Equal Pay Act may have any backpay award doubled as a form of liquidated damages. 820 ILCS 112/35(b).

i. The burden of proof is slightly different. See §11.28 below.

## 7. [11.10] Use of Federal Laws in State Courts

Although technically not a remedy “under state law,” a theoretical alternative to the Illinois Human Rights Act is the filing of a discrimination claim in state court based on alleged violations of federal antidiscrimination laws. The Fourth and Fifth District Appellate Courts have ruled, however, that the IHRA deprives Illinois state courts of jurisdiction over all discrimination claims, and therefore circuit courts lack jurisdiction to hear Title VII-type claims. *Brewer v. Board of Trustees of University of Illinois*, 339 Ill.App.3d 1074, 791 N.E.2d 657, 274 Ill.Dec. 565 (4th Dist. 2003); *Cooper v. Illinois State University*, 331 Ill.App.3d 1094, 772 N.E.2d 396, 265 Ill.Dec. 358 (4th Dist. 2002); *Meehan v. Illinois Power Co.*, 347 Ill.App.3d 761, 808 N.E.2d 555, 283 Ill.Dec. 589 (5th Dist. 2004).

It appears that the General Assembly unintentionally reversed this precedent (as it applies to state employees) when it passed a law designed to waive Eleventh Amendment sovereign immunity. Instead of merely waiving sovereign immunity, P.A. 93-414, (eff. Jan. 1, 2004) amends §1 and adds §1.5 of the State Lawsuit Immunity Act, 745 ILCS 5/0.01, *et seq.* Section 1.5 states that the State of Illinois consents to suits in either federal or state courts by state employees claiming violation of the Age Discrimination in Employment Act of 1967, the Fair Labor Standards Act of 1938, the Family and Medical Leave Act, the Americans with Disabilities Act of 1990, and Title VII. The legislation explicitly gives state employees (but not private sector employees) the right to have their claims of discrimination heard in state courts. The legislation may also give private sector employees the right to go to state court because it may undermine the rationale of the Fourth and Fifth District precedent, which is that state courts lack jurisdiction to hear discrimination claims.

In any event, the employer always has the option of removing claims based on federal law to the appropriate federal court, and attorneys for private sector employers will probably do so. It remains to be seen, however, whether the Attorney General will adopt the same strategy when the State is sued in state court.

It should be noted that as of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would allow complainants the right to file complaints in circuit courts after the charge is processed by the IDHR. If a complaint is filed in circuit court based on state law, there would not appear to be any basis for removal. The new law would apply to charges filed after January 1, 2008.

#### **8. [11.11] Civil Rights Act of 2003**

P.A. 93-425 (eff. Jan. 1, 2004), creates the Illinois Civil Rights Act of 2003, 740 ILCS 23/1, *et seq.* This Act provides a remedy in state court for individuals who have been (among other things) excluded from participation in any program or activity by a unit of state, county, or local government on the basis of race, color, or national origin. Although the primary target of this legislation would appear to be discrimination by governmental entities with respect to public accommodations, similar language in the Americans with Disabilities Act has been held to apply to public employment. *Bledsoe v. Palm Beach County Soil & Water Conservation District*, 133 F.3d 816 (11th Cir. 1998).

#### **9. [11.12] Victims' Economic Security and Safety Act**

P.A. 93-591 (eff. Aug. 25, 2003) creates the Victims' Economic Security and Safety Act, 820 ILCS 180/1, *et seq.* Under certain circumstances, this Act requires employers to give victims of domestic or sexual violence up to 12 weeks of unpaid leave to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, participate in safety planning, or seek legal assistance or remedies. 820 ILCS 180/20. An employee who has a family member who is a victim may also qualify for a leave under the Act. In addition, employers are prohibited from discriminating against employees who have exercised their rights or opposed any practice made unlawful by the Act. *Id.* Furthermore, employers may not discriminate against employees merely because they are (or are perceived to be) victims of domestic or sexual violence. 820 ILCS 180/30. In fact, under certain circumstances, the employer may have to make a reasonable accommodation for an otherwise qualified victim, such as granting a transfer, changing a telephone number, or installing locks. *Id.*

#### **10. [11.13] Nursing Mothers in the Workplace Act**

The Nursing Mothers in the Workplace Act, 820 ILCS 260/1, *et seq.*, provides:

**An employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, other than a toilet stall, where [a nursing mother] can express her milk in privacy.** 820 ILCS 260/15.

The Act also provides that an employer must usually provide reasonable unpaid break time for this purpose, although this time will usually run concurrently with the break time provided to all employees. 820 ILCS 260/10. Although the Act does not contain an explicit private cause of action for employees, it is mentioned here because it is conceivable that an employee may cite a violation of this law as evidence that an employer maintained a working environment hostile to women.

### III. COVERAGE OF THE IHRA

#### A. Entities Forbidden To Discriminate

##### 1. [11.14] Private Employers

The IHRA reaches generally all private employers located or operating in Illinois that employ 15 persons or more within the state during at least 20 weeks of a year. IHRA §2-101(B)(1)(a). The IHRA does not require at least 15 employees for a continuous 20-week period and does not require that the same 15 persons remain employed throughout each of the required 20 weeks. It appears sufficient if the total number of persons employed aggregates 15 in any 20 weeks out of a single calendar year.

The IHRC has considered the traditional common-law tests to decide who is an employee. If someone is an independent contractor, he or she does not count as an “employee” for purposes of the IHRA. *In re Whittington & K-Mart Corp.*, Charge No. 1987SF0520, 1993 ILHUM LEXIS 631 (Nov. 8, 1993). An earlier attempt to include some independent contractors under the IHRA was overturned by the appellate court in an unpublished opinion. *Memory Lane Photographers, Inc. v. Human Rights Commission*, Nos. 4-85-0526, 4-85-0541 (4th Dist. 1986) (Rule 23). In *Wanless v. Illinois Human Rights Commission*, 296 Ill.App.3d 401, 695 N.E.2d 501, 230 Ill.Dec. 1011 (3d Dist. 1998), the Third District Appellate Court issued a published opinion that confirmed that an independent contractor under the common law is not an employee under the IHRA. It also ruled that, generally, a director of a corporation or an association is considered an employer rather than an employee. In *Mitchell v. Department of Corrections*, 367 Ill.App.3d 807, 856 N.E.2d 593, 305 Ill.Dec. 788 (1st Dist. 2006), the court ruled that a health care worker who worked for a private health care company at an Illinois Department of Correction (DOC) facility was not an employee of DOC because the worker had not shown that DOC had sufficient control over the worker’s day-to-day activities to make it a joint employer with the private company.

It also should be noted that the IHRA does not count only full-time workers. Part-time and casual employees would appear includible toward the jurisdictional minimum. Thus, if one employee replaces another during a given 20-week period, the employer cannot argue that no employee worked the entire 20 weeks. On the other hand, the charging party cannot argue that when one employee replaces another, this counts as two employees during the 20-week period. *In re Worthington & Karlson Kitchens*, Charge No. 1992CA3723, 1994 ILHUM LEXIS 114 (Apr. 5, 1994). Thus, the emphasis should be on how many employees the employer needs to carry out business; a great deal of turnover does not transform a small employer into a large one.

One looks at the size of the employer during the calendar year of the alleged violation and in the preceding calendar year. If the test is met in either of these calendar years, the respondent is an employer. The wording of the statute appears to give a “free ride” to a company that starts up with less than 20 weeks left in the calendar year. No matter how large that company is, it cannot be considered an employer during the year it starts up because it will not have employed 15 employees for 20 weeks in either the calendar year of the violation or in the previous calendar year.

On the other hand, a company is not exempt merely because it has fewer than 15 employees at the time of the violation. If a charge alleges a violation early in a calendar year, the IDHR must wait to see if the respondent meets the jurisdictional minimum number of employees later in the year. If there are enough new employees hired for 20 weeks later in the year, the company will not be considered exempt even though it did not have 15 employees at the time of the violation. *In re Ryan & Capital Funding-GFC*, Charge No. 1994CA1129, 1994 ILHUM LEXIS 339 (Sept. 29, 1994).

There are two exceptions to the small-employer exemption under the IHRA. In cases alleging either handicap discrimination or sexual harassment, there is no minimum number of employees. If the relationship between the company and the charging party involves employment, the IDHR has jurisdiction over the charge.

In *Dana Tank Container, Inc. v. Human Rights Commission*, 292 Ill.App.3d 1022, 687 N.E.2d 102, 227 Ill.Dec. 179 (1st Dist. 1997), the appellate court ruled that even if an entity is exempt as a small employer, it may still be liable for retaliation against an employee who files a charge of discrimination against it. Thus, even though the IHRC would not have jurisdiction over an original charge alleging, for example, failure to promote, it would have jurisdiction over a subsequent charge that the employee was discharged for filing the original charge. In fact, the full IHRC has ruled there is jurisdiction under the IHRA for claims of retaliation, even when the original charge fails to state a civil rights violation. *In re Hatch & Pate*, Charge No. 1993SP0482, 1998 ILHUM LEXIS 318 (Nov. 20, 1998).

Finally, the appellate court has made it clear that the burden of proving that an entity is an employer always rests with the complainant. In *Aero Services International, Inc. v. Human Rights Commission*, 291 Ill.App.3d 740, 684 N.E.2d 446, 225 Ill.Dec. 761 (4th Dist. 1997), the court ruled against the complainant when the respondent stated that it would prove, as an affirmative defense, that it was not an employer under the IHRA but neither party put on sufficient evidence to demonstrate how many employees the respondent had.

## **2. [11.15] Private Employers with Government Contracts**

The IHRA devotes special attention to private firms doing business with the state or local governments in Illinois. Section 2-101(B)(1)(d) of the IHRA provides that its coverage of employers extends to “[a]ny party to a public contract without regard to the number of [its] employees.” The term “public contract” is defined in IHRA §1-103(M) as including “every contract to which the State, any of its political subdivisions or any municipal corporation is a party.”

While IHRA §2-101(B)(1)(d) means that firms holding public contracts are subject to charges of unlawful discrimination regardless of their size, IHRA §2-105(A)(1) further obliges them to “undertake affirmative action to assure equality of employment opportunity and eliminate the effects of past discrimination” and to comply with other reasonable requirements imposed by the IDHR. The IDHR is charged under §7-105 of the IHRA to establish minimum policies and compliance criteria to which public contractors must adhere.

The statutory language requiring affirmative action by public contractors has been recognized as requiring more than the mere avoidance of unlawful discrimination. *Eastman Kodak Co. v. Fair Employment Practices Commission*, 86 Ill.2d 60, 426 N.E.2d 877, 55 Ill.Dec. 552 (1981); *S.N. Nielsen Co. v. Public Building Commission of Chicago*, 81 Ill.2d 290, 410 N.E.2d 40, 43 Ill.Dec. 40 (1980); *Southern Illinois Builders Ass’n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972). The IDHR’s public contracts regulations (44 Ill.Admin. Code §750.5, *et seq.*), which are like those of the predecessor FEPC, require employers seeking contracts with the state to analyze their workforces for underutilizations of minorities and females and, when underutilization exists, to adopt affirmative action plans with goals and timetables aimed at overcoming such underutilization.

It is a separate civil rights violation for a public contractor or eligible bidder to fail to comply with its affirmative action obligations. Under IHRA §2-105(C)(2), the IDHR must notify the public contractor in writing by certified mail that it is not in compliance with its affirmative action obligations. If the public contractor does not bring itself into compliance within 60 days, it risks debarment from participating in public contracts for three years and other penalties set forth in §§8A-104 and 8-109 of the IHRA.

Every party to a public contract must have a written sexual harassment policy. IHRA §2-105(A)(4). The IHRA specifies some of the details that must be in the policy. The employer must submit the policy to the IDHR on request.

Notably, neither the IHRA nor the IDHR’s public contracts regulations exempt smaller contractors or those doing less than a minimum dollar volume of public business from their affirmative action and other compliance requirements. They may thus be contrasted with the counterpart federal contract compliance regulations. See 41 C.F.R. Parts 60-2, 60-4. The federal regulations do not preempt or require conformity by the states. *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973); *People ex rel. Illinois Fair Employment Practices Commission v. Brennan*, 11 F.E.P.Cas. (BNA) 5 (N.D.Ill. 1975).

### 3. [11.16] Private Individuals

In certain narrow circumstances, the IHRA permits employment discrimination charges to be filed not only against organizations (*i.e.*, employers, employment agencies, and labor organizations) but also against individuals. The IHRA forbids “any employer, *employee, agent of any employer, employment agency or labor organization*” to commit sexual harassment in employment. [Emphasis added]. IHRA §2-102(D). Thus a sexual harassment charge may be filed against the specific supervisor, coworker, or other person allegedly committing or permitting the wrongful conduct. See *In re Langa & Kelly*, Charge No. 1991SN0215, 1995 ILHUM LEXIS

7599 (May 26, 1995). In addition, §6-101 of the IHRA forbids any “person” to take reprisals against an individual who files a charge, provides evidence, or otherwise opposes a violation, or willfully to interfere with the IDHR or the IHRC or their agents in the conduct of their official duties. Under §6-101 of the IHRA, a charge also may be filed against a person who aids, abets, compels, or coerces a person to commit a violation of the IHRA or who willfully interferes with the performance of a duty by the IHRC or one of its members or representatives or the IDHR or one of its officers or employees.

The IHRC has ruled, however, that when a corporate employer is guilty of a civil rights violation because of the acts of a person such as the president or the personnel manager, the charging party cannot name that person individually on the theory that the individual aided and abetted the corporation’s violation. *In re Taylor & Ahlers*, Charge No. 1990SN0252, 1992 ILHUM LEXIS 486 (Apr. 6, 1992). The same rule applies with respect to allegations of retaliation by an employer. *In re Bingham & Clemons*, Charge No. 1991CN2356, 1994 ILHUM LEXIS 608 (May 27, 1994).

#### 4. [11.17] Public Employers

IHRA §2-101(B)(1)(c) provides that the class of employers subject to its provisions includes

**[t]he State and any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of [its] employees.**

While this does not, of course, include agencies of the federal government, it means that all state and local public bodies in Illinois are amenable to charges under the IHRA, notwithstanding their size.

It is occasionally argued that agencies of state government are amenable to IHRA actions only in the Illinois Court of Claims. The argument is premised on language of the Court of Claims Act providing that the Court of Claims has “exclusive jurisdiction to hear and determine . . . [a]ll claims against the State founded upon any law of the State of Illinois.” 705 ILCS 505/8(a). This language has been given an expansive reading so as to bar the litigation in state courts of most claims by disgruntled state employees. *See, e.g., Ellis v. Board of Governors of State Colleges & Universities*, 102 Ill.2d 387, 466 N.E.2d 202, 80 Ill.Dec. 750 (1984). However, it has been held that claims under the IHRA against arms of the state are properly presented to the IDHR and the IHRC. *Lott v. Governors State University*, 106 Ill.App.3d 851, 436 N.E.2d 569, 62 Ill.Dec. 543 (1st Dist. 1982); *Zackai v. Board of Governors of State Colleges & Universities*, 118 Ill.App.3d 1161, 470 N.E.2d 660, 83 Ill.Dec. 534 (1st Dist. 1983) (Rule 23).

Agencies in the executive branch of state government are obliged, under §2-105(B) of the IHRA, to undertake affirmative action, in addition to avoiding unlawful discrimination. Each such agency must “[e]stablish, maintain, and carry out a continuing affirmative action plan” including goals for increasing its employment of underrepresented racial and sexual classes as well as the disabled. IHRA §2-105(B)(3). Each agency with 1,000 or more employees must appoint a full-time equal employment opportunity (EEO) officer, subject to approval of the IDHR, with wide-ranging authority to oversee internal compliance. IHRA §2-105(B)(4).

As originally enacted, IHRA §2-105(B) required affirmative action planning by state agencies focused on the characteristics of “race, sex and handicap.” Effective July 1, 1982, the General Assembly amended the section to further require affirmative action consideration based on “national origin as required by Department [of Human Rights] rule.” P.A. 82-709. The IDHR’s implementing regulations appear at 56 Ill.Admin. Code §2520.700, *et seq.*

The regulations construe IHRA §2-105(B) as designed to specially address the circumstances of groups that have experienced particularly chronic and pervasive employment discrimination by affording such groups the benefit of affirmative action. Thus the regulations currently require affirmative action treatment for African Americans, Hispanics or Latinos, Asians, Native Americans, women, and the disabled and contemplate extending affirmative action consideration to additional national origin groups that can demonstrate that they have confronted discrimination similar to that which has afflicted the present beneficiaries. In identifying such additional groups, the regulations prescribe several criteria to be considered, including the extent to which members of a group are underrepresented in state employment in relation to their presence in the available labor force; the volume of discrimination complaints filed by such persons; and other “evidence of a continuing cycle of discrimination which, without affirmative action, will continue” to plague the group. 56 Ill.Admin. Code §2520.730. National origin groups may petition the IDHR for addition to the affirmative action list, and the evidence will be evaluated and a decision rendered by the IDHR through the rule-making process. *Id.*

The term “disability” in the IDHR’s rules on affirmative action is significantly different from the term “handicap” as used in the IHRA. The term “disability” is defined as

**a mental or physical condition (other than pregnancy), lasting six months or longer, that limits the amount or kind of work an individual can perform.** 56 Ill.Admin. Code §2520.700.

Many people who are protected against discrimination because they have a condition that limits an activity other than employment would, nevertheless, not be entitled to affirmative action because they would not be “disabled.”

The same regulations also prescribe in considerable detail the ingredients to be contained in state agencies’ affirmative action plans, the methodologies to be employed in performing workforce and utilization analyses, the functions to be performed by agency EEO officers, and the manner in which the agencies’ compliance will be monitored.

Public employers are the only employers subject to §2-102(E) of the IHRA, which makes it illegal for a public employer to prohibit an employee from taking time off for the practice of religious beliefs and making up the lost time by working alternative hours. The public employer can exempt itself from this provision if it can show that compliance would be inconsistent with its operational needs.

## 5. [11.18] Joint Apprenticeship Committees

Section 2-101(B)(1)(e) brings joint apprenticeship committees within the IHRA’s reach as “employers,” without regard to the numbers of persons they employ. The term “age” has a

different definition when it is used in a charge alleging discrimination by a joint apprenticeship committee. Normally, someone who is under 40 years of age may not allege discrimination based on age. IHRA §1-103(A) provides, however, that in the case of a training or apprenticeship program, “age” means the chronological age of a person who is 18 but not yet 40 years old.

Under IHRA §2-104(A)(6), a joint apprenticeship committee may impose an educational requirement as a prerequisite to selection for a training or apprenticeship program provided that the requirement does not operate to discriminate on the basis of any prohibited classification except age.

## 6. [11.19] Religious Organizations

The IHRA does not provide a blanket exemption for religious organizations. Under IHRA §2-101(B)(2), a religious organization is exempt from charges of religious discrimination by individuals who are employed by the organization to carry on its activities.

