

SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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I. INTRODUCTION

This article analyzes cases decided by the Illinois Supreme Court and the Illinois Appellate Courts from November 2006 through December 2007 in both private and public sectors of interest to employers.

In Section II, the Illinois Supreme Court considered whether employee parking was subject to mandatory collective bargaining. The Court also reversed summary judgment and remanded the case in *Murray v. Chicago Youth Center et al.* with the court concluding there were genuine and material triable issues that existed as to whether defendants were guilty of willful and wanton conduct which is an exception to immunity.

Section III of this article covers appellate decisions in employment and labor law related to the prevailing wage law, line-of-duty pensions, sexual harassment, termination for cause, the doctrine of nonreview, retaliatory discharge and retaliatory demotion, compelled self-defamation, noncompete agreements. The Court again addresses unemployment compensation benefits by examining voluntary separation and misconduct and ordered a company to pay unemployment compensation contributions and interest due to the misclassification of workers as independent contractors. Another interesting case in this article involves a widow's annuity. The First District rendered a decision in which the plaintiff was entitled to a widow's annuity, but she had to first repay a refund of annuity contributions that had not been paid to her but rather had been paid to her husband's estate consisting of her husband's first wife and children. In a case of first impression, the Second District held that the One Day Rest in Seven provides a basis for retaliatory discharge.

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There is also a case that may create some anxiety for employers that the disclaimers in subsequent employee handbooks may not be effective when an employee alleges he/she must be terminated in accordance with the employee handbook in existence at the time they are hired.

II. ILLINOIS SUPREME COURT DECISIONS

A. Unfair Labor Practice

Whether an employer's refusal to bargain over providing parking or reimbursing parking expenses constituted an unfair labor practice was at issue in *Board of Trustees of University of Illinois v. Illinois Labor Relations Board*.¹ This case involved a consolidated appeal of two matters involving unfair labor practice charges for a failure to negotiate. In the first cause, the Service Employees International Union ("Union") proposed a parking fee schedule that based the amount of the parking fee on the time of day and type of parking. The University refused to negotiate, unilaterally increasing the parking fees and the Union filed an unfair labor practice charge. In the second cause, the Fraternal Order of Police Labor Council ("FOP") submitted a proposal that the University would provide members with a parking space, or reimburse them for their cost of obtaining parking. As in the first cause, the University refused to bargain.²

In both cases, an Administrative Law Judge ("ALJ") found that parking and parking fees constituted terms and conditions of employment. The ALJ further determined that the University's refusal to bargain on the Union's parking proposal was an unfair labor practice. The Illinois Labor Relations Board adopted the ALJ's findings of fact and upheld the finding that the University had engaged in an unfair labor practice.

On appeal of the first case, the lower appellate court reversed, finding the Board's conclusion that the benefits of bargaining outweighed the burdens was clearly erroneous.³ On appeal of the second case, the lower appellate court reversed, finding it was clear error to find that parking and parking fees were not part of the University's inherent managerial authority, and that the parking issue presented only a permissible subject for bargaining.⁴

The Illinois Supreme Court began its analysis by considering the applicable statutes. The charge filed by the FOP would be governed by the

1. Bd. of Tr.'s of Univ. of Ill. v. Ill. Labor Relations Bd., 224 Ill. 2d 88, 862 N.E.2d 944 (2007).

2. *Id.* at 92, 862 N.E.2d at 948.

3. *Id.* at 93, 862 N.E.2d at 948.

4. *Id.* at 95, 862 N.E.2d at 949.

Illinois Public Labor Relations Act (“Act”),⁵ whereas the charge filed by the Union would be covered by the Illinois Educational Labor Relations Act (“Educational Act”).⁶ Both acts similarly define an unfair labor practice to include an employer’s interference with, restraint of, or coercion of employees in the exercise of rights guaranteed by statute and a refusal to engage in good-faith collective bargaining.⁷

Under a clearly erroneous standard of review, the Court next applied the three-step test set forth in *Central City Education Association v. Illinois Educational Labor Relations Board*⁸ for purposes of determining whether the parking issues were subject to mandatory bargaining. Under this test, the court considers: (1) whether the issue is one of wages, hours and terms and conditions of employment; (2) whether the issue is one of inherent managerial authority; and (3) whether the benefits that the bargaining will have on the decision-making process will outweigh the burdens bargaining imposes on the employer’s authority. If the court determines in step one that the issue does not involve wages, hours, or terms and conditions of employment, the analysis ends and bargaining is not required. If the analysis proceeds to step two, and the court determines the issue does not involve inherent managerial authority, then the issue is subject to mandatory bargaining.⁹

With respect to the first step, the University argued parking in its lots was a “service” and not a condition of employment because employees were not required to use the lots. The Court rejected this argument, noting the record showed that “the majority of union employees commute to work by car and that the University had chosen to provide a system of parking lots and structures for their use.”¹⁰ In addition, “the integral role that adequate parking plays in any employee’s ability to get to the workplace in a timely manner and to perform daily duties without outside disruptions due to parking factors [was] self-evident.”¹¹ Accordingly, the Board’s decision that parking involved terms and conditions of employment was not clearly erroneous.

As to step two, the University argued parking involved inherent managerial authority in two respects. As an initial matter, the University’s parking was legislatively required to be self-funded through the collection of fees. The building of parking structures was, moreover, part of a master plan

5. *Id.* (citing 5 ILL. COMP. STAT. 315/5 (West 2000)).

6. *Id.* (citing 115 ILL. COMP. STAT. 5/1 (West 2000)).

7. *Id.* at 96, 862 N.E.2d at 949–50 (citing 5 ILL. COMP. STAT. 315/10(a)(1); 115 ILL. COMP. STAT. 5/14(a)(1)).

8. *Central City Educ. Ass’n v. Ill. Educ. Labor Relations Bd.*, 149 Ill. 2d 496, 599 N.E.2d 892 (1992).

9. *Univ. of Ill.*, 224 Ill. 2d at 97, 862 N.E.2d at 950.

10. *Id.* at 100, 862 N.E.2d at 952.

11. *Id.* at 100, 862 N.E.2d at 952–53.

identifying long term needs for both parking and academic structures. Because new academic structures typically result in lost parking space, and a need to create new parking structures, any union parking proposals would indirectly alter the University's "ability to provide for future needs of its academic services."¹² The University also contended "the parking proposals also implicate[d] its essential academic functions by impacting student services."¹³

The Court rejected the University's arguments, noting the Act and the Educational Act similarly identified "inherent managerial policy" to include "functions of the employer, standards of service, its overall budget, the organizational structure and selection of new employees, examination techniques and direction of employees."¹⁴

While acknowledging the "inherent managerial policy" definition was not exhaustive, the court found the parking matters at issue were not consistent with the definition. The University's attempt to connect parking with its overall budget failed because it conceded parking had to be "self-funded." The University, moreover, could not establish the "inherent management" prong through speculation about what might occur because the question in step two is not "*how* core managerial rights may be indirectly affected under some conceivable outcome of the bargaining process."¹⁵

The court also rejected the University's argument that parking issues indirectly affect essential academic functions by impacting students' access. The fact that student parking was an issue for the University did not mean it was an integral part of its inherent managerial authority.¹⁶

Based on the foregoing, the court found the union's parking proposals involved terms and conditions of employment which did not affect the University's inherent managerial rights. They were therefore subject to mandatory collective bargaining.¹⁷

B. Tort Immunity

Summary judgment was reversed and the case was remanded in *Murray v. Chicago Youth Center*¹⁸ Ryan Murray ("Murray") was thirteen years old

12. *Id.* at 103, 862 N.E.2d at 954.

13. *Id.*

14. *Id.* at 104, 862 N.E.2d at 954 (citing 5 ILL. COMP. STAT. 315/4; 115 ILL. COMP. STAT. 5/4 (West 2000)).

15. *Id.* at 105, 862 N.E.2d at 954.

16. *Id.* at 106, 862 N.E.2d at 955.

17. *Id.* at 107, 862 N.E.2d at 955.

18. *Murray v. Chicago Youth Center*, 224 Ill. 2d 213, 864 N.E.2d 176 (2007).

at the time of his participation in a tumbling class at the Chicago Youth Center (“CYC”). He attempted to do a forward flip off of the mini-trampoline, landed on his neck, and is now a quadriplegic. A lawsuit was filed by Murray and his mother (jointly “Murray”) and the trial court granted summary judgment to defendants holding they were immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act (“Act”).¹⁹ The appellate court affirmed and this appeal was allowed.

This case examines the interplay of specific provisions under the Act, namely sections 2–201, 3–108(a) and 3–109. The issue is whether the exceptions for hazardous recreational activity in 3–109 take precedence over the immunity granted in sections 2–201 and 3–108(a). Section 2–201 provides as follows: “Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.”²⁰ Section 3–108(a) provides, “Except as otherwise provided by this Act and subject to subdivision (b) neither a local public entity nor a public employee is liable for an injury caused by a failure to supervise an activity on or the use of any public property.”²¹

In the past, the supreme court had held that willful and wanton conduct is also protected by these sections, when applicable.²² However, section 3–108(a) has been amended to include an exception for willful and wanton conduct which must now be considered.²³

Agreeing with the appellate court’s rejection of the reasoning in *Johnson v. Decatur Park District*,²⁴ the supreme court took special note of the ‘except as otherwise provided’ language that prefaces both sections 2–201 and 3–108(a) indicating there is not absolute immunity in all circumstances.²⁵ The supreme court is of the opinion that the ‘otherwise provided’ language in sections 2–201 and 3–108(a) addresses the injury suffered by Murray due to trampolining being listed as a hazardous recreational activity in section 3–109(b)(3). Under 3–109, immunity is still provided subject to two exceptions:

19. 745 ILL. COMP. STAT. 10/1–101 *et seq.* (1992).

20. *Murray*, 224 Ill. 2d at 229–30, 864 N.E.2d at 185–86, 745 ILL. COMP. STAT. 10/2–201 (1992).

21. *Id.* at 229–30, 864 N.E.2d at 185–86, 745 ILL. COMP. STAT. 10/3–108(a) (1992).

22. *Id.* at 230, 864 N.E.2d at 186.

23. *Id.*

24. *Johnson v. Decatur Park Dist.*, 301 Ill. App. 3d 798, 704 N.E.2d 416 (4th Dist. 1998).

25. *Murray*, 224 Ill. 2d at 232, 864 N.E.2d at 187.

- (1) . . . Failure of the local public employee to guard or warn of a dangerous condition of which it has actual or constructive notice and of which the participant does not have nor can be reasonably expected to have had notice.
- (2) An act of willful and wanton conduct by a public entity or a public employee which is a proximate cause of the injury.²⁶

Once the supreme court found defendants immune from liability subject to the exceptions in section 3–109, it proceeded to examine the applicability of those exceptions in this case.²⁷

First, section 1–201 defines willful and wanton conduct in part as “a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property”²⁸ and this definition is applicable to the entire Act.²⁹ The court went on to disagree with defendants’ position that a 1986 amendment to the Act narrowed the definition that was not met in this case.³⁰ The court refused to render an opinion that a 1998 amendment replaced the common law definition with something more similar to intentional misconduct, since that amendment was not effective at the time Murray was injured.³¹

Two more arguments were also rejected by the supreme court. The first additional contention by defendants was that by excluding the word ‘omissions’ in 3–109(c)(2), the legislature intended an overt act rather than a failure to act.³² The court found no legal basis for this argument.³³ The second additional contention by Murray was that the facts alleged in the amended complaint brought the case within the exception in section 3–109(c)(1) of a failure to guard or warn.³⁴ However, that argument was not briefed or argued by the parties and the court refused to address it.³⁵

The final consideration by the supreme court was whether the appellate court erred in granting summary judgment to defendants finding their conduct was not willful and wanton.³⁶ Genuine and material triable issues existed as

26. 745 ILL. COMP. STAT. 10/3–109 (1992).

27. *Murray*, 224 Ill. 2d at 234–35, 864 N.E.2d at 188–89.

28. 745 ILL. COMP. STAT. 10/1–201 (1992).

29. *Murray* at 235, 864 N.E.2d at 189.

30. *Id.* at 236–38, 864 N.E.2d at 189–90.

31. *Id.* at 242, 864 N.E.2d at 193.

32. *Id.* at 243, 864 N.E.2d at 193–94.

33. *Id.* at 243, 864 N.E.2d at 194.

34. *Id.* at 244, 864 N.E.2d at 194.

35. *Id.*

36. *Id.*

to whether defendants were guilty of willful and wanton conduct.³⁷ The appellate and circuit court's grant of summary judgment was reversed and remanded for further proceedings.³⁸

III. ILLINOIS APPELLATE COURT DECISIONS

A. Compensation and Benefits

1. *Unemployment*

a. Voluntary Separation

A person may draw unemployment compensation benefits after voluntarily quitting in certain circumstances; however, leaving work for personal reasons without advising your employer is not one of them.³⁹ In *White v. Department of Employment Security*,⁴⁰ George White, Plaintiff-Appellant ("White") worked for Windward Roofing and Construction ("Windward").⁴¹ On or about December 13, 2005, White offended a customer with a comment.⁴² On December 27, 2005, Windward protested an unemployment compensation claim for benefits citing the reason as voluntary quit.⁴³ During the initial investigation of White's claim, a claim adjudicator in the local office interviewed White.⁴⁴ The interviews of both White and the accounting manager at Windward indicated White quit for personal reasons.⁴⁵ However, on that date, White advised the claim adjudicator that he did not quit and was told there was no work.⁴⁶ A determination was made that White left voluntarily without good cause attributable to his employer.⁴⁷ White appealed.

A notice was sent to both White and Windward about the scheduled telephone hearing.⁴⁸ The notice provided that in order for evidence to be

37. *Id.* at 246, 864 N.E.2d at 195.

38. *Id.*

39. *White v. Dept. of Employment Sec.*, 376 Ill. App. 3d 668, 875 N.E.2d 1154 (1st Dist. 2007).

40. *Id.*

41. *Id.* at 669, 875 N.E.2d at 1155–56.

42. *Id.*

43. *Id.* at 669, 875 N.E.2d at 1155–56.

44. *Id.* at 669, 875 N.E.2d at 1156.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

considered all exhibits must arrive twenty-four hours before the hearing and copies must be sent to the opposing side.⁴⁹

On March 7, 2006, the telephone hearing was held.⁵⁰ The referee determined Windward's protest of White's initial claim for unemployment benefits was not filed in a timely manner, but Windward was still allowed to participate in the hearing.⁵¹ Testimony was given by two (2) employees of Windward that White quit his job.⁵² White denied he quit, denied he told the claim adjudicator that he quit and alleged he called every day and was told there was no work.⁵³ Even though the hearing referee acknowledged the claim adjudicator's notes contained some inconsistencies, he/she affirmed the determination denying unemployment compensation benefits.⁵⁴

When White appealed the referee's decision to the Board of Review ("Board"), he submitted his telephone records to demonstrate he maintained contact with Windward.⁵⁵ The Board did not consider the telephone records because they were not produced as evidence at the hearing as set forth in the notice.⁵⁶ The Board affirmed the referee's determination.

White filed a complaint for administrative review and the trial court affirmed the Board's decision.⁵⁷

White appealed asserting he did not voluntarily quit, his employer was improperly allowed to participate in the unemployment telephone hearing and it was improper to exclude additional evidence he failed to submit at the telephone hearing.⁵⁸ Deferring to the Board's factual findings, the appellate court agreed White voluntarily quit his job without good cause attributable to Windward.⁵⁹ Even though Windward did not file a timely protest, White waived this argument and Windward was able to appear and present evidence as a nonparty.⁶⁰ White was not to show that he was unable to produce his telephone records for the telephone hearing and therefore, the Board properly refused to exercise its discretion to allow those records.⁶¹ In September 2007, the appellate court affirmed the trial court's affirmation of the Board's

49. *Id.*

50. *Id.* at 670, 875 N.E.2d 1156.

51. *Id.*

52. *Id.*

53. *Id.* at 669–70, 875 N.E.2d at 1156–57.

54. *Id.* at 671, 875 N.E.2d at 1157.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 672, 875 N.E.2d at 1158.

59. *Id.*

60. *Id.*; 56 ILL. ADMIN. CODE §2720.205(c) (West 2008).

61. *White*, 376 Ill. App. 3d at 672, 875 N.E.2d at 1158.

decision to affirm the hearing referee's determination to deny unemployment compensation benefits to White as initially determined by the claims adjudicator in January 2006.⁶²

b. Misconduct

The strict application by the Illinois Department of Employment Security ("IDES") of the definition of misconduct, particularly the phrase, "deliberate and willful", has resulted in some awards for unemployment compensation that most ER's would think are unreasonable. *Odie v. Department of Employment Security*,⁶³ restores some confidence by finding sleeping on the job is misconduct. Plaintiff, Marlene Odie, contends she did not intentionally fall asleep at work, and, therefore, was unjustly denied unemployment compensation benefits.⁶⁴ Odie was assigned to monitor twenty-five residents in a nursing home.⁶⁵ She took some extra-strength Tylenol for a toothache, and believed it made her drowsy causing her to fall asleep for ten to twenty minutes.⁶⁶ While asleep a resident began yelling and a visitor shook Odie.⁶⁷ Odie made some comments to the visitor and went back to sleep.⁶⁸ Odie told the administrator she had fallen asleep due to the Tylenol.⁶⁹ Odie knew sleeping on the job was a violation of company policy and could result in her termination.⁷⁰ Even though she had not been warned about sleeping on the job, she had received warnings about other violations that put her job in jeopardy.⁷¹ After an investigation, Odie was terminated which was upheld by her union.⁷² The IDES claims adjudicator found her ineligible for unemployment compensation because the reason she was terminated was within her control.⁷³ Therefore, she was terminated for misconduct in connection with her work.⁷⁴ The hearing referee upheld the decision finding Odie exhibited a deliberate and willful disregard when she

62. *Id.* at 670, 875 N.E.2d 1158.

