2013 IL App (4th) 120603-U

NO. 4-12-0603

FILED
May 7, 2013
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KATHY J. MOWEN,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Sangamon County
THE DEPARTMENT OF VETERANS AFFAIRS,	)	No. 11L139
Defendant-Appellee.	)	
	)	Honorable
	)	John Schmidt,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: Because the legislature has not clearly and unequivocally waived sovereign immunity in the Illinois Human Rights Act (775 ILCS 5/1-101 to 10-104 (West 2010)), the trial court was correct to grant the state employer's motion for dismissal pursuant to section 2-619(a)(1) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(1) (West 2010)).

¶ 2 The plaintiff is Kathy J. Owen, and the defendant is her former employer, the Illinois Department of Veterans Affairs. She sued defendant in circuit court for unlawful discrimination. Some of the counts in her complaint alleged violations of the Illinois Human Rights Act. Invoking sovereign immunity, defendant moved for dismissal of the counts arising under that statute. See 735 ILCS 5/2-619(a)(1) (West 2010). The trial court granted the motion and made a finding under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010). Plaintiff appeals.

¶ 3 In our *de novo* review (*Country Mutual Insurance Co. v. D & M Tile, Inc.*, 394 Ill.

App. 3d 729, 735 (2009)), we affirm the trial court's judgment because we find no clear and unequivocal waiver of sovereign immunity in the Illinois Human Rights Act.

¶ 4 I. BACKGROUND

¶ 5 On June 14, 2010, plaintiff filed a charge of discrimination with the Illinois Department of Human Rights (hereinafter, "the Department"). The charge alleged that defendant had taken adverse employment actions against her because of her sexual orientation, her disabilities, and her age. See 775 ILCS 5/1-103(Q) (West 2010).

¶ 6 On May 17, 2011, after performing an investigation and holding a fact-finding conference (see 775 ILCS 5/7A-102(C)(1), (C)(4) (West 2010)), the Department served upon the parties a document entitled "Notice of Substantial Evidence and Notice of Dismissal." In that document, the Department notified the parties it had found substantial evidence of discrimination by defendant on the basis of plaintiff's sexual orientation and on the basis of one her disabilities, dysphagia. As to those particular claims of discrimination, the Department wrote that plaintiff now had two options: one of her options was to notify the Department, in writing, within 14 days of her receipt of the notice, that she wanted the Department to file a complaint on her behalf with the Illinois Human Rights Commission (hereinafter, "the Commission"). Alternatively, her other option was to "[c]ommence a civil action in the appropriate state court within ninety (90) days after receipt of this notice." The notice added: "A complaint should be filed in the circuit court in the county where the civil rights violation was allegedly committed."

¶ 7 As for the remaining claims in plaintiff's charge of discrimination, *i.e.*, the claims that defendant had discriminated against her on the basis of her age and on the basis of her other disability, Sjogren's disease, the Department notified the parties it had found a lack of substantial

evidence and that it therefore was dismissing those claims. The Department wrote that plaintiff could do either of two things with respect to those dismissed claims: she could ask the Commission to review the dismissal, or she could commence a civil action in circuit court within 90 days.

¶ 8 Plaintiff took the judicial route. On August 3, 2011, she filed a complaint against defendant in the Cook County circuit court. The complaint consisted of seven counts, and it alleged that defendant had violated the Illinois Human Rights Act (775 ILCS 5/1-101 to 10-104 (West 2010)), the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621 to 624 (2006)), and the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 to 12213 (2006)).

¶ 9 On September 30, 2011, the Cook County circuit court transferred the case to the Sangamon County circuit court.

¶ 10 On December 19, 2011, defendant filed an answer to the complaint as well as a combined motion to dismiss certain counts of the complaint. See 735 ILCS 5/2-619.1 (West 2010). Defendant contended that counts III and V, arising under the Americans with Disabilities Act of 1990, failed to state a cause of action (735 ILCS 5/2-615 (West 2010)) and that, because of the doctrine of sovereign immunity, the trial court lacked subject matter jurisdiction over counts I, II, IV, and VI, which arose under the Illinois Human Rights Act (735 ILCS 5/2-619(a)(1) (West 2010)).