Two points should be noted about this exemption. First, the activities in question need not be religious. A religious organization has the right to discriminate against a secretary on the basis of religion even though the job duties of the secretary are not religious. *In re Hopkins & Urbana Assembly of God*, 39 Ill.H.R.C.Rep. 394 (1988). Second, the text of the IHRA does not exempt religious organizations charged with discrimination based on a characteristic other than religion. Thus, there would be jurisdiction over a charge by a secretary to a religious organization that she was discriminated against because of her national origin. It is important, however, to read the IHRA in a way that is consistent with the First Amendment to the United States Constitution, which prohibits excessive entanglement between state and church. Thus, the IHRC was prohibited from finding that explicit discrimination against a minister because he was divorced constituted “marital status” discrimination under the IHRA. *Lutheran Church, Missouri Synod v. State of Illinois, Department of Human Rights*, No. 86-MR-60 (Sangamon Cty.Cir. Aug. 18, 1987). It would appear, therefore, that there is an implied exemption in the IHRA for employment decisions involving members of the clergy.

In *Noel v. Wee Care Day Care Center*, Charge No. 1988SF0223 (Ill.H.R.C. Oct. 3, 1991), the IHRC ruled that a church could discharge a teacher’s assistant on the basis of her single marital status. The church contended that it violated church doctrine for an employee such as the complainant to have a live-in, sexual relationship with a man outside of marriage. The IHRC ruled that the former prohibition against “fornication” in the Criminal Code (Ill.Rev.Stat. (1987), c. 38, ¶11-8) made it clear that there was no public policy to protect cohabitation outside of marriage. Thus, the IHRA could not be interpreted to prohibit the discrimination by the church. *See also Mister v. A.R.K. Partnership*, 197 Ill.App.3d 105, 553 N.E.2d 1152, 143 Ill.Dec. 166 (2d Dist. 1990), which reached a similar conclusion in the housing context.

## B. [11.20] Persons Eligible To File Charges

The remedial provisions of the IHRA are invoked by the filing of a “charge” with the IDHR. See also IHRA §1-103(C).

“Aggrieved party” is defined in §1-103(B) of the IHRA as meaning “a person who is alleged or proved to have been injured by a civil rights violation.” The term “person” is in turn defined in IHRA §1-103(L) as follows:

**“Person” includes one or more individuals, partnerships, associations or organizations, labor organizations, labor unions, joint apprenticeship committees, or union labor associations, corporations, the State of Illinois and its instrumentalities, political subdivisions, units of local government, legal representatives, trustees in bankruptcy or receivers.**

Hence, the IHRA does not restrict to individuals the right to file charges. Under the IHRA, corporations, labor organizations, and all manner of other organizations, as well as individuals, are entitled to file charges if they can allege that they are “injured” by the practice complained of. *See In re Walczak & City of Chicago*, 9 Ill.H.R.C.Rep. 51 (1983). This insistence on an allegation of personal injury, however, probably precludes the filing of third-party charges by advocacy groups on behalf of interests they merely espouse.

The IHRA also includes under its definition of “employee” some exceptions that may be read as precluding charges by certain classes of persons. Thus, the IHRA provides that “employee” does not refer to “[d]omestic servants in private homes,” to elected public officials and their immediate personal staffs, or to principal administrative officers of state or local government bodies. IHRA §2-101(A)(2). An exemption of agricultural laborers from this definition was deleted effective January 1, 1984, by P.A. 83-622. Although the IHRA does not say that the privilege of filing charges is limited to employees, the caselaw is clear that non-employees such as independent contractors are not protected against employment discrimination. *Wanless v. Illinois Human Rights Commission*, 296 Ill.App.3d 401, 695 N.E.2d 501, 230 Ill.Dec. 1011 (3d Dist. 1998); *Mitchell v. Department of Corrections*, 367 Ill.App.3d 807, 856 N.E.2d 593, 305 Ill.Dec. 788 (1st Dist. 2006) (IHRC had no “jurisdiction” over charge against Department of Corrections filed by employee of independent contractor providing health care within prison). *See also Office of Lake County State’s Attorney v. Illinois Human Rights Commission*, 235 Ill.App.3d 1036, 601 N.E.2d 1294, 176 Ill.Dec. 596 (2d Dist. 1992) (assistant state’s attorney could file charge because she was employee within meaning of IHRA).

### C. [11.21] Noteworthy Substantive Issues

As mentioned at the outset of this chapter, the substantive protections of the IHRA in some respects depart from or involve considerations not found in their federal counterparts. A few of the differences are discussed in §§11.22 – 11.32 below.

#### 1. [11.22] Arrest and Conviction Information

Under §2-103 of the IHRA, it is illegal to inquire into or use arrest information or expunged criminal history information with respect to any and all aspects of employment. Section 2-103(B) makes it clear, however, that an employer may take action against an employee or an applicant if the employer is acting on information (beside the fact that the person was arrested) that indicates that the person actually engaged in the behavior that was the subject of the arrest.

The distinction drawn by subsection (B) applies only to alleged violations of §2-103. A white male who has an extensive arrest record may claim the protection of IHRA §2-103, even though he cannot demonstrate that white males are arrested at a higher rate than other elements of the population. On the other hand, §2-102 of the IHRA has been interpreted to prohibit policies that are neutral on their faces, but that have a disparate impact on minorities. The proviso in IHRA §2-103(B) applies only to claims under that section. Thus, for example, if an employer had reliable information that an applicant had been involved in gang activity ten years prior to the application, it could reject the application without fear of violating IHRA §2-103. On the other hand, the employer would still have to consider whether such rejections would have a disparate impact on minorities. The employer might be guilty of racial discrimination under IHRA §2-102, even though it did not commit an arrest record violation under IHRA §2-103, if its policy had a disparate impact and if the employer could not justify its actions by demonstrating business necessity.

The basic prohibition against asking about expunged records is expanded under the Criminal Identification Act, which provides that applications for employment must contain specific language stating that the applicant is not obligated to disclose sealed or expunged records of conviction or arrest. 20 ILCS 2630/12. Thus, it is not sufficient for an application to make no mention of expunged records; the applicant must be told specifically that he or she does not have to disclose them.

## 2. [11.23] Marital Status

The IHRA's bar against discrimination based on marital status is also unusual, at least in its employment applications. Section 1-103(J) of the IHRA defines "marital status" as meaning "the legal status of being married, single, separated, divorced or widowed."

At one time there was a question whether the prohibition against marital status discrimination prohibited enforcement of certain kinds of anti-nepotism policies with respect to spouses. The Illinois Supreme Court answered that question in the negative in *Boaden v. Department of Law Enforcement*, 171 Ill.2d 230, 664 N.E.2d 61, 215 Ill.Dec. 664 (1996). The court held that the IHRA does not prohibit discrimination against someone based on the identity of that person's spouse. There must be an animus against someone because that person is, for example, married, not married to a particular person.

## 3. [11.24] Pregnancy Discrimination

There exists some doubt as to whether the IHRA requires that employers' disability benefit and insurance plans provide coverage for pregnancy disabilities equivalent to that afforded other types of disabilities. Title VII mandates such equivalency as a result of a 1978 amendment. 42 U.S.C. §2000e(k).

The IHRA contains no such express mandate; it merely forbids discrimination based on sex. In *Illinois Bell Telephone Co. v. Fair Employment Practices Commission*, 81 Ill.2d 136, 407 N.E.2d 539, 41 Ill.Dec. 41 (1980), the Illinois Supreme Court reversed an FEPC holding that the prohibition against sex discrimination forbade disparate pregnancy coverage. The court did so,

however, on apparently narrow grounds. The parties had stipulated that the employer's disability plan covered "'medically approved sicknesses' and off-the-job injuries." 407 N.E.2d at 540. The plan itself was not introduced in evidence. The court, per curiam, noted that normal pregnancy is neither a sickness nor an injury (407 N.E.2d at 541, citing *Winks v. Board of Education of Normal Community Unit School District No. 5 of McClean County*, 78 Ill.2d 128, 398 N.E.2d 823, 34 Ill.Dec. 832 (1979)), and thus held that it was permissibly excluded from coverage under the plan as described (407 N.E.2d at 542).

In a subsequent case, *Illinois Consolidated Telephone Co. v. Illinois Fair Employment Practices Commission*, 104 Ill.App.3d 162, 432 N.E.2d 1218, 60 Ill.Dec. 319 (5th Dist. 1982), the appellate court followed *Illinois Bell*, although not constrained by a similar stipulation describing the employer's disability plan. In *Illinois Consolidated*, the plan itself was admitted in evidence and apparently covered disabilities other than mere sicknesses and injuries. But the court nonetheless regarded *Illinois Bell* as dispositive. 432 N.E.2d at 1221.

The IHRC and the IDHR have promulgated joint rules on sex discrimination in employment. 56 Ill.Admin. Code §5210.10, *et seq.* Section 5210.110 of these rules deals with pregnancy, childbirth, and child rearing. These provisions are generally consistent with Title VII principles. The rules provide that a woman cannot be excluded from a position unless she is physically unable to perform the job. The terms and conditions of a pregnancy-related disability leave of absence may not be more restrictive than those applied to disability leaves for other purposes. Non-disability leaves of absence for the purpose of child rearing must be granted on the same terms and conditions applied to other non-disability leaves of absence. Illness or disability caused or contributed to by pregnancy, miscarriage, abortion, or childbirth and recovery therefrom must be treated as any other temporary disability under a disability or medical benefit plan available in connection with employment. Policies and practices involving such matters as the commencement and duration of leave, the accrual of seniority, and payment under any wage loss or insurance plan must be applied to disability due to or related to pregnancy on the same terms and conditions as they are applied to other temporary disabilities. The IHRC and the IDHR take the position that these regulations are consistent with *Illinois Bell* and *Illinois Consolidated*. These rules have never been challenged in court, and in light of the fact that virtually every employer subject to the IHRA is also subject to equivalent rules under Title VII, there would not appear to be much point in such a challenge.

#### 4. [11.25] Sexual Harassment

As noted in §11.2 above, there is a major distinction between how sexual harassment is dealt with under the IHRA and how it is dealt with under federal law. Under the IHRA an employer is automatically liable for sexual harassment carried out by a supervisor. IHRA §2-102(D); *Board of Directors, Green Hills Country Club v. Human Rights Commission*, 162 Ill.App.3d 216, 514 N.E.2d 1227, 113 Ill.Dec. 216 (5th Dist. 1987). Under Title VII, an employer will be liable for sexual harassment carried out by a supervisor only in limited circumstances. As noted in Chapter 2 of this handbook, the United States Supreme Court ruled in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L.Ed.2d 662, 118 S.Ct. 2275 (1998), that an employer would have a defense in certain kinds of cases in which the sexual harassment was by a supervisor. The

practitioner should keep in mind that despite the enormous amount of publicity that the Supreme Court decisions received, the defense that is announced in *Ellerth* and *Faragher* is simply not available under the IHRA. *Webb v. Lustig*, 298 Ill.App.3d 695, 700 N.E.2d 220, 233 Ill.Dec. 119 (4th Dist. 1998).

Furthermore, because “sexual harassment” is a separate, independent violation of the IHRA, an aggrieved party need not show that the conduct in question resulted in sex discrimination. Accordingly, it is clear under the IHRA that there is liability for sexual harassment by a bisexual supervisor who harasses both sexes. Under Title VII it is not clear that such conduct constitutes “sex” discrimination, although the fact that both the harasser and the victim are of the same sex is not an absolute barrier to liability under the federal law. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 140 L.Ed.2d 201, 118 S.Ct. 998 (1998).

Finally, as noted in §11.16 above, individual harassers are explicitly liable as individuals for their harassment. There is no such explicit individual liability under Title VII. In fact, seven out of eight circuits that have considered the question have found no individual liability under Title VII. See *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995). See *Annot.*, 131 A.L.R.Fed. 221 (1996).

#### **5. [11.26] Age Discrimination**

Although the substantive provisions of the federal Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §621, *et seq.*, do not differ in most respects from the age discrimination prohibitions in the IHRA, there are enough procedural differences to note them here. First, the ADEA has a minimum employee threshold of 20. As noted in §11.14 above, the minimum employee threshold under the IHRA is 15. Second, the ADEA provides for liquidated damages in certain cases; the IHRA does not. Third, the Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990), amended the ADEA to include certain standards for waiver of age discrimination claims under federal law. The IHRA has no equivalent provision. Fourth, in *Smith v. City of Jackson, Mississippi*, 544 U.S. 228, 161 L.Ed.2d 410, 125 S.Ct. 1536 (2005), the U.S. Supreme Court held that the scope of disparate impact liability under the ADEA is narrower than under Title VII. This kind of dual analysis would appear to be impossible under the IHRA. Age discrimination is but one element in the definition of “unlawful discrimination.” There is nothing to distinguish age from sex, religion, or national origin. Thus, it would appear that if a disparate impact analysis should apply to race, sex, or national origin discrimination under the IHRA, it should also apply in exactly the same way in the area of age discrimination. The IHRC has not had occasion to address this issue.

#### **6. [11.27] Handicap Discrimination**

There is a substantial difference in the definition of a “handicap” under the IHRA and the definition of a “disability” under the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12101, *et seq.* In *Lake Point Tower, Ltd. v. Illinois Human Rights Commission*, 291 Ill.App.3d 897, 684 N.E.2d 948, 225 Ill.Dec. 957 (1st Dist. 1997), the appellate court ruled that the state definition of “handicap” differed significantly from the analogous definition under federal law

and, therefore, there was no need to find that a condition limited a major life activity in order to find that the condition was protected as a “handicap” under the law. 684 N.E.2d at 953. Accordingly, the court found that an individual who was in the very early stages of cancer was protected against discrimination under state law.

In 1998 the United States Supreme Court found that a woman who was HIV positive, but who was asymptomatic, was disabled under the ADA. *Bragdon v. Abbott*, 524 U.S. 624, 141 L.Ed.2d 540, 118 S.Ct. 2196 (1998). The Court said that HIV impairs the major life activity of reproduction. 118 S.Ct. at 2205. Thus, under both laws, under certain circumstances, individuals who are essentially asymptomatic may, nevertheless, be protected against discrimination.

On the other hand, the United States Supreme Court ruled in 1999 that individuals who are not impaired if they use mitigating devices or medicines are not disabled within the meaning of the ADA. *See Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 144 L.Ed.2d 450, 119 S.Ct. 2139 (1999); *Murphy v. United Parcel Service*, 527 U.S. 516, 144 L.Ed.2d 484, 119 S.Ct. 2133 (1999). Given the differences in definitions, it is not clear that Illinois courts would reach the same conclusion under the IHRA. It may be that the IHRA is the exclusive remedy for discrimination against individuals who fit into this category.

There is also a difference in the scope of required accommodations when handicaps or disabilities prevent employees from doing their current jobs. Under the IHRA, an employer need not look for an equivalent job as a reasonable accommodation for a handicapped employee who cannot perform the essential functions of his or her current position. *Fitzpatrick v. Illinois Human Rights Commission*, 267 Ill.App.3d 386, 642 N.E.2d 486, 204 Ill.Dec. 785 (4th Dist. 1994). Under the ADA, transfer to another position is sometimes a required reasonable accommodation. *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, (7th Cir. 1998).

Finally, one district of the appellate court has declared that it is not a violation of the IHRA to discriminate against a person with a substantial impairment if that person cannot prove at trial that he or she would have been able to do the job with an accommodation. *Harton v. City of Chicago Department of Public Works*, 301 Ill.App.3d 378, 703 N.E.2d 493, 234 Ill.Dec. 632 (1st Dist. 1998) (employer not guilty of handicap discrimination under IHRA for summarily rejecting blind applicant because she could not prove at hearing that she could have done job had she been hired, and was, therefore, not “handicapped”). Because of structural differences in the two laws, the burden of proof under a similar ADA claim may be different.

## 7. [11.28] Equal Pay Act

As noted in Chapter 2 of this handbook, individuals who are alleging discrimination in pay based on gender in a federal action may proceed under both Title VII and the Equal Pay Act of 1963, 29 U.S.C. §206, *et seq.* In *Illinois State Board of Elections v. Illinois Human Rights Commission*, 291 Ill.App.3d 185, 683 N.E.2d 1011, 225 Ill.Dec. 508 (4th Dist. 1997), the court ruled that when there are allegations of unequal pay based on gender under the IHRA, the complainant must prove intentional gender discrimination, which is the same standard as under Title VII. Under this precedent, proof that an employer maintains an unequal pay system that would violate the federal Equal Pay Act is not sufficient to prove a violation of the IHRA.

As noted in §11.9 above, P.A. 93-6 (eff. Jan. 1, 2004) created the state Equal Pay Act of 2003. The cause of action created thereunder is separate and apart from the IHRA. The Equal Pay Act of 2003 is clearly modeled on the federal law. Accordingly, there are instances in which an employer could be guilty of maintaining an illegal pay system even though there was no intent to discriminate on the basis of gender. It is unclear whether the IHRC could, or would, use the standards set forth in the state Equal Pay Act in determining whether an employer had engaged in “sex discrimination” within the meaning of the IHRA.

#### **8. [11.29] Federal Preemption**

In many instances federal law was meant to exclude parallel or inconsistent regulation by the states. Accordingly, there are certain areas in which the IDHR and the IHRC have no jurisdiction, even though there may be facts that would otherwise make out a violation of the IHRA. For example, in *Lara-Girjikian v. Mexicana Airlines*, 307 Ill.App.3d 510, 718 N.E.2d 584, 241 Ill.Dec. 13 (1st Dist. 1999), the court affirmed an IHRC ruling that it had no jurisdiction over a claim of handicap discrimination. One of the issues was whether the employer, an airline, could accommodate the complainant’s condition by relieving her of the obligation of working mandatory overtime. The problem was that overtime was assigned in reverse order of seniority, in accordance with the collective bargaining agreement. The IHRC and the court both found that deciding the handicap claim would involve interpreting the collective bargaining agreement, but that the Railway Labor Act, 45 U.S.C. §151, *et seq.*, prohibited the IHRC from doing so.

The court also ruled that the IHRC lacked jurisdiction because the complainant’s job related to the services of an air carrier regulated under the Federal Aviation Act, 49 U.S.C. §40101, *et seq.* That law preempts all state laws relating to a carrier’s services. Regulating the employment of individuals engaged in such services is thus prohibited.

When preemption is an issue and when federal law is different from the IHRA, the aggrieved party may be better off proceeding under federal law. Since Congress enacted the federal labor laws, one may argue that the federal civil rights laws constitute an implied exception to the doctrine of preemption. This argument is not available when one is proceeding under state laws. The United States Supreme Court has ruled, however, that when the state law prohibits the same thing as Title VII, Congress intended to create an exception to the doctrine of preemption for actions under both state and federal law. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 77 L.Ed.2d 490, 103 S.Ct. 2890 (1983). Thus, when the IHRA is exactly the same as federal civil rights law, the question of preemption should be analyzed in the same way under either law.

The question of preemption also comes up with respect to the kinds of remedies that the IHRC can award once a violation has been proven. This aspect of preemption is discussed in §§11.84 – 11.88 below.