63. *Odie v. Dept. of Employment Sec.*, 377 Ill. App. 3d 710, 881 N.E.2d 358 (1st Dist. 2007), *appeal denied* Mar. 26, 2008.

64. *Id.* at 711, 881 N.E.2d at 359.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 712, 881 N.E.2d at 359.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

fell asleep while she was suppose to be monitoring the residents, without telling her employer about the medication, had to be awakened by visitors, and all while having prior warnings.⁷⁵ The Board affirmed the referee's decision.⁷⁶

On administrative review by the circuit court, Odie made the arguments others have been successful using to obtain unemployment compensation benefits.⁷⁷ She argued falling asleep while on duty is not deliberate and willful using the language of the statute which is strictly applied in many instances.⁷⁸ On appeal Odie again argued that falling asleep while on duty was unintentional, and, therefore, could not be deliberate and willful as required by the definition of misconduct.⁷⁹ Using the clearly erroneous standard for a mixed question of law and fact, the court reviewed the agency's determination that Odie was ineligible for benefits.⁸⁰ The court reasoned that when an employee is aware of and consciously disregards a company rule, it is willful misconduct.⁸¹ Odie did not challenge the reasonableness of the rule or the harm caused to the employer.⁸² She only argued her actions were not deliberate and willful.⁸³ The appellate court distinguished *Washington v. Board of Review*,⁸⁴ by the fact that unlike in *Washington*, Odie knew her job was in jeopardy, her explanation of involuntarily falling asleep was discredited, and instead of showing alarm or embarrassment, she responded to the visitor about the shouting resident by saying "she do that all the time."⁸⁵ The court distinguished Odie's duty to monitor twenty-five nursing home residents with an administrative assistant's duties in *Washington*.⁸⁶ The court also distinguished *Wrobel v. Department of Employment Security*,⁸⁷ in which the employee overslept. The court determined it was not deliberate or willful because he did not chose to oversleep.⁸⁸ Here, Odie voluntarily took the Tylenol that she believed made her drowsy, and did not tell her employer.⁸⁹

75. *Id.* at 712, 881 N.E.2d at 360.

76. *Id.*

77. *Id.* at 712–13, 881 N.E.2d at 360.

78. *Id.*

79. *Id.* at 712–13, 881 N.E.2d at 360.

80. *Id.*

81. *Id.* at 713, 881 N.E.2d at 360–61 (citing *Livingston v. Dept. of Employment Sec.*, 375 Ill. App. 3d 710, 873 N.E.2d 444 (2007)).

82. *Id.* at 713, 881 N.E.2d at 361.

83. *Id.*

84. *Washington v. Bd. of Review*, 211 Ill. App. 3d 663, 570 N.E.2d 566 (1st Dist. 1991)

85. *Id.* at 714, 881 N.E.2d at 361.

86. *Id.*

87. *Wrobel v. Ill. Dept. of Employment Sec.*, 344 Ill. App. 3d 533, 801 N.E.2d 29 (1st Dist. 2003).

88. *Odie v. Dept. of Employment Sec.*, 377 Ill. App. 3d 710, 714, 881 N.E.2d 358, 361 (1st Dist. 2007) (citing *Wrobel*, 344 Ill. App. 3d at 538, 801 N.E.2d at 29).

89. *Id.* at 714–15, 881 N.E.2d at 361–62.

Therefore, it was intentional.⁹⁰ The appellate court concluded the agency's denial of unemployment compensation benefits was not clearly erroneous.⁹¹

A second case denying unemployment compensation benefits due to misconduct, *Livingston v. Department of Employment Security*,⁹² examined the discharge of plaintiff, Janie Livingston, for abusing a resident by slapping her face. Livingston worked for the nursing home for twenty-five (25) years. Four (4) witnesses appeared and testified at the telephone hearing before a referee of the Illinois Department of Employment Security.⁹³ Livingston admitted her conduct was not necessary nor appropriate, but rather bad judgment.⁹⁴ The referee found she was not eligible for benefits under section 602(A) of the Act because she knew her actions were improper and she was in control of her conduct.⁹⁵ Livingston appealed contending she did not slap the resident and she would not have done so because after working there twenty-five (25) years she knew better than to do so.⁹⁶ The Board of Review affirmed the referee's determination and Livingston filed an action for administrative review with the appellate court.⁹⁷ A transcript of the telephone hearing was not part of the record.⁹⁸ Again, Livingston focused on the same language most applicants for benefits use by arguing she attempted to calm the resident and it was not a deliberate and willful violation of a company rule.⁹⁹ This case involved a mixed question of law and facts because the fact about whether Livingston slapped the resident is disputed.¹⁰⁰ Therefore, the clearly erroneous standard was used by the appellate court in its review of the Board's decision.

Analyzing the case, the court reviewed section 602(A) focusing on the definition of misconduct. The court examined past decisions providing insight into the interpretation of the definition.¹⁰¹ A rule is reasonable if it concerns, "standards of behavior which an employer has a right to expect."¹⁰² If an

90. *Id.*

91. *Id.*

92. *Livingston v. Dept. of Employment Sec.*, 375 Ill. App. 3d 710, 873 N.E.2d 444 (1st Dist. 2007) *reh'g denied*, Aug. 23, 2007.

93. *Id.* at 711, 873 N.E.2d 447.

94. *Id.* at 716, 873 N.E.2d at 450.

95. *Id.* at 713-14, 873 N.E.2d at 448-49.

96. *Id.* at 714, 873 N.E.2d at 449.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 715, 873 N.E.2d at 450.

101. *Id.* at 716, 873 N.E.2d at 451.

102. *Id.* (quoting *Bandemer v. Dept. of Employment Sec.*, 204 Ill. App. 3d 192, 195, 562 N.E.2d 6 (1st Dist. 1990)).

employee is aware of and consciously disregards a rule, it is deemed willful.¹⁰³ And finally, harm may be potential harm and not actual harm.¹⁰⁴ Livingston was aware of the rule, and she still slapped or in the least inappropriately touched the resident's face.¹⁰⁵ It was a reasonable rule and she willfully and deliberately violated it.¹⁰⁶ Harm was actually caused by Livingston's misconduct when another employee was taken away from her duties so she could report Livingston's actions.¹⁰⁷ However, the court continued to examine the issue of potential harm recognizing there is a split in authorities on this point.¹⁰⁸ The court distinguished the cases and finds the actions taken by Livingston were willful and deliberate and potential harm was not remote because of the potential for liability of the nursing and the potential damage to the nursing home's reputation as opposed to Livingston merely being careless or negligent.¹⁰⁹ The appellate court affirmed the judgment of the circuit court holding Livingston was ineligible for unemployment compensation benefits.¹¹⁰

c. Named Parties

There are multiple cases providing advice about which parties must be named in a lawsuit seeking review of decisions made with regard to unemployment compensation benefits. The Second District addressed some very specific arguments made by the plaintiff-appellant in *Van Milligen v. Department of Employment Security, et al.*¹¹¹ The trial court dismissed a complaint filed by Frank Van Milligen ("Van Milligen") because he failed to name the Board of Review ("Board") of the Illinois Department of Employment Security ("IDES") as a party to the lawsuit.¹¹² Van Milligen appealed alleging the court erred in refusing to let him amend his complaint to add the Board as a party.¹¹³

103. *Id.* (citing *Wrobel v. Dept. of Employment Sec.*, 344 Ill. App. 3d 533, 538, 801 N.E.2d 29 (1st Dist. 2003)).

104. *Id.* (citing *Greenlaw v. Dept. of Employment Sec.*, 299 Ill. App. 3d 446, 448, 701 N.E.2d 175 (1st Dist. 1998)).

105. *Livingston v. Dept. of Employment Sec.*, 375 Ill. App. 3d 710, 716–17, 873 N.E.2d 444, 451 (1st Dist. 2007).

106. *Id.*

107. *Id.*

108. *Id.* at 717, 873 N.E.2d at 452.

109. *Id.* at 718, 873 N.E.2d at 452.

110. *Id.* at 719, 873 N.E.2d at 453.

111. *Van Milligen v. Dept. of Employment Sec.*, 373 Ill. App. 3d 532, 868 N.E.2d 1083 (2d Dist. 2007).

112. *Id.* at 533, 868 N.E.2d at 1086.

113. *Id.*

Van Milligen was terminated for violating his employer's policy prohibiting harassment and discrimination.¹¹⁴ He applied for unemployment compensation benefits, but was denied such benefits for misconduct under section 602(A) of the Unemployment Insurance Act ("Act") which was the final decision of the Board.¹¹⁵ Thirty-five (35) days after the Board's decision, Van Milligen sought administrative review and named Bond Drug, Walgreens, the IDES, and Brenda Russell ("Russell"), the director of the IDES, but failed to name the Board.¹¹⁶ The complaint was dismissed by the circuit court. To support his argument that he is entitled to amend his complaint, Van Milligen identifies section 3-103 of the Act, the good faith exception of the Administrative Review Law ("Review Law"), equitable tolling principles, due process, and section 2-616(d) of the Administrative Law Code and Rule 15 of the Federal Rules of Civil Procedure.¹¹⁷

The Review Law provides in section 3-103 that a complaint for review must be filed within thirty-five (35) days from the date a copy of the decision was served upon the party affected.¹¹⁸ Section 3-107(a) of the Review Law provides the administrative agency and all persons, except plaintiff, who were parties of the record must be named as defendants.¹¹⁹ The supreme court of Illinois has ruled that failure to comply with these two sections is grounds for dismissal without leave to amend.¹²⁰ Van Milligen argued that naming Russell was enough under section 107(a).¹²¹ Section 107(a) provides in part, "Naming the director or agency head, in his or her official capacity, shall be deemed to include as defendant the administrative agency, board, committee, or government entity that named defendants direct or head"¹²² Van Milligen argued the Board is part of the IDES, Russell is the head of the IDES, and, therefore, Russell is the head of the Board, he named Russell, so he named the Board.¹²³ The appellate court disagreed relying on two former cases, *Veazey*

114. *Id.*

115. *Id.*; 820 ILL. COMP. STAT. 405 *et seq.* (2008).

116. *Van Milligen*, 373 Ill. App. 3d at 533, 868 N.E.2d at 1086.

117. *Id.* at 534, 868 N.E.2d at 1086.

118. *Id.* at 534-35, 868 N.E.2d at 1087; 735 ILL. COMP. STAT. 5/3-103 (2008).

119. *Van Milligen v. Dept. of Employment Sec.*, 373 Ill. App. 3d 532, 535, 868 N.E.2d 1083, 1087 (2d Dist. 2007); 735 ILL. COMP. STAT. 5/3-107(a) (2008).

120. *Van Milligen*, 373 Ill. App. 3d at 535, 868 N.E.2d at 1087 (quoting *McGaw Med. Ctr. of Nw. Univ. v. Dept. of Employment Sec.*, 369 Ill. App. 3d 37, 40 (1st Dist. 2006)).

121. *Id.* at 535, 868 N.E.2d at 1087-88.

122. 735 ILL. COMP. STAT. 5/3-107(a) (2008).

123. *Van Milligen*, 373 Ill. App. 3d at 535, 868 N.E.2d at 1088.

and *Fedorev*,¹²⁴ which held naming the director was insufficient to include the Board.¹²⁵

Van Milligen also contended he should have been allowed to amend his complaint to add the Board.¹²⁶ His argument was based on a distinction he draws between the exception in section 3–103(2) which provides in part, “[I]f the director or agency head in his or her official capacity, is a party to the administrative review, a complaint filed within the time limit established by this Section may be amended to add the administrative agency, board, committee, or government entity”¹²⁷

Again, the appellate court disagreed. Finding the language was ambiguous, the court examined the statute as a whole and the legislative history of the 1997 amendments with a focus on comments made by Senator Hawkinson.¹²⁸ It concluded that Russell is not the head of the Board, and therefore, the exception quoted above did not apply.¹²⁹ Further support is lent to the court’s position by the decisions in *ESG Watts, Inc. v. Pollution Control Board*¹³⁰ and *McGaw Medical Center of Northwestern University v. Department of Employment Security*.¹³¹

Some of Van Milligen’s other contentions failed as well. His good faith exception failed because he did not offer any evidence to support a good faith effort to serve the Board.¹³² This was a fatal mistake.¹³³ The appellate court also ruled that his equitable tolling position failed because that remedy applies to statute of limitations not a fixed time within which Van Milligen was required to file his administrative review action.¹³⁴ Van Milligen’s last arguments that section 2–616(d) of the Administrative Law Code and Rule 15 of the Federal Rules of Civil Procedure allowed him to amend his complaint both fail. Rule 15 is not binding on the state court and section 616(d) of the Code has been previously rejected.¹³⁵ The circuit court decision was affirmed.

124. *Veazey v. Baker*, 322 Ill. App. 3d 599 (1st Dist. 2001); *Fedorev v. Doherty*, 305 Ill. App. 3d 355 (2d Dist. 1999).

125. *Van Milligen v. Dept. of Employment Sec.*, 373 Ill. App. 3d 532, 536, 868 N.E.2d 1083, 1088 (2d Dist. 2007).

126. *Id.* at 536, 868 N.E.2d at 1089.

127. *Id.* at 537, 868 N.E.2d at 1090; 735 ILL. COMP. STAT. 5/3–103(2) (2008).

128. *Van Milligen*, 373 Ill. App. 3d at 538–39, 868 N.E.2d at 1090–91.

129. *Id.* at 539, 868 N.E.2d at 1091.

130. *ESG Watts, Inc. v. Pollution Control Bd.*, 191 Ill. 2d 26, 727 N.E.2d 1022 (2000).

131. *McGaw Med. Ctr. of Nw. Univ. v. Dept. of Employment Sec.*, 369 Ill. App. 3d 37, 40 (1st Dist. 2006); *Van Milligen*, 373 Ill. App. 3d at 539–40, 868 N.E.2d at 1091–92.

132. *Van Milligen*, 373 Ill. App. 3d at 541–42, 868 N.E.2d at 1092–93.

133. *Id.* at 542, 868 N.E.2d at 1093.

134. *Id.*

135. *Id.* at 543–44, 868 N.E.2d at 1095.

d. Base Period Employer

In *Martin v. Department of Employment Security*,¹³⁶ Helen Martin (“Martin”) sought review of a decision finding her ineligible for unemployment compensation benefits because she was receiving disqualifying income. In 1999, Martin began receiving social security income.¹³⁷ She was employed by Wal-Mart from September 19, 2004 until August 17, 2005.¹³⁸ After she was terminated, she filed for unemployment compensation benefits, but was denied such benefits because of her disqualifying social security income.¹³⁹ The denial was affirmed by a hearing referee and by the Board of Review.¹⁴⁰ Martin waived a constitutional argument, so the only question on appeal is whether Wal-Mart was her base-period employer in determining eligibility for unemployment compensation benefits.¹⁴¹ Martin’s argument that Wal-Mart was not her base-period employer was grounded in her belief that a base-period employer is one who was an employer prior to her receiving social security income.¹⁴² There is no legal support for her argument.¹⁴³ Section 237(A) of the Unemployment Insurance Act¹⁴⁴ sets forth the base period for determining whether the claimant had sufficient earnings to qualify for unemployment compensation benefits.¹⁴⁵ It is undisputed that Wal-Mart was her employer during the base period.¹⁴⁶ The decision denying her benefits was affirmed by the appellate court.

e. Unemployment Insurance Contributions

In *SMRJ v. Russell, et al.*,¹⁴⁷ the company, SMRJ, was found to have had 1,350 workers deemed employees that it classified as independent contractors and order to pay \$58,264.41 in unpaid unemployment insurance contributions,

136. *Martin v. Dept. of Employment Sec.*, 376 Ill. App. 3d 853, 877 N.E.2d at 1119 (5th Dist. 2007).

137. *Id.* at 854, 877 N.E.2d at 1120.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at 854–55, 877 N.E.2d at 1120.

142. *Id.* at 855, 877 N.E.2d at 1120.

143. *Id.*

144. 820 ILL. COMP. STAT. 405/100 *et seq.* (2008).

145. *Martin v. Dept. of Employment Sec.*, 376 Ill. App. 3d 853, 855, 877 N.E.2d at 1119, 1120 (5th Dist. 2007).

146. *Id.*

147. *SMRJ, Inc. v. Russell*, 378 Ill. App. 3d 563, 884 N.E.2d. 1152 (1st Dist. 2007).

plus \$36,894.75 in statutory interest.¹⁴⁸ The company had workers sign a document when they came looking for a referral to work. It provided in part,

By signing this agreement, I hereby attest that the information [I] am providing with this statement (Photocopies on back) is accurate and true. I certify, under penalties of perjury, that my taxpayer identification number is correctly shown above. I certify that I am not subject to withholding.