¶ 11 On April 2, 2012, the trial court granted defendant's motion to dismiss counts I, II, IV, and VI, with prejudice, on the ground of sovereign immunity. Also, the court dismissed counts III and V, without prejudice, for failure to state a cause of action.

¶ 12 On June 14, 2012, in response to plaintiff's motion for reconsideration, the trial court gave her leave to replead counts III and V within 28 days, but the court adhered to its decision to dismiss counts I, II, IV, and VI with prejudice. At the same time, the court made a finding, pursuant

to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), that there was no just reason to delay either the enforcement of its order of April 2, 2012, or an appeal from that order. The court added that the 28-day period for repleading counts III and V would be stayed in the event that plaintiff took an interlocutory appeal.

¶ 13 Plaintiff filed her notice of appeal on June 25, 2012.

¶ 14 II. ANALYSIS

¶ 15 A. The Necessity for a Clear and Unequivocal Waiver of Sovereign Immunity

¶ 16 Sovereign immunity originally was a common-law doctrine that protected the government from being sued unless the government consented to be sued. *Jackson v. Alverez*, 358 Ill. App. 3d 555, 559 (2005). Section 4 of article XIII of the Illinois Constitution of 1970 (Ill. Const. 1970, art. XIII, § 4) declared sovereign immunity to be abolished "[e]xcept as the General Assembly [might] provide by law." The General Assembly restored sovereign immunity by passing the State Lawsuit Immunity Act (745 ILCS 5/0.01 to 1.5 (West 2010)), which states in section 1 (745 ILCS 5/1 (West 2010)): "Except as provided in the Illinois Public Labor Relations Act, the Court of Claims Act, the State Officials and Employees Ethics Act, Section 1.5 of this Act, and, except as provided in *** the Clean Coal FutureGen for Illinois Act, the State of Illinois shall not be made a defendant or party in any court." Thus, sovereign immunity came back into force, with statutory exceptions.

¶ 17 The exceptions to sovereign immunity do not have to be expressed in the acts listed in section 1 of the State Lawsuit Immunity Act. *Lynch v. Department of Transportation*, 2012 IL App (4th) 111040, ¶ 23. The legislature may waive sovereign immunity in other statutes, but the waiver has to be "clear and unequivocal." *Id.* If a statute provides a remedy in general language

without clearly specifying that the remedy is available against the state, the state retains its sovereign immunity. *In re Special Education of Walker*, 131 Ill. 2d 300, 304 (1989); *Department of Revenue v. Appellate Court*, 67 Ill. 2d 392, 396 (1977).

¶ 18 B. The Lack of Such a Clear and Unequivocal Waiver in the Illinois Human Rights Act

¶ 19 Plaintiff argues that two features of the Illinois Human Rights Act amount to a clear and unequivocal waiver of sovereign immunity: (1) the inclusion of the state in the definition of "[e]mployer" (775 ILCS 5/2-101(B)(1)(c) (West 2010)) and (2) the provisions giving the complainant the option of suing the respondent in circuit court after the Department concludes its investigation (775 ILCS 5/7A-102(D)(3), (D)(4), (F)(2), (G)(2) (West 2010)).

¶ 20 Section 2-101(B)(1)(c) of the Illinois Human Rights Act defines "[e]mployer" to include "[t]he State and any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees[.]" 775 ILCS 5/2-101(B)(1)(c) (West 2010). An "employer" commits a "civil rights violation" if, when taking an adverse employment action, the employer has any of several impermissible motivations that fall under the heading of "unlawful discrimination." 775 ILCS 5/2-102(A) (West 2010). Section 2-102(A) (775 ILCS 5/2-102(A) (West 2010)) provides:

> "§ 2-102. Civil Rights Violations—Employment. It is a civil rights violation:
>
> (A) Employers. For an employer to refuse to hire, to segregate, or to act with respect to recruitment, hiring, promotion, renewal of employment, selection

> for training or apprenticeship, discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination or citizenship status."

¶ 21 Section 1-103(Q) (775 ILCS 5/1-103(Q) (West 2010)) in turn defines "[u]nlawful [d]iscrimination" as "discrimination against a person because of his or her race, color, religion, national origin, ancestry, age, sex, marital status, order of protection status, disability, military status, sexual orientation, or unfavorable discharge from military service." Thus, if a state employer acts with respect to discipline or discharge on the basis of the employee's sexual orientation or disability (to use those bases as examples), the state employer commits a civil rights violation.