#### **9. [11.30] Speak-English-Only Rules**

The Illinois Human Rights Act §102(A-5) makes it illegal for an employer to impose a restriction that has the effect of prohibiting a language from being spoken by an employee in communications that are unrelated to the employee’s duties. Although Title VII has sometimes

been interpreted as prohibiting speak-English-only rules, as noted in Chapter 7, courts have sometimes been reluctant to equate a speak-English-only rule with national origin discrimination, especially when the employee is capable of speaking in English. In contrast, the new amendment to the IHRA is a per se rule, and therefore, the employee does not have to prove that the employer's language restriction has the effect of discrimination on the basis of national origin.

#### 10. [11.31] Sexual Orientation

There is no federal equivalent to the Illinois Human Rights Act's prohibition against discrimination on the basis of "sexual orientation." That term is defined in §1-103(O-1) of the Act as

**actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. "Sexual orientation" does not include a physical or sexual attraction to a minor by an adult.**

As can be seen, the definition goes well beyond what is traditionally thought of as sexual orientation, to include transsexuals and individuals who have what has previously been described as "gender dysphoria" or "gender identity disorder." In contrast, the ADA specifically excludes homosexuals, bisexuals, and individuals with gender identity disorders from coverage. 42 U.S.C. §12211. In addition, discrimination on the basis of actual or perceived sexual orientation is not considered a violation of Title VII. In certain instances, however, individuals have argued that they have been harassed because their appearance did not fit in with gender stereotypes, and therefore they were the victims of "sexual harassment." See *Hamm v. Weyauwega Milk Products, Inc.*, 332 F.3d 1058 (7th Cir. 2003). Obviously, the analysis is much more straightforward under the amended IHRA. For example, harassment of a man because he appears to be "too feminine" is a violation of the IHRA, regardless of the sexual orientation of the victim or the motivation of the harassers. As of the date of publication, the IHRC has not issued a decision interpreting this provision of the IHRA.

#### 11. [11.32] Military Status

The Illinois Human Rights Act defines the term "military status" as

**a person's status on active duty in or status as a veteran of the armed forces of the United States, status as a current member or veteran of any reserve component of the armed forces of the United States, including the United States Army Reserve, United States Marine Corps Reserve, United States Navy Reserve, United States Air Force Reserve, and United States Coast Guard Reserve, or status as a current member or veteran of the Illinois Army National Guard or Illinois Air National Guard. 775 ILCS 5/1-103(J-1).**

Prior to the enactment of P.A. 94-803 (eff. May 26, 2006), the law protected only current members of the U.S. armed forces, the National Guard, and the reserves. The addition of

veteran status to the IHRA greatly expands its scope. Although there are federal laws that protect veterans in various ways, there is no equivalent federal law that makes having been a veteran (no matter how long ago) a “protected category” under a general antidiscrimination law.

#### IV. [11.33] PROCEDURE UNDER THE IHRA

In cases in which there is a pattern and practice of discrimination, the Attorney General may file a complaint under the IHRA in circuit court. In such cases, the procedure for establishing a violation of the IHRA is governed by the Code of Civil Procedure and the Supreme Court Rules.

Actions by individual complainants are resolved through an administrative process that can be divided into two phases. Proceedings are commenced by the filing of a charge with the IDHR, and the first phase involves the IDHR’s investigation of and efforts to resolve the charge. These procedures, while not unstructured, are confidential and basically informal.

The second phase is reached only if a complaint is filed. There are two ways this can happen. If there is a finding of substantial evidence and the parties are unable to conciliate the matter, the IDHR will file a complaint on behalf of the complainant. If the IDHR does not conclude its investigation before the time limit provided for in the IHRA, the complainant may elect to file his or her own complaint. In any case, the complaint must be based on the allegations in the charge. The IHRC will convene a public hearing and ultimately adjudicate the controversy.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill became law, it would change the nature of this two-step process. Under the bill, if there is a finding of substantial evidence at the IDHR, the complainant has the option of asking the IDHR to file a complaint in front of the IHRC or filing his or her own complaint directly in circuit court. If such a complaint is filed, either the plaintiff or the defendant may demand a jury trial. If the charge is dismissed for lack of substantial evidence, the complainant may ask the IHRC to review the decision, or may file a complaint directly in circuit court. Thus, if the bill becomes law, a complainant would have the right to a jury trial in circuit court regardless of the outcome at the IDHR. The new law would apply to charges filed after January 1, 2008.

The IDHR and IHRC are separate and independent entities. Each has promulgated its own regulations governing procedures before it. These regulations appear in Title 56 of the Illinois Administrative Code, and hard copies of the IHRC’s rules are available at its Chicago and Springfield offices. They may also be downloaded from the Commission’s Web site at [www.state.il.us/ihr/Act&Rules\\_03.htm](http://www.state.il.us/ihr/Act&Rules_03.htm). Copies of the IDHR’s rules are available on the Internet at [www.state.il.us/dhr/Rule\\_Reg/Rules-p1.htm](http://www.state.il.us/dhr/Rule_Reg/Rules-p1.htm). Except to the extent adopted by the agencies’ rules, the Illinois Code of Civil Procedure does not govern IHRA administrative proceedings (*In re Taylor & Illinois Central Gulf R.R.*, 1 Ill.H.R.C.Rep. 161 (1981); *Village of South Elgin v. Pollution Control Board*, 64 Ill.App.3d 565, 381 N.E.2d 778, 21 Ill.Dec. 451 (2d Dist. 1978)), although it may provide a useful reference in appropriate settings (*In re Strunin & Marshall Field*

& Co., 8 Ill.H.R.C.Rep. 199 (1983)). For example, it would be a mistake to cite the Code of Civil Procedure, 735 ILCS 5/2-1001, to support a motion to substitute a new ALJ. Section 8A-103(F) of the IHRA explicitly states this principle with respect to procedures for obtaining discovery at the IHRC.

### A. [11.34] Circuit Court Actions by the Attorney General

Section 10-104 of the IHRA authorizes the Attorney General to bring IHRA actions directly in circuit court. Prior to initiating such an action, the Attorney General must conduct a preliminary investigation to determine whether there is “reasonable cause” to believe that there has been a “pattern and practice” of discrimination. The Attorney General is authorized to issue subpoenas, take depositions, hold hearings, and demand written reports under oath regarding alleged violations. IHRA §10-104(A). If the subject of the investigation refuses to cooperate in the investigation, the Attorney General may file a civil action without first making a finding of reasonable cause. IHRA §10-104(A)(6).

If the Attorney General finds reasonable cause, the individual or entity alleged to have engaged in the discriminatory pattern or practice may enter into an “Assurance of Voluntary Compliance.” IHRA §10-104(A)(4). If there is no settlement, the Attorney General may file an action as *parens patriae*, in the name of the People of the State of Illinois, in the circuit court where the alleged violation occurred. Significantly, the filing of a charge of discrimination is not a prerequisite for the Attorney General to initiate action. The only requirement is that the action be initiated within two years after the termination of the civil rights violation alleged in the complaint. IHRA §10-104(A)(1). If a party breaches the terms of an “Assurance of Voluntary Compliance” or conciliation agreement, the Attorney General may file a civil action within two years of the breach. *Id.*

If the Attorney General is able to prove a pattern and practice of discrimination, the court may award appropriate equitable relief and a civil penalty of up to \$50,000 if the defendant has had multiple past violations (IHRC §10-104((B)(1)(c)), or up to \$10,000 for a first offense (IHRC §10-104((B)(1)(a)). Significantly, the Attorney General may not obtain monetary relief for individual victims of the pattern and practice. Under IHRC §10-104((B)(3), aggrieved parties seeking actual damages must follow the administrative procedures set out in §§11.35 – 11.58 below. As of the date of publication, no cases have been filed under this provision of the IHRA, although the Attorney General has conducted a number of investigations.

### B. Department of Human Rights

#### 1. Filing a Charge

##### a. *When Must a Charge Be Filed?*

##### (1) [11.35] Jurisdictional nature of the filing deadline

Under §7A-102 of the IHRA, a charge may be filed at any time within 180 days after the occurrence of an alleged violation. In *Pickering v. Human Rights Commission*, 146 Ill.App.3d

340, 496 N.E.2d 746, 99 Ill.Dec. 885 (2d Dist. 1986), the Second District Appellate Court held that the 180-day deadline was in the nature of a jurisdictional prerequisite and not a statute of limitations. In general, jurisdictional deadlines do not allow for consideration of such equitable principles as waiver, tolling, and equitable estoppel. In other words and in most instances, if the charge is not filed by the last day of the filing period, it will be dismissed even if the charging party has an excellent reason for filing late. The *Pickering* court provided for only one exception to the principle that the 180-day rule is jurisdictional: if the employer misleads the charging party and this conduct results in the charge being filed late, the employer may be estopped from asserting the 180-day deadline. For example, if an employee tells an employer that he thinks that he did not receive a promotion because of his race, the employer cannot defeat a claim of discrimination by then asking the employee not to file a charge because the employee will be promoted to a fictitious new position that will open in 181 days. If the employee fails to file a timely charge because he believes that he will soon be promoted and if the employer, in bad faith, withdraws the new promotion offer immediately after the running of the 180-day deadline, the employer will be estopped from asserting that the charge filed by the employee is not timely.

The view that the 180-day deadline is jurisdictional is supported by the vast weight of authority. *Robinson v. Human Rights Commission*, 201 Ill.App.3d 722, 559 N.E.2d 229, 147 Ill.Dec. 229 (1st Dist. 1990); *Larrance v. Human Rights Commission*, 166 Ill.App.3d 224, 519 N.E.2d 1203, 117 Ill.Dec. 36 (4th Dist. 1988); *Trembczynski v. Human Rights Commission*, 252 Ill.App.3d 966, 625 N.E.2d 215, 192 Ill.Dec. 255 (1st Dist. 1993); *Polacek v. Human Rights Commission*, 160 Ill.App.3d 664, 513 N.E.2d 1117, 112 Ill.Dec. 508 (5th Dist. 1987).

There is one appellate court decision that hints that the 180-day deadline is in the nature of a statute of limitations. In *Gonzalez v. Human Rights Commission*, 179 Ill.App.3d 362, 534 N.E.2d 544, 547 n.2, 128 Ill.Dec. 362 (1st Dist. 1989), a division of the First District indicated that the more persuasive authority on the subject was the United States Supreme Court's interpretation of the deadline for charge filing under Title VII in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 71 L.Ed.2d 234, 102 S.Ct. 1127 (1982). In *Zipes*, the Supreme Court ruled that the federal deadline was in the nature of a statute of limitations and therefore subject to waiver, estoppel, and equitable tolling. The Illinois appellate court found, however, that in the case before it, the charge had been timely filed. Therefore, the statement made in the opinion must be considered dicta. There is, therefore, no court ruling that holds that the 180-day deadline is in the nature of a statute of limitations.

On the other hand, the courts have not applied the 180-day deadline with the kind of rigidity one might expect from a jurisdictional prerequisite. As noted above, the court in *Pickering*, *supra*, held that the doctrine of estoppel would be applied if there was employer misconduct. This exception to the jurisdictional nature of the 180-day deadline was derived from the holding in *Lee v. Human Rights Commission*, 126 Ill.App.3d 666, 467 N.E.2d 943, 81 Ill.Dec. 821 (1st Dist. 1984). In *Whitaker v. Human Rights Commission*, 184 Ill.App.3d 356, 540 N.E.2d 361, 132 Ill.Dec. 621 (1st Dist. 1989), and *Larrance*, *supra*, there is dicta that indicates that if the failure to file a charge within 180 days is due to the misleading conduct of the IDHR, the employer would be blocked from asserting that the charge was not timely filed. One panel of the IHRC has ruled, however, that the failure of the IDHR to provide accurate advice cannot block the employer from asserting that the charge was not timely filed. *In re Massey & City of Zion, Illinois*, Charge No.

1993CF2237, 1995 ILHUM LEXIS 176 (Jan. 13, 1995). In *Weatherly v. Illinois Human Rights Commission*, 338 Ill.App.3d 433, 788 N.E.2d 1175, 1178, 273 Ill.Dec. 299 (1st Dist. 2003), the appellate court ruled that advice from an IDHR investigator that caused the complainant to file an untimely charge of retaliatory discharge did not support a claim of estoppel because the complainant did not even talk to the investigator until well after 180 days after she was fired.

Regardless of the flexibility that some courts have shown with respect to the jurisdictional quality of the 180-day rule, the lesson for the practitioner is clear. The odds are very high that if a charge is not filed within 180 days, it will be dismissed. Although some courts have talked about exceptions, there is not one appellate level case in which there was a finding that the charge was not timely filed but the IDHR still had jurisdiction over the employee's claim.

(2) [11.36] When does the 180-day period start?

The 180-day period begins on the day after a civil rights violation has been committed. In other words, the day of the violation is not counted. In cases in which the act of discrimination is clear and discreet, one merely adds 180 calendar days to the date of the violation to determine the last date on which a charge can be filed. For example, if a violation occurs on the second day of the year, the last day for filing a charge would be the 182nd day of the year. 56 Ill.Admin. Code §2520.20. Of course, if the last day falls on a Saturday, Sunday, or legal state holiday, the charging party has until the next state business day. *Id.* In most cases, one should be able to determine the last day for filing a charge by using a calendar. There are, however, a substantial number of cases in which it is not clear when the alleged violation occurred.

The first group of cases of this sort involves the situation in which the employee has been informed that "something bad" is going to happen, but the adverse consequences are in the future. Even though nothing adverse has actually happened to the employee, the 180-day period begins to run from the date that the employee is informed of the adverse employment action. For example, a teacher who is given a 10-month, terminal contract cannot complain at the end of the 10-month period that his or her unemployment is due to a discriminatory decision to make the contract terminal. The discriminatory event is the announcement that the teacher will receive a terminal contract. *Board of Governors of State Colleges & Universities v. Rothbardt*, 98 Ill.App.3d 423, 424 N.E.2d 742, 53 Ill.Dec. 951 (4th Dist. 1981); *Faulkner-King v. Illinois Department of Human Rights*, 225 Ill.App.3d 784, 587 N.E.2d 599, 167 Ill.Dec. 330 (4th Dist. 1992); *Allen v. Lieberman*, 359 Ill.App.3d 1170, 836 N.E.2d 64, 296 Ill.Dec. 649 (5th Dist. 2005). It is a mistake to wait to file a charge because the employer's announced employment action has not yet gone into effect.

The second group of cases in which it might not be clear when the discrimination occurred involves the situation in which the employee knows that an adverse event has occurred but is unsure whether the employer was motivated by unlawful discrimination. The 180-day deadline begins to run no later than the date that the employee has facts sufficient to make out a prima facie case of discrimination. *Whitaker v. Human Rights Commission*, 184 Ill.App.3d 356, 540 N.E.2d 361, 132 Ill.Dec. 621 (1st Dist. 1989). It must be remembered that it is very easy to state a prima facie case in employment discrimination cases. Therefore, in most cases the 180-day period

will begin to run on the date that the adverse employment action occurs. One should not wait to file a charge until there is evidence that the reason articulated by the employer is merely a pretext for discrimination.

There is a third group of cases in which there is confusion over the date of the violation. These are cases in which many adverse actions take place over a long period of time. For example, if a single supervisor denies an employee a number of promotions over a long period of time, the failure to promote may be considered a “continuing violation.” If, however, the promotions involve different supervisors and different jobs at different times, each failure to promote will be considered a separate violation. *In re Owusu & State of Illinois, Department of Transportation*, Charge No. 1987SF0305, 1994 ILHUM LEXIS 361 (Sept. 29, 1994). In the case of a continuing violation, one has 180 days from the last discriminatory act to file a charge of discrimination. If one files timely, the entire course of conduct comes within the IDHR’s and the IHRC’s jurisdiction. If the charge involves discrete events, only events that occurred less than 180 days before the charge was filed can be considered.

Similar questions arise when one discriminatory event takes place over a period of time. In such cases, the discriminatory event occurs when the act of discrimination is complete. For example, if an employer pays men for sick leave but not women and if the policy is never communicated to the female employees, the discriminatory act occurs when the paycheck arrives after the medical leave and does not contain the expected sick leave pay. *Northtown Ford v. Human Rights Commission*, 171 Ill.App.3d 479, 525 N.E.2d 1215, 121 Ill.Dec. 908 (4th Dist. 1988). Under these circumstances, a sex discrimination charge can contain an allegation that the employee was not paid for sick leave even if the sick leave itself ended more than 180 days before the filing of the charge. *Id.* It must be emphasized, however, that this kind of counting is used only when the employer does not announce the discriminatory policy.

The U.S. Supreme Court has ruled that under federal law, harassment may be viewed as one long, discriminatory act that does not end until the harassment ceases. Thus, in many cases, a charge timely filed after the last act of harassment will bring in all prior acts of harassment, even though they may have occurred years before the filing of the charge. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 153 L.Ed.2d 106, 122 S.Ct. 2061 (2002). One Illinois court had ruled, to the contrary, that the charge filing period began to run once the harassment was severe enough to put the employee on notice that he or she had a substantial claim. *Graves v. Chief Legal Counsel of Illinois Department of Human Rights*, 327 Ill.App.3d 293, 762 N.E.2d 722, 261 Ill.Dec. 153 (4th Dist. 2002). This test was explicitly overruled by the Supreme Court in *Morgan, supra*.

Both the Second District (*Gusciara v. Lustig*, 346 Ill.App.3d 1012, 806 N.E.2d 746, 282 Ill.Dec. 449 (2d Dist. 2004)) and the Third District (*Jenkins v. Lustig*, 354 Ill.App.3d 193, 820 N.E.2d 1181, 290 Ill.Dec. 114 (3d Dist. 2004)) have adopted the *Morgan* doctrine. In *Hoffelt v. Illinois Department of Human Rights*, 367 Ill.App.3d 628, \_\_\_ N.E.2d \_\_\_, \_\_\_ Ill.Dec. \_\_\_ (1st Dist. 2006), *leave to appeal denied*, 222 Ill.2d 628 (2007), the First District not only adopted *Morgan*, it expanded on it significantly. The complainant in that case alleged that she had been harassed in retaliation for her protests against previous acts of sexual harassment. The charge was limited to the retaliation (not the sexual harassment) and was further limited to the 180-day period

prior to the date it was filed. Nevertheless, the appellate court ruled that on remand, the IDHR had to investigate the underlying harassment (which started two years before the charge was filed), as well as the retaliation. The rationale was that, under *Morgan*, the harassment and the retaliation were part of one, long, unlawful employment practice.

Confusion regarding the date of “the discriminatory act” can also arise when there is a series of regular and foreseeable events, such as the payment of wages. In *Rothbardt, supra*, the Illinois courts adopted the standard used by the United States Supreme Court under federal law. *Delaware State College v. Ricks*, 449 U.S. 250, 66 L.Ed.2d 431, 101 S.Ct. 498 (1980). The nondiscriminatory consequences of past discriminatory actions are not new violations of the IHRA. Thus, if an employee believes that he or she was denied a promotion on the basis of race, the employee must file a charge within 180 days of the date of the promotion. The employee cannot wait and say that each paycheck that the promoted employee receives is a separate act of discrimination. On the other hand, if the employer merely has a policy of paying employees of one race more than those of another race for the same job, each unequal paycheck based on race constitutes a separate violation of the law. *In re Smith & Williams Electronics, Inc.*, 17 Ill.H.R.C.Rep. 297 (1984).