I also agree that I will be treated as an Independent Contractor and that all financial responsibilities (Federal and State taxes) will rest upon me.

I also understand that there will be a service fee taken out of pay each and every time I work.

I also understand that I will receive no fringe benefits and I will also be paid a certain fee for the services I render depending on the amount of hours that I will work at the discretion of the company I will work at, not FOUR BOYS LABOR SERVICE.¹⁴⁹

There was testimony that the service fee referred to was a referral fee collected by SMRJ, SMRJ exercised no control over the workers, had no relationship with the workers, workers were free to choose whether they would take the job referred, there were no fringe benefits, and any materials, supplies or equipment were supplied by the referred company, but the workers received their pay from SMRJ.¹⁵⁰ The Director of the Illinois Department of Employment Security (“Director”) concluded that because SMRJ provided workers upon receiving requests from clients, who paid SMRJ, and because SMRJ determined the number of hours worked by each worker and paid them, less the service fee, they were not employees of the client companies as asserted by SMRJ.¹⁵¹ The Director then found SMRJ had failed to show the workers were exempt under section 212 of the Unemployment Insurance Act (“Act”).¹⁵² Section 212 provides that an individual is an employee unless he/she:

A . . . has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

148. *Id.* at 565, 884 N.E.2d at 1156.

149. *Id.* at 566–67, 884 N.E.2d at 1157.

150. *Id.* at 567, 884 N.E.2d at 1157.

151. *Id.* at 568–69, 884 N.E.2d at 1159.

152. *Id.* at 569, 884 N.E.2d at 1159; 820 ILL. COMP. STAT. 405/100 *et seq.* (1998).

B . . . is either outside the usual course of the business for which such service is performed or that such services is performed outside of all the places of business of the enterprise for which such service is performed; and

C . . . is engaged in an independently established trade, occupation profession or business.¹⁵³

SMRJ also contended that because of statements made by a Department auditor, Voight, in 1993 that she was pleased SMRJ was able to keep so many people off the unemployment rolls by referring them to available jobs, it should not be subject to the statutory interest under the doctrine of equitable estoppel.¹⁵⁴ The Director rejected this argument.¹⁵⁵

The appellate court agreed that the workers were employees based on the fact that the client companies provided SMRJ with a report of the name and number of hours worked, paid SMRJ for those services, SMRJ collected its fees, and paid the workers all to the benefit of SMRJ.¹⁵⁶ The appellate court also agreed that the workers were not exempt under the conjunctive parts of section 212, of which SMRJ did not meet at least part C because the workers were not engaged in an independently established trade, occupation, profession or business.¹⁵⁷ Relying on *Jack Bradley, Inc. v. Department of Employment Security*,¹⁵⁸ the court focused on whether the workers had businesses or occupations which were capable of operation independent of a relationship with SMRJ.¹⁵⁹ They did not. In addition, SMRJ unsuccessfully asserted some of the thirteen (13) factors provided in the regulations used to help determine if an individual is an independent contractor under 212C of the Act.¹⁶⁰ Again, the court focused on the factors showing the workers owned or maintained their own businesses.¹⁶¹ The workers did not negotiate directly with the client companies and they did not sign the form each time a referral was made further supporting the Director's position that they were employees.¹⁶²

The court also rejected the argument that the statements made in 1993 should relieve them of the payments or interest because the statements did not

153. 820 ILL. COMP. STAT. 405/212 (1998).

154. *SMRJ, Inc.*, 378 Ill. App. 3d at 569, 884 N.E.2d. at 1159.

155. *Id.*

156. *Id.* at 573, 884 N.E.2d at 1162.

157. *Id.* at 574, 884 N.E.2d at 1162.

158. *Jack Bradley, Inc. v. Dept. of Employment Sec.*, 146 Ill. 2d 61, 585 N.E.2d 123 (1991).

159. *See SMRJ*, 378 Ill. App. 3d at 574, 884 N.E.2d at 1163.

160. *Id.*; 56 ILL. ADMIN. CODE §2732.200(e) (2008).

161. *SMRJ, Inc.*, 378 Ill. App. 3d at 563, 574, 884 N.E.2d. at 1163.

162. *Id.*

mislead SMRJ by causing them to alter its conduct or procedures that increased its liability.¹⁶³

Contending that the interest was more than sixty percent under section 2207 of the Act, and, therefore exceeded the statutory limit was incorrectly interpreted by SMRJ as a cap on unpaid contributions according to the appellate court.¹⁶⁴ The decision of the circuit court affirming the Director's determinations was affirmed by the appellate court.

2. *Sales Representative Act*

Sales commission is the subject of the case in *Clinton Imperial China, Inc. v. Lippert Marketing, Ltd.*¹⁶⁵ Robert Harris ("Harris") met Jeffrey Lippert ("Lippert") at a trade show.¹⁶⁶ Lippert was the president of a marketing company ("Marketing") and Harris was the president of a pottery manufacturer ("Potteries").¹⁶⁷ In July 1995, the two signed an agreement which included a provision as follows: "The Pampered Chef shall be exclusively assigned to [Marketing] and may not be reassigned to another sales representative or become a house account without the express consent of Lippert."¹⁶⁸ Marketing's commissions on Potteries sales to The Pampered Chef ("Chef") was to be ten percent (10%).¹⁶⁹ Chef implemented a new policy of communicating directly with manufacturers instead of through sales representatives.¹⁷⁰ Harris agreed to accommodate Chef's policy.¹⁷¹ Potteries and Marketing renegotiated its contract which provided in part,

[Potteries] acknowledges that [Marketing] has been the procuring agent of The Pampered Chef, Ltd., account and agrees to make [Marketing] the exclusive agent of said account during the term of this agreement. A copy of the July 5, 1995 AGREEMENT BETWEEN HARRIS POTTERIES AND THE PAMPERED CHEF, LTD. of which [Marketing] initiated and consulted on [Potteries'] behalf, is attached hereto and incorporated herein.

163. *Id.* at 575, 884 N.E.2d at 1163.

164. *Id.* at 577, 884 N.E.2d at 1165.

165. *Clinton Imperial China, Inc., v. Lippert Marketing, Ltd.*, 377 Ill. App. 3d 474, 878 N.E.2d 730 (1st Dist. 2007)

166. *Id.* at 476, 878 N.E.2d at 733.

167. *Id.*

168. *Id.* at 476-77, 878 N.E.2d at 733.

169. *Id.* at 477, 878 N.E.2d at 733.

170. *Id.*

171. *Id.*

For and in consideration of [Marketing's] procuring The Pampered Chef, Ltd. account for [Potteries] and rendering consulting marketing and sales expertise to [Potteries, Potteries] will pay compensation to [Marketing] as a percent of Potteries annual collected sales to The Pampered Chef, Ltd. as follows[:] from January 1, 1996 to December 31, 2000, 5% \$0 to \$20,000,000 of sales, 2% \$20,000,001 to \$30,000,000 of sales, 1% over \$30,000,000.

[Marketing] will be paid on paid invoices of all orders placed by The Pampered Chef, Ltd.

[Potteries] may sell to The Pampered Chef, Ltd. after the expiration of this agreement on December 31, 2000 without any further compensation being paid to [Marketing].¹⁷²

The July 1995 agreement which was made a part of the renegotiated contract, provided in part, "Chef agrees to buy from [Potteries], and [Potteries] agrees to make and sell to [Chef], a minimum of 700,000 pieces in total during each of the calendar years 1996 through 2000."¹⁷³ In December 1995, Chef proposed an amendment to purchase a minimum of 3,500,000 pieces each year from 1997 through 2000.¹⁷⁴ In January 1996, Marketing and Potteries amended their agreement to limit Marketing's right to represent competitors of Potteries, but if Potteries could not manufacture sufficient quantities to meet at least seventy percent of Chef's requirements as agreed with Chef, Marketing could seek and solicit other vendors or manufacturers to supply Chef.¹⁷⁵ In March 1996, Potteries and Chef amended their supply agreement to reduce the minimum to 2,000,000 pieces per year.¹⁷⁶ In 1997, Chef and Potteries signed another amendment reducing the annual purchases, but extended the agreement to reach the same sales total of 8,000,000 pieces.¹⁷⁷ Potteries paid Marketing commission and Marketing did not exercise its right to sale for competitors.¹⁷⁸

In 1995, Chef sent Lippert a letter that he was not permitted on its premises because Chef found out Lippert secretly recorded a conversation with an officer of Chef.¹⁷⁹ Marketing sued Chef for tortious interference with

172. *Id.* at 477–78, 878 N.E.2d at 733–34.

173. *Id.* at 478, 878 N.E.2d at 734.

174. *Id.* at 478, 878 N.E.2d at 734.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 478, 878 N.E.2d at 734–35.

179. *Id.* at 478, 878 N.E.2d at 735.

the business relationship Marketing had with Potteries.¹⁸⁰ In 1998, Potteries asked Marketing for assistance with sourcing a soup tureen for Chef.¹⁸¹ Marketing agreed to assist Potteries, if Potteries would sign a new agreement designating Marketing as a Potteries' sales representative.¹⁸² It was Potteries position that Marketing was already obligated to provide these services on an on-going basis, and if Marketing refused, Potteries would stop paying commissions.¹⁸³ Potteries sued Marketing for breach of contract and Marketing countersued for breach of contract, commissions due under the Sales Representative Act ("Act")¹⁸⁴ and for fraud.¹⁸⁵ The trial court award Marketing five percent commission on all orders Potteries received by December 31, 2000, in the amount of \$1,290,790.90, but denied it on all 8 million pieces sold under the 1997 amendment, and denied the claim under the Sales Representative Act because there was no willful and wanton conduct by Potteries and Marketing was no longer a sales representative after Chef would not allow Lippert on the premises.¹⁸⁶

The appellate court refused to find that the trial court abused its discretion in its award to Marketing. It found the tape recording was done to protect Lippert's interests not to harm Potteries.¹⁸⁷ Further, it found Marketing had substantially performed the most important part of the agreement before the breaches occurred.¹⁸⁸

Potteries also argued the amount awarded to Marketing was wrong due to a miscalculation.¹⁸⁹ The trial court found that the reason Marketing was awarded five percent was because the sales in any given year did not exceed \$20,000,000 denying Potteries argument that it should have only been two percent for the \$5,000,000 in excess of the \$20,000,000.¹⁹⁰ Marketing claimed it was owed commissions on all 8 million pieces, but the contract provisions only required Potteries to pay on orders from Chef prior to December 31, 2000.¹⁹¹ The appellate court affirmed the trial court's decision that Marketing had no sales representative duties at the time because before Marketing entered into the August 1995 contract with Potteries, Chef had already told

180. *Id.*

181. *Id.* at 478–79, 878 N.E.2d at 735.

182. *Id.* at 479, 878 N.E.2d at 735.

183. *Id.*

184. 820 ILL. COMP. STAT. 120/01 *et seq.* (2008).

185. *Clinton Imperial China, Inc., v. Lippert Mktg. Ltd.*, 377 Ill. App. 3d at 479, 878 N.E.2d at 735.

186. *Id.* at 481, 878 N.E. 2d at 737.

187. *Id.* at 482, 878 N.E.2d at 737.

188. *Id.* at 482, 878 N.E.2d at 737–38.

189. *Id.* at 482, 878 N.E.2d at 738.

190. *Id.* at 482–83, 878 N.E.2d at 738.

191. *Id.* at 483–84, 878 N.E.2d at 738–39.

Potteries it would be contacting it directly and not through a sales representative.¹⁹² Therefore, Marketing did not fall within the definition of sales representative under the Act and had no right to recovery under the Act.¹⁹³ The appellate court affirmed the trial court's decision, except it reversed as to any part of the judgment entered against Harris personally.¹⁹⁴

3. Pensions

a. Line-of-Duty Disability (Police Officer)

Can an act of duty occur while off duty for purposes of line-of-duty disability? The court in *Harroun v. Addison Police Pension Board*¹⁹⁵ affirms a decision finding it can.

In December 2001, plaintiff, Douglas Harroun ("Harroun"), was employed as a police officer by the Village of Addison ("Village").¹⁹⁶ While off duty at his home in Bloomingdale, Harroun saw Ryan Hanses ("Hanses") trying to break in to his neighbor's house.¹⁹⁷ Harroun called the local police and in attempting to apprehend Hanses, he was seriously injured and became disabled from performing his duties as a police officer for the Village of Addison.¹⁹⁸ The Village of Addison Pension Board ("Board") found he was entitled to a disability pension, but because he was not on duty and was outside the Village's city limits, he was not entitled to a line-of-duty pension.¹⁹⁹ The trial court held Harroun was entitled to a line-of-duty pension.²⁰⁰ With a focus on sections 3-114.1(a) and 5-113 of the Illinois Pension Code ("Code"),²⁰¹ the Board argued that Harroun was not on duty and under section 3-114.1(a) he was not entitled to line-of-duty pension.²⁰² The appellate court interpreted section 3-114.1(a) as not requiring a police officer to be on duty, but rather performing an act of duty when he suffers the disabling injury.²⁰³ It interpreted the use of "on duty" in the second paragraph of 3-114.1(a) to be used when it is legally significant whether the officer is

192. *Id.* at 484, 878 N.E.2d at 739.

193. *Id.*

194. *Id.* at 485, 878 N.E.2d at 740.

195. *Harroun v. Addison Police Pension Bd.*, 372 Ill. App. 3d 260, 865 N.E.2d 273 (2d Dist. 2007).

196. *Id.* at 261, 865 N.E.2d at 275.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. 40 ILL. COMP. STAT. 5/3-114.1(a), 5-113 (West 2008).

202. *Harroun*, 372 Ill.App. 3d at 262-63, 865 N.E.2d at 276.

203. *Id.* at 261, 865 N.E.2d at 275.

on or off duty.²⁰⁴ The appellate court concluded Harroun was performing an act of duty when he attempted to apprehend Hanes because it was an act inherently involving special risk that the ordinary public would not encounter and it was specifically imposed by section 107-16 of the Code of Criminal Procedure of 1963²⁰⁵ which provides a duty of every policeman to apprehend an offender when a crime is committed in his presence.²⁰⁶ The court also disagreed with the Board's position that Harroun had no authority to attempt the apprehension in Bloomingdale relying on the territorial jurisdiction part of the Illinois Municipal Code, specifically section 5/7-4-8, related to police districts.²⁰⁷ The court also recognized the right of police officers to make citizen arrests outside their jurisdictions.²⁰⁸ Since there is no dispute about Harroun being disabled, the appellate court held as a matter of law that the act of apprehending Hanes was an act of duty and affirmed the trial court's reversal of the Board's decision.²⁰⁹

The availability of a line of duty disability pension was also considered in *Fedorski v. Board of Trustees of the Aurora Police Pension Fund*.²¹⁰ In *Fedorski*, the plaintiff was employed as a police officer assigned to work as a plainclothes investigator.²¹¹ His duties included investigating crimes, identifying witnesses, interviewing suspects, and compiling evidence.²¹² On the date in question, the plaintiff was assisting other investigators in taking photographs of a crime suspect and other individuals taking part in a lineup. After the lineup was completed, plaintiff and the other investigators left in an unmarked squad car. Plaintiff testified that they planned to stop en route to the Aurora police station to return a camera to another officer from whom it had been borrowed. While the vehicle was stopped at a red light, it was struck from behind and the plaintiff suffered a disabling injury.²¹³ Plaintiff filed an application for a line-of-duty disability pension. The Pension Board granted a non-duty disability and found the plaintiff was not entitled to a line-of-duty

204. *Id.* at 263, 865 N.E.2d at 277.

205. 725 ILL. COMP. STAT. 5/107-16 (2000).

206. *Harroun*, 372 Ill. App. 3d at 264, 865 N.E.2d at 278.

207. *Id.* at 264-65, 865 N.E.2d at 278.

208. *Id.* at 265, 865 N.E.2d at 278 (quoting *People v. Kleutgen*, 359 Ill. App. 3d 275, 279, 833 N.E.2d 416 (2005)).

209. *Id.* at 265, 865 N.E.2d at 278.

210. *Fedorski v. Bd. of Tr.'s of Aurora Police Pension Fund*, 375 Ill. App. 3d 371, 873 N.E.2d 15 (2d Dist. 2007).

211. *Id.* at 371, 873 N.E.2d at 16.

212. *Id.*

213. *Id.*

disability because he was not performing an act of duty at the time of the accident.²¹⁴

On appeal, the Board's findings of fact would be upheld unless against the manifest weight of evidence, whereas rulings of law would be reviewed *de novo*.²¹⁵ Mixed questions of fact and law would be upheld unless clearly erroneous.²¹⁶ The court found the relevant facts were undisputed and that the parties' dispute turned on the meaning of "act of duty" as defined in section 5-113²¹⁷ of the Pension Code and its review was therefore *de novo*.²¹⁸

Under section 5-113, the phrase "act of duty" is defined as "any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walks of life, imposed on a policeman by the statutes of this State or by the ordinances or police regulations of the city in which this Article is in effect or by a special assignment."²¹⁹ In interpreting this definition, the court reaffirmed that the issue is the capacity in which the officer was acting, rather than the precise mechanism of the injury.²²⁰ The act of duty, moreover, must involve a risk not shared by an ordinary citizen.