¶ 22 If an employer, including a state agency, commits a civil rights violation, the aggrieved party may file a charge against that employer with the Department. 775 ILCS 5/7A-102 (A)(1) (West 2010). The Department will investigate the charge (775 ILCS 5/7A-102(C) (West 2010)) and will prepare a report of its investigation for the director of the Department (775 ILCS 5/7A-102(D)(1) (West 2010)). After reading the report, the director will determine whether there is substantial evidence of a civil rights violation. 775 ILCS 5/7A-102(D)(2) (West 2010)).

¶ 23 Section 7A-102(D)(3) (775 ILCS 5/7A-102(D)(3) (West 2010)) describes what will happen if the director determines there is no substantial evidence of a civil rights violation:

> "(3) If the Director determines that there is no substantial evidence, the charge shall be dismissed by order of the Director and the Director shall give the complainant notice of his or her right to seek review of the dismissal order before the Commission or

commence a civil action in the appropriate circuit court. If the complainant chooses to have the Human Rights Commission review the dismissal order, he or she shall file a request for review with the Commission within 90 days after receipt of the Director's notice. If the complainant chooses to file a request for review with the Commission, he or she may not later commence a civil action in a circuit court. If the complainant chooses to commence a civil action in a circuit court, he or she must do so within 90 days after receipt of the Director's notice."

¶ 24 Section 7A-102(D)(4) (775 ILCS 5/7A-102(D)(4) (West 2010)) describes what will happen if the director determines there is substantial evidence of a civil rights violation:

"(4) If the Director determines that there is substantial evidence, he or she shall notify the complainant and respondent of that determination. The Director shall also notify the parties that the complainant has the right to either commence a civil action in the appropriate circuit court or request that the Department of Human Rights file a complaint with the Human Rights Commission on his or her behalf. Any such complaint shall be filed within 90 days after receipt of the Director's notice. If the complainant chooses to have the Department file a complaint with the Human Rights Commission on his or her behalf, the complainant must, within 30 days after receipt of the Director's notice, request in writing that the Department

file the complaint. If the complainant timely requests that the Department file the complaint, the Department shall file the complaint on his or her behalf. If the complainant fails to timely request that the Department file the complaint, the complainant may file his or her complaint with the Commission or commence a civil action in the appropriate circuit court. If the complainant files a complaint with the Human Rights Commission, the complainant shall give notice to the Department of the filing of the complaint with the Human Rights Commission."

¶ 25 Section 7A-102(F) (775 ILCS 5/7A-102(F) (West 2010)) describes the complaint that the Department would file with the Commission or, alternatively, the complaint that the complainant would file in circuit court:

"(F) Complaint.

(1) When the complainant requests that the Department file a complaint with the Commission on his or her behalf, the Department shall prepare a written complaint, under oath or affirmation, stating the nature of the civil rights violation substantially as alleged in the charge previously filed and the relief sought on behalf of the aggrieved party. The Department shall file the complaint with the Commission.

(2) If the complainant chooses to commence a civil action in a circuit court, he or she must do so in the circuit court in the county wherein the civil rights violation was allegedly committed. The form of the complaint in any such civil action shall be in accordance with the Illinois Code of Civil Procedure."

¶ 26 Sections 7A-102(G)(2) and (G)(3) (775 ILCS 5/7A-102(G)(2), (G)(3) (West 2010)) describe what may happen if the Department takes too long to issue its investigative report:

"(2) If the Department has not issued its report within 365 days after the charge is filed, or any such longer period agreed to in writing by all the parties, the complainant shall have 90 days to either file his or her own complaint with the Human Rights Commission or commence a civil action in the appropriate circuit court. If the complainant files a complaint with the Commission, the form of the complaint shall be in accordance with the provisions of paragraph (F)(1). If the complainant commences a civil action in a circuit court, the form of the complaint shall be in accordance with the Illinois Code of Civil Procedure. The aggrieved party shall notify the Department that a complaint has been filed and shall serve a copy of the complaint on the Department on the same date that the complaint is filed with the Commission or in circuit court. If the complainant files a complaint with the Commission, he or she may not later

commence a civil action in circuit court.