Finally, there may be a question about the timing of a charge if the employee has filed a grievance or appealed an adverse decision. In general, if the employer has made a definite decision to take an adverse employment action, the 180-day period begins to run from the date the employee is informed of the employer’s intent. The denial of an appeal of the decision is not a subsequent act of discrimination. *Lee v. Human Rights Commission*, 126 Ill.App.3d 666, 467 N.E.2d 943, 81 Ill.Dec. 821 (1st Dist. 1984). The fact that an appeal is pending does not extend the time for filing. *Faulkner-King, supra*.

*b. [11.37] What Constitutes a Charge?*

A charge must be in writing, signed by the complainant under oath or affirmation, and sufficiently detailed as to substantially apprise other parties of the time, place, and facts of the alleged violation. IHRA §7A-102(A). It is important to realize, however, that all of these requirements need not be met in order to give the IDHR jurisdiction under the 180-day filing rule. The IDHR’s rules provide that it will accept for filing any written instrument complying substantially with the requirements for a charge, subject to later “perfection” or amendment to cure technical defects or refine or amplify allegations. 56 Ill.Admin. Code §§2520.350, 2520.360. The amendment then relates back to the date the original, unperfected charge was filed.

This situation arises quite frequently because the IDHR gives to employees who want to file a charge a questionnaire called a Complainant Information Sheet (CIS). The CIS form may be downloaded online ([www.state.il.us/dhr/Forms/CIS-Emp.htm](http://www.state.il.us/dhr/Forms/CIS-Emp.htm)), then printed out and filled in, but the IDHR does not accept electronic filings. The IDHR will take the information placed on the CIS by the employee and produce a formal proposed charge of discrimination. The employee then executes the charge under oath or affirmation. There is a space on the formal charge form for a notary seal to verify that this execution has happened. In the past, there were many instances in which the CIS was turned over to the IDHR before the 180-day deadline, but there was not enough time for the IDHR to insert the information into a formal charge and send it to the

employee before the expiration of the 180-day period. The CIS has no space for a notary seal to indicate that it was signed under oath or affirmation. Thus, the CIS is not a charge for purposes of the 180-day deadline. Nevertheless, under the IDHR's rules, the absence of a signature under oath or affirmation is considered a mere technical defect that is cured by the filing of the formal charge within a reasonable amount of time. The filing of the formal charge relates back to the date that the CIS was filed. Thus, if a CIS is filed within 180 days and if the charge is perfected by the filing of a formal charge under oath or affirmation within a reasonable period of time, the IDHR will have jurisdiction over the claim despite the fact that the formal charge may have been filed more than 180 days after the discriminatory event. *Gonzalez v. Human Rights Commission*, 179 Ill.App.3d 362, 534 N.E.2d 544, 128 Ill.Dec. 362 (1st Dist. 1989). The *Gonzalez* court did not define a reasonable amount of time. In *Phelps v. Human Rights Commission*, 185 Ill.App.3d 96, 540 N.E.2d 1147, 133 Ill.Dec. 281 (4th Dist. 1989), however, the court indicated that an employee could perfect a charge years after the fact when the IDHR failed to process the CIS. One should note, however, that the relation-back logic is usually used only to determine whether there has been compliance with the 180-day filing deadline. As noted, the date the formal charge is filed is used for most other purposes.

*c. [11.38] Mechanics of Filing a Charge*

Charges may be filed with the IDHR in person (the IDHR has offices in Chicago, Springfield, and Marion), by mail, or by telephone. If someone wishes to file a charge in person, he or she must come to the IDHR during normal business office hours. In the Chicago office, the IDHR does not conduct in-person interviews on Fridays. When a complainant contacts the IDHR by telephone, an IDHR employee will draft a charge and mail it to the complainant for approval and signature; the charge will be treated as filed if it is returned to the IDHR properly executed. The IDHR's policy is to consider the date of filing as the date the perfected charge is postmarked. Section §7A-102(B) of the IHRA provides that the IDHR is to serve each charge on the party accused of the violation (referred to as the "respondent") within ten days after the charge is filed, although compliance with this time limit is not a jurisdictional requirement.

An "attorney packet" is available at [www.state.il.us/dhr/Forms/Forms-N.htm](http://www.state.il.us/dhr/Forms/Forms-N.htm). Using the forms provided in the packet, an attorney may draft a charge for filing with the IDHR instead of allowing the client go through the intake process and having the IDHR draft the charge. The packet includes examples of the format preferred by the IDHR and an attorney appearance form. The forms must be printed, filled in, and returned to the IDHR. They cannot be filed electronically. The IDHR has changed a long-standing policy and will now attempt to investigate an attorney-drafted charge as written, even if it does not conform to the IDHR's preferred format.

*d. [11.39] Dual Filing*

The topic of dual filing and work sharing is the subject of much confusion among practitioners. In most employment cases, the IDHR uses a standard charge form identical to that used by the EEOC for charges arising under its jurisdiction. Under a work-sharing agreement between the IDHR and the EEOC, IDHR employees are authorized to accept charges alleging violations of federal laws subject to the jurisdiction of the EEOC. There is a box to check if one

wants the charge to be dual filed. If the box is checked, the paperwork is forwarded to the federal government. Dual filing fulfills the obligation under federal law to file a charge with the EEOC. Of course, it also fulfills the obligation to file a charge with the IDHR under the IHRA.

Until recently, this relationship was one way only. The IDHR did not treat filing with the EEOC as the filing of a charge under the IHRA. Even though federal law requires the EEOC to “defer” federally filed charges to the IDHR for 60 days (42 U.S.C. §2000e-5(c)), the IDHR waived in advance this 60-day deferral period, and the EEOC would begin its processing of federally filed charges immediately. Although the IDHR had a list of charges deferred to it, it seldom docketed those cases as charges.

This former practice has been legislatively reversed by P.A. 94-857 (eff. June 15, 2006). If a charge is filed with the EEOC within 180 days of the alleged violation, IDHR must notify the complainant that he or she has the right to have the charge processed at the state, as well as the federal, level. The complainant has 35 days to respond in writing. If the complainant does not respond or elects not to proceed at the state level, the case is closed. If the complainant files a written notification that he or she wishes to proceed at both levels, the IDHR holds its investigation in abeyance, pending the results of the EEOC investigation. After the EEOC investigation is complete, the IDHR, once again, requires the complainant to confirm that he or she wants to proceed at the state level. If the complainant states that he or she wants a state-level investigation and signs a charge under oath, the IDHR may either conduct a second investigation or merely adopt the findings of the EEOC. IHRA §7A-102(A-1).

During the relatively brief period that this new procedure has been in effect, the IDHR has routinely adopted the investigation findings of the EEOC. There is a potential problem, however, because the EEOC does not conduct its investigations with this purpose in mind. In most cases, the EEOC’s file does not contain detailed findings and analysis. This creates a problem when an EEOC “no cause” finding is adopted by the IDHR and the complainant files a request for review.

The upshot is that as long as the employee meets both statutory filing periods, he or she can usually have two investigations. If the charge is filed with the IDHR, it will usually be investigated at the state level first, subject to a review at the EEOC. In almost all cases, however, the EEOC will merely adopt the IDHR’s findings. Similarly, if the charge is filed with the EEOC, the investigation will usually be conducted by the EEOC first. The employee is entitled to a second investigation at the state level, but in most instances, the IDHR will merely adopt the EEOC’s determination.

Although a charge filed with the IDHR will usually be investigated first by IDHR, this does not prevent an employee from having his or her case tried in federal court. Under §706(f)(1) of Title VII, a complainant may request a right-to-sue letter from the EEOC after the federal charge has been pending for 180 days, even though the EEOC has taken no action on the charge. 42 U.S.C. §2000e-5(f)(1). The charging party can then go into federal court within 90 days after receipt of the right-to-sue letter. Most courts considering the matter have allowed the EEOC to waive the 180-day waiting period. *See Advani v. Andrew Corp.*, No. 96 C 7628, 1999 U.S. Dist. LEXIS (N.D.Ill. Mar. 11, 1999). See Chapter 9 of this handbook for the prerequisites for federal

court actions under other laws administered by the EEOC. In other words, if there is a timely dual-filed charge, the charging party can decide whether the case will be tried in federal court based on the federal law claim or in front of the IHRC based on the IHRA (but only if there is substantial evidence to support an IHRA claim).

In addition to the EEOC, IDHR has a work-sharing agreement with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) ([www.usdoj.gov/crt/osc/](http://www.usdoj.gov/crt/osc/)). The agreement with the OSC concerns a rather narrow group of cases in which the basis of the discrimination is the complainant's citizenship status or in which an employer does not follow federal law with respect to the production of documents showing that an employee is eligible to work in this country.

Dual filing comes into play only when the charge states violations of both state and federal law. Unless the charge comes within the jurisdiction of the EEOC or the OSC, there can be no dual filing. Thus, if a woman is alleging that she has been discriminated against on the basis of marital status, for example, she cannot dual file a charge. If she puts in the same charge allegations of actions that violate a provision of the IHRA that is not subject to dual filing and one that is (marital status and sex, for example), the charge will be dual filed and the IDHR will have initial processing responsibility.

## **2. Processing a Charge**

### *a. [11.40] Service of the Charge*

After a charge is filed, the IDHR is under an obligation to serve it on the respondent within ten days. It should be noted that even though the date the CIS is filed is used for calculating compliance with the 180-day filing deadline, the IDHR does not serve the charge until the charge is perfected. Thus, the ten-day period runs from the date the perfected charge is filed.

### *b. [11.41] Response to Charges*

Respondents are required by IHRA §7A-102(B) to file a verified response to the allegations contained in the charge. Unlike most other submissions to IDHR, the verified response must be served on the other side, and it must contain a proof of service. All allegations that are not timely denied will be deemed admitted unless the respondent states that it is without sufficient information to form a belief with respect to any particular allegation. The IDHR will issue a notice of default if a verified response, with proof of service, is not filed within the deadline provided for under the IHRA. The deadline is 60 days after the respondent receives the charge. A respondent can prevent the issuance of such a notice if it can demonstrate to the IDHR good cause for its failure to comply with the deadline. IDHR regulations define "good cause" to include proof that the respondent acted with due diligence and that its failure to file within the 60-day period was not deliberate or contumacious. The respondent may submit affidavits or other evidence that the failure to meet the deadline was due to circumstances beyond the respondent's control. 56 Ill.Admin. Code §2520.405(c). Given the potential for a default, it is extremely important for respondents' counsel to make sure that the verified response, with proof of service,

is filed by the deadline. A sample verified response is included in the packet that the IDHR sends to the respondent with the charge and is also available on the Internet at [www.state.il.us/dhr/Forms/Forms-N.htm](http://www.state.il.us/dhr/Forms/Forms-N.htm).

The IHRC has held that when the respondent has failed to file a verified response, the IDHR has the option of making a finding of substantial evidence and filing a complaint. The complainant has no right to demand a default under these circumstances. *In re Ufford & Archer-Daniels Midland Co.*, Charge No. 1992SA0409, 1994 ILHUM LEXIS 368 (Sept. 29, 1994).

Once a response has been filed, the complainant has a right to file a reply; the deadline is 30 days after receipt of the response. This document must also be served on the other side.

*c. [11.42] Questionnaires*

The IDHR will send the respondent a questionnaire designed to elicit information pertinent to the charge. The answers to the questionnaire differ from the verified response because they are not served on the complainant. Further, the response to the charge need only contain specific responses to the allegations in the charge. The questionnaire may raise many collateral issues that will help the IDHR investigator decide whether there is discrimination. It is a mistake to believe that answering the questionnaire fulfills the obligation to file a verified response to the charge or vice versa.

*d. [11.43] Position Statements*

The IHRA specifically provides for the filing of “position statements” by both the complainant and the respondent. The deadline for the filing of such statements is 60 days after receipt of the notice of the charge. Unlike the verified response, the position statement is confidential during the pendency of the charge with the IDHR. The tactical questions presented for the practitioner are similar to those presented in answering the questionnaire. Filing a detailed position statement may help at the IDHR level, but it also may provide “free” discovery for the other side when and if the case moves to the public hearing phase.

*e. [11.44] Mediation*

The IDHR provides a free, voluntary mediation service. Parties to a charge may be contacted by the IDHR regarding their willingness to participate in the program. At present, the IDHR’s limited number of mediators work in Chicago. Accordingly, if downstate attorneys wish to take advantage of the IDHR mediation service, they must be willing to travel to Chicago. If the mediation is not successful, the case will continue to be processed by the IDHR.

*f. [11.45] Temporary Injunctive Relief*

Section 7A-104(A) of the IHRA authorizes the IDHR or a complainant to obtain temporary injunctive relief from a circuit court pending the final disposition of a charge at the administrative level. The object of such relief is to maintain the status quo until the IHRC is in a position to

order permanent relief. Whether it is brought by the IDHR or the complainant, the petition must contain a certification by the director of the IDHR that the particular matter presents exceptional circumstances in which irreparable injury will result from a civil rights violation in the absence of temporary relief.

There is no appeal from a decision by the director that the case does not meet the statutory standard. In other words, if the director refuses to certify the case so that the complainant can go into court, the complainant cannot file a request for review. *In re Jones & Chicago Transit Authority*, 16 Ill.H.R.C.Rep. 189 (1985).

It is very important that a complaint for temporary relief under this section be worded correctly. In *People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corp.*, 122 Ill.App.3d 517, 461 N.E.2d 505, 77 Ill.Dec. 882 (1st Dist. 1984), an injunction was lifted by the appellate court because the circuit court had called the injunction it had issued under the predecessor to IHRA §7A-104 a “permanent” injunction. Months of work were lost because the wrong word was used.

*g. [11.46] Expedited Proceedings*

Another circuit court action that may be maintained while a charge is being processed is an action for expedited proceedings. This kind of action is authorized by §7A-104(B) of the IHRA. It may be brought by either the IDHR or the complainant. If the complainant brings the action, he or she must name the IDHR, the IHRC, and the employer. If the circuit court determines that the complainant is likely to die before the termination of the proceedings under the IHRA, it may order the IDHR and the IHRC to give the charge priority over all other pending cases. Further, such an order will allow the agencies to shorten nearly all filing deadlines under the IHRA. Finally, under expedited proceedings, the IDHR has 90 days from the circuit court order to process the charge.

*h. [11.47] Fact-Finding Conferences*

Although §7A-102(C)(4) of the IHRA makes it appear that the IDHR has the discretion to dispose of a charge without a fact-finding conference, at the present time, the IDHR’s primary mode of processing employment charges involves the use of fact-finding conferences that the parties are required to attend and at which the basic facts and the possibility of settlement are discussed. Section 7A-102(C)(4) of the IHRA provides that “[a]ny party’s failure to attend the conference without good cause shall result in dismissal or default.” The regulations provide that in deciding whether a party has shown “good cause” for its failure to appear at a fact-finding conference, the Department will look at whether the party has provided timely notice to the Department of its inability to attend the fact-finding conference and whether the party has complied with the Department’s request for documentation of the reason for not attending the conference. 56 Ill.Admin. Code §2520.440(d)(4).

The regulations also provide:

**A party who appears at the conference exclusively through an attorney or other representative unfamiliar with the events at issue shall be deemed to have failed to attend, unless, with respect to a respondent, it establishes that it does not employ or control any person with knowledge of the events at issue.** 56 Ill.Admin. Code §2520.440(d)(2).

The appellate court upheld the validity of the predecessor to this rule. *Chicago Transit Authority v. Department of Human Rights*, 169 Ill.App.3d 749, 523 N.E.2d 1108, 120 Ill.Dec. 197 (1st Dist. 1988).

Fact-finding conferences are informal and are conducted by the IDHR's investigator. Parties may be accompanied by counsel, but cross-examination ordinarily is not permitted. Parties may bring witnesses but should make advance arrangements with the investigator, who will decide which witnesses to hear. The investigator may exclude witnesses and other persons from the conference, except that each party and its representative are permitted to remain. 56 Ill.Admin. Code §2520.440(c). Statements by parties and witnesses are not under oath. No verbatim record of conference proceedings is made or permitted. *Id.* See also *Board of Education of Hawthorne School District No. 17, Marengo v. Eckmann*, 103 Ill.App.3d 1127, 432 N.E.2d 298, 59 Ill.Dec. 714 (2d Dist. 1982).

At the fact-finding conference, the investigator will usually make an attempt to settle the case. If the case cannot be settled, the investigator usually has the complainant affirm the allegations in the charge. A witness for the respondent is then asked to specifically admit or deny each allegation. The complainant is then given an opportunity to tell his or her side of the story. The investigator will then ask the appropriate respondent witness to respond. Attorneys are not allowed to cross-examine witnesses, but may suggest potential questions or issues to explore.

*i. [11.48] Subpoenas*

If a charge is not resolved at a fact-finding conference, investigation may continue afterward, including witness interviews, document inspection, and an on-site visit, if appropriate. Because of the press of cases at the IDHR, these additional methods of gathering evidence are not very common.

The IDHR is authorized under §7A-102(C)(2) of the IHRA to subpoena witnesses and evidence in connection with its investigations. Objections to IDHR subpoenas may be raised to the IHRC, and subpoenas are judicially enforceable. IHRA §§8-104 (E)(1), 8-104(E)(3). In *Fair Employment Practices Commission v. Hohe*, 53 Ill.App.3d 724, 368 N.E.2d 709, 11 Ill.Dec. 158 (1st Dist. 1977), it was held that an investigative subpoena was not objectionable on the grounds that it sought data from years prior to the alleged infraction or more data than might be essential for a determination of the charge. The court observed that historical evidence is highly probative of whether discrimination has occurred within a particular time frame and held that the investigation may cover such evidence if doing so is not unreasonably burdensome.

In recent years, the IDHR has used the subpoena process infrequently. In most instances, the investigator will merely mail a request for additional information. If the employer does not turn over the information based on the request of the investigator, the IDHR will presume that the information requested tends to prove discrimination. Thus, in most instances, if vital information is not turned over voluntarily, it will result in a complaint being filed against the employer, not a subpoena contest in circuit court.

*j. [11.49] Department Finding*

At the conclusion of the investigation, the investigator prepares a written report summarizing the facts disclosed. The IHRA sets forth standards for the content of final determinations by the director. The IDHR's practice is to make the investigation report the determination of the director once he or she approves it. Accordingly, the requirements set out in the IHRA for the contents of the director's determination have become the requirements for the investigation report. The IHRA requires that determinations have findings of fact and conclusions. There must be reasons presented for determinations on all material issues. IHRA §7A-102(D)(2). At one time, the IHRA contained language that made it appear that investigators were supposed to make credibility determinations. This raised due process concerns. *See Cooper v. Salazar*, No. 98 C 2930, 2001 U.S. Dist. LEXIS 17952 (N.D.Ill. Nov. 1, 2001). The offending language was eliminated by P.A. 94-146 (eff. July 8, 2005).