Applying these principles, the court determined the plaintiff was not performing an act of duty when he was injured.²²¹ The fact that the injury could happen to anyone traveling in a car did not, in itself, foreclose a line-of-duty disability pension.²²² Plaintiff was not entitled to a line-of-duty disability pension because: (1) it was not clear that an evidence technician faces any risks while photographing lineups; (2) law enforcement agencies may employ civilians to photograph lineups and those civilians would presumably face the same risks that the plaintiff had faced; and (3) the plaintiff was not acting in a capacity that entailed any special risk when the accident occurred.²²³ The trial court's judgment affirming the Pension Board's conclusion was affirmed, with the court noting the plaintiff was merely riding in a car, that he faced risks no different from those faced by any other automobile passenger, and that nothing related to his duties as an evidence technician increased his risk.²²⁴

214. *Id.* at 372, 873 N.E.2d at 17.

215. *Id.* at 372-73, 873 N.E.2d at 17.

216. *Id.* at 373, 873 N.E.2d at 17.

217. 40 ILL. COMP. STAT. 5/5-113 (2002).

218. *Fedorski*, 375 Ill. App. 3d at 373, 873 N.E.2d at 17.

219. 40 ILL. COMP. STAT. 5/5-113.

220. *Fedorski*, 375 Ill. App. 3d at 319, 873 N.E.2d at 18 (citing *Alm v. Lincolnshire Police Pension Bd.*, 352 Ill. App. 3d 595, 816 N.E.2d 389 (2d Dist. 2004)).

221. *Id.* at 375, 873 N.E.2d at 19.

222. *Id.*

223. *Id.*

224. *Id.* at 376, 873 N.E.2d at 20.

b. Widow's Annuity (Firefighter)

In *Fleming v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*,²²⁵ the court examined a wife's annuity under section 6-142(B) of the Illinois Pension Code ("Code"). William Fleming ("Fleming"), who suffered a heart attack while at work was granted duty disability benefits and never returned to work.²²⁶ At that time of his disability, he was married to his first wife, Jeanne, who died in 1994.²²⁷ Fleming remarried plaintiff.²²⁸ Fleming died in 1996 and plaintiff received an ordinary death benefit payment of \$6,800, but was denied a widow's annuity because she married him while he was receiving disability benefits pursuant to section 6-142(f) of the Code.²²⁹ Pursuant to section 6-162 of the Code, \$57,000 was paid to Fleming's estate.²³⁰ Fleming's will left all his assets to his first wife, Jeanne, and then to his two (2) children.²³¹ In January 2004, section 6-142(f) was amended as section 6-142(A)(f) and was then subject to 6-142(B) which allowed widows to receive the annuity, if they had been married to the deceased fireman at least one (1) year preceding his death regardless of whether he was in service, except it does not apply to the widow who received a refund of contributions for widow's annuity under section 6-160, unless the refund is repaid with interest of four percent per year.²³² This amendment entitled plaintiff to the widow's annuity, but she had to repay the refund amount paid to Fleming's estate of which plaintiff had received nothing as required in section 6-158 of the Code.²³³ She paid the refund and began receiving a monthly widow's annuity of \$2,285.96 for the rest of her life.²³⁴ Plaintiff filed a complaint that the Board erred by making her repay the refund before receiving her widow's annuity.²³⁵ Plaintiff appealed the trial court decision contending the refund was given to her husband's estate and not pursuant to section 6-160 of the Code, so she was not required to repay the refund.²³⁶ The refund was made to Fleming's estate pursuant to section 6-162

225. *Fleming v. Retirement Bd. of Fireman's Annuity & Benefit Fund of Chicago*, 373 Ill. App. 3d 432, 869 N.E.2d 359 (1st Dist. 2007).

226. *Id.* at 433, 869 N.E.2d 360.

227. *Id.*

228. *Id.*

229. *Id.* at 433-34, 869 N.E.2d at 360-61.

230. *Id.* at 434, 869 N.E.2d at 361.

231. *Id.*

232. *Id.* at 434-35, 869 N.E.2d at 361.

233. *Id.* at 435, 869 N.E.2d at 361.

234. *Id.* at 435, 869 N.E.2d at 362.

235. *Id.*

236. *Id.*

of the Code which provides that if the amount accumulated for annuity purposes is not paid in the form of an annuity, it will be paid in the order specified, the first being his estate.²³⁷ The court acknowledged that the neither section 6–162 nor amended section 6–142(B) include a repayment provision.²³⁸ Relying on its analysis of sections 6–158 and 6–159, the court further expresses its belief that the legislature intended any widow, who became eligible for the annuity, to repay any refund either she or the fireman's estate would have received.²³⁹ To find otherwise would require paying benefits to the estate and also to Plaintiff.²⁴⁰ Using the same argument, plaintiff also contended the Board erred in making her pay the interest. The appellate court again rejects her argument.²⁴¹

Finally, plaintiff argued she was entitled to an annuity from the date her husband died pursuant to section 6–141.1(b)(2), which provides:

(b) If the deceased fireman was an active fireman at the time of his death and had at least 1 ½ years of creditable service, the widow's annuity shall be the greater of (1) 30% of the salary attached to the rank of first class firefighter in the classified career service at the time of the fireman's death, or (2) 50% of the retirement annuity the deceased fireman would have been eligible to receive if he had retired from service on the day before his death.²⁴²

The question to be answered is whether Fleming was an active fireman at the time of his death because he had the required one and one-half (1½) years of creditable service. Section 5/6–109 provides that an active fireman is any person employed and receiving a salary as a fireman.²⁴³ In accordance with section 5/6–109 of the Code, the court concluded Fleming was not active because he was receiving disability benefits not a salary.²⁴⁴ The last argument made by plaintiff in reliance on *Waliczek v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*²⁴⁵ was distinguished by the court because at the time of his death Fleming was receiving disability

237. *Id.*

238. *Id.* at 436, 869 N.E.2d at 362.

239. *Id.* at 436, 869 N.E.2d at 363.

240. *Id.* at 436–37, 869 N.E.2d at 363.

241. *Id.*

242. 40 ILL. COMP. STAT. 5/6–141.1(b) (1996).

243. 40 ILL. COMP. STAT. 5/6–109 (1996).

244. *Fleming v. Retirement Bd. of Fireman's Annuity & Benefit Fund of Chicago*, 373 Ill. App. 3d 432, 438, 869 N.E.2d 359, 364 (1st Dist. 2007).

245. *Waliczek v. Retirement Bd. of Fireman's Annuity & Benefit Fund of Chicago*, 318 Ill. App. 3d 32, 741 N.E.2d 272 (1st Dist. 2000).

benefits at the time of his death, not an age and service annuity as in *Waliczek*.²⁴⁶ The circuit court decision was affirmed.²⁴⁷

c. Line-of-Duty (Firefighter/Paramedic)

The court reviewed a decision denying a line-of-duty pension to a firefighter-paramedic injured while working for the Kankakee Fire Department in *Roszak v. Kankakee Firefighters' Pension Board*.²⁴⁸ In responding to an emergency call, Roszak and his female partner were confronted with lifting a 300–400 pound elderly woman.²⁴⁹ In moving the woman, both Roszak and his partner experience some pain in their upper backs when they had to lower her gently to the ground after having problems with the stretcher.²⁵⁰ After the woman was transported to the hospital, Roszak sought medical attention for his back.²⁵¹ The next day, Dr. Panuska, the city's doctor, examined Roszak.²⁵² The following month, Dr. Charuk gave him medication for pain and restricted his lifting.²⁵³ In March 2004, Dr. Deguzman referred him to Dr. Goldberg who recommended surgery.²⁵⁴ Due to the workers' compensation insurer's refusal to pay for Roszak's surgery, it was postponed multiple times, but was done on August 31, 2004.²⁵⁵ He continued to have pain and his range of motion was restricted.²⁵⁶ Dr. Panuska testified that when he saw Roszak the day after the lifting incident, Roszak seemed to have a full range of motion and he only diagnosed Roszak with a back strain.²⁵⁷ Dr. Panuska also testified that after the surgery the injury will get worse if Roszak does not have some rehabilitation therapy.²⁵⁸ He also admitted that the shoulder blade could have been involved in the injury as well.²⁵⁹ Dr. Panuska gave the opinion that Roszak could improve with more therapy, it was unlikely his shoulder would be 100% better, and he could not

246. *Fleming* at 438–39, 869 N.E.2d at 364.

247. *Id.* at 439, 869 N.E.2d at 365.

248. *Roszak v. Kankakee Firefighters' Pension Bd.*, 376 Ill. App. 3d 130, 875 N.E.2d 1280 (3d Dist. 2007).

249. *Id.* at 132, 875 N.E.2d at 1281–82.

250. *Id.* at 132, 875 N.E.2d at 1282.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.* at 133, 875 N.E.2d at 1282.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.* at 133–34, 875 N.E.2d at 1283.

do his job at that time.²⁶⁰ Roszak testified that he stopped physical therapy because of pain.²⁶¹ He said he had less range of motion after the surgery than before the surgery, always had persistent pain and could not lift as well as he could before the injury.²⁶² The Kankakee Firefighters' Pension Board ("Board") confronted Roszak about photographs of him snorkeling on vacation, surgery cancellations, and his income and net worth.²⁶³ Various evaluations and doctor reports were also entered into evidence.²⁶⁴ A functional capacity report showed Roszak was potentially an excellent candidate for rehabilitation.²⁶⁵ Dr. Goldberg's report was that Roszak's injury was related to the lifting incident and he could either live with the injury and not get better or have surgery and possibly resume his job within six (6) months.²⁶⁶ Three (3) doctors selected by the Board reported as well.²⁶⁷ Dr. Moisan was perplexed by his shoulder injury and the lifting incident, but agreed Roszak was incapable of performing his job at that time.²⁶⁸ Dr. Thometz found he was not capable of returning to his job and the injury was related to the lifting incident.²⁶⁹ Dr. Malik found Roszak's injury was the result of the lifting incident and was disabled due to the failed surgery.²⁷⁰ The Board denied him disability benefits finding Roszak was not disabled, and in the alternative, he was not entitled to the benefits because he did not take reasonable steps to rehabilitate his shoulder.²⁷¹

On appeal, Roszak contended he was improperly denied benefits because all of the medical opinions stated he was disabled due to the lifting incident.²⁷²

The appellate court began its analysis by examining the language of the Illinois Pension Code ("Code").²⁷³ Sections 6-112 and 6-110 of the Code provide the definitions of disability and act of duty as follows:

A condition of physical or mental incapacity to perform any assigned duty or duties in the fire service.²⁷⁴

260. *Id.*

261. *Id.*

262. *Id.* at 134, 875 N.E.2d at 1283.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 135, 875 N.E.2d at 1283-84.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* at 137-38, 875 N.E.2d at 1286.

272. *Id.* at 138, 875 N.E.2d at 1286.

273. 40 ILL. COMP. STAT. 5/6-110 (2006).

274. 40 ILL. COMP. STAT. 5/6-112 (2006).

Any act imposed on an active fireman by the ordinances of a city, or by rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person.²⁷⁵

The Code also provides that proof of disability shall be furnished by at least one licensed and practicing physician appointed by the Board.²⁷⁶ The appellate court found the Board's analysis problematic in that it listed credibility issues with the testimony given by Roszak, and used that to discount the opinions given by Drs. Thometz, Moisan, and Malik.²⁷⁷ The appellate court concluded that the findings relied upon by the Board were against the manifest weight of the evidence and Roszak met his burden in showing he was disabled.²⁷⁸

Next, the court reviewed the denial of a line-of-duty disability pension based on the Board's determination that Roszak was not entitled to the disability pension because he failed to reasonably take steps to rehabilitate his injury.²⁷⁹ The Board argued that under the Workers' Compensation Act ("Act"), such failure of foregoing rehabilitation was a superceding cause of the disability and, therefore, it was not the lifting incident that caused the disability.²⁸⁰ The appellate court noted that there is no such language in the Code.²⁸¹ Relying on *Luchesi v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago*,²⁸² the court further pointed out that there was evidence in the record that further rehabilitation was necessary for further improvement of Roszak's shoulder.²⁸³ However, Dr. Malik stated Roszak was permanently disabled.²⁸⁴ Roszak did some physical therapy, but due to the pain and nonpayment by the workers' compensation insurer, he did not continue.²⁸⁵ There was no statement from any of the doctors that the failure to continue therapy was a superceding cause of the disability.²⁸⁶ Dr. Panuska

275. 40 ILL. COMP. STAT. 5/6-110 (2006).

276. *Rozsak v. Kankakee Firefighters' Pension Fund*, 376 Ill. App. 3d 130, 139, 875 N.E.2d 1280, 1287 (3d Dist. 2007); 40 ILL. COMP. STAT. 5/6-153 (2006).

277. *Rozsak* at 140-43, 875 N.E.2d at 1287-90.

278. *Id.* at 145, 875 N.E.2d at 1291-92.

279. *Id.* at 145, 875 N.E.2d at 1292.

280. *Id.*

281. *Id.* at 145-46, 875 N.E.2d at 1292.

282. *Luchesi v. Retirement Bd. of Fireman's Annuity & Benefit Fund of Chicago*, 333 Ill. App. 3d 543, 776 N.E.2d 703 (1st Dist. 2002).

283. *Rozsak*, 376 Ill. App. 3d at 148, 875 N.E.2d at 1294.

284. *Id.*

285. *Id.*

286. *Id.*

even testified Roszak would not be 100% better even with physical therapy.²⁸⁷ The appellate court reversed and remanded with direction to grant the application for line-of-duty disability benefits.²⁸⁸

4. *Prevailing Wage Act*

In *Brandt Construction Co. v. Ludwig*²⁸⁹ the appellate court addressed the issue of whether the Department of Labor ("Department") was required to give actual notice to a contractor under the Prevailing Wage Act. Brandt Construction ("Brandt") had performed four construction jobs under contracts with certain cities.²⁹⁰ After the contract date, the Department raised the prevailing rate of hourly wages, but failed to give Brandt notice of the increase.²⁹¹ Brandt, accordingly, failed to pay its employees the prevailing wage and it received letters from the Department directing it to pay back wages and penalties.²⁹²

Brandt filed a complaint for declaratory and injunctive relief, contending the Prevailing Wage Act²⁹³ ("Act") required the cities to provide it with actual notice of the increase in the prevailing wage rate.²⁹⁴ Brandt sought a declaration that it did not owe the Department or its employees any back wage or any penalties, interest, or liquidated damages.²⁹⁵ The trial court granted Brandt's motion for summary judgment, finding it owed nothing in penalties, interest or liquidated damages, but reserving for further hearing whether Brandt owed back wages.²⁹⁶

On appeal, the court first rejected the Department's procedural arguments that a declaratory judgment was not proper because: (1) there was no actual controversy; (2) Brandt was seeking a declaration of nonliability for past conduct; and (3) Brandt failed to exhaust administrative remedies.²⁹⁷ The court likewise rejected the Department's substantive argument that public notice of the prevailing wage rate change on the Department's website and at its main office was sufficient.²⁹⁸ In reaching this conclusion, the court relied

287. *Id.*

288. *Id.*

289. *Brandt Constr. Co. v. Ludwig*, 376 Ill. App. 3d 94, 878 N.E.2d 116 (3d Dist. 2007).

290. *Id.* at 97, 878 N.E.2d at 119.

291. *Id.*

292. *Id.*

293. 820 ILL. COMP. STAT. 130/0.01 *et seq.* (West 2004).

294. *Brandt*, 376 Ill. App. 3d at 97, 878 N.E.2d at 119.

295. *Id.* at 97–98, 878 N.E.2d at 119.

296. *Id.* at 99, 878 N.E.2d at 120.

297. *Id.* at 100–03, 878 N.E.2d at 122–25.

298. *Id.* at 106, 878 N.E.2d at 126.

on Section 4(d) of the Act,²⁹⁹ which provides that where the prevailing rate is revised “the public body shall be responsible to notify the contractor and each subcontractor of the revised rate.”³⁰⁰ The court found this statutory language placed an affirmative obligation on public bodies to provide actual notice of the revised rate. Acceptance of the Department’s position that public notice was sufficient would effectively shift the obligation of notice from the public body to the contractor.³⁰¹

The court next addressed whether the lack of notice impacted Brandt’s liability for back wages, penalties, and interest.³⁰² In considering Section 11,³⁰³ the court concluded the penalties under the act are in the nature of punitive damages.³⁰⁴ Accordingly, it would be inequitable to punish Brandt for its failure to pay a wage rate for which it received no notice.³⁰⁵ Brandt was therefore not liable for penalties or interest.³⁰⁶ With respect to back wages, the court held the cities’ failure to provide actual notice of the revised rate did not relieve Brandt of its obligation to pay wages at the revised increased rate.³⁰⁷

B. Retaliation

1. Retaliatory Discharge

Retaliatory discharge alleged by a former employee is not uncommon. One of the exceptions to at-will employment in Illinois is terminating an employee for exercising his/her rights under the Workers’ Compensation Act (“Act”).³⁰⁸ In *Siekierka v. United Steel Deck, Inc.*,³⁰⁹ Siekierka alleged he was injured at work and claimed workers’ compensation and temporary total disability benefits.³¹⁰ About two and one-half (2½) months later and while still recuperating from his injury, Siekierka was terminated.³¹¹ Among other

299. 820 ILL. COMP. STAT. 130/4(d) (2004).

300. *Brandt*, 376 Ill. App. 3d at 104, 878 N.E.2d at 126.