(3) If an aggrieved party files a complaint with the Human Rights Commission or commences a civil action in circuit court pursuant to paragraph (2) of this subsection, or if the time period for filing a complaint has expired, the Department shall immediately cease its investigation and dismiss the charge of civil rights violation."

¶ 27 Plaintiff argues that, if the legislature intended the state to be immune from being sued for civil rights violations, the legislature easily could have said so in the above-quoted provisions giving the complainant the unqualified option of filing suit in circuit court. See 775 ILCS 5/7A-102(D)(3), (D)(4), (F)(2), (G)(2) (West 2010). Plaintiff observes that, elsewhere in the Illinois Human Rights Act, the legislature explicitly draws a distinction between public employers and private employers when the legislature intends to make such a distinction. For example, in section 2-102(E) (775 ILCS 5/2-102(E) (West 2010)), the legislature says it is a civil rights violation for any "public employer," defined to include the state (775 ILCS 5/2-101(G) (West 2010)), "to refuse to permit a public employee under its jurisdiction who takes time off from work in order to practice his or her religious beliefs to engage in work, during hours other than such employee's regular working hours, consistent with the operational needs of the employer and in order to compensate for work time lost for such religious reasons." By contrast, it is not a civil rights violation for a private employer to arbitrarily decline to allow such an employee to work different hours. Likewise, plaintiff observes, the legislature knows how to refer to public and private employers as a single group when it wishes to do so. For example, any "employer," public or private, "may prohibit the

illegal use of drugs and the use of alcohol at the workplace by all employees." 775 ILCS 5/2-104(C)(3)(a) (West 2010).

¶ 28 Given the legislature's practice, throughout the Illinois Human Rights Act, of referring explicitly to "public employers" when it means public employers and referring to "employers" when it means both public employers and private employers, plaintiff finds it implausible that the legislature, without saying so, would intend to exempt a public employer, the state, from being sued in circuit court. After all, state agencies are employers that can incur liability for civil rights violations. Knowing that "employers," defined to include state agencies (775 ILCS 5/2-101(B)(1)(c) (West 2010)), could commit civil rights violations (775 ILCS 5/2-102(A) (West 2010)) and knowing therefore that state agencies would be named in charges of discrimination (775 ILCS 5/7A-102(A)(1) (West 2010)), the legislature directed the Department to notify complainants that they could sue the respondent in the circuit court of the county in which the civil rights violation allegedly occurred. 775 ILCS 5/7A-102(D)(3), (D)(4), (F)(2) (West 2010). The legislature did not say "except if the respondent is the state," even though, throughout the Illinois Human Rights Act, the legislature shows an ability to make a distinction between public and private employers when it wishes to do so. Instead, at the conclusion of the Department's investigation in each and every case, without exception, including cases in which a state agency is the respondent, the Department is to notify the complainant that he or she may commence a civil action in circuit court. 775 ILCS 5/7A-102(D)(3), (D)(4), (F)(2) (West 2010). One might ask, if the legislature intended to retain its sovereign immunity, why would the legislature require the Department to mislead complainants by telling them, in cases in which a state agency is the respondent, that they may file suit in circuit court? One might argue that an interpretation of the Illinois Human Rights Act that preserves sovereign

immunity is absurd because the Department would be required to send out deceptive notices: the Department would be notifying complainants that they may sue a state employer that absolutely cannot be sued. Plaintiff argues that, to avoid this conflict between sovereign immunity and the right-to-sue provisions of the statute, we should find a clear and unequivocal waiver of sovereign immunity. See *Township of Jubilee v. State*, 2011 IL 111447, ¶ 36 ("Courts are obliged to construe statutes to avoid absurd, unreasonable, or unjust results."); *Walker*, 131 Ill. 2d at 303.

¶ 29 The trouble with this argument is that it relies heavily on inference: a reasonable inference, but merely an inference nevertheless, and the inference falls short of a clear and unequivocal waiver of sovereign immunity. Yes, the legislature could have easily said, in sections 7A-102(D)(3), (D)(4), (F)(2), and (G)(2), that the state could not be sued, but there is a good explanation for the legislature's not doing so: the legislature did not have to express an exception for the state, because sovereign immunity is the default assumption (*id.*). Overcoming that assumption requires a clear and unequivocal waiver, which is more than a reasonable inference.