For the most part, activities at the IDHR are confidential. Prior to December of 1997, the IDHR's rules provided that the investigation report and most of the investigation file would be made available to the parties after the IDHR had reached a determination in the case. In December 1997 the IDHR issued amendments to its rules stating that parties would not have access to the contents of the investigation file while a request for review was pending. 2 Ill. Admin. Code §926.210. This rule change was also the subject of an injunction in *Cooper*. The district court judge ordered the IDHR to "to provide complainants who pursue Requests for Review with access to their investigative files, including notes of witness statements but excluding sensitive materials as defined in the pre-1997 regulation." 2001 U.S. Dist. LEXIS 17952 at \*33. The IDHR has changed its rules to conform to the injunctions. 26 Ill. Reg. 17212 (eff. Nov. 18, 2002).

The availability of virtually all of the material in the investigation file highlights an important strategy question that confronts employers in many cases. Although an employer must submit all information requested by the IDHR, the amount of extra detail presented is up to the employer. In some cases, submitting the extra information will be worthwhile because it will result in a dismissal for lack of substantial evidence. In other cases, it will amount to free discovery for the complainant. Whether the chance of having the case dismissed early is worth the risk of providing free discovery will, of course, vary from case to case.

Section 7A-102(D)(2) of the IHRA prescribes that the director's determination shall be based on whether there is "substantial evidence" of a violation. This standard is deliberately vague to permit the director and the chief legal counsel some degree of discretion in ascertaining and evaluating the facts on review. *Klein v. Fair Employment Practices Commission*, 31 Ill. App.3d

473, 334 N.E.2d 370 (1st Dist. 1975); *Sanders v. United Parcel Service*, 142 Ill.App.3d 362, 491 N.E.2d 1314, 96 Ill.Dec. 854 (1st Dist. 1986). IHRA §7A-102(D)(2) defines substantial evidence as follows:

**Substantial evidence is evidence which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance.**

If it is found that there is not substantial evidence of a violation, the charge will be dismissed subject to review before the chief legal counsel of the IDHR. IHRA §7A-102(D)(2)(a). See §§11.53 – 11.58 below. If it is found that there is substantial evidence of a violation, an IDHR attorney will be designated to attempt conciliation, failing which a formal complaint will be filed with the IHRC. IHRA §§7A-102(D)(2)(b), 7A-102(E), 7A-102(F). When a single charge incorporates more than one cause of action, portions may be dismissed and substantial evidence found with respect to the remainder of the charge. Because of the time limit on IDHR proceedings discussed in §11.58 below, the IDHR will sometimes file a complaint with respect to the portion of the charge that is the subject of the substantial evidence finding, even though there is a request for review pending with respect to the portion of the charge that was dismissed for lack of substantial evidence.

At one time, the Fourth District Appellate Court ruled that the question of whether there is substantial evidence to support a charge was the same as the question of whether the complainant can establish a prima facie case of discrimination. *Whipple v. Illinois Department of Rehabilitation Services*, 269 Ill.App.3d 554, 646 N.E.2d 275, 206 Ill.Dec. 908 (4th Dist. 1995). The First District took the position that the question of whether there is substantial evidence has to be answered after an evaluation of all the evidence, not just the evidence supporting the prima facie case. Eventually, the Fourth District reversed itself. *Webb v. Lustig*, 298 Ill.App.3d 695, 700 N.E.2d 220, 233 Ill.Dec. 119 (4th Dist. 1998). The First District issued an opinion that appears to endorse the proposition that the complainant need only establish a prima facie case, but this portion of the opinion appears to be dicta. *Hoffelt v. Illinois Department of Human Rights*, 367 Ill.App.3d 628, \_\_\_ N.E.2d \_\_\_, \_\_\_ Ill.Dec. \_\_\_ (1st Dist. 2006), *leave to appeal denied*, 222 Ill.2d 607 (2007).

*k. [11.50] Conciliation*

If the director determines that there is substantial evidence, an IDHR staff attorney is assigned to attempt to conciliate the matter. Although settlement possibilities ordinarily will have been explored earlier during investigation, the IHRA calls for a formal conciliation effort after the IDHR has found substantial evidence and stands poised to file a complaint. It should be noted, however, that at the time of publication of this chapter, the General Assembly has passed H.B. No. 1509, but the bill had not been signed by the Governor. If it becomes law, the bill would make the decision whether to engage in conciliation discretionary.

The IDHR may, in its discretion, convene a conciliation conference for face-to-face negotiations. IHRA §7A-102(E). As with earlier settlement discussions, conciliation negotiations are confidential, and nothing said or done is admissible in evidence in later proceedings without the consent of all parties. *Id.*

If the parties agree to a settlement, they must decide if they want it to be approved by the IHRC. Approved settlements are in the nature of consent decrees and are subject to enforcement by the IHRC. IHRA §8-105. If the parties indicate they want the agreement to go to the IHRC, the IDHR attorney will prepare the terms of settlement for the parties' signatures. The IDHR will then send the terms to the IHRC. On the other hand, the parties may sign a private settlement, in which case a motion to withdraw the charge will be presented to the IDHR. In this circumstance, the settlement agreement will be enforceable in the same way as any other private agreement.

If the respondent has taken measures or offered terms sufficient to provide the complainant with complete relief and the complainant refuses to settle the case, the IDHR may dismiss the charge. IHRA §7A-103(D). In determining whether the relief is complete, the IDHR must decide if the respondent has provided or has offered to provide all of the relief the IHRC could order after a determination in favor of the complainant on the merits. *Id.*

*l. [11.51] Time Limit on IDHR Proceedings*

After a charge has been properly filed, the IDHR has 365 days to either dismiss the charge or file a complaint. IHRA §7A-102(G)(1). This time period may be extended by the written agreement of all the parties. As mentioned in §11.49 above, the IDHR faces a dilemma when it has found substantial evidence on less than the entire charge. In certain instances, it cannot hold the substantial evidence finding in abeyance while a request for review is pending on the portion of the charge that has been dismissed. The IDHR must file a complaint by the deadline, not just find substantial evidence. Accordingly, the IDHR will sometimes file a complaint on a portion of the charge and move to amend the complaint if the lack of substantial evidence finding on the other portion of the charge is reversed on review.

The 365-day investigation period does not begin until the complainant has filed a formal, verified charge. *Davis v. Illinois Human Rights Commission*, 286 Ill.App.3d 508, 676 N.E.2d 315, 221 Ill.Dec. 794 (1st Dist. 1997). This leads to a situation that may be confusing. Filing an informal, unverified document may be sufficient to allow the IDHR to say that a charge was filed within the 180-day time limit, but the 365-day investigation period does not begin until the unverified charge is perfected. As with most legal deadlines, the day of filing is not counted; the day after the verified charge is filed is day one.

The IHRA gives complainants the right to file their own complaints between days 365 and 395. If there has been a stipulation to extend the 365-day investigation period, this complaint filing "window" will also be extended. IHRA §7A-102(G)(2). The word "between" is not defined; it is unclear whether a complainant can file his or her own complaint on day 365 or day 395. It is also unclear whether the IDHR retains the right to file a complaint during this period.

In any event, if neither the complainant nor the IDHR files a complaint by the close of business on day 395, the case is over. At that point, the IDHR loses all jurisdiction. If the IDHR fails to immediately cease the investigation and dismiss the charge, it may be enjoined by the circuit court and liable to the respondent for any costs or damages incurred as a result of the IDHR's actions. IHRA §7A-102(G)(3). Thus, if the IDHR is unable to complete its investigation in 395 days, the complainant must either file a complaint between days 365 and 395 or give up on the claim. Of course, all of these dates are subject to extension by agreement of the parties.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would give the IDHR 365 days to issue a report in a case. The Department would not have to take the further step of either dismissing the charge or filing a complaint by day 365. The changes would apply to charges filed after January 1, 2008.

### 3. [11.52] Complaints Filed by Complainants

When complainants file their own complaints, they must notify the IDHR that a complaint has been filed and must serve a copy of the complaint on the IDHR on the same date that the complaint is filed with the IHRC. There has been no ruling on whether these requirements are jurisdictional. The same kinds of relief and penalties are available for complainant-filed complaints that are available when the IDHR files the complaint. IHRA §8A-104.

Although complainant-filed complaints must be verified, the failure to do so within the 30-day window is not fatal. If the complaint is verified within a reasonable amount of time after the expiration of the 30-day window, the correction will relate back to the date the original, unamended complaint was filed. *Maliszewski v. Human Rights Commission*, 269 Ill.App.3d 472, 646 N.E.2d 625, 207 Ill.Dec. 59 (5th Dist. 1995).

In *Moeser v. Human Rights Commission*, 292 Ill.App.3d 402, 686 N.E.2d 373, 226 Ill.Dec. 743 (5th Dist. 1997), *appeal denied*, 176 Ill.2d 576 (1998), the court ruled that if a complaint was filed with the IDHR within the 30-day window, the complaint could be considered to be timely filed with the IHRC. The court said that filing the complaint within the 30-day window was jurisdictional, although filing it correctly with the IHRC was not. Obviously, the practitioner should strive to comply fully with the IHRA and the rules. If, however, a mistake is made, *Moeser* allows the complainant to argue the equities as long as a complaint was filed somewhere sometime within the 30-day window period.

It should be noted that the failure of both the IDHR and the complainant to file a complaint within 395 days does not affect the complainant's rights under a dual-filed federal charge. Presumably, if the IDHR loses jurisdiction of a case because of the 395-day limit, the EEOC would still have an obligation to process the federal charge.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would give complainants 90 days after the expiration of the 365-day investigation period to either file a complaint with the IHRC or commence a civil action in circuit court. The new law would apply to charges filed after January 1, 2008.

### 4. Requests for Review

#### a. [11.53] Filing

When a charge is dismissed during the investigation phase or the respondent has been held in default, the written notice by the IDHR must advise the affected party of the availability of

review by the chief legal counsel, and the request for review must be filed with the chief legal counsel within 30 days of the party's receipt of the IDHR's notice. IHRA §§7A-102(C)(4), 7A-102(D)(2). The IDHR presumes that a document is "received" five days after it is mailed. 56 Ill.Admin. Code §2520.20. The IDHR will include with the notice of dismissal or default a request for review form. The form will usually have a filing date, which is calculated based on a presumed date of receipt.

The IDHR's rules allow for one 14-day extension of time for good cause shown. 56 Ill.Admin. Code §2520.580. If an extension is granted, but no further materials are presented, the chief legal counsel will consider the matter as one in which the party has filed a request for review without any evidence or argument.

*b. [11.54] Investigation File*

In accordance with the injunction issued in *Cooper v. Salazar*, No. 98 C 2930, 2001 U.S. Dist. LEXIS 17952 (N.D.Ill. Nov. 1, 2001), once the Illinois Department of Human Rights has issued a notice of dismissal, the parties are entitled to review most of the investigation file, including witness statements.

The IDHR excludes

1. internal memoranda;
2. work papers and draft documents;
3. fact-finding conference notes;
4. the investigator's notes, materials reflecting the deliberative processes, mental impressions, or legal theories, and advice of the department;
5. material generated in preparation for judicial or administrative proceedings; and
6. the identities of confidential witnesses and settlement materials.

Importantly, on a request for review, the chief legal counsel may not look at or consider materials in the investigation file, other than the identities of confidential witnesses, if those materials have not been disclosed to the parties. 2 Ill.Admin. Code §926.210. Forms for requesting review of the investigation file may be obtained online at [www.state.il.us/dhr/Forms/Forms-N.htm](http://www.state.il.us/dhr/Forms/Forms-N.htm). The IDHR does not accept electronic filing of the completed form.

*c. [11.55] Content*

As §§11.53 and 11.54 above imply, requests for review are unlike appeals. The party requesting review is not limited to the record. The request may contain additional evidence along with argument. The party should supply the chief legal counsel with relevant supporting

documents and/or the names of witnesses with direct knowledge. The request should state how to contact each witness listed. The party must supply the chief legal counsel with good cause as to why the supplemental evidence was not submitted during the IDHR's investigation. 56 Ill.Admin. Code §2520.575.

*d. [11.56] Consideration*

Once a request for review is timely filed, it is up to the chief legal counsel to determine whether the disposition of the case by the director was correct. Thus, the chief legal counsel evaluates decisions made by his or her boss. In *Cooper v. Salazar*, No. 98 C 2930, 2001 U.S. Dist. LEXIS 17952 (N.D.Ill. Nov. 1, 2001), Judge Shadur found that without safeguards against conflict of interest, the procedure employed by the IDHR would be unconstitutional. The court found that the State could cure the due process problem by either returning the authority to decide requests for review to the IHRC or changing the IDHR procedures so that review by the chief legal counsel would be substantially equivalent to review by the IHRC. The IDHR chose the latter course.

First, under new rules, neither the parties nor IDHR employees who do not work for the chief legal counsel may communicate about a request for review with the chief legal counsel or the staff attorney assigned to the request for review, except in writing, with copies to all parties, including the IDHR. Second, if resources permit, the chief legal counsel must assign a request for review to a staff attorney who was not involved in the director's original finding in the case. Under the rule, the chief legal counsel is given sole discretion over the assignment of requests for review to staff attorneys. 56 Ill.Admin. Code §2520.573.

The other party does not have an automatic right to file a response to the request for review. The chief legal counsel will notify the party if a response is desired. At that point, the party will have 14 days to file a pleading that supports the original department action.

Under rules adopted by the IDHR in response to the *Cooper* decision, the party's response (designated a "reply") must be served on all parties, with a certificate of service filed with the chief legal counsel. The complainant (or respondent in a default case) has 14 days from the date the reply was due to file a "surreply," which must also be served on all parties, with a certificate of service filed with the chief legal counsel. 56 Ill.Admin. Code §2520.583.

If the chief legal counsel believes that the issues raised by the charge and the investigation cannot be resolved based on the request and the additional information supplied by the director, the chief legal counsel may designate a staff attorney to conduct an investigation into the factual basis of the matter at issue. IHRA §7-101.1. Because of the conflict of interest issue discussed above, the IDHR's rules provide that if the case is given to a staff attorney to conduct an additional investigation, the chief legal counsel will endeavor to assign the matter to a staff attorney who did not perform the original substantial evidence review. If the IDHR's resources do not permit this, however, the chief legal counsel does retain the right to assign the investigation to the same staff attorney who performed the original substantial evidence review. 56 Ill.Admin. Code §2520.585.

As required by the injunction in *Cooper* and pursuant to the IDHR's procedural rules, the chief legal counsel's review is de novo. 56 Ill.Admin. Code §2520.587.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would transfer responsibility for hearing requests for review to the IHRC. It would also give complainants the option of ignoring the request for review procedure and filing a complaint directly in circuit court within 90 days of the notice of dismissal. If the complainant filed a request for review with the Commission, he or she would lose the right to file a complaint in circuit court. The new law would apply to charges filed after January 1, 2008.

*e. [11.57] Court Review*

When the request for review is from a default determination by the IDHR, and when the request for review is denied, the case is transferred to the IHRC for the entry of a default order and for a hearing on the amount of damages. IHRA §7-101.1. Under these circumstances, the chief legal counsel's order is not immediately appealable. *Pinkerton Security & Investigation Services v. Illinois Department of Human Rights*, 309 Ill.App.3d 48, 722 N.E.2d 1148, 243 Ill.Dec. 79 (1st Dist. 1999). The respondent cannot appeal until the IHRC had reached a decision on damages.

When the request for review is from a dismissal by the IDHR and the chief legal counsel sustains the dismissal on review, the resulting order is final and appealable. IHRA §7-101.1(A). However, if the IDHR reaches a split decision on the charge (finding substantial evidence on some of the counts and lack of substantial evidence on others) a chief legal counsel decision upholding the lack of substantial evidence findings is not final. Unless the chief legal counsel's order states "that there is no just reason for delaying appeal," the appellate court has no jurisdiction. *Matson v. Department of Human Rights*, 322 Ill.App.3d 932, 750 N.E.2d 1273, 1279, 255 Ill.Dec. 888 (2d Dist. 2001).

The IHRA gives parties 35 days after service of the chief legal counsel's decision to file a petition for review in the appellate court. Because the IDHR's procedural rules create a presumption that service is complete 5 days after mailing, parties have 40 days from the date of the order to file the petition, and if that date falls on a Saturday, a petition filed on the 42nd day after the order is issued will be considered timely. *Moren v. Illinois Department of Human Rights*, 338 Ill.App.3d 906, 790 N.E.2d 86, 88 – 89, 273 Ill.Dec. 944 (1st Dist. 2003).

If an appeal is taken, both the IDHR and the chief legal counsel should be named as separate parties respondent. *Traficano v. Department of Human Rights*, 297 Ill.App.3d 435, 697 N.E.2d 372, 231 Ill.Dec. 818 (1st Dist. 1998). There are appellate court decisions that hold, however, that the failure to name the chief legal counsel does not result in a loss of jurisdiction by the appellate court based on §3-107(a) of the Administrative Review Law, which provides:

**No action for administrative review shall be dismissed for lack of jurisdiction based upon the failure to name an employee, agent, or member, who acted in his or her**

**official capacity, of an administrative agency, board, committee, or government entity, where the administrative agency, board, committee, or government entity, has been named as a defendant as provided in this Section. 735 ILCS 5/3-107(a).**

Although direct appeals are governed by S.Ct. Rule 335, and although that rule does not incorporate by reference 735 ILCS 5/3-107, the appellate court ruled that it was the intent of the Supreme Court that S.Ct. Rule 335 be read in harmony with §3-107. *Traficano, supra*, 697 N.E.2d at 374. See also *Peyton v. Department of Human Rights*, 298 Ill.App.3d 1100, 700 N.E.2d 451, 233 Ill.Dec. 146 (4th Dist. 1998) (chief legal counsel need not be named separately because he or she is merely employee of IDHR).

A divided panel of the Fourth District has found, however, that 735 ILCS 5/3-107 does not apply to direct appeals. In *Dahman v. Illinois Department of Human Rights*, 334 Ill.App.3d 660, 778 N.E.2d 732, 268 Ill.Dec. 466 (4th Dist. 2002), the complainant filed a charge of sexual harassment against both her employer, the Secretary of State, and the alleged harasser, a coworker. When the chief legal counsel upheld the dismissal of the charge by the IDHR, the complainant filed a petition for review that named all parties except the coworker. The court found it irrelevant that the coworker's employer had been named because §3-107 was not applicable. Importantly, the court found that it had no jurisdiction over the entire case and refused to hear the employee's claims against her employer, the Secretary of State, even though the employer had been properly named in the petition for review.

On appellate review of a request for review order, the standard appears to be whether the decision of the chief legal counsel is arbitrary and capricious or an abuse of discretion. The Fifth District of the Appellate Court has declared, however, that the chief legal counsel must give deference to the factual findings made by the IDHR in its investigation report. *Roedl v. Midco International*, 296 Ill.App.3d 213, 694 N.E.2d 179, 230 Ill.Dec. 548 (5th Dist. 1998). At this point the question may be moot because the IDHR's investigators are enjoined from making credibility decisions. *Cooper v. Bombela*, 34 F.Supp.2d 693 (N.D.Ill. 1999). Other appellate panels have focused on the chief legal counsel's analysis of the investigative record, not the analysis of the findings made by the investigator. See, e.g., *Kalush v. Illinois Department of Human Rights Chief Legal Counsel*, 298 Ill.App.3d 980, 700 N.E.2d 132, 233 Ill.Dec. 31 (1st Dist. 1998). However, *Roedl, supra*, continues to be cited with approval. *Willis v. Illinois Department of Human Rights*, 307 Ill.App.3d. 317, 718 N.E.2d 240, 240 Ill.Dec. 759 (4th Dist. 1999).