301. *Id.*

302. *Id.*

303. 820 ILL. COMP. STAT. 130/11 (West 2004).

304. *Brandt*, 376 Ill. App. 3d at 107, 878 N.E.2d at 127.

305. *Id.* at 108, 878 N.E.2d at 127.

306. *Id.*

307. *Id.* at 109–10, 878 N.E.2d at 128.

308. 820 ILL. COMP. STAT. 308/1 *et seq.* (2002).

309. *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 868 N.E.2d 374 (3d Dist. 2007).

310. *Id.* at 215, 868 N.E.2d at 375.

311. *Id.*

allegations, Siekierka claimed his termination was motivated by his pursuit of workers compensation benefits.³¹²

United Steel Deck defended its termination of Siekierka on the basis that Siekierka failed to return to work after an extension of almost a month beyond his twelve-week leave granted pursuant to the Family and Medical Leave Act.³¹³ The facts showed that the company considered extensions given to other employees, and provided Siekierka with a similar extension.³¹⁴ The company advised Siekierka that if he was unable to return at the end of August he would be terminated and was invited to seek re-employment should that happen.³¹⁵ The trial court granted summary judgment in favor of United Steel Deck.³¹⁶

A retaliatory discharge claim falls within the traditional tort analysis.³¹⁷ It is plaintiff's burden to prove: (1) he was an employee, (2) he exercised his rights under the Act, and (3) his termination was causally related to his exercise of those rights.³¹⁸ It is the employer's motive for adverse action that is the ultimate issue.³¹⁹ If the employer has a legitimate basis for termination, and it is not pretextual, then the causation element is not met.³²⁰ From the facts, we know Siekierka was a good employee, he filed a claim for workers' compensation benefits, and he was terminated.³²¹ United Steel Deck chose to come forward with a valid nonpretextual reason for Siekierka's termination which was his failure to return from leave within the time designated by the company.³²² However, there was also evidence that the insurer made it impossible for Siekierka to return to work because it refused to accommodate his surgery and required him to be examined by an insurer-provided doctor.³²³ The surgery was authorized, but the recovery time was going to take him beyond the deadline of August 30 set by United Steel Deck.³²⁴ The court believed United Steel Deck's actions of (1) waiting to inform Siekierka that he had used up eleven weeks of his leave time after he had followed the

312. *Id.*

313. *Id.* at 215, 868 N.E.2d at 376.

314. *Id.* at 218–20, 868 N.E.2d at 377–79.

315. *Id.* at 216, 868 N.E.2d at 376.

316. *Id.* at 220, 868 N.E.2d at 379.

317. *Id.* at 221, 868 N.E.2d at 380.

318. *Id.* (citing *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 335–36, 704 N.E.2d 403, 406 (1998)).

319. *Id.*

320. *Id.* at 222, 868 N.E.2d at 380 (citing *Hartlein v. Ill. Power Co.*, 151 Ill. 2d 142, 160, 601 N.E.2d, 720, 728 (1992)).

321. *Id.* at 222, 868 N.E.2d at 381.

322. *Id.*

323. *Id.*

324. *Id.* at 222–23, 868 N.E.2d at 381.

insurer-provided doctors instructions to wait and see, (2) knowing he could not recover and return within the time period given, and (3) that Siekierka did not realize he had a deadline to return to work until he received the letter from the company, put Siekierka in a position of having to choose between the surgery which would require he go beyond the final return date or returning to work without the surgery.³²⁵ In agreement with *Kelsay v. Motorola*,³²⁶ the court believed this is the choice employees should not have to make and if this choice was created by United Steel Deck, it was retaliatory.³²⁷ The summary judgment granted by the trial court was reversed.

The court in *Irizarry v. Illinois Central Railroad Co.*³²⁸ found that the common-law tort of retaliatory discharge does not extend to railroad employees discharged for filing a personal injury claim under the Federal Employer's Liability Act ("FELA").³²⁹ The plaintiff, who was employed as a carman for the defendant, was injured when he was adjusting a piston underneath a train car.³³⁰ After plaintiff filed a personal injury report, the defendant threatened to, and did ultimately, terminate his employment. Plaintiff filed a retaliatory discharge claim,³³¹ contending he was terminated for filing a personal injury report and for potentially pursuing his rights under FELA.³³²

The trial court dismissed the plaintiff's retaliatory discharge claim, relying on the court's decision in *Sutherland v. Norfolk Southern Railway Co.*,³³³ holding that a railroad employee subject to FELA could not assert a state law claim for retaliatory discharge.³³⁴

The court noted that the retaliatory discharge tort was an exception to the employment at-will doctrine, which provides that an employer can fire an employee with or without cause.³³⁵ To establish such a claim, the plaintiff must prove: (1) that he was discharged in retaliation for his activities; and (2) that the discharge violates a clear mandate of public policy.³³⁶

325. *Id.* at 223, 868 N.E.2d at 381–82.

326. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

327. *Siekierka v. United Steel Deck, Inc.*, 373 Ill. App. 3d 214, 223, 868 N.E.2d 374, 382 (3d Dist. 2007).

328. *Irizarry v. Ill. Cent. R.R. Co.*, 377 Ill. App. 3d 486, 879 N.E.2d 1007 (1st Dist. 2007), *appeal denied* Mar. 26, 2008.

329. *Id.* at 492, 879 N.E.2d at 1013.

330. *Id.* at 487, 879 N.E.2d at 1009.

331. *Id.*

332. *Id.* at 487, 879 N.E.2d at 1010.

333. *Sutherland v. Norfolk Ry. Co.*, 356 Ill. App. 3d 620, 826 N.E.2d 1021 (1st Dist. 2005).

334. *Irizarry*, 377 Ill. App. 3d at 487, 879 N.E.2d at 1010.

335. *Id.* at 488, 879 N.E.2d at 1010.

336. *Id.* at 826, 826 N.E.2d at 1021.

On appeal, the plaintiff argued the court should reconsider its holding in *Sutherland* because that decision was premised on the assumption that a plaintiff had a remedy for retaliatory discharge under the Railway Labor Act when no such remedy actually exists.³³⁷ The court rejected plaintiff's argument, noting its decision in *Sutherland* was grounded upon an analysis of the history and development of the retaliatory discharge doctrine.³³⁸

Continuing, the court noted that the "current policy of [the] supreme court is to restrict and narrow rather than expand the range of the retaliatory discharge cause of action."³³⁹ Thus, the Illinois Supreme Court and the lower appellate courts have declined to extend the tort to claims of retaliation for the exercise of free speech, for filing a health insurance claim, for age, for constructive discharge, and for filing a claim under the Illinois Wage Payment and Collection Act.³⁴⁰

The court reaffirmed its *Sutherland* holding that the tort or retaliatory discharge is available in only two situations: (1) where the discharge stems from exercising rights pursuant to the Illinois Workers' Compensation Act ("IWCA"), and (2) where the discharge is for reporting illegal or improper conduct.³⁴¹ Aside from these two narrow exceptions, the court found Illinois courts "consistently have refused to expand the tort to encompass a private and individual grievance."³⁴² Applying the foregoing rationale, the court refused to extend the retaliatory discharge tort to employees discharged for filing FELA claims.³⁴³

The court also rejected the plaintiff's argument that the refusal to recognize such claim violated his constitutional right to equal protection.³⁴⁴ According to the plaintiff, there was no rational basis to distinguish between railroad and non-railroad employees and to provide only non-railroad employees with a retaliatory discharge cause of action.³⁴⁵ The plaintiff further contended that there is no difference in the purpose underlying the public policies of the IWCA and the FELA.³⁴⁶

The court rejected the plaintiff's equal protection argument noting, as an initial matter, that the distinction between railroad and non-railroad

337. *Id.*

338. *Id.* at 488, 879 N.E.2d at 1011.

339. *Id.* at 489, 879 N.E.2d at 1011.

340. *Id.* at 489, 879 N.E.2d at 1011–12.

341. *Id.* at 490, 879 N.E.2d at 1012.

342. *Id.* at 490–91, 879 N.E.2d at 1012.

343. *Id.* at 492, 879 N.E.2d at 1013.

344. *Id.* at 493, 879 N.E.2d at 1014–15.

345. *Id.* at 493, 879 N.E.2d at 1014.

346. *Id.* at 495, 879 N.E.2d at 1016.

employees does not implicate a suspect class, and therefore does not require strict scrutiny.³⁴⁷ Accordingly, there only need be a rational relationship to a legitimate government interest.³⁴⁸

The court found there was a rational relationship for distinguishing between railroad and non-railroad employees because: (1) the United States Congress exempted FELA employees from state workers' compensation statutes, and (2) the Illinois Supreme Court's unwillingness to extend the retaliatory discharge tort is rationally related to the legitimate government interest in preserving at-will employment and not creating new causes of action without legislative authorization.³⁴⁹

The court also found there were differences in the public policy underlying the IWCA and FELA.³⁵⁰ The purpose of the IWCA is to provide financial protection to employees whose earning power has been temporarily diminished or terminated because of workplace injuries.³⁵¹ In contrast, FELA was enacted to provide a federal remedy for railroad workers injured because of their employer or co-worker's negligence.³⁵² The IWCA, moreover, contains specific language protecting an employee from retaliatory discharge, whereas no such language is contained within FELA.³⁵³

2. Retaliatory Demotion and Compelled Self-Defamation

As in *Irizarry*, the court in *Emery v. Northeast Illinois Regional Commuter Railroad Corp.*³⁵⁴ found that employees discharged for filing Federal Employer's Liability Act ("FELA") actions could not assert a claim for retaliatory discharge. The court also rejected the plaintiff's claims for retaliatory demotion and for compelled self-defamation.

In *Emery*, the plaintiff was hired for the position of senior attorney. Within six months, she was promoted to associate general counsel and director of litigation. Prior to 2002, she received raises, bonuses and compliments on her work.³⁵⁵

347. *Id.* at 494, 879 N.E.2d at 1015.

348. *Id.*

349. *Id.*

350. *Id.* at 495, 879 N.E.2d at 1016.

351. *Id.*

352. *Id.*

353. *Id.* at 495-96, 879 N.E.2d 1016.

354. *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 880 N.E.2d 1002 (1st Dist. 2007).

355. *Id.* at 1016, 880 N.E.2d at 1004-05.

In 1999, and while employed by the defendant, the plaintiff sustained a work-related knee injury. Although she filed a claim with the defendant's risk management department, it refused to pay most of her medical bills. In 2001, the plaintiff retained counsel and filed a lawsuit under FELA, claiming the defendant's negligence caused her injury and violated Occupational Safety and Health Administration ("OSHA") regulations. After the lawsuit was filed, defendant told plaintiff she did not deserve a bonus and she was the only attorney that did not receive a bonus. The plaintiff was also told she had committed ethical violations by filing the lawsuit and that she therefore could no longer represent the defendant in FELA cases. The plaintiff was thereafter demoted to senior attorney, her work was scrutinized, and she was criticized for her performance and lack of professionalism. The defendant ultimately told plaintiff she could either resign or be terminated, and she was ultimately terminated.³⁵⁶ Subsequent to her termination, the individual defendants allegedly engaged in a smear campaign against the plaintiff. Plaintiff sued, alleging retaliatory discharge and demotion and compelled self-defamation.

The court dismissed the retaliatory discharge claim, relying on its decision in *Irizzary*.³⁵⁷ The court likewise dismissed the plaintiff's retaliatory demotion claim on the grounds that the Illinois Supreme Court has repeatedly held that the retaliatory discharge cause of action does not extend to any employment action short of actual discharge.³⁵⁸

Regarding the compelled self-defamation claim, the plaintiff alleged she was compelled to explain to potential employers the reasons given by the defendant for her discharge even though they were not truthful and because a failure to do so could have led to charges of misconduct by a new or potential employer.³⁵⁹

The court concluded that Illinois law does not recognize a cause of action for compelled self-defamation. In reaching its conclusion, the court noted the Illinois Supreme Court had yet to address the issue, that two districts of the appellate court had considered the doctrine and rejected its applicability, and the Seventh Circuit had also rejected the tort.³⁶⁰ The court further noted that the majority of other jurisdictions addressing the issue had

356. *Id.* at 1017, 880 N.E.2d at 1005.

357. *Id.* at 1019, 880 N.E.2d at 1007 (citing *Irizzary v. Ill. Cent. R.R. Co.*, 377 Ill. App. 3d 486, 879 N.E.2d 1007 (1st Dist. 2007)).

358. *Id.* at 1020, 880 N.E.2d at 1008.

359. *Id.* at 1021, 880 N.E.2d at 1008.

360. *Id.* at 1022, 880 N.E.2d at 1009 (citing *Layne v. Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 968, 569 N.E.2d 1104, 1106 (2d Dist. 1991); *Harrel v. Dillard's Dep't Stores, Inc.*, 268 Ill. App. 3d 537, 548, 644 N.E.2d 448, 455 (5th Dist. 1994); *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 910-12 (7th Cir. 1994)).

declined to recognize a cause of action for such a tort. The court relied on three rationales for declining to recognize the tort: (1) the tort would curtail communications with employees and their prospective employers, (2) the tort would discourage plaintiffs from mitigating damages by providing them with too much control over the cause of action, and (3) the tort conflicts with the employment at-will doctrine.³⁶¹

C. Sexual Harassment

In *Sangamon County Sheriff's Department v. State Human Rights Commission*,³⁶² the court reversed the Commission's decision that the employer was strictly liable for a co-worker's sexual harassment of an employee. The employee had filed a charge with the Illinois Department of Human Rights ("IDHR"), alleging sexual harassment. That charge was subsequently amended to allege sexual harassment with a retaliatory motivation. The Commission subsequently filed a four-count complaint against the Sangamon County Sheriff's Department and the alleged harasser, alleging retaliation and sexual harassment discrimination. The Sheriff's Department filed a verified answer, denying it sexually harassed the complainant and denying that strict liability should be imposed because the complainant failed to use the department's complaint procedure and because the department took prompt remedial action.³⁶³

The employee, who was a clerk in the Sheriff's record department, claimed she was being periodically harassed by a non-supervisor sergeant in 1998 and early 1999.³⁶⁴ The sergeant did not have any supervisory responsibilities over the employee or any ability to impact her working conditions.³⁶⁵ In February 1999, the employee received a letter which appeared to be from the Department of Public Health stating she may have been exposed to a sexually transmitted disease. The employee reported the letter to her supervisor, who then took the employee to the Department of Public Health and learned the letter did not originate from that office. An investigation by the Sheriff's Department ensued and it was determined that the harasser had authored the letter and that the employee's complaint of sexual harassment had been substantiated.³⁶⁶ The harasser was suspended for

361. *Id.* at 1026–1028, 880 N.E.2d at 1012–14.

362. *Sangamon County Sheriff's Dep't v. State Human Rights Comm'n*, 375 Ill. App. 3d 834, 875 N.E.2d 10 (4th Dist. 2007).

363. *Id.* at 836–37, 875 N.E.2d at 11–12.

364. *Id.* at 836, 875 N.E.2d at 12.

365. *Id.* at 840, 875 N.E.2d at 15.

366. *Id.* at 838, 875 N.E.2d at 13–14.

four (4) days without pay. The employee complained that she felt the harasser's discipline was insufficient, particularly because there were rumors that she had acquired AIDS.³⁶⁷

The Administrative Law Judge ("ALJ") issued a decision recommending dismissal of the sexual harassment and retaliation claims. The Commission disagreed, in part, with the ALJ's decision, finding the alleged conduct constituted sexual harassment. The Commission further determined that the Sheriff's Department was liable because it failed to take reasonable corrective action and because it told the employee not to press charges or go near the harasser.³⁶⁸ The Sheriff's Department appealed the Commission's decision.³⁶⁹

As a procedural matter, the Commission argued the appeal should be dismissed because the IDHR was not named as a party in the Sheriff Department's petition for review. The appellate court rejected this argument, noting the IDHR was not a named party on the complaint and had nothing to do with the case after the filing of the complaint.³⁷⁰

Substantively, the Sheriff's Department argued it should not be held strictly liable for the harasser's conduct. In considering the issue, the court noted an employer is liable for (1) a supervisor's sexual harassment of an employee and (2) a nonsupervisory employee's sexual harassment if the employer becomes aware of the conduct and fails to take reasonable corrective measures. The appellate court agreed with the Sheriff Department's argument that it cannot be held strictly liable because the harasser was not the employee's supervisor and he did not have authority to affect the terms and conditions of the employee's employment.³⁷¹

In reaching this conclusion, the court noted that the term "supervisor" is defined to mean "any individual having authority to hire, transfer, suspend, lay off, recall, promote, discharge, discipline, and handle grievances of other employees."³⁷² A "manager" is one who "administers or supervises the affairs of a business, office, or other organization."³⁷³ Because the harasser did not possess any of these powers, as they related to the employee, the Sheriff's Department was not strictly liable.³⁷⁴

Continuing, the court noted the Sheriff's Department could be liable only if it knew or should have known of the harassment and failed to take

367. *Id.* at 839, 875 N.E.2d at 14.

368. *Id.* at 841, 875 N.E.2d at 15-16.

369. *Id.* at 842, 875 N.E.2d at 16.

370. *Id.* at 843-44, 875 N.E.2d at 17-19.

371. *Id.* at 846, 875 N.E.2d at 19 (citing 775 ILL. COMP. STAT. 5/2-102(D) (2002)).