¶ 30 If a statute is susceptible to more than one reasonable interpretation, including an interpretation that preserves sovereign immunity, we should conclude that the state has not waived its sovereign immunity. *Sossamon v. Texas*, ____ U.S. ____, ____, 131 S. Ct. 1651, 1659 (2011). Although there is something to be said for plaintiff's interpretation of the Illinois Human Rights Act, there also is something to be said for the opposing interpretation. Arguably, when the Department notifies the complainant that he or she may file suit in circuit court, that notification is subject to the implied qualification that the complainant use sound judgment about the potential merits of such a suit, including any defenses that the respondent would be expected to raise. See *Lynch*, 2012 IL App (4th) 111040, ¶ 30. The message "sue at your own risk" might be inferred from the requirement that

the Department send out a right-to-sue notification even after the Department finds no substantial evidence. Granted, the Department might be wrong about the lack of substantial evidence—but it also might be right. Surely, by directing the Department to issue a right-to-sue notification even after the Department finds no substantial evidence of a civil rights violation, the legislature did not intend to override, for example, Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), which punishes the filing of frivolous lawsuits. Likewise, the legislature did not intend to override sovereign immunity. When the Department notifies the complainant that he or she may commence a civil action in circuit court (775 ILCS 5/7A-102(D)(3), (D)(4), (F)(2) (West 2010)), that notification is subject to all the considerations that normally would go into the decision of whether to file suit, including a consideration of the defenses available to the respondent, such as sovereign immunity.

¶ 31 So, we adhere to our recent decision in *Lynch*, 2012 IL App (4th) 111040, ¶ 31, that the legislature has not clearly and unequivocally waived sovereign immunity in the Illinois Human Rights Act. (We issued our decision in *Lynch* three days after plaintiff filed her initial brief in this case).

¶ 32 In *Lynch*, we observed that, before the 2008 amendments to the Illinois Human Rights Act, only the Commission, not circuit courts, could hear claims of civil rights violations after the Department finished its investigation. *Id.*, ¶ 27. Therefore, before the 2008 amendments, the legislature could not have intended to waive sovereign immunity in the Illinois Human Rights Act, because there would have been no occasion to do so. *Id.* There would have been no occasion because the State Lawsuit Immunity Act immunized the state only from being sued in "court" (745 ILCS 5/1 (West 2010)), and the Commission—at that time the exclusive forum in which to file complaints of civil rights violations—was an administrative agency, not a court. *Lynch*, 111040 IL

App (4th), ¶ 27.

¶ 33 The question, then, was whether the 2008 amendments waived sovereign immunity by adding the option of suing in circuit court. Those amendments allowed the complainant to go, from the Department, to either the Commission or the circuit court. *Id.*, ¶ 28. "[T]he first time sovereign immunity could have become an issue for *** claims [under the Illinois Human Rights Act] was on January 1, 2008, the effective date of the [2008 amendments], because this is the first time complaints could be filed in circuit court." *Id.*

¶ 34 We agreed with the First District and with the Northern District of Illinois that the 2008 amendments contained no clear and unequivocal waiver of sovereign immunity. *Id.*, ¶¶ 29-30 (citing *Watkins v. Office of the State Appellate Defender*, 2012 IL App (1st) 111756, ¶ 23, and *Harris v. Illinois*, 753 F. Supp. 2d 734, 741 (N.D. Ill. 2010)). Nor did we find such a clear and unequivocal waiver when reading the Illinois Human Rights Act as a whole. *Id.*, ¶ 30. We reasoned, as we reason now: "[O]ne could read [sections 7A-102(D)(3), (D)(4), and (G)(2)] to mean a complainant may either commence a civil action when appropriate (*i.e.*, when sovereign immunity does not apply) or file a complaint with the Commission when an action in circuit court is not the proper forum (*i.e.*, against state employers who have sovereign immunity)." *Id.*

¶ 35 We might add that, when the legislature passed the 2008 amendments, it presumably was aware of *Walker* and other cases holding that a waiver of sovereign immunity had to be clear and unequivocal. See *Millennium Park Joint Venture, LLC v. Houlihan*, 241 Ill. 2d 281, 305-06 (2010) ("When statutes are enacted after judicial opinions are published, it must be presumed that the legislature acted with knowledge of the governing case law."). Knowing the clarity and specificity that would have been required to waive sovereign immunity, the legislature did not even

mention the state in the 2008 amendments. Therefore, the legislature must not have intended to waive sovereign immunity.