In light of the injunction in *Cooper, supra*, a request for review should be successful if it points to credible evidence in the investigation file that supports an inference of discrimination, even if there is opposing, equally credible evidence in the investigation file. Of course, on appellate review, the question would be whether the chief legal counsel abused his or her discretion in failing to find the inference of discrimination.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would transfer responsibility for requests for review to the IHRC. In that case, appeals would be from the final decision of the Commission. The new law would apply to charges filed after January 1, 2008.

*f. [11.58] Time Limit Considerations*

If the chief legal counsel vacates the dismissal for additional investigation, one must keep in mind that there may be a problem with completing matters before the expiration of the 365-day investigation period. The time limit is tolled from the date that the director of the IDHR issues the notice of dismissal until the chief legal counsel issues an order. IHRA §7-101.1(D). Accordingly, if the notice of dismissal was issued close to the deadline, it may not be possible to complete the supplemental investigation before the time limit expires.

A similar problem arises if the chief legal counsel vacates the dismissal and finds substantial evidence. The IHRA requires the IDHR to issue and file a complaint within the time limit, not just find substantial evidence of a violation. Accordingly, if the initial dismissal was issued just before the expiration of the time limit, there may be very little time left to draft and file a complaint after the chief legal counsel vacates the dismissal.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would give the IHRC responsibility for deciding requests for review. Under §8-103 of the HRA, time limits would be tolled from the date of the notice of dismissal or default until the date of the Commission order. The new law would apply to charges filed after January 1, 2008.

### **C. Illinois Human Rights Commission**

#### **1. [11.59] Complaint and Answer**

Within five days after a complaint is filed by the IDHR or a complainant, the IHRC must serve it on the parties. IHRA §8A-102(A). When served, the complaint is accompanied by a notice setting a hearing before an administrative law judge (ALJ) of the IHRC on a date between 30 and 90 days thereafter at a place within 100 miles of the alleged infraction. IHRA §§8A-102(A), 8A-102(B). The IHRC sets the hearings in accordance with the statute and, if both parties are able to present their cases in that time frame, the IHRC will hold the hearing at the time and place stated in the notice. Given the time that discovery takes, however, it is highly unlikely that both parties will be in a position to try their case within 90 days after the filing of the complaint.

When the complaint is served on the parties, it will contain a packet of information and orders from the IHRC. In the packet is a “Standing Order Relating to Prehearing Procedures and Prehearing Memorandum” form, which sets out the materials that must be in the prehearing memorandum and the date by which it must be filed. The “Notice of Public Hearing” will state that if a joint prehearing memorandum is not timely filed, as provided in the standing order, this failure will be deemed evidence that the parties will not be prepared and do not intend to proceed with public hearing on the initial date. For cases scheduled to be heard in the Chicago office, the initial hearing date will automatically be turned into an initial status date. If the case is scheduled to be heard in the Springfield office, a motion to continue should be filed if the parties are unable to go to hearing on the initial date. The judge assigned to the case will grant the motion and set the case for status.

The IHRC treats complaints properly filed by complainants in exactly the same way as complaints filed by the IDHR. As noted in §11.51 above, a complainant may not file a complaint unless the IDHR has failed to act on the charge during the investigation period, which is 365 days. The complainant must file between days 365 and 395. This period may be lengthened by the written agreement of all parties. IHRA §7A-102(G)(2).

The respondent's answer to the complaint is due within 30 days after the complaint is served, but the respondent may obtain an extension of that time or move to dismiss the complaint within the 30-day period. Failure to answer each allegation of the complaint constitutes an admission unless a motion to dismiss is granted. IHRA §8A-102(D). By IHRC rule, answers and motions to dismiss must be served on the IDHR as well as all parties. 56 Ill.Admin. Code §5300.640(b).

A complaint may be amended at any time prior to the issuance of an order based thereon.

**Amendments to the complaint may encompass any unlawful discrimination which is like or reasonably related to the charge and growing out of the allegations in such charge, including, but not limited to, allegations of retaliation.** IHRA §8A-102(C).

In *In re Grayson & Bimba Manufacturing Co.*, Charge No. 1993CF1243, 1997 ILHUM LEXIS 652 (Nov. 24, 1997), the full IHRC ruled that the quoted language did not authorize a complainant to amend a complaint to add allegations regarding incidents that occurred more than 180 days before the charge was filed and that were not part of the same cause of action alleged in the charge. Prior to the decision in *Hoffelt v. Illinois Department of Human Rights*, 367 Ill.App.3d 628, \_\_\_ N.E.2d \_\_\_, \_\_\_ Ill.Dec. \_\_\_ (1st Dist. 2006), *leave to appeal denied*, 222 Ill.2d 607 (2007), sexual harassment and retaliation were thought of as separate causes of actions. The *Hoffelt* court indicated, however, that an employee who charges that he or she was retaliated against for opposing sexual harassment need not file a charge alleging the underlying sexual harassment because the harassment and the retaliation can be considered to be one, long, continuing violation, even if no act of sexual harassment took place less than 180 days before the charge was filed.

In *In re Bonner & AT&T*, Charge No. 1989CF1673, 1996 ILLHUM LEXIS 365 (Oct. 2, 1996), the full IHRC ruled that a complaint could be amended to add actions that occurred after the date of filing of the charge that were merely a continuation of the behavior alleged in the charge. It is not clear exactly how far this precedent allows a complainant to go. As noted above, the 180-day charge-filing period has been held to be jurisdictional.

The IHRC's procedural rules allow a complaint to be amended to name successors or assigns of the original respondent. 56 Ill.Admin. Code §5300.660(a). The complainant may correct a misnomer at any time. If the complainant wishes to name an entity that was mistakenly not named in the original complaint and that is not a successor or assign of the named respondent, six conditions outlined in 56 Ill.Admin. Code §5300.660 must be met. Essentially, the entity involved had to have notice of the charge during the 180-day charge-filing period and the nature of the original charge must have been such that the entity would have known that the employment transaction in issue involved it. 56 Ill.Admin. Code §5300.660(a). The most common situation in

which an amendment of this sort is allowed is when the wrong subsidiary of a parent corporation is named but all of the officers of the correct entity were aware of the original charge because of the nature of the relationship between the sister subsidiaries.

If a party to a complaint dies, the proper party may be substituted upon motion. If a motion to substitute is not filed within 90 days after the death is suggested of record, the complaint may be dismissed as to the deceased party. 56 Ill.Admin. Code §5300.660(b).

As a rule, the IDHR plays only a limited role in IHRC hearings and related proceedings after the filing of the complaint unless the IDHR is a complainant. In most cases, the IDHR does not act as a party and does not represent the complainant or otherwise prosecute the action. The IDHR is sometimes invited to submit memoranda on questions of procedure or of general public importance, but otherwise the preparation and trial of actions before the IHRC is the responsibility of the individual parties.

## **2. [11.60] Alternative Hearing Procedure**

If all of the parties agree, they may elect a procedure that, in effect, makes the ALJ the arbitrator of the case. Under the alternative procedure, an ALJ is selected by the parties from a pool designated by the IHRC. There is a limited right to discovery. The ALJ assigned to the case has the power to dispose of the case with only a limited right to review or appeal. Although the final order of the ALJ must be in sufficient detail to apprise the parties as to the basis for the decision, there need not be detailed findings of fact and conclusions of law. IHRA §8A-102.5(B)(4).

The only right to appeal an order issued under the alternative procedure arises when the order is procured under fraud or duress. IHRA §8A-102.5(C). There is no explanation in the IHRA as to what is meant by those terms. An order entered under the alternative hearing process by an ALJ is enforceable in the same manner as orders issued by the IHRC. IHRA §8A-102.5(D).

The alternative procedure was added to the IHRA because numerous practitioners had expressed a desire for a way to try a case and obtain a quick, “up or down” decision from an ALJ. Despite these expressed desires, the alternative procedure has not been used with any frequency.

## **3. [11.61] Discovery**

The types of discovery available to the parties are the same as in civil court except for discovery depositions. The IHRA provides that discovery depositions may be taken only upon leave of the ALJ and for good cause shown. IHRA §8A-102(F).

It is important to note that although the types of discovery available to the parties are the same as in circuit court, the IHRC expects the parties to follow the IHRC’s procedural rules to accomplish discovery. The Code of Civil Procedure and the Supreme Court Rules are not directly applicable.

There are basically two kinds of discovery: written interrogatories and requests to produce. Answers to written interrogatories must be served within 28 days after they are propounded. 56 Ill.Admin. Code §5300.720(a)(1). There is no set limit to the number of interrogatories that may be propounded, but they must be related to the subject matter of the complaint or defense, they must avoid undue detail, and they cannot impose an undue burden or expense on the answering party. Supplemental interrogatories are not allowed without the leave of the ALJ. The answers to interrogatories must be under oath or affirmation. The answering party must file either an answer or an objection to each interrogatory.

The second major method of discovery is the request to produce. The IHRC's rules require the answering party to file a response to a request to produce within 28 days after service. With respect to each document or thing requested, the answering party must either state that inspection and copying will be permitted or state that there is an objection. 56 Ill.Admin. Code §5300.720(a)(2).

The IHRC does not permit the filing of discovery requests and responses. The party responsible for service of the discovery material must serve a copy of the certificate of service with the IHRC. The original is kept by that party. If a motion is filed with respect to any discovery material, then copies of the pertinent materials must be attached to the motion. 56 Ill.Admin. Code §5300.725.

In addition to this sort of discovery, a party may file with the other party a request for the admission of the truth of any specified relevant fact or the genuineness of any relevant document. 56 Ill.Admin. Code §5300.745. The party receiving the requests has 28 days to serve a sworn statement either denying or admitting the facts in question or stating that it cannot truthfully admit or deny the specified allegation. The party has the same 28 days to file objections to the request. 56 Ill.Admin. Code §5300.745(c).

Evidence depositions may be taken if a witness resides out of state or through illness or other good cause is unable to testify at the hearing. IHRA §8-104(F)(1). It is up to the ALJ to determine whether a witness is able to testify.

As noted above, there is no right to a discovery deposition. The parties may, however, stipulate to the taking of depositions. 56 Ill.Admin. Code §5300.720(a)(3)(B). There is no statutory definition of the term "good cause" for the taking of a discovery deposition. It is clear, however, that such depositions are not allowed in most cases. Therefore, if one wants an ALJ to allow the taking of discovery depositions, one must show the ALJ how this case differs from the ordinary employment discrimination case. One must also show how the other methods of discovery are inadequate to obtain the information necessary to try the case.

Although evidence depositions are not allowed, the IHRC's procedural rules provide for a special kind of subpoena to nonparties to obtain documents in anticipation of a hearing. 56 Ill.Admin. Code §5300.210(a)(1)(C).

Parts of the IDHR's investigation file are accessible to the parties in the case at the hearing stage pursuant to the IDHR's regulations. 2 Ill.Admin. Code §926.210. The IDHR will make

arrangements for the copying of the records in question. The party should be prepared to pay for the cost of the copies. Forms for requesting access to the investigation file are available online at [www.state.il.us/dhr/Forms/Forms-N.htm](http://www.state.il.us/dhr/Forms/Forms-N.htm). The form must be filled out and returned to the IDHR. It cannot be filed electronically.

It is important to note that, although anything that is in the IDHR's investigation file can be presented at hearing if it is otherwise admissible evidence, the investigation file is not automatically made part of the public hearing record at the IHRC. In most respects, the public hearing at the IHRC is a trial de novo.

One should also keep in mind that under the IHRC's rules (56 Ill.Admin. Code §5300.750(b)(4)) no IDHR or IHRC employee may testify at a hearing regarding the contents of the IDHR's investigation file or the results of any investigation except upon order of the ALJ based on a finding that the employee's testimony will be admissible and that no reasonable substitute is available. The latter rule is intended to protect the agencies' personnel resources. If a party desires to enter into evidence a statement that was made by the other party at a fact-finding conference, the best course of action is probably to submit a request to admit.

#### **4. [11.62] Subpoenas on Nonparties**

After all parties have answered the complaint or the time for answering the complaint has passed, a party may serve a subpoena on a nonparty for the production of documents or other physical evidence. 56 Ill.Admin. Code §5300.210(a)(1)(C). This procedure compensates for the fact that no discovery depositions are allowed. The subpoena to a nonparty allows parties under the IHRA to obtain needed documents from nonparties without setting up a deposition. Copies of subpoenas must be served on all parties, and any party, in addition to the subject of the subpoena, may file a motion to quash or modify. IHRA §8-104.

A difficult problem arises when a party wants records that are made confidential by the Mental Health and Developmental Disabilities Confidentiality Act, 740 ILCS 110/1, *et seq.* The problem is that individuals who have such records may not disclose them even if they are the subject of an administrative subpoena unless disclosure is specifically authorized by "a court." It is very clear from the context in which it is used that the IHRC is not a "court." In *In re Lauren & Peer Services, Inc.*, Charge No. 1991CN2575, 1996 ILHUM LEXIS 366 (Oct. 2, 1996), the full IHRC ruled that a party to a proceeding must first seek leave of an ALJ before serving a subpoena that seeks confidential mental health records. At that point, the subject of the subpoena may move to quash. If the motion to quash is denied, the subject of the subpoena must refuse to turn over the records. A petition for enforcement can then be filed in the circuit court. This moves the matter to a circuit court judge, who has the authority to authorize disclosure.

#### **5. [11.63] Motions**

The way motions are handled depends on three things: the place where the alleged discrimination occurred, whether the motion is dispositive, and whether the hearing has begun.

a. [11.64] *Motion Call*

If the site of the alleged violation is in Cook County and if the motion at issue involves a non-dispositive, prehearing matter, the motion will be considered on the assigned ALJ's motion call. When such a motion is filed with the IHRC, it should be entered on the IHRC's motion call book for the ALJ assigned to the case. The copy of the motion served on the other side must then contain a notice of hearing, which informs the party of the date and the time when the motion will be presented on the motion call. 56 Ill.Admin. Code §5300.730(d). The date entered on the motion call book must be at least two days after personal service of the notice of hearing or five days after service by mail. Personal service must be accomplished by 4:00 p.m. on a day, or it is considered served on the next business day. 56 Ill.Admin. Code §5300.730(d)(1). Each ALJ has his or her own motion call days, and a motion must be set for the ALJ assigned to the case. Accordingly, the practitioner may find that a motion cannot be heard for two or three weeks after the date that it is filed.

On the day specified in the motion call book, the motion will be called for hearing. If the matter cannot be resolved at that time, the ALJ may order briefing on the issue and reset the matter for a later time.

If a matter must be resolved before the next available motion call day, the movant should contact the clerk for the administrative law section of the IHRC. It is sometimes possible to arrange a conference call to take care of the matter. Similarly, if counsel is from out of state, it is sometimes possible to arrange a conference call through the clerk. Finally, if the parties have agreed to the entry of an order by the assigned judge, it is possible to have the judge sign the order without both parties being present on the motion call day.

b. [11.65] *Dispositive Motions*

Motions to dismiss and motions for summary decision are not generally considered on the motion call, regardless of the site of the alleged violation. All motions to dismiss the complaint must be served on the IDHR as well as the complainant. The ALJ will sometimes ask the IDHR to respond to a motion to dismiss if it involves the IDHR's jurisdiction or the nature of the investigation that led up to the filing of the complaint.

Motions for summary decision are specifically provided for under §8-106.1 of the IHRA. The motion will be granted if the pleadings and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a recommended order as a matter of law. The ALJ may recommend summary decision on the question of liability even though there is a genuine issue as to the relief to be awarded. IHRA §8-106.1(2).

It is important to keep in mind that if a motion for summary decision is filed with affidavits that are sufficient to warrant a decision in the moving party's favor, the pleadings that contradict the assertions in the affidavits will not be considered sufficient to raise a genuine issue of material fact. *Cano v. Village of Dolton*, 250 Ill.App.3d 130, 620 N.E.2d 1200, 189 Ill.Dec. 883 (1st Dist. 1993). Responsive affidavits or other verified materials must be submitted.

The nonmoving party has the right to reply to a motion within five days of the completion of service. 56 Ill.Admin. Code §5300.730(b). For most dispositive motions, the ALJ will set a more lengthy response time. Except in extraordinary cases, the time for response will not exceed 45 days. *Id.* An ALJ may not set a dispositive motion deadline that is more than 60 days before the hearing on the merits. IHRA §8-106.1(1).

*c. [11.66] Other Motions*

In many respects, all other non-motion call motions, including motions in cases from outside of Cook County, are handled in the same way as dispositive motions. The written motion is filed, and the other party has five days to respond. The judge may extend this time through a written briefing schedule. When the motion is fully briefed, the judge issues a written ruling. Motions to amend the pleadings or to take the testimony of IDHR employees must be served on the IDHR as well as the other parties.

Once the case is ready for hearing, motions may be made orally on the public hearing record. The ALJ assigned to the case may then rule on the motion in the course of the public hearing in the case. The ALJ assigned to the case must also rule on post-hearing motions. 56 Ill.Admin. Code §5300.530(b).

The ALJ's ability to rule on motions ends when a recommended order and/or decision is filed with the IHRC. *Id.* There is no such thing as a motion to reconsider a recommended order and decision. If one thinks that an ALJ has made a mistake, one must file exceptions to the recommended order. If one files a motion to reconsider, the time for filing exceptions may lapse before one is told that the ALJ who wrote the recommended order no longer has the ability to rule on motions. Unlike the analogous situation in circuit court, filing a motion to reconsider does not toll the time period for filing exceptions with the IHRC.

## **6. Interlocutory Appeals**

*a. [11.67] Administrative Law Judge Orders*

The IHRA does not provide for review by the IHRC of ALJs' interlocutory rulings except as part of the case as a whole submitted with the ALJ's recommended order and decision. However, the IHRC's regulations recognize that in exceptional circumstances an interlocutory ruling may merit individual attention. 56 Ill.Admin. Code §5300.740. The rule provides that an ALJ may "certify [such] a question for the Commission's consideration" when the ALJ determines that it "is of such extraordinary significance that a decision of the Commission is required prior to completion of the case." 56 Ill.Admin. Code §5300.740(a). As the language would suggest, the rule is infrequently invoked.

If the matter is certified, it is considered by the full IHRC based on the motions and briefs filed with the ALJ. Unless the IHRC requests additional briefs, the parties do not have the right to submit additional materials once the case is certified.

*b. [11.68] IHRC Orders*

Section 8-111 of the IHRA provides for interlocutory appellate review of IHRC orders. The procedure for obtaining such review is virtually the same as that for obtaining interlocutory review of a circuit court order. If a panel of the IHRC or the full IHRC finds that an interlocutory order involves a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, any party may petition the appellate court for permission to appeal the order. *Id.*

Supreme Court Rule 308 governs this process, except that references in that rule to the “trial court” are understood to be references to the IHRC. IHRC §8-11(A)(1).