372. *Id.* at 847, 875 N.E.2d at 20 (citing Black's Law Dictionary 1452 (7th ed. 1999)).

373. *Id.* (citing Black's Law Dictionary 972 (7th ed. 1999)).

374. *Id.* at 847, 875 N.E.2d at 20-21.

reasonable corrective measures. The court concluded that the department took corrective measures upon learning of the harassment when it launched an investigation, suspended the harasser, and issued the harasser a letter of reprimand.³⁷⁵

D. Illinois Human Rights Act

1. *Arrest or Criminal History Ordered Expunged, Sealed or Impounded*

In *C.R.M. v. Chief Legal Counsel of the Illinois Department of Human Rights*,³⁷⁶ a fifty-year-old black male interviewed for a position.³⁷⁷ He received an offer contingent on successfully completing a physical exam and background check which included his criminal history.³⁷⁸ He provided written releases for such information.³⁷⁹ Eight (8) aliases, four (4) criminal misdemeanor convictions of two (2) thefts, resisting police officers, and battery, in addition to numerous arrests were revealed by the background check.³⁸⁰ He was notified by letter that he would not receive a final offer of employment.³⁸¹ Four (4) days later he filed a charge of discrimination with the Illinois Department of Human Rights (“IDHR”).³⁸² The evidence showed background checks were conducted on all candidates for sensitive positions, the background check revealed four (4) convictions and eight (8) aliases, and he did not establish a prima facie case because no one was hired in the position and it was later eliminated.³⁸³ The charge was dismissed for lack of substantial evidence.³⁸⁴ He requested review by the Chief Legal Counsel and the dismissal was upheld.³⁸⁵ He appealed.

Reviewing the Chief Legal Counsel’s decision, the court determined whether sustaining the dismissal was arbitrary and capricious or an abuse of discretion.³⁸⁶ Using the three-part test adopted by the Illinois Supreme Court in *Zaderaka v. Illinois Human Rights Comm’n*,³⁸⁷ a prima facie case must be

375. *Id.* at 847, 875 N.E.2d at 21.

376. *C.R.M. v. Chief Legal Counsel of the Ill. Dep’t of Human Rights*, 372 Ill. App. 3d 730, 866 N.E.2d 1177 (1st Dist. 2007).

377. *Id.* at 731, 866 N.E.2d at 1179.

378. *Id.*

379. *Id.*

380. *Id.* at 732, 866 N.E.2d at 1179.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 732, 866 N.E.2d at 1180.

385. *Id.*

386. *Id.* at 733, 866 N.E.2d at 1180.

387. *Zaderaka v. Human Rights Comm’n*, 131 Ill. 2d 172, 545 N.E.2 684 (1989).

established.³⁸⁸ If that is rebutted by the employer with an articulated legitimate, nondiscriminatory reason for its decision, and it cannot be proven by a preponderance of the evidence that the employer's articulated reason is pretextual, then a finding in favor of the employer must be entered.³⁸⁹ First, petitioner failed to establish the position remained open and was thus unable to establish an element of the prima facie case.³⁹⁰ Second, there was no evidence that the employer relied on his prior arrests in violation of the Illinois Human Rights Act ("IHRA"),³⁹¹ but rather relied on the four (4) criminal convictions that had not been sealed, expunged or impounded pursuant to section 2-103(A) of the IHRA.³⁹² The lack of substantial evidence finding by the investigator was supported by the record and no abuse of discretion by the Chief Legal Counsel was found.³⁹³ The order of the Chief Legal Counsel sustaining the dismissal of the charge was affirmed by the appellate court.³⁹⁴

2. Preemption

In *Blount v. Stroud*,³⁹⁵ a complaint was filed alleging common law retaliatory discharge, retaliatory discharge under section 1981 of the Civil Rights Act of 1991, defamation and intentional infliction of emotional distress because plaintiff, Blount, had supported another employee in her charge of discrimination filed with the Equal Employment Opportunity Commission ("EEOC") alleging racial and sexual harassment.³⁹⁶ A motion to dismiss was denied on the grounds that the claims were not inextricably linked with claims covered by the Illinois Human Rights Act ("IHRA")³⁹⁷ because the allegations were actually that plaintiff refused to perjure herself which falls within the scope of common law retaliation.³⁹⁸

In May 2000, Blount, the plaintiff, was made the local sales manager and the best salesperson generating approximately \$2 to \$3 million in revenue for Stroud's company, Jovon.³⁹⁹ Bonnie Fouts ("Fouts"), reported to Joseph Stroud ("Stroud") that Rick Howell ("Howell") was acting hostile toward her

388. *C.R.M.*, 372 Ill. App. 3d at 733, 866 N.E.2d at 1181.

389. *Id.*

390. *Id.*

391. 775 ILL. COMP. STAT. 5/2-103(A) (2004).

392. *C.R.M.*, 372 Ill. App. 3d at 734, 866 N.E.2d at 1181.

393. *Id.*

394. *Id.*, appeal denied, 224 Ill. 2d 575, 871 N.E.2d 55 (May 31, 2007).

395. *Blount v. Stroud*, 376 Ill. App. 3d 935, 877 N.E.2d 49 (1st Dist. 2007).

396. *Id.* at 937, 877 N.E.2d at 53.

397. 775 ILL. COMP. STAT. 5/1-101 *et seq.* (2006).

398. *Blount*, 376 Ill. App. 2d. at 937, 877 N.E.2d at 53.

399. *Id.* at 939-40, 877 N.E.2d at 53.

and calling her racial and sexual epithets.⁴⁰⁰ Stroud offered Fouts money, but she refused it.⁴⁰¹ Stroud moved Fouts to another department, but Fouts continued to report continued harassment by Howell.⁴⁰² Howell was not disciplined or terminated.⁴⁰³ Stroud fired Fouts on August 24, 2000.⁴⁰⁴ Fouts filed a charge of discrimination with the EEOC.⁴⁰⁵ Upon receiving the charge, Stroud held a meeting at which Blount stated she would be supporting Fouts in her charge.⁴⁰⁶ Blount admonished Stroud for witnessing the treatment of Fouts and doing nothing which made Stroud irate.⁴⁰⁷ Stroud suspended Blount because Howell, who is Stroud's nephew, told him Blount was telling other employees that the business was going to be hers, that she had diverted business, she had no respect for him and she was not organized.⁴⁰⁸ Stroud offered Blount the opportunity to work as an independent contractor, asked her to drop the lawsuit, and offered her \$10,000 for future services.⁴⁰⁹ Blount cashed the check, but did not work for Stroud again.⁴¹⁰ At the conclusion of the trial, but before the jury was instructed, Blount dropped the section 1981 claim against Stroud personally and the jury was instructed only on one combined retaliation claim against the company.⁴¹¹ The jury awarded Blount \$257,350 in back wages, \$25,000 for pain and suffering and \$2.8 million in punitive damages.⁴¹² Stroud filed a motion for judgment notwithstanding the verdict because the retaliation claim was preempted by the IHRA.⁴¹³ The circuit court denied the motion on the grounds the claims were not based on her race, but because she would not perjure herself, so in its opinion, the claim was not preempted by the IHRA.⁴¹⁴

On appeal Stroud again raised preemption by the IHRA and argued the circuit court did not have subject matter jurisdiction to which the appellate court agreed.⁴¹⁵ The appellate court explained that Blount could not establish her retaliation claims without reference to the IHRA which provides that an

400. *Id.* at 939, 877 N.E.2d at 54.

401. *Id.*

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 939–40, 877 N.E.2d at 54.

408. *Id.* at 939–40, 877 N.E.2d at 54–55.

409. *Id.* at 940, 877 N.E.2d at 55.

410. *Id.*

411. *Id.*

412. *Id.* at 941, 877 N.E.2d at 55.

413. *Id.*

414. *Id.*

415. *Id.* at 941, 877 N.E.2d at 56.

employer cannot retaliate against its employees because he/she opposed unlawful discrimination or harassment.⁴¹⁶ The appellate court held, “. . . the Human Rights Act deprives Illinois circuit courts of subject matter jurisdiction over all civil rights claims, regardless of whether they are brought under state or federal law. With respect to the Illinois court system, jurisdiction over all of plaintiff’s claims exists only in the Illinois Human Rights Commission.”⁴¹⁷ The circuit court was reversed.⁴¹⁸

Effective January 1, 2008, by Public Act 95–243, the IHRA was amended to allow plaintiffs the right to file civil rights action in the circuit court or with the Illinois Human Rights Commission.⁴¹⁹

E. Non-Compete Agreements and Restrictive Covenants

1. *Enforceability*

More guidance is given on non-compete agreements in *Cambridge v. Mercury Partners 90 BI, Inc.*⁴²⁰ Gregory Deger (“Deger”) was employed by Cambridge as a sales representative.⁴²¹ Deger’s employment agreement contained provisions prohibiting him from competing and from soliciting Cambridge’s customers.⁴²² Deger was terminated April 21, 2001 by Cambridge.⁴²³ He was hired by Mercury Partners 90 BI, Inc. d/b/a Brucker Company (“Brucker”) to allegedly compete and solicit in violation of his agreement with Cambridge.⁴²⁴ Cambridge sent a letter to Brucker advising it of the restrictive covenants in Deger’s agreement and demanding it cease and desist Deger’s competitive activities.⁴²⁵ A circuit court in St. Louis, MO granted Cambridge a permanent injunction against Deger enforcing the restrictive covenants.⁴²⁶ The restrictive covenants are as follows:

c.c. . . . Employee shall not, for a period of 24 months following the termination of his/her employment, whether as principal, employee,

416. *Id.*

417. *Id.* at 949, 877 N.E.2d at 62

418. *Id.* at 950, 877 N.E.2d at 63.

419. Pub. A. 95–243 (effective Jan. 1, 2008).

420. *Cambridge Eng’g, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 879 N.E.2d 512 (1st Dist. 2007).

421. *Id.* at 449, 879 N.E.2d at 516.

422. *Id.*

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

independent contractor or otherwise, in any way, directly or indirectly, engage in any activity for or on behalf of Employer's competitors, or engage in any business that competes with Employer, anywhere in the United States and Canada.

d. Employee shall not, for the same period, either directly or indirectly, contact or communicate with any customer, employee or representative of Employer for any purpose, including without limitation, to engage in sales activities, employment recruitment, or solicitation of any kind.⁴²⁷

The choice of law was designated as the State of Missouri.⁴²⁸ The agreement also contained a provision allowing the court to modify any term or provision to accomplish the purpose and intent of the provision.⁴²⁹ At trial, testimony was given that Deger was not a sales person for Brucker, but did give inside support to the outside sales persons and would have had contact with former Cambridge customers.⁴³⁰ Testimony also revealed only a small part of Brucker's business was competitive with Cambridge.⁴³¹ Cambridge's president testified that it conducted some business in Canada, but that it was not a market.⁴³² The president also testified that the intent was to prevent Deger from "holding any job with a competitor, even a security guard or public relations person."⁴³³ It was also established through testimony that Cambridge did business nationally and Deger had information about its company that would be applicable throughout the United States and Canada.⁴³⁴ Deger testified he was only providing support or background information, denied soliciting customers, admitted contact with customers, and denied selling.⁴³⁵ Deger did not believe there were any established customers in Canada.⁴³⁶ The trial court granted Brucker's motion for judgment *n.o.v.* finding the noncompete provisions were unreasonable and therefore unenforceable.⁴³⁷

In the court's opinion, there was a discussion regarding the choice of law. The employment agreement provided for Missouri law to govern.⁴³⁸

427. *Id.* at 450, 879 N.E.2d at 517.

428. *Id.*

429. *Id.*

430. *Id.* at 451, 879 N.E.2d at 518.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* at 453, 879 N.E.2d at 519.

437. *Id.* at 453, 879 N.E.2d at 520.

438. *Id.*

However, since the issue of enforceability is similarly analyzed in Missouri and Illinois, the court determined the conclusion would be the same.⁴³⁹

The court found the territorial scope to be too broad because Cambridge's own president testified Canada was not even a market.⁴⁴⁰ Further, the court found the intent to keep Deger from performing any job at a competitor was too broad. The court examined the restrictive covenant and because of the separate use of a verb, it determined the phrase "that competes with Employer" applied to "engage in any business" rather than "engage in any activity for or on behalf of Employer's competitors" rendering it too broad.⁴⁴¹ The language combined with Cambridge's president testimony of Cambridge's intent to keep Deger from holding any job, including a janitor, with a competitor convinced the court it was unenforceable.⁴⁴²

Despite the court's ruling that the nonsolicitation clause as an alternative was waived, it also found the nonsolicitation provision was unenforceable because it extended to past and future customers and to those customers whom Deger never had contact with while he was employed by Cambridge.⁴⁴³

Finally, the court refused to amend the covenants to make the enforceable because Cambridge waived that issue as well. However, the court went on to explain what it would have done had that issue been properly raised. Relying on the decision in *North American Paper Co. v. Unterberger*,⁴⁴⁴ the court believed any modification would have to be significant, and thus would have refused to modify them.⁴⁴⁵ The trial court decision was affirmed.

2. Trade Secrets and Extension of Non-Compete Period

In *Stenstrom v. Mesch*,⁴⁴⁶ the court addressed the likelihood of success on a claim for purposes of a preliminary injunction and when the noncompete period ends and whether it is extended due to a breach of the agreement. Robert Mesch ("Mesch") began working the petroleum business in 1974.⁴⁴⁷ Mesch worked for Precision Petroleum, Inc. ("Old PPI") for about seven (7)

439. *Id.* at 455, 879 N.E.2d at 522.

440. *Id.*

441. *Id.* at 457–58, 879 N.E.2d at 524–25.

442. *Id.* at 457, 879 N.E.2d at 524.

443. *Id.* at 461–62, 879 N.E.2d at 528–29.

444. *N. Am. Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 526 N.E.2d 621 (1988).

445. *Cambridge*, 378 Ill. App. 3d at 462–63, 879 N.E.2d at 529–30.

446. *Senstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 874 N.E.2d 959 (2d Dist. 2007).

447. *Id.* at 1079, 874 N.E.2d at 963.

years.⁴⁴⁸ Stenstrom Petroleum Services Group, Inc. (“Stenstrom”) purchased Old PPI, hired Mesch, and Mesch signed a noncompete agreement and a confidentiality agreement.⁴⁴⁹ The noncompete agreement provided as follows:

RESTRICTIVE COVENANT. Employee, as additional consideration for the training, classroom study and materials provided by the Company, shall not for a period of six (6) months from the date of termination of his employment with the Company, engage directly or indirectly in any capacity in the excavation or equipment repair field in the counties of Winnebago and Boone (which constitute the Company’s trade area or areas), except with Company’s written consent. In addition to any other rights or remedies available to the Company for breach of this Agreement, the Company shall be entitled to enforcement by preliminary restraining order and injunction. In the event the Company’s costs and expenses of such action, including reasonable [attorney] fees shall be paid by Employee.⁴⁵⁰

As an employee of Stenstrom, Mesch estimated petroleum jobs, bid on jobs and managed jobs awarded on the basis of a successful bid.⁴⁵¹ During his employment he bid on 378 jobs and managed 121 jobs.⁴⁵² He used an Excel spreadsheet to estimate jobs for bidding purposes.⁴⁵³ Mesch resigned on December 22, 2006.⁴⁵⁴ Mesch began working for Precision Petroleum Installation, Inc. (“New PPI”).⁴⁵⁵

Relying on *Prairie Eye Center, Ltd. v. Butler*,⁴⁵⁶ Stenstrom argued that the six-month covenant not to compete should have commenced once Mesch stopped breaching the covenant contained in his agreement, not from the date he ceased being an employee.⁴⁵⁷ However, the court distinguished *Prairie Eye Center* because that covenant contained express language extending the noncompetition period should a breach occur.⁴⁵⁸ Unlike the *Prairie Eye Center* covenant, Stenstrom’s covenant provided, “six months from the date of termination of his employment with the Company” with no language regarding any extension should a breach occur.⁴⁵⁹

448. *Id.* at 1080, 874 N.E.2d at 963–64.

449. *Id.* at 1080, 874 N.E.2d at 964.

450. *Id.*

451. *Id.*

452. *Id.*

453. *Id.*

454. *Id.* at 1081, 874 N.E.2d at 964.

455. *Id.* at 1081, 874 N.E.2d at 965.

456. *Prairie Eye Cent. V. Butter*, 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002).

457. *Stenstrom*, 375 Ill. App. 3d at 1087–88, 874 N.E.2d at 969.

458. *Id.* at 1088, 874 N.E.2d at 969–70.

459. *Id.* at 1088, 874 N.E.2d at 970.