¶ 36 C. Why *Martin v. Giordano* Affords No Basis for Reversal

¶ 37 According to plaintiff, our decision in *Martin v. Giordano*, 115 Ill. App. 3d 367 (1983), is "instructive" in that we found a waiver of sovereign immunity in the Workers' Compensation Act, a statute that, like the Illinois Human Rights Act, defined " 'employer' " to include the state (*id.* at 369 (citing Ill. Rev. Stat. 1981, ch. 48, par. 138.1(a)(1)). Also, "[s]ection 2 of the [Workers' Compensation] Act state[d] without equivocation, 'The State of Illinois hereby elects to provide and pay compensation according to the provisions of the Act' " (*Martin*, 115 Ill. App. 3d at 369 (quoting Ill. Rev. Stat. 1981, ch. 48, par. 138.2)), just as, in the Illinois Human Rights Act, the state has elected to provide compensation for its civil rights violations. See 775 ILCS 5/8A-104(B) (West 2010) (upon finding a civil rights violation, the Commission may order the payment of actual damages).

¶ 38 We arrived at the correct result in *Martin*, but our analysis in that case went astray. Our discussion of a clear and unequivocal waiver of sovereign immunity seems, in retrospect, superfluous. To explain what we mean, we first will recount what happened in *Martin*. The Illinois Department of Transportation agreed to pay one of its employees, Joe D. Martin, a lump sum in settlement of his workers' compensation claim. *Martin*, 115 Ill. App. 3d at 368. Time passed, and the Department of Transportation did not pay, so, pursuant to section 19(k) of the Workers' Compensation Act (Ill. Rev. Stat. 1981, ch. 48, par. 138.19(k)), Martin petitioned the Industrial Commission for an additional payment in the amount of 50% of his claim, because of the state's vexatious and unreasonable delay. *Martin*, 115 Ill. App. 3d at 368. Section 19(k) provided:

" 'In cases where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation, or proceedings have been instituted or carried on by the one liable to pay the compensation, which do not present a real controversy, but are merely frivolous or for delay, then the Commission may award compensation additional to that otherwise payable under this Act equal to 50% of the amount payable at the time of such award. Failure to pay compensation in accordance with the provisions of Section 8, paragraph (b) of this Act, shall be considered unreasonable delay.' "

Id. at 368-69 (quoting Ill. Rev. Stat. 1981, ch. 48, par. 138.19(k).

¶ 39 The Industrial Commission found an unreasonable and vexatious delay by the state and therefore, pursuant to section 19(k), awarded Martin additional compensation in the amount of 50% of his workers' compensation claim. *Martin*, 115 Ill. App. 3d at 368. The state refused to pay this additional 50%, and consequently Martin brought an action for *mandamus* in circuit court to compel the payment. *Id.* In response, the state pleaded sovereign immunity. *Id.* at 369.

¶ 40 We reasoned that the legislature had clearly and unequivocally waived sovereign immunity by subjecting the state to liability under the Workers' Compensation Act. *Id.* at 369-70. Section 19(k) referred to the additional 50% as "compensation," and in section 2 the State elected to pay "compensation" under the provisions of the Workers' Compensation Act. (Internal quotation marks omitted.) *Id.* at 370.

¶ 41 Apparently, though, we overlooked that administrative proceedings do not trigger sovereign immunity. Again, the State Lawsuit Immunity Act provides that "the State of Illinois

[should] not be made a defendant or party in any *court*." (Emphasis added.) 745 ILCS 5/1 (West 2010). The Industrial Commission was not a court, and therefore sovereign immunity, or the waiver of it, was irrelevant to the question of whether the state could be made a party in proceedings before the Industrial Commission. See *Lynch*, 2012 IL App (4th) 111040, ¶ 27.