**7. [11.69] Prehearing Memorandum**

As noted in §11.59 above, the initial packet that is served with the complaint contains a prehearing memorandum form. This form must be filled out and submitted by the parties by the due date. It must contain

- a. the name, address, and telephone number of counsel for each party;
- b. a comprehensive statement of all contested and uncontested material facts;
- c. a statement of the contested and uncontested issues of law relating to liability;
- d. a statement regarding the damages suffered by the complainant and the relief to which the complainant is entitled containing specific dollar figures for all monetary damages, attorneys’ fees, and costs as of the date the memorandum is submitted;
- e. a statement regarding the exhibits the parties will move into evidence, including objections and responses;
- f. a statement with respect to witnesses, including the identities of expert witnesses; and
- g. a certification that the parties have discussed settlement within the week prior to the filing of the prehearing memorandum.

It is generally the duty of the complainant to produce an initial draft of the prehearing memorandum. It is the practice of the IHRC’s ALJs to hold a prehearing conference to address any unresolved issues prior to the hearing.

**8. [11.70] Hearing**

IHRC hearings are public and are conducted by the ALJ assigned to the complaint. The IHRC prefers to schedule hearings for successive days until completed. 56 Ill.Admin. Code §5300.520(c). They are held within 100 miles of the site of the alleged infraction unless the

parties agree otherwise. The parties have the right and are well advised to be represented by counsel. Because corporations are legal entities that are distinct from their owners and officers, they must be represented by an attorney. Attorneys not licensed in Illinois may obtain leave to appear pro hac vice. 56 Ill.Admin. Code §5300.560(c).

Complainants are responsible for presenting the evidence in support of the complaint and respondents for presenting their defense. All parties may call, examine, and cross-examine witnesses whose testimony is taken under oath or affirmation. IHRA §8A-102(G)(2). IHRC subpoenas are available to the parties to secure the attendance of witnesses and/or the production of evidence at hearing; the parties bear responsibility for the service of their subpoenas and payment of the requisite witness and mileage fees. IHRA §8-104. A party may petition to proceed in forma pauperis under §8A-102(E) of the IHRA. If the ALJ grants leave to so proceed, the party may subpoena witnesses without the prepayment of fees. The subpoena has the same force and effect even though no witness fee is attached to it.

Under §8-104 of the IHRA, subpoenas are enforced through the staff of the IHRC. A motion must be filed with a three-member panel of the IHRC. If the motion is granted, the staff of the IHRC will work with the Attorney General's Office to prepare a petition that will be filed in circuit court. The circuit court then enforces the subpoena.

The appearance at the hearing of a party or a person who, at the time of the hearing, is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. No fee is required to be paid unless the party or person is a nonresident of the county. Under those circumstances, the ALJ may order the payment of reasonable expenses. IHRA §8A-102(H).

Upon motion, the ALJ may exclude witnesses from the hearing room, but one representative of each party in addition to counsel is allowed to remain even if there is an order of exclusion. 56 Ill.Admin. Code §5300.530(c). A party may call and examine a person as an adverse witness. 56 Ill.Admin. Code §5300.750(a). All testimony and other evidence are subject to the rules of evidence. IHRA §8A-102(G)(3). Section 10-40 of the Administrative Procedures Act, 5 ILCS 100/10-40, which allows for a relaxation of the evidentiary rules in administrative proceedings, does not apply. If testimony would not be admitted in circuit court, it is highly unlikely that it will be admitted at the IHRC hearing.

A transcript of each hearing is prepared and filed with the IHRC at its expense and is available thereafter to parties and the public. IHRA §8A-102(G)(2); 56 Ill.Admin. Code §5300.750(c). At the conclusion of the hearing, the ALJ will establish a briefing schedule.

## **9. [11.71] Proof**

The complainant must prove his or her case by a preponderance of the evidence. IHRA §8A-102(I)(1); *Eastman Kodak Co. v. Fair Employment Practices Commission*, 86 Ill.2d 60, 426 N.E.2d 877, 55 Ill.Dec. 552 (1981). Illinois has adopted the three-part method for proving employment discrimination first articulated by the United States Supreme Court in *McDonnell*

*Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973). See *Zaderaka v. Illinois Human Rights Commission*, 131 Ill.2d 172, 545 N.E.2d 684, 137 Ill.Dec. 31 (1989). The details of such proof are beyond the scope of this chapter.

Although Illinois courts generally follow the *McDonnell Douglas* method of proof, in “mixed motive” cases, the method of proof under the IHRA is not the same as under federal law. Under the IHRA, the employee must first present “direct evidence” that the employer considered an illegitimate factor, among others, in deciding to take the employment action at issue. *Chicago Housing Authority v. Human Rights Commission*, 325 Ill.App.3d 1115, 759 N.E.2d 37, 259 Ill.Dec. 557 (1st Dist. 2001). Under federal law, the Supreme Court has specifically rejected the argument that an employee has to produce direct evidence of discrimination before he or she is entitled to a mixed motive jury instruction. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 156 L.Ed.2d 84, 123 S.Ct. 2148 (2003).

## 10. [11.72] Settlements

If a case is settled at the IHRC level after the filing of a complaint, there are two options. After the parties reach a private settlement, the complainant can move for a voluntary dismissal of the complaint and charge and an ALJ can enter a final order that disposes of the case. As long as the motion is voluntary, it will be granted. 56 Ill.Admin. Code §5300.780. If the parties want the IHRC to retain jurisdiction for purposes of enforcement, the terms of the settlement must be presented to the IHRC for approval. 56 Ill.Admin. Code §5300.320. If the case is at the ALJ level, the terms should be presented to the ALJ for transmittal to the IHRC. 56 Ill.Admin. Code §5300.310(b). If the case is in front of an IHRC panel, the terms should be transmitted to the panel in the form of a joint motion for approval of terms of settlement. It is important in such circumstances to make it clear that the parties want the IHRC to approve the terms of settlement, not merely dismiss the case at the request of the complainant.

## 11. [11.73] Recommended Order and Decision

After the hearing and the submission of briefs, the ALJ will prepare a written decision. If the ALJ determines that, based on that decision, a party may be entitled to recover costs or attorneys’ fees under either §8A-102(I)(5) or §8A-104(G) of the IHRA, the decision will be designated as a Recommended Liability Determination (RLD). The RLD is not a final recommendation of the ALJ. It does not trigger the start of the time period for filing exceptions; it merely identifies the party who is entitled to recover attorneys’ fees and costs.

The RLD will be served on all parties. 56 Ill.Admin. Code §5300.760(e)(1). Within 21 days thereafter, the identified party may file a petition for an award of such relief, incorporating certain requirements set forth in the rules. 56 Ill.Admin. Code §5300.765. After a response by the petitioner’s adversary, the ALJ will decide the fee petition and issue a final Recommended Order and Decision (ROD) recommending the appropriate relief. 56 Ill.Admin. Code §5300.765(f). In any event, the final recommendation of the ALJ will be in the ROD. Many attorneys make the mistake of filing exceptions to the RLD and not filing exceptions to the ROD. Under the IHRA, exceptions may be filed only to the final recommendation of the ALJ, which is the ROD.

The ALJs' written decisions follow a standard format outlined in 56 Ill.Admin. Code §5300.760 and include enumerated findings of fact and conclusions of law, discussion of the issues, and an ultimate determination of whether a preponderance of the evidence sustains the violations alleged.

A case in which an ALJ cannot author a ROD because of death, disability, or separation from employment must be reheard by a different ALJ unless the parties file a joint motion stipulating that an ALJ other than the one who presided over the hearing may write the recommended decision. IHRA §8A-102(I)(4).

Section 8A-103(E)(1) of the IHRA provides that if no exceptions to the ROD are filed, the ROD automatically becomes the order of the IHRC. Thus, although RODs are cast in terms of a recommendation to the IHRC, they can become final and binding on the parties without IHRC review.

## **12. Review by the IHRC**

### *a. [11.74] Copies*

The rule for the number of copies that must be submitted changes once a case reaches the IHRC level. A filing that is directed to an IHRC panel must contain an original and 5 copies, except as otherwise provided. If the filing is to be considered by the full IHRC, there must be the original and 15 copies.

### *b. [11.75] Motions at the IHRC Level*

All motions at the IHRC level must be in writing. The motion should state on its face whether it is directed to a three-member panel or to the full IHRC. The other side has ten days to file a written response. The matter will be presented to the IHRC by its staff after the time for response has elapsed. The IHRC will then rule in writing. 56 Ill.Admin. Code §§5300.805, *et seq.* Exceptions to RODs are not treated like motions. The procedure for filing exceptions is described in §11.76 below.

### *c. [11.76] Exceptions*

A party has 30 days after service of the ROD to file written exceptions supported by argument. 56 Ill.Admin. Code §5300.920. A party is entitled to an automatic 15-day extension based on a timely motion. Any request for additional time must be approved by an IHRC panel. 56 Ill.Admin. Code §5300.940. It should be remembered that under §8A-103(E)(2) of the IHRA, the findings of fact of the ALJ must be upheld unless they are against the manifest weight of the evidence. Therefore, it is improper to ask the IHRC panel to reweigh the evidence or to determine witness credibility. Parties filing exceptions must supply the IHRC with an original and five copies. 56 Ill.Admin. Code §5300.40(e). As noted, if no exceptions are filed, the ROD automatically becomes the order of the IHRC. Accordingly, it is very important to ask for an extension of time to file exceptions before the 30 days are up.

*d. [11.77] Response to Exceptions*

Responses to exceptions are due within 21 days after service of the exceptions. 56 Ill.Admin. Code §5300.930. The IHRC's rules provide for an automatic 10-day extension based on a timely motion. 56 Ill.Admin. Code §5300.940. Objections may not be raised to a finding of an ALJ in a response to exceptions. If there is an objection to something the ALJ has done, exceptions should be filed even though the ultimate recommendation is favorable. The response must be limited to the points raised in the exceptions.

*e. [11.78] Acceptance of the Case*

The IHRC has the option of rejecting a case for review. No standards are provided in the IHRA for acceptance of a case for review. When review is declined, the parties receive a short notice from the IHRC by first class mail. IHRA §8A-103(E)(3).

The fact that an IHRC panel has declined to review a ROD does not prevent the filing of a petition for rehearing. Section 8A-103(F)(1) specifically allows parties to file petitions for rehearing within 30 days after service of the notification that review has been declined.

*f. [11.79] Oral Argument*

Either party may request oral argument on the exceptions. If one party does request oral argument and the other party does not, the party that did not ask for oral argument must file a notice of intention to participate at least ten days before the date set for oral argument. 56 Ill.Admin. Code §5300.950.

Section 8A-103(C) of the IHRA gives the IHRC the authority to deny oral argument in a case scheduled for review. Although it appears theoretically possible for the IHRC to deny oral argument and decide a case based on the written amendment, the power to deny oral argument was granted by P.A. 89-348 (eff. Jan. 1, 1996), which also gave the IHRC the power to decline review of a ROD. The context of the change makes it appear that it was the intent of the General Assembly to allow the IHRC to deny oral argument only in those cases in which review has been declined altogether.

Oral arguments are heard by three-member panels of the IHRC. These panels meet in Chicago and Springfield. There is no requirement that the oral argument be held near the site of the alleged violation or the original hearing. In general, if the hearing was held in front of an ALJ who has an office in Springfield, the oral argument will be in Springfield; otherwise, it will be in Chicago. A notice of the time and place of the oral argument will be sent out by the IHRC at least 20 days in advance.

In most cases the IHRC will give each side a set number of minutes for its main argument, and the party that filed the exceptions will be given additional time for rebuttal. There is no need to reserve time. The time periods may be extended if there is extensive questioning by the panel.

The members of the IHRC panel are not necessarily attorneys, but they have a great deal of expertise in the area of employment discrimination law. They are sent a packet with the ROD (including the RLD, if any), the exceptions, and the response at least ten days before the oral argument. In addition, the transcript and the common-law record are available to them both before and after the argument. The IHRC's counsel and executive director may be present during oral argument and may participate. This combination presents a unique challenge for the practitioner. The oral argument must be legally sufficient, but it must be understandable to an educated nonlawyer. Commissioners may have a better understanding than most lawyers of substantive employment discrimination law, but they may have little understanding of rules of evidence or principles of equity. It is a mistake to treat an oral argument in front of the IHRC in the same way as an appellate court argument. It is also a mistake, however, to treat it as a closing argument to a jury.

The final IHRC decision on a complaint is usually styled an "Order and Decision" (O & D). A party who is not happy with an IHRC decision has three options: petition for rehearing, petition for modification, or appeal to the appellate court.

*g. [11.80] Rehearing*

A party has 30 days after service of an O & D to petition for rehearing. IHRA §8A-103(F). It should be remembered that the IHRC deems service of an O & D complete four days after mailing. 56 Ill.Admin. Code §5300.20. Because the application for rehearing is directed to the full IHRC, the original should be filed with 15 copies. Such applications are viewed with disfavor and will be granted only if the case raises legal issues of significant impact or the petition shows that three-member panel decisions are in conflict. IHRA §8A-103(F)(2).

It is a mistake to argue in the petition the merits of a case that turns on a factual determination by an ALJ. First, questions of fact rarely meet the standard for granting rehearing. Second, the IHRC will give both parties an opportunity to argue the merits of their positions if rehearing is granted. The question to be addressed in a petition is not why one's client should win but why this case is important enough for the full IHRC to hear it.

There is no automatic right to reply to a petition for rehearing. If the IHRC wants to see a response before voting on the matter, it will send out an order to that effect. A response to a petition that is filed without leave of the IHRC will be stricken.

The IHRC will grant a petition for rehearing if 6 of the 13 Commissioners vote to accept the case. *Id.* If a petition is granted, the original order is nullified and the case is set for oral argument before the full IHRC. The IHRC will notify the parties of the particular issue that should be addressed.

The filing of an application for rehearing is optional. The failure to file such an application is not considered a failure to exhaust administrative remedies. IHRA §8A-103(F)(1). If an application is filed and denied, the time for appeal runs from the date of service of the order of denial. If the petition is granted, the appeal time runs from the date of service of the full IHRC decision on rehearing.

*h. [11.81] Judicial Review*

Final IHRC decisions are, by virtue of §8-111(A) of the IHRA, subject to judicial review. Proceedings for judicial review are commenced in the appellate court for the district in which the civil rights violation was committed. Direct review of administrative decisions in the appellate court is governed by S.Ct. Rule 335. Review is commenced by filing a petition for review with the clerk of the appellate court. The petition must name all parties of record and the IHRC. The Administrative Review Law provides that if a court decides that an entity or person who was not named as a party by the administrative agency is in fact a party, the plaintiff will be given an additional 21 days to serve the unnamed party. 735 ILCS 5/3-107. Although most aspects of the Administrative Review Law have been incorporated by reference by S.Ct. Rule 335 for use in direct appellate review of administrative decisions, this particular section has not. P.A. 88-1 (eff. Jan. 1, 1994) purports to make the Administrative Review Law applicable to direct appellate review of administrative decisions. 735 ILCS 5/3-113. If there is a conflict, however, the courts will apply the Supreme Court rule, not the statute. In fact, in *Dahman v. Illinois Department of Human Rights*, 334 Ill.App.3d 660, 778 N.E.2d 732, 268 Ill.Dec. 466 (4th Dist. 2002), the court found that §3-107 of the Administrative Review Law does not apply to direct review of final orders under the IHRA and dismissed a sexual harassment case against an employer and a coworker because the coworker was not named in the petition for review. In any event, it is not a good idea to depend on the 21-day grace period. All parties to the case, even those not named by the IHRC, should be named as parties respondent in the petition for review.

The time for filing a petition for review is 35 days after service of the final order of the IHRC. The IHRC deems service complete four days after mailing. 56 Ill.Admin. Code §5300.30. It has been held that even when it is clear that the appellant received the final decision sooner, the 35-day appeal period does not begin until 4 days after the final order was mailed. *Gemini Services, Inc. v. Martin*, 141 Ill.App.3d 17, 489 N.E.2d 1145, 95 Ill.Dec. 417 (4th Dist. 1986). The IDHR presumes that an order is served five days after mailing. Thus, in most cases, the appellant has 40 days to file a petition for review from an IDHR order (*Moren v. Illinois Department of Human Rights*, 338 Ill.App.3d 906, 790 N.E.2d 86, 88 – 89, 273 Ill.Dec. 944 (1st Dist. 2003)), but only 39 days to file an appeal of an IHRC order.

As of the date of publication of this chapter, H.B. No. 1509 had been passed by the General Assembly but not signed by the Governor. If the bill becomes law, it would give the IHRC responsibility for deciding requests for review. Thus, parties would have 39 (not 40) days from the date of issuance of the order to appeal denials of requests for review. The new law would apply to charges filed after January 1, 2008.

The appellant is limited on review to subjects that were raised in exceptions to the IHRC. If an issue was not raised by way of exception to the ROD, it is considered waived. *Johnson v. Human Rights Commission*, 173 Ill.App.3d 564, 527 N.E.2d 883, 123 Ill.Dec. 245 (1st Dist. 1988). This doctrine does not include jurisdictional issues, which cannot be waived.

It is a mistake to think that filing an appeal automatically stays the effect of the IHRC decision. Under S.Ct. Rule 335(g), an application for stay must be filed with the IHRC. If that

application is denied, a subsequent application may be filed with the appellate court. If the petition for stay is denied in both forums, there must be compliance with the IHRC order despite the pendency of the appeal.

*i. [11.82] Modification of IHRC Orders*

If there is a problem with an IHRC order that can be fixed through modification, the IHRA gives the three-member panel an opportunity to change the decision at any time until there is a final order from the court on judicial review. IHRA §8A-103(G). This provision has been used by the IHRC to modify damages awards to include damages that accrued subsequent to the issuance of the ROD. The use of the modification section of the IHRA to update damages awards has been approved by the appellate court. *ISS International Service System, Inc. v. Illinois Human Rights Commission*, 272 Ill.App.3d 969, 651 N.E.2d 592, 209 Ill.Dec. 414 (1st Dist. 1995). When the IHRC issues a modified decision, it represents a separate, appealable order. The IHRC's ability to modify does not make the original decision non-final. *Babcock & Wilcox Co. v. Department of Human Rights*, 189 Ill.App.3d 827, 545 N.E.2d 799, 137 Ill.Dec. 146 (2d Dist. 1989).

**D. [11.83] Enforcement of IHRC Decisions**

Section 8-111 of the IHRA provides two methods for enforcing IHRC decisions. Under §8-111(B)(1) of the IHRA, either the IDHR or the aggrieved party may petition the IHRC for enforcement. A three-member panel of the IHRC will consider the matter and decide whether enforcement should be granted. If the panel determines that it should, the panel will order the IDHR to commence an action in the circuit court. As a practical matter, the IDHR does not have the ability to go into circuit court on its own. All state agencies must be represented by the Attorney General. Thus, petitions under this subsection go from the IHRC to the IDHR to the Attorney General to the circuit court.