Stenstrom also argued the trial court erred by denying the preliminary injunction based on the alleged violations of the Trade Secrets Act⁴⁶⁰ (“Act”) by Mesch.⁴⁶¹ The Act requires that Stenstrom show that the information is sufficiently secret to give it a competitive advantage and that it took measures to prevent disclosure or use by others.⁴⁶² The court also considered six common law factors.⁴⁶³ A company’s trade secret protection must be balanced against an employee’s ability to use general knowledge and skills he/she acquired through experience.⁴⁶⁴ Moreover, it is not a trade secret if the information can be duplicated without a lot of effort, time or expense.⁴⁶⁵ The court determined that Stenstrom did not treat the spreadsheet information or its profit margin sufficiently secret to meet the first requirement of the Act.⁴⁶⁶ The court did not address whether Stenstrom had a right to injunctive relief because its customer list was a trade secret.⁴⁶⁷ The parties confused the near-permanent test used in restrictive covenants with the standard required by the Act.⁴⁶⁸

Although the court ruled Stenstrom waived its right to a breach of fiduciary duty claim, the court expressed its rejection of the argument on the grounds that the information was not a trade secret.⁴⁶⁹ The appellate court affirmed the trial court’s decision. Since the preliminary injunction expired, the court also dismissed Mesch’s cross-appeal that the noncompete is unenforceable as being moot.⁴⁷⁰

3. *Injunctive Relief for Protectible Confidential Information*

The issue before the court in *Lifetec, Inc. v. Edwards*,⁴⁷¹ is whether Lifetec had a protectible confidential information that Edwards received through his employment by Lifetec and that Edwards attempted to use for his own benefit for which he could be enjoined.⁴⁷²

460. 765 ILL.COMP. STAT. 1065/1 (2008).

461. *Stenstrom*, 375 Ill. App. 3d at 1089, 874 N.E.2d at 970.

462. *Id.* at 1090, 874 N.E.2d at 972

463. *Id.*

464. *Id.* at 1090–91, 874 N.E.2d at 972.

465. *Id.* at 1091, 874 N.E.2d at 972 (citing *Hamer Holding Group, Inc. v. Elmore*, 202 Ill. App. 3d 994, 560 N.E.2d 907 (1990)).

466. *Id.* at 1093, 874 N.E.2d at 974.

467. *Id.* at 1097, 874 N.E.2d at 977.

468. *Id.* at 1098, 874 N.E.2d at 977–78.

469. *Id.* at 1098–99, 874 N.E.2d at 978.

470. *Id.* at 1100, 874 N.E.2d at 979.

471. *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 880 N.E.2d 188 (4th Dist. 2007).

472. *Id.* at 268, 880 N.E.2d at 198.

Edwards accepted an offer of employment from Lifetec and signed an employment agreement which contained provisions restricting his competition, solicitation, and future representation for twenty-four (24) months after termination of the employment agreement.⁴⁷³ Lifetec employed Edwards for approximately ten (10) years.⁴⁷⁴ While employed, Edwards interviewed for a job with Patterson Medical Supply, Inc. (“Patterson”) involving the sale of the same products.⁴⁷⁵ Patterson was given a copy of Edwards’ employment agreement with Lifetec.⁴⁷⁶ Patterson assured Edwards he would be taken care of by Patterson if Lifetec sued him.⁴⁷⁷ Edwards accepted the job before resigning from Lifetec.⁴⁷⁸ When Edwards resigned, he said it was due to personal problems, not because he had a new job with Patterson.⁴⁷⁹ Lifetec sued Edwards for breach of contract and moved to enjoin him from violating the restrictive covenants of the employment agreement.⁴⁸⁰

Testimony revealed Lifetec was a small family-run business and Patterson was its largest competitor as both marketed to the same customers.⁴⁸¹ There was a loss of sales in Edwards’ former territory.⁴⁸² The medical sales industry that used the products distributed by Patterson and Lifetec is price-driven and purchasers have many suppliers looking for the lowest price available.⁴⁸³ Edward possessed confidential information related to the pricing and information related to open quotes.⁴⁸⁴ Edwards sent some correspondence in which he admitted he was targeting Lifetec accounts, contacting people he already knew and was converting them to Patterson.⁴⁸⁵ The trial court entered an order preliminarily enjoining Edwards, for specific periods of time, from competing with Lifetec, from soliciting purchase orders and from acting as a sales representative or distributor for any manufacturer for whom he had done the same during his employment with Lifetec.⁴⁸⁶ An interlocutory appeal was filed.

473. *Id.* at 263, 880 N.E.2d at 191.

474. *Id.*

475. *Id.* at 264, 880 N.E.2d at 191.

476. *Id.*

477. *Id.* at 264, 880 N.E.2d at 192.

478. *Id.*

479. *Id.*

480. *Id.*

481. *Id.* at 265, 880 N.E.2d at 192.

482. *Id.*

483. *Id.* at 266, 880 N.E.2d at 193.

484. *Id.*

485. *Id.* at 266–67, 880 N.E.2d at 194.

486. *Id.* at 267, 880 N.E.2d at 194.

The reasonableness of the time and territory of the restrictive covenant were not in dispute.⁴⁸⁷ The focus of the appellate court was on the knowledge Edwards had about open quotes and information that would allow him to undercut Lifetec, particularly because of the competitiveness of the medical sales industry.⁴⁸⁸ The correspondence revealed that Edwards was in fact targeting Lifetec customers with the intent to use such information.⁴⁸⁹

Edwards also challenged the injunction by arguing Lifetec had not established an emergency warranting the preliminary injunction. He argued that when the order enjoining him was entered it was twenty (20) months after he had access to Lifetec information.⁴⁹⁰ However, competition was still ongoing because Edwards was still calling on Lifetec customers in the same territory.⁴⁹¹ Nor did Edwards argue he was not competing, but rather argued that Lifetec did not have a protectible business interest, and, therefore, the covenants were unenforceable.⁴⁹² The trial court had determined there was a protectible business interest.⁴⁹³ The trial court also determined Edwards could continue to work for Patterson, he just could not violate his restrictive covenants.⁴⁹⁴

Finally, Edwards challenged the validity of the preliminary injunction on the basis that the order was not in specific enough detail to comply with section 11–101 of the Code of Civil Procedure (“Code”) which provides in part, “. . . Every order granting an injunction and every restraining order shall set forth the reasons for its entry; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained”⁴⁹⁵

This argument was somewhat successful in that the appellate court held it did not render the order invalid or require its reversal, but rather it needed to be clarified in compliance with section 11–101 of the Code.⁴⁹⁶ The trial court decision was affirmed, but was remanded with instruction to clarify the preliminary injunction in accordance with section 11–101 of the Code.⁴⁹⁷

487. *Id.* at 268, 880 N.E.2d at 195.

488. *Id.* at 271, 880 N.E.2d at 197.

489. *Id.*

490. *Id.* at 272, 880 N.E.2d at 198.

491. *Id.*

492. *Id.*

493. *Id.*

494. *Id.* at 273, 880 N.E.2d at 199.

495. *Id.* (citing 735 ILL. COMP. STAT. 5/11–101(2006)).

496. *Lifetec*, 377 Ill. App. 3d at 274, 880 N.E.2d at 199.

497. *Id.* at 275, 880 N.E.2d at 200.

This decision contains a special concurring opinion which examined whether the legitimate business interest is still or ever had been valid.⁴⁹⁸

F. Labor

1. *Illinois Educational Labor Relations Act*

In *Board of Education of Glenview Community Consolidated School District No. 34 v. Illinois Educational Labor Relations Board*,⁴⁹⁹ the issue was whether a technology administrative assistant position was required to be excluded from professional association under the Educational Labor Relations Act (“ELRA”).

The issue arose when the Glenview Professional Association (“Association”) filed a petition with the defendant, seeking to add the technology administrative assistant position to a bargaining unit represented by the Association. The plaintiff objected, contending the position was “confidential” pursuant to the ELRA.⁵⁰⁰

At hearing, the evidence showed that the defendant created the position at the end of the 2003–2004 school year. The position combined duties of a former full-time network technician with the duties of a former part-time administrative assistant. The new position reported to work in the District’s administrative buildings, along with the director of educational technology and the network manager.

The job description for the position indicated its purpose was to provide administrative and secretarial support. Job responsibilities included (1) providing support to the director of educational technology, network manager, and network engineers; (2) coordinating technology purchases; (3) coordinating inventory of software and hardware; (4) maintaining the District’s voice mail, e-mail, and telephone systems; (5) coordinating telephone system service activities; (6) coordinating new staff members’ access to the District’s network; (7) maintaining group e-mail lists; (8) providing support with computer-software applications; (9) developing and downloading data sets; and (10) assisting in the technology budgeting process. The job description further provided that the employee in the position should have the ability to handle confidential information.⁵⁰¹

498. *Id.* at 275–80, 880 N.E.2d at 200–04.

499. *Bd. of Educ. of Glenview Cmty. Consol. Sch. Dist. No. 34 v. Ill. Educ. Labor Relations Bd.*, 374 Ill. App. 3d 892, 874 N.E.2d 158 (4th Dist. 2007).

500. *Id.* at 893, 874 N.E.2d at 160 (citing 115 ILL. COMP. STAT. 5/2(n) (2004)).

501. *Id.* at 894, 874 N.E.2d at 160–61.

Following the close of evidence, the Administrative Law Judge (“ALJ”) issued a recommended decision and order dismissing the Association’s petition, and finding the position was confidential. The Board reversed the ALJ’s decision and an appeal followed.

In reaching the issue, the court noted that the purpose of the ELRA was to regulate labor relations between educational employers and their employees. Under the ELRA, the phrase “educational employee” is defined as “any individual excluding . . . confidential . . . employees;” “confidential employee” is defined as one who, “in the regular course of his or her duties has access to information relating to the effectuation or review of the employer’s collective bargaining employees.”⁵⁰² The purpose of the “confidential employee” exclusion is to protect against premature disclosure of bargaining positions by limiting the association’s membership to employees who do not have access to information concerning matters arising from the collective bargaining process.⁵⁰³

Under the “access test”, the inquiry is limited to whether the employee has unfettered access ahead of time to information regarding the review or effectuation of collective bargaining policies. Applicability of the test depends on whether the information is confidential and the employee’s access authorized.⁵⁰⁴

In considering the issue, the court recognized it could not reverse the Board’s decision unless that determination was clearly erroneous. The Board had concluded the employee in the position was not a confidential employee because: (1) the facts did not establish the employee’s actual access to confidential collective bargaining information in the regular course of her duties; (2) the employee did not have the responsibility of accessing files in order to maintain the computer system; (3) the employee was not required to read documents that she would be troubleshooting; (4) the job description did not indicate the employee is to have access to confidential labor-relations information; and (5) the employee’s day-to-day responsibilities did not demonstrate that she was a confidential employee.⁵⁰⁵

The court concluded that while the employee could have access to confidential collective-bargaining information, there was no evidence showing the employee had actual authorized, unfettered access to such information in

502. *Id.* at 897, 874 N.E.2d at 163 (citing 115 ILL. COMP. STAT. 5/2(b) & 2(n)(ii) (2004)).

503. *Id.* at 898, 874 N.E.2d at 164.

504. *Id.*

505. *Id.* at 900–03, 874 N.E.2d at 166–68.

the course of her regular duties. The court thus concluded the Board's decision was not clearly erroneous.⁵⁰⁶

2. *Unfair Labor Practice*

Whether the process of appointing individuals to positions outside the bargaining unit was a mandatory subject of bargaining was addressed by the court in *City of Bloomington v. Illinois Labor Relations Board, State Panel*⁵⁰⁷ In *City*, the International Association of Firefighters, Local 49 ("Union"), claimed in a letter to the plaintiff that it should be involved in the promotional process for the assistant chief position and demanded formal negotiations over the new assistant chief promotional exam. The City refused the Union's bargaining demand, contending the process of appointing individuals outside the bargaining unit was not a mandatory subject of bargaining.⁵⁰⁸

The Union filed an unfair labor practice with the Board. The Administrative Law Judge ("ALJ") issued a recommended decision and order finding an unfair labor practice. The Board upheld and adopted the ALJ's decision and granted the additional relief sought by the union in the form of invalidating the promotional list and rescinding any promotions to the rank of assistant fire chief.⁵⁰⁹ On appeal, the City argued that at the time in question, the Promotion Act⁵¹⁰ made promotions to positions outside the bargaining unit a permissive, but not a mandatory, subject of bargaining.

The issue before the court was whether the original version of the 2003 Promotions Act required the City to bargain over promotions to the assistant fire chief position. In reaching this issue, the court considered the case law existing prior to 2003. In *Village of Franklin Park v. Illinois State Labor Relations Board*⁵¹¹ the court held that the Village's proposal for promotion to captain was not a mandatory subject to bargaining because captains were not members of the bargaining unit.

The original provisions of the Promotions Act were effective August 4, 2003.⁵¹² The Act outlined various requirements to be followed in the

506. *Id.* at 904, 874 N.E.2d at 168.

507. *City of Bloomington v. Ill. Labor Relations Bd., State Panel*, 373 Ill. App. 3d 599, 871 N.E.2d 752 (4th Dist. 2007).

508. *Id.* at 600, 871 N.E.2d at 754.

509. *Id.*

510. 50 ILL. COMP. STAT. 742/10(a) (2004).

511. *Vill. of Franklin Park v. Ill. State Labor Relations Bd.*, 265 Ill. App. 3d 997, 638 N.E.2d 1144 (1994).

512. *City of Bloomington*, 373 Ill. App. 3d 602, 871 N.E.2d at 756 (citing Pub. Act No. 93-411 (codified at 50 ILL. COMP. STAT. 742/1-999) (2004)).

promotion of various positions, including administration of the promotion process, factors to be determined for promotion, the monitoring of the process by the bargaining agent, and the content of any promotional test. The term “promotion” includes “any appointment or advancement to a rank within the affected department . . . that is the next rank immediately above the highest rank included within the bargaining unit.”⁵¹³

Section 10(d) of the Promotions Act further provided that it shall be construed to “authorize and not limit . . . the negotiation by an employer and an exclusive bargaining representative of clauses within a collective bargaining agreement relating to conditions, criteria, or procedures for the promotion of employees who are members of the bargaining units.”⁵¹⁴

The Union and City both agreed that the assistant fire chief position falls within the “promotion” definition. The question was whether the “authorization” language of section 10(d) mandated, or merely permitted, negotiation with the collective bargaining unit. Applying a *de novo* review, as well as rules of statutory interpretation, the court affirmed the Board’s decision. The court first noted that the Promotions Act was enacted after the *Franklin Park* decision, that it is presumed the legislature acted with knowledge of the prevailing case law, and the statutory language suggested a legislative intent to overrule *Franklin Park*.⁵¹⁵

The court further found that issues relating to promotion to the upstream position outside the bargaining unit was a mandatory subject of bargaining because: (1) the Act defines “promotion” to include promotions to the position at issue; and (2) the legislature’s definition of “promotion” to include the next rank immediately above the highest rank in the bargaining unit demonstrated an intent to overrule *Franklin Park*. The court further concluded that the use of the word “authorize” mandated, rather than permitted, bargaining because any other interpretation would render the definition of “promotion” meaningless, and because the legislative history for the 2006 Promotions Act amendments showed that amendment was made to clarify that the original 2003 Promotions Act required the employer to bargain over the promotion at issue.⁵¹⁶

513. *Id.* at 604, 871 N.E.2d at 757 (citing 50 ILL. COMP. STAT. 742/5 (2004)).

514. *Id.* at 605, 871 N.E.2d at 758 (citing 50 ILL. COMP. STAT. 742/10(d) (2004)).

515. *Id.* at 608, 871 N.E.2d at 760.

516. *Id.* at 609, 871 N.E.2d at 761.

3. *Public Relations Act*

The Department of Corrections' obligation to arbitrate in the middle of a contract, as opposed to its beginning or end was considered by the court in *Department of Central Management Services v. Illinois Labor Relations Board, State Panel*.⁵¹⁷ In 2002, the Department ("CMS") and the American Federation of State, County, and Municipal Employees, Council 31 ("AFSCME"), entered into negotiations concerning the impact that the closure of correctional facilities would have on security employees. When the parties were unable to reach accord on several points not covered by the bargaining agreement, AFSCME requested that the parties enter into "interest arbitration," meaning arbitration in the middle of the contract. CMS refused the request and implemented its final offer. AFSCME thereafter filed unfair labor practice charges, contending CMS violated the Illinois Public Labor Relations Act ("IPLRA") when it refused to proceed to interest arbitration. The Administrative Law Judge ("ALJ") found in favor of AFSCME and the Board concurred, ordering the parties to "design a process for the resolution" of the dispute.⁵¹⁸

In considering the issue on appeal, the court applied a *de novo* review; acknowledging, however, that in the case of any ambiguities in the legislation it was required to give deference to an administrative agency's interpretation of the Act it was created to enforce.

CMS argued that section 14 of the IPLRA did not require interest arbitration because that section references only initial and successor contracts and the absence of any reference to midterm disputes necessarily excluded interest arbitration from the provision. The court disagreed, finding there were subtle references within section 14 to midterm disputes by virtue of its reference to "disputes under section 18." As noted by the court "Section 18 authorizes the courts to relegate employees who have the right to strike to resolve their disputes under section 14 procedure when the act of striking might present a clear and present danger to the public."⁵¹⁹ Because an employee has a statutory right to strike midterm, section 14 authorizes the use of its procedures to employees involved in a midterm dispute.⁵²⁰

The court further noted that it must evaluate the statute as a whole, construing it so that no term was rendered superfluous or meaningless. CMS

517. *Dep't of Cent. Mgmt. Serv. V. Ill. Labor Relations Bd., State Panel*, 373 Ill. App. 3d 242, 869 N.E.2d 274 (4th Dist. 2007).

518. *Id.* at 246, 869 N.E.2d at 277-78.

519. *Id.* at 251, 869 N.E.2d at 281.