¶ 42 It is true that Martin also filed a *mandamus* action in circuit court, to compel the state to pay the 50%. *Martin*, 115 Ill. App. 3d at 368. Nevertheless, since deciding *Martin*, we have held:

> " '[T]he determination of whether a suit is brought against the State and thus barred by the doctrine of sovereign immunity does not depend on the identity of the formal parties, but rather on the issue raised and the relief sought.' *Senn Park Nursing Center v. Miller*, 104 Ill. 2d 169, 186, 470 N.E.2d 1029, 1038 (1984) (citing *Senn Park Nursing Center v. Miller*, 118 Ill. App. 3d 733, 746, 455 N.E.2d 162, 171 (1983)). A suit to compel state officials to act in accordance with the law is not regarded as an action against the state and is not barred by sovereign immunity even though the payment of state funds may be involved. *In re Lawrence M.*, 172 Ill. 2d 523, 527, 670 N.E.2d 710, 713 (1996). Compelling a state official to act in accordance with the law, even if so acting involves the payment of state funds, differs from an action seeking actual money damages from the State and the state official in his official capacity. See, *e.g.*, *City of Chicago v. Board of Trustees of the University of Illinois*, 293 Ill. App. 3d 897, 901-02, 689 N.E.2d 125, 128 (1997). ' "[A]n action to compel a

public official to perform a clear and mandatory duty is not a suit against the State." ' *Senn Park*, 104 Ill. 2d at 189, 470 N.E.2d at 1039 (quoting *Senn Park*, 118 Ill. App. 3d at 746, 455 N.E.2d at 171-72)." *McFatridge v. Madigan*, 2011 IL App (4th) 100936, ¶ 47.

¶ 43 Because the state had a clear duty, under the Workers' Compensation Act, to pay Martin the additional compensation that the Industrial Commission had awarded, his *mandamus* action was not, in essence, an action against the state for money damages. Rather, it was an action against renegade governmental officials, to compel them to perform a clear ministerial duty, and thus the issue of whether legislature had clearly and unequivocally waived sovereign immunity was a red herring. See *id.*; *Farmer v. McClure*, 172 Ill. App. 3d 246, 253-54 (1988) ("Applying the presumption that the State or one of its departments cannot violate the State's constitution or laws, however, any such violation is deemed made by the head of the department involved and a lawsuit against that officer is not an action against the State."). So, we disagree with plaintiff that our analysis in *Martin* is instructive.

¶ 44 D. The Designation of the Dismissal as Being "With Prejudice"

¶ 45 Plaintiff argues that, in the event we find no clear and unequivocal waiver of sovereign immunity in the Illinois Human Rights Act, the trial court nevertheless erred in another respect, by making the dismissal of counts I, II, IV, and VI with prejudice. She argues that, instead, the court should have made the dismissal without prejudice and with leave to refile in the Court of Claims or, alternatively, with leave to "have the Department of Human Rights file her complaint with the Human Rights Commission."

¶ 46 Actually, plaintiff does not need leave from either us or the trial court to file a

document in the Court of Claims, the Illinois Department of Human Rights, or the Illinois Human Rights Commission. The designation of the dismissal as being "with prejudice" would not bar her from pursuing counts I, II, IV, and VI in a different forum. Evidently, in this context, all the trial court meant by the phrase "with prejudice" was that plaintiff could not replead or reassert those counts in the trial court. See *Perkins v. Collette*, 179 Ill. App. 3d 852, 854 (1989). A dismissal for lack of subject-matter jurisdiction is not an adjudication on the merits that would be *res judicata* in a different forum. See Ill. S. Ct. R. 273 (eff. Jan. 1, 1967); *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 303 (1998).

¶ 47 As for whether plaintiff now may file counts I, II, IV, and VI in the Court of Claims or whether, at her request, the Department now may file those counts with the Commission, that question is not before us, and we may not issue advisory opinions for the guidance of future litigation. See *Lynch*, 2012 IL App (4th) 111040, ¶ 31; *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 32.

¶ 48 III. CONCLUSION

¶ 49 For the foregoing reasons, we affirm the trial court's judgment.

¶ 50 Affirmed.