Under §8-111(B)(2) of the IHRA, the aggrieved party may go into circuit court directly. Once in circuit court, the case is treated in the same way as if it had been filed by the State. Thus, about the only advantage to proceeding through the IHRC is that the Attorney General's Office does the bulk of the work.

Once a complaint has been filed, the circuit court may order all of the relief sought, the advantage being that circuit court judges have a wide range of tools to ensure compliance, including civil contempt. IHRA §8-111(B)(5). The venue for an enforcement complaint is the county in which the alleged civil rights violation was committed. S.Ct. Rule 335(i).

**V. REMEDIES UNDER THE IHRA**

**A. [11.84] Generally**

Section 8A-104 of the IHRA prescribes the forms of relief available in the event a violation of the IHRA is proved. As they apply to employment cases, the remedies provided are generally like those available in federal employment discrimination cases, with some potential differences noted in §§11.85 – 11.88 below.

**B. [11.85] Backpay and Reinstatement**

The IHRC may order that the respondent cease and desist from practices found unlawful. IHRA §8A-104(A). It may require that the complainant be hired, reinstated, promoted, or admitted to an apprenticeship or training program or a labor organization, with backpay and the restoration of appropriate fringe benefits. IHRA §§8A-104(C), 8A-104(D). It also may order any other form of relief that is necessary to make the complainant whole. IHRA §8A-104(J).

A complainant who prevails in a claim involving the discriminatory loss or denial of a job is presumptively entitled to be awarded the position with full backpay, absent exceptional circumstances. *In re Clay & Illinois Department of Corrections*, 7 Ill.H.R.C.Rep. 46 (1982). If the amount of backpay is inherently speculative and if the complainant has set forth a plausible case for a specific amount of damages, any doubts must be resolved in favor of the complainant and against the employer who committed the civil rights violation. *Clark v. Human Rights Commission*, 141 Ill.App.3d 178, 490 N.E.2d 29, 95 Ill.Dec. 556 (1st Dist. 1986). There is, however, no right to reinstatement and backpay after a proven violation. For example, the IHRC declined to award reinstatement when the evidence showed the complainant had been guilty of significant misconduct. *In re Walsh & Village of Oak Lawn Police Department*, 9 Ill.H.R.C.Rep. 129 (1983), *rev'd on other grounds sub nom. Village of Oak Lawn v. Illinois Human Rights Commission*, 133 Ill.App.3d 221 (1st Dist. 1985); *In re Culbertson & Curtis Detective Agency*, 8 Ill.H.R.C.Rep. 260 (1983). The IHRC may not award relief that would force the employer to violate a valid, nondiscriminatory collective bargaining agreement reached under federal labor law. *Carver Lumber Co. v. Human Rights Commission*, 162 Ill.App.3d 419, 515 N.E.2d 417, 113 Ill.Dec. 608 (3d Dist. 1987). The mere fact that a complainant has a right to arbitration under a collective bargaining agreement does not, however, prevent the individual from exercising the right to a hearing under state law. *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 100 L.Ed.2d 410, 108 S.Ct. 1877 (1988). The complainant may proceed as long as the claim of discrimination does not depend on a particular interpretation of the collective bargaining agreement. *See Lara-Girjikian v. Mexicana Airlines*, 307 Ill.App.3d 510, 718 N.E.2d 584, 241 Ill.Dec. 13 (1st Dist. 1999), for application of this principle to IHRA cases that involve an interpretation of the Railway Labor Act.

A prevailing complainant's backpay award will be reduced by the amount of any unemployment compensation benefits received. If, however, the complainant is forced to pay back the unemployment compensation received, then the employer can no longer count the unemployment compensation as a credit. *In re Brown & Cresco Lines, Inc.*, 46 Ill.H.R.C.Rep. 184 (1985). Similarly, the IHRC takes the position that a complainant may not keep both disability benefits made available to the complainant through the employer and a backpay award for the same period of time. This view was upheld by the appellate court as within the discretion of the IHRC. *City of Chicago v. Illinois Human Rights Commission*, 264 Ill.App.3d 982, 637 N.E.2d 589, 202 Ill.Dec. 50 (1st Dist. 1994). The court said that the IHRC has the ability to deny benefits in this kind of situation, even if the benefits in question could be characterized as "collateral" under the collateral source rule. 637 N.E.2d at 594.

If the complainant had another job outside of normal working hours, the earnings from that job will not be considered an offset to the backpay award. For example, in *ISS International Services System, Inc. v. Illinois Human Rights Commission*, 272 Ill.App.3d 969, 651 N.E.2d 592, 209 Ill.Dec. 414 (1st Dist. 1995), both complainants had full-time jobs in addition to their jobs with the respondent. The complainants were entitled to full backpay for the loss of their jobs with the respondent despite the existence of the other jobs.

The complainant has a duty to attempt to mitigate damages by obtaining other employment while the charge is pending. *Chas. A. Stevens & Co. v. Human Rights Commission*, 196 Ill.App.3d 748, 554 N.E.2d 976, 143 Ill.Dec. 904 (1st Dist. 1990). If the complainant fails to mitigate damages, the amount of money that could have been earned will be deducted from the backpay award. In fact, in *In re Cliburn & Veterans of Foreign Wars, Department of Illinois*, 42 Ill.H.R.C.Rep. 176 (1988), the IHRC cut off all backpay for the time period after the complainant quit a part-time job that had been accepted in mitigation of damages.

The failure of the complainant to mitigate damages is an affirmative defense that must be pled and proved by the respondent. The respondent must prove both (1) that the complainant failed to use reasonable care and diligence in seeking substantially equivalent positions and (2) that substantially equivalent positions were available. *In re Golden & Clark Oil & Refining Corp.*, Charge No. 1978CF0703, 63 Ill.H.R.C.Rep. 1094 (July 13, 1991).

Although the IHRC prefers to award backpay and reinstatement, it is sometimes impossible to do so. Under those circumstances, the IHRC may award “front pay,” which is an amount of money that will make up for pay that the complainant will lose in the future due to a civil rights violation. *Chas. A. Stevens & Co.*, *supra*. In *In re Brigel & Builders Heating, Inc.*, Charge No. 1987CN2158, 1993 ILHUM LEXIS 260 (May 7, 1993), the IHRC awarded front pay to a complainant when the harassment that was the subject of the complaint was so intense and damaging that he was mentally unable to go back to his job after the finding of discrimination. The IHRC also said in that case, however, that a layperson could not competently testify as to the expected length of such a mental disability.

Prejudgment interest is available on actual damages and backpay starting from the date of the violation. IHRA §8A-104(J).

### C. [11.86] Actual Damages

Section 8A-104(B) of the IHRA empowers the IHRC to order the payment of “actual damages” for injury or loss suffered by the complainant. The IHRC has interpreted this language to cover non-economic damages such as pain and suffering. This view has been upheld by the appellate court. *Village of Bellwood Board of Fire & Police Commissioners v. Human Rights Commission*, 184 Ill.App.3d 339, 541 N.E.2d 1248, 133 Ill.Dec. 810 (1st Dist. 1989). The court cautioned, however, that an award for such damages must be kept within reasonable parameters. The IHRC itself has stated that it will presume that the recovery of all pecuniary losses, such as backpay, will fully compensate an aggrieved party for his or her losses. If it is absolutely clear that the recovery of pecuniary losses will not compensate the complainant for all “actual”

damages, the IHRC will award an amount of money that is adequate to make up for the humiliation and embarrassment caused by the violation of the IHRA. *In re Smith & Cook County Sheriff's Office*, Charge No. 1982CF1564, 1985 ILHUM LEXIS 2 (Oct. 31, 1985).

Unlike Title VII, there is no set limit on the amount of non-economic damages that may be awarded under the IHRA. In general, however, IHRC awards for non-economic damages have been much smaller than equivalent awards in federal court. The IHRC has been criticized for being too conservative in its awards for emotional distress. *ISS International Services System, Inc. v. Illinois Human Rights Commission*, 272 Ill.App.3d 969, 651 N.E.2d 592, 209 Ill.Dec. 414 (1st Dist. 1995).

Punitive damages are not available under the IHRA for employment discrimination claims.

#### **D. [11.87] Costs and Attorneys' Fees**

Under §8A-104(G) of the IHRA, a prevailing complainant may recover from an adversary reasonable costs and expenses, including attorneys' fees, incurred in bringing and maintaining the action. The point in the proceedings at which it is appropriate for a prevailing party to submit a request for such relief is described in §11.73 above.

The IHRC has had occasion in several decisions to outline the methodology it will employ in determining the amount of attorneys' fees to be awarded a successful complainant. The starting point is the attorney's regular hourly rate, multiplied by the number of hours worked. *In re Clark & Champaign National Bank*, 4 Ill.H.R.C.Rep. 193 (1982). It is recognized that most complainants' attorneys do not bill on an hourly basis for the type of work involved in pursuing a claim under the IHRA. Accordingly, it is sufficient if the complainant shows the prevailing community rate for the type of work involved, which can be accomplished by submitting affidavits reciting the precise fees that attorneys with similar qualifications have received from fee-paying clients in comparable cases. There is quite a bit of confusion about this requirement. It is not sufficient for an affidavit to state as a conclusion that a particular dollar figure is the community rate. The affidavit should describe who received the fee, the type of qualifications the attorney had, and the type of work involved.

Because IHRA cases can take years to resolve, the question arises whether the attorney should be reimbursed at the rate he or she charges when the petition is filed, or the rate he or she charged when the work was done. The IHRC has taken the position that ALJs have the power to use current rates in order to account for the effects of inflation and the loss of the use of money over time. On the other hand, it is not appropriate to use current rates when the attorney's current rate is much higher due to a change in status or professional credentials. *In re Smith & Professional Service Industries, Inc.*, Charge No. 1987CN1189, 1993 ILHUM LEXIS 257 (May 7, 1993).

The IHRC will order reimbursement for all hours reasonably spent by an attorney on successful claims. If there are separable claims on which the complainant did not prevail, the hours spent on those claims must be excluded. When it is impossible to separate time spent on unsuccessful claims from time spent on successful claims, the IHRC will reduce the overall fee

by a percentage that reflects the overall degree of success enjoyed by the complainant. *In re Clark & Western Union Telegraph Co.*, 10 Ill.H.R.C.Rep. 316 (1983). One should keep in mind, however, that the degree of success is not measured by the amount of damages suffered by the complainant on the successful claim. This means that even if the complainant has suffered relatively small monetary damages with respect to the successful claim and relatively great damages with respect to the unsuccessful claim, the ALJ does not automatically substantially reduce the amount of attorneys' fees awarded. For example, in *Brewington v. Illinois Department of Corrections*, 161 Ill.App.3d 54, 513 N.E.2d 1056, 112 Ill.Dec. 447 (1st Dist. 1987), the complainant successfully proved discrimination but was unable to prove that it resulted in a constructive discharge. Nevertheless, the appellate court approved an IHRC decision that granted the complainant 90 percent of her attorneys' fees.

The IHRA provides for reimbursement for attorneys' fees at all stages of the action. In *ISS International Services System, Inc. v. Illinois Human Rights Commission*, 272 Ill.App.3d 969, 651 N.E.2d 592, 209 Ill.Dec. 414 (1st Dist. 1995), the appellate court approved the IHRC's practice of issuing an O & D that awards attorneys' fees for all work done at the ALJ level. After that, the successful complainant can petition the IHRC to modify an order to include all attorneys' fees incurred up to the issuance of the O & D. A successful complainant is also entitled to attorneys' fees for defending the IHRC decision in appellate court and for any necessary hours spent enforcing the IHRC decision in circuit court. There is no indication in the IHRA as to how such fees are calculated or awarded. In *ISS*, the appellate court remanded the case to the IHRC to determine the amount of attorneys' fees and damages that had accrued while the case was pending in the appellate court.

The IHRC has ruled that in most instances, an attorney will not receive the full hourly fee for time spent traveling or performing other non-legal functions. *In re Wood & University of Illinois at Urbana/Champaign*, Charge No. 1989SF0560, 1994 ILHUM LEXIS 107 (Nov. 21, 1994).

Section 8A-102(I)(5) of the IHRA allows an ALJ to recommend an award of attorneys' fees to a respondent if the judge concludes that the complaint was frivolous, unreasonable, or groundless or that the complainant continued to litigate after it became clearly so. The mere fact that a complainant presents a weak claim, however, is not enough to fulfill this standard. A prevailing respondent's application for a fee award has been denied even though the complainant had been unable to establish a prima facie case. *In re Parker & Danville Metal Stamping Co.*, 10 Ill.H.R.C.Rep. 224 (1983).

Attorneys' fees may be awarded as a sanction for unreasonable conduct in front of the IHRC, regardless of which side ultimately prevails on the merits at a scheduled hearing. Under 56 Ill.Admin. Code §5300.750(e), attorneys' fees may be awarded if a party fails to appear at a scheduled hearing, refuses to comply with an order, or otherwise engages in conduct that unreasonably delays or protracts proceedings. The obligation for paying the attorneys' fees may fall on either a party or an attorney or both.

#### **E. [11.88] Additional Sanctions for Public Contractors**

When the respondent holds a contract with the state or a local governmental unit in Illinois at the time it commits a violation of the IHRA, it may be liable to the complainant for the individual

relief mentioned in §§11.85 – 11.87 above and also may face special penalties exacted under §8-109(A) of the IHRA. That section provides that in such an instance the IHRC may order termination of the public contract, debarment of the respondent from further public contracts for up to three years, and assessment of a penalty (payable to the state treasury) equivalent to the profits earned on the public contract. Such orders can be entered, however, only if the IHRC concludes that the respondent's act or practice that is held to have violated the IHRA was authorized, requested, commanded, performed, or knowingly permitted by the board of directors of the respondent or by an officer or executive agency acting within the scope of his or her employment.

It is not clear exactly what this language means. Cases in which public contractor sanctions are an issue rarely make it to the IHRC level.

## **VI. [11.89] EFFECT OF IHRA DECISIONS ON FEDERAL CLAIMS**

In many cases the same allegations will state a cause of action under both the IHRA and Title VII. The Seventh Circuit Court of Appeals has ruled that an unreviewed finding against a complainant by the IHRC under state law does not prevent the complainant from relitigating the exact same issue in federal district court under Title VII. *Buckhalter v. Pepsi-Cola General Bottlers, Inc.*, 820 F.2d 892 (7th Cir. 1987). The court also stated, however, that an adverse IHRC finding does preclude relitigating the same claim based on the Civil War-era civil rights statutes, *e.g.*, 42 U.S.C. §1983.

The practitioner should note, however, that if the IHRC decision is appealed and if the appeal is upheld by an Illinois court, the federal courts will give that determination full faith and credit. *Compare Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 72 L.Ed.2d 262, 102 S.Ct. 1883 (1982), *with University of Tennessee v. Elliott*, 478 U.S. 788, 92 L.Ed.2d 635, 106 S.Ct. 3220 (1986).

## **VII. EFFECT OF OTHER STATE PROCEEDINGS AND LAWS ON IHRA CLAIMS**

### **A. [11.90] State Agency Determinations**

The IHRC has ruled that it will not give preclusive effect to factual findings of the Illinois Civil Service Commission. *In re Moore & State of Illinois, Department of Public Aid*, 14 Ill.H.R.C.Rep. 261 (1984). The IHRC takes the position that it has the exclusive authority to decide cases brought under the IHRA.

In *Board of Trustees of Police Pension Fund of City of Urbana v. Illinois Human Rights Commission*, 141 Ill.App.3d 447, 490 N.E.2d 232, 95 Ill.Dec. 759 (4th Dist. 1986), the appellate court ruled that the Board of Trustees of the Police Pension Fund of the City of Urbana had exclusive authority to decide who would be admitted into the police pension fund. The court

found that even if the complainant had been discriminated against because of a physical handicap, his exclusive remedy was to appeal the decision of the pension fund to the circuit court under the Administrative Review Law. He could not file a charge against the pension fund even though the charge, on its face, stated a violation of the IHRA.

This same analysis does not apply to decisions made by police and fire commissioners. An individual with a handicap may bring a charge against police or fire boards for discrimination under the IHRA. *City of Belleville, Board of Police & Fire Commissioners v. Human Rights Commission*, 167 Ill.App.3d 834, 522 N.E.2d 268, 118 Ill.Dec. 813 (5th Dist. 1988). In *Village of Maywood Board of Fire & Police Commissioners v. Department of Human Rights of State of Illinois*, 296 Ill.App.3d 570, 695 N.E.2d 873, 231 Ill.Dec. 100 (1st Dist. 1998), the appellate court ruled that even if a complainant has the opportunity to raise a bias claim in front of a police merit board or similar quasi-judicial entity and even if that board's decision has been appealed to the circuit court pursuant to the Administrative Review Law, nothing prevents the complainant from raising the bias claim in the form of a charge of discrimination filed with the IDHR. The court ruled that no other agency or court has jurisdiction over an alleged violation of the IHRA and, therefore, decisions by merit boards cannot be res judicata with respect to a charge of discrimination under the IHRA.

It appears that the rule is not the same in federal court, at least with respect to state and local employees. In *Garcia v. Village of Mount Prospect*, 360 F.3d 630 (7th Cir. 2004), the court ruled that a former village police officer could not bring a Title VII or §1981 claim in federal court because he could have raised the issues of racial bias and retaliation in the state court system, either in administrative review of a police pension board decision or in administrative review of an IHRC decision. Once the plaintiff brought the case into the state court system on his administrative appeal of the pension board decision, he could not bring a discrimination claim in federal court based on the same facts.

## **B. [11.91] Laws and Regulations**

Even when an employer is specifically required to do something under another state law, there may still be a determination that the employer's conduct violated the IHRA. In *State of Illinois v. Mikusch*, 138 Ill.2d 242, 562 N.E.2d 168, 149 Ill.Dec. 704 (1990), the Illinois Vehicle Code, 625 ILCS 5/1-100, *et seq.*, compelled the Secretary of State to retire an unwilling investigator at the age of 60 despite the fact that this violated the IHRA. The Illinois Supreme Court used standard principles of statutory construction to determine the intent of the state legislature. It found that the mandatory retirement policy of the Secretary of State was age discrimination in violation of the IHRA. Parenthetically, it should be noted that in this particular instance the General Assembly legislatively reversed this result and made forced retirement under the Vehicle Code an exception to the IHRA's prohibition against age discrimination. *See In re Langley & Illinois Secretary of State*, Charge No. 1991SA0096, 1999 ILHUM LEXIS 52 (Apr. 23, 1999).

The IHRC has ruled that when an employer is arguing that it is compelled to take an action by valid regulations of another state agency, it must show, as a matter of law, that the regulations do, indeed, compel the action in question. It is not enough for an employer to have a reasonable, good-faith belief that its actions were required by another section of the Illinois Administrative

Code. *In re Davis & Raintree Health Care Center, Inc.*, Charge No. 1988CH2190, 1994 ILHUM LEXIS 225 (Apr. 15, 1994). This view was upheld by the appellate court in *Raintree Health Care Center v. Human Rights Commission*, 275 Ill.App.3d 387, 655 N.E.2d 944, 211 Ill.Dec. 561 (1st Dist. 1995).