520. *Id.*

argued that the general policy provision of section 2 of the IPLRA requiring all collective bargaining disputes to be resolved through arbitration conflicted with the specific provisions of section 14. The court disagreed, reasoning that section 2 makes clear a legislative intent that employees having no legal right to strike have rights commensurate with such right. Accordingly, the procedures of section 14 must cover midterm disputes if its dispute resolution procedures are to be alternate and equitable to the right to strike.⁵²¹

CMS also argued that the employees had waived the right to interest arbitration in the collective bargaining agreement that contained both a “no-strike” and “grievance-arbitration” provision. Noting that a waiver of a statutory right in a labor agreement must be “clear and unmistakable,” the court found the coterminous no-strike and grievance-arbitration provisions did not result in a waiver. Such result “would only be tenable if a security employee’s statutory right to interest arbitration was somehow inversely dependent upon a nonsection 14 employee’s contractual waiver of the statutory right to strike.”⁵²² Moreover, the fact that nonsection 14 employees gave up their right to strike in exchange for grievance-arbitration did not mean section 14 employees had waived their statutory right to interest arbitration.⁵²³

The court also rejected CMS’ argument that the dispute could only be covered under the agreement’s grievance-arbitration procedure because the agreement did not include language identifying a right to go to interest arbitration, noting: (1) there was no rule that a party has to name a statutory right in order to preserve that right; (2) CMS’ argument that it had a right to implement its final offer upon reaching an impasse and that dispute could only be covered under the contract’s grievance-arbitration provision was inconsistent; and (3) the parties stipulated there was no issue of deferral to the grievance-arbitration procedures.⁵²⁴

4. *Majority Interest Petition*

In June 2005, the appellate court found the emergency rules promulgated by the Illinois Labor Relations Board (“Board”) with regard to a majority interest petition procedure were invalidly enacted. At issue in *County of DuPage v. Illinois Labor Relations Board*,⁵²⁵ was another representation

521. *Id.* at 253–54.

522. *Id.* at 257, 869 N.E.2d at 283.

523. *Id.*

524. *Id.* at 258, 869 N.E.2d at 287.

525. *County of DuPage v. Ill. Labor Relations Bd.*, 375 Ill. App. 3d 765, 874 N.E.2d 319 (2d Dist. 2007), *appeal allowed*, 226 Ill. 2d 582, 879 N.E.2d 920 (Ill. 2007).

petition filed by the Metropolitan Alliance of Police DuPage County Sheriff's Police Chapter No. 126 ("MAP").⁵²⁶ The Sheriff opposed the petition because it again excluded deputies assigned to the corrections bureau and included the deputies who qualified as peace officers.⁵²⁷ The Sheriff also argued that under section 9(a-5) of the Illinois Labor Relations Act ("Act"),⁵²⁸ MAP must provide at least two kinds of evidence to make a showing of a majority interest.⁵²⁹ The Board rejected the Sheriff's arguments, found MAP made a significant showing, decided no hearing was warranted and certified MAP as the representative of deputies below the rank of sergeant who were assigned to certain units and bureaus, but still excluding the corrections bureau.⁵³⁰ The County appealed arguing: (1) the corrections bureau deputies were peace officers and should have been included, (2) the Board erred by not requiring both authorization cards and other evidence, and (3) the Board erred by not holding a hearing.⁵³¹ The court addressed the second argument first because it would be dispositive in the appeal.⁵³²

Starting with examination of section 9(a-5), the argument revolved around the word 'and' and whether it is used conjunctively or disjunctively.⁵³³ Although the court believed both arguments were reasonable, it believed the language of the statute is ambiguous and resorted to statutory construction. Looking at the grammar in the sentence that specifies the evidentiary burden, it maintained that using the word 'and' disjunctively renders the phrase 'dues deduction authorization' redundant.⁵³⁴ That sentence is as follows:

"If the parties to a dispute are without agreement on the means to ascertain the choice, if any, of employee organization as their representative, the Board shall ascertain the employees' choice of employee organization, on the basis of dues deduction authorization and other evidence, or, if necessary, by conducting an election."⁵³⁵

The court further bolstered its position by comparing the evidentiary burden sentence to the sentence requiring an election upon evidence of fraud or coercion which was asserted by MAP and is as follows:

526. *Id.* at 769, 874 N.E.2d at 323.

527. *Id.*

528. 5 ILL. COMP. STAT. 315/1 *et seq.* (2004).

529. *Id.* at 769, 874 N.E.2d at 323, 5 ILL. COMP. STAT. 315/9(a-5).

530. *Id.* at 769-70, 874 N.E.2d at 323-24.

531. *Id.* at 770, 874 N.E.2d at 324.

532. *Id.*

533. *Id.* at 773, 874 N.E.2d at 326-27.

534. *Id.* at 774, 874 N.E.2d at 327.

535. *Id.* (quoting 5 ILL. COMP. STAT. 315/9(a-5)).

“If either party provides to the Board, before the designation of a representative, clear and convincing evidence that the dues deduction authorizations, and other evidence upon which the Board would otherwise rely to ascertain the employees’ choice of representative, are fraudulent or were obtained through coercion, the Board shall promptly thereafter conduct an election.”⁵³⁶

and concluding that they can be read in harmony because it takes the dues deduction authorization and other evidence to demonstrate a majority interest showing, but an election must be held if one or both types of evidence are obtained through fraud or coercion.⁵³⁷

The court next compared the election provision language in 9(a) with that in 9(a-5) to support its conclusion that different evidence is required under each provision.

Finally, the court reviewed the legislative history by examining statements made by Representatives McKeon and Black and concluded the legislature intended the showing of a majority interest was equivalent to an election which would require a specific evidentiary burden.⁵³⁸ The court held that both dues deduction authorization and other evidence are required.⁵³⁹

The appellate court also agreed with the petitioners that not requiring dues deduction authorization cards nor two forms of evidence in the Board’s rules contradicts the statute, and, therefore is invalid.⁵⁴⁰

Last, the appellate court held the Board’s decision was reviewable and was against the manifest weight of the evidence.⁵⁴¹ The Board’s decision was vacated and remanded.⁵⁴²

G. Uniform Peace Officers’ Disciplinary Act

In *Kelley v. Sheriff’s Merit Commission of Kane County*,⁵⁴³ plaintiff, Michelle Kelley (“Kelley”), a corrections officer was suspended without pay

536. *Id.* (quoting 5 ILL. COMP. STAT. 315/9(a-5)).

537. *Id.* at 775, 874 N.E.2d at 328.

538. *Id.* at 776, 874 N.E.2d at 329.

539. *Id.*

540. *Id.* at 777, 874 N.E.2d at 329-30.

541. *Id.* at 777-79, 874 N.E.2d at 330-31.

542. *Id.*

543. *Kelley v. Sheriff’s Merit Comm’n of Kane County*, 372 Ill. App. 3d 931, 866 N.E.2d 702 (2d Dist. 2007).

for 120 days because she refused to comply with a superior officer's order to submit to a polygraph examination.⁵⁴⁴

Less than a year following the case of *Kaske v. City of Rockford*,⁵⁴⁵ the legislature enacted the Uniform Peace Officers' Disciplinary Act ("Act").⁵⁴⁶ Section 3.11 of the Act provides in part that an officer cannot be required to submit to a polygraph test during an interrogation without the written consent of the officer.⁵⁴⁷ During the disciplinary hearing before the Kane County Sheriff's Merit Commission ("Commission"), Kelley claimed she was protected under this section.⁵⁴⁸ Her duties as a corrections officer were not enough to bring her to the status of a peace officer within the meaning of section 2-13 of the Criminal Code of 1961.⁵⁴⁹ Kelley contended before the appellate court that *Kaske* was not dependent on plaintiffs' status as peace officers and section 3.11 does not limit the scope of the holding in *Kaske* and that it was error to use the results of a polygraph examination at a police officer's disciplinary hearing.⁵⁵⁰ The appellate court agreed that the supreme court decision in *Kaske* was based on the unreliability of the polygraph test and not the fact that they were police officers.⁵⁵¹ While acknowledging the argument by the Sheriff that this position affords protection to corrections officers which is not provided in section 3.11, the court distinguished the protection coming from the supreme court decision and not the statute.⁵⁵² Analyzing both what the majority opinion stated in *Kaske*, along with the sheriff's argument being the precise point raised in the dissenting opinion in *Kaske*, the appellate court concluded the supreme court in *Kaske* intended its holding to apply to purely investigatory polygraph tests.⁵⁵³ The circuit court was reversed and remanded the case for entry of an order reversing the Commission's decision.⁵⁵⁴

H. Employee Handbooks

For many years, employers have relied on disclaimers in their employee handbooks to preserve the at-will employment status of its employees and to

544. *Id.* at 931, 866 N.E.2d at 703.

545. *Kaske v. City of Rockford*, 96 Ill. 2d 298, 450 N.E.2d 314 (1983).

546. *Kelley*, 372 Ill. App. 3d at 932, 866 N.E.2d at 703, 50 ILL. COMP. STAT. 725/1 *et seq.* (2004).

547. *Id.* at 932, 866 N.E.2d at 704.

548. *Id.*

549. *Id.*

550. *Id.*

551. *Id.* at 934, 866 N.E.2d at 706.

552. *Id.* at 935, 866 N.E.2d at 706-07.

553. *Id.* at 936, 866 N.E.2d at 707.

554. *Id.*

clarify that the handbook is not an employment contract. A First District case, *Ross v. May Company*,⁵⁵⁵ has created a great deal of uncertainty for employers. Plaintiff, Gary Ross, (“Ross”) was terminated after forty years of employment. He filed a lawsuit alleging breach of contract when his employer failed to terminate him in accordance with a 1968 employee handbook.⁵⁵⁶ Ross drew stick figures of a co-worker being electrocuted, boiled, guillotined, run over by a train, shot out of a canon, tied to a rocket, and standing under a 10,000 pound weight.⁵⁵⁷ He was suspended and told to see a psychologist.⁵⁵⁸ Ross alleged after two (2) visits he was not found to be a threatening individual, and he needed no further treatment, except perhaps for depression.⁵⁵⁹ He was terminated shortly thereafter.⁵⁶⁰ He claimed he had a right to an appeal or review of his termination as provided in the 1968 handbook.⁵⁶¹ He also alleged he reasonably relied on the promissory language of the handbook and oral representations made by an agent of his employer.⁵⁶² The issue addressed by the appellate court was whether, even if the 1968 employee handbook gave rise to an employment contract altering his at-will status, the disclaimers inserted in revised handbooks modified the employment contract and converted him to an at-will employee.⁵⁶³ The appellate court held the subsequent disclaimers did not modify his employment contract because he received no consideration.⁵⁶⁴

The court acknowledged that Illinois is an at-will state, while recognizing the requirements necessary to fall within the exception set forth in *Duldulao v. Saint Mary of Nazareth Hospital Center*.⁵⁶⁵ The trial court found the 1968 employee handbook contained the requisite promissory language, oral assurances of job security and he was commenced and continued to work for the employer.⁵⁶⁶ Meeting these requirements required the defendant to follow the procedures in its 1968 employee handbook, before it could terminate Ross’ employment.⁵⁶⁷ However, the trial court dismissed his complaint finding the subsequent disclaimers invalidated his previous

555. *Ross v. May Co.*, 377 Ill. App. 3d 387, 880 N.E.2d 210 (1st Dist. 2007).

556. *Id.* at 388, 880 N.E.2d at 212–13.

557. *Id.* at 388, 880 N.E.2d at 213.

558. *Id.*

559. *Id.*

560. *Id.*

561. *Id.*

562. *Id.*

563. *Id.*

564. *Id.*

565. *Id.* (citing *Duldulao v. Saint Mary of Nazareth Hosp. Cent.*, 115 Ill. 2d 482, 505 N.E.2d 314 (1987)).

566. *Id.* at 390, 880 N.E.2d at 213–14.

567. *Id.* at 390, 880 N.E.2d at 214.

employment contract and the revised employee handbooks made it impossible for him to rely on the alleged oral assurances.⁵⁶⁸ The trial court also determined the new benefits offered to Ross and his coworkers constituted consideration for the unilateral modification.⁵⁶⁹ Ross argued those benefits were not consideration because they were offered to all eligible employees and there was no bargained for exchange between him and May Company.⁵⁷⁰ The appellate court agreed. Relying on general principles of contract law, the court examined the consideration element of a bargained-for exchange.⁵⁷¹ The court found the additional benefits offered to other employees were not related to his preexisting contractual rights.⁵⁷² It also concluded that defendant acted unilaterally.⁵⁷³ Relying on *Doyle v. Holy Cross Hospital*,⁵⁷⁴ it found the trial court erred in dismissing the breach of contract claim because the mere continued employment does not constitute consideration to support the unilateral modification made by defendant.⁵⁷⁵ The appellate court opined that adopting Ross' arguments will not create a logistical nightmare and found a Wyoming opinion, *Brodie v. General Chemical Corp.*,⁵⁷⁶ instructive. That case suggests an employer should negotiate employment contracts on an individual basis.⁵⁷⁷

The appellate court affirmed the portion of the trial court's decision dismissing his promissory estoppel claim and reversed the dismissal of his breach of contract claim.⁵⁷⁸ An appeal is pending.

I. Termination for Cause

The discharge of a paramedic for cause was reversed by the court in *Hermesdorf v. Wu*.⁵⁷⁹ Disciplinary proceedings were initiated after the paramedic engaged in acts of misconduct that violated various policies, the Department's performance of duty policy, and the applicable code of ethics. During the disciplinary hearing, several co-workers testified that the paramedic had acted inappropriately toward a female in custody during a call to provide treatment.⁵⁸⁰ Pictures of the female depicted bruises on her arms, shoulders, neck, and back resulting from the paramedic's handling of her. At

568. *Id.*

569. *Id.*

570. *Id.* at 391, 880 N.E.2d at 215.

571. *Id.* at 392, 880 N.E.2d at 215.

572. *Id.*

573. *Id.* at 393, 880 N.E.2d at 215.

574. *Doyle v. Holy Cross Hosp.*, 289 Ill. App. 3d 75, 682 N.E.2d 68 (1st Dist. 1997).

575. *Ross*, 377 Ill. App. 3d at 392, 880 N.E.2d at 215.

576. *Brodie v. General Chemical Corp.*, 934 P.2d 1263 (Wyo. 1997).

577. *Ross*, 377 Ill. App. 3d at 393, 880 N.E.2d at 216.

578. *Id.*

579. *Hermesdorf v. Wu*, 372 Ill. App. 3d 842, 867 N.E.2d 34 (2d Dist. 2007).

580. *Id.* at 846, 867 N.E.2d at 37-38.

the close of the disciplinary hearing, the board found the paramedic guilty of misconduct and proceeded to the penalty phase of the hearing.

The paramedic introduced his annual performance reviews for the past seventeen years which reflected “above average” performance. He also introduced commendations and letters of appreciation that he had received for his work in developing and teaching classes. He also submitted medical documentation indicating he had been severely depressed in the months leading up to his inappropriate conduct, that he had been taking Paxil, and that he had been diagnosed with depression and bipolar disorder.⁵⁸¹ A physician’s statement was submitted, indicating the paramedic had been recently diagnosed with bipolar disorder and that he was unable to work because his medication was affecting his motor skills. Subsequent statements indicated the paramedic’s bipolar condition was under control.⁵⁸² The board voted to terminate the paramedic for cause.⁵⁸³

The trial court affirmed the board’s decision and the paramedic appealed, contending the board’s discharge decision was arbitrary and unreasonable given his prior “above average” job history and evidence suggesting his misconduct was caused by a psychiatric illness. The court first found that the board’s finding of guilt was not against the manifest weight of the evidence.⁵⁸⁴ It next considered whether the misconduct justified a discharge for cause.

The paramedic’s seventeen years of prior “above average” employment history did not invalidate the board’s conclusion because “a single instance of misconduct can constitute cause for discharge where the misconduct is serious.”⁵⁸⁵ The court found that the board could have reasonably concluded that the severity of the paramedic’s misconduct rendered his continued employment detrimental to the Department, notwithstanding his job history. Continuing, the court noted that a discharge for cause is not appropriate when the employee’s alleged misconduct was substantially related to or caused by a psychiatric condition.⁵⁸⁶ It was therefore unreasonable for the board to discharge the paramedic for cause without having made a specific finding as to whether his illnesses were substantially related to his misconduct. The court remanded the case for additional proceedings to determine whether there was any causal link.⁵⁸⁷

581. *Id.* at 848, 867 N.E.2d at 40.

582. *Id.* at 849, 867 N.E.2d at 41.

583. *Id.*

584. *Id.* at 852, 867 N.E.2d at 43.

585. *Id.* at 853, 867 N.E.2d at 44.

586. *Id.* at 855, 867 N.E.2d at 46.

587. *Id.* at 857, 867 N.E.2d at 47.

J. Whistleblower Act

Whether the Whistleblower Act ("Act") repealed the common-law action of retaliatory discharge was answered by the First District in *Callahan v. Edgewater Care and Rehabilitation Center, Inc.*⁵⁸⁸ Melissa Callahan ("Callahan") filed a retaliatory discharge action alleging she was terminated from her position at Edgewater Care and Rehabilitation Center, Inc. ("Edgewater") because she reported a resident was being kept against her will which she believed to be in violation of the Nursing Home Care Act.⁵⁸⁹ After filing an answer, the trial court allowed Edgewater to file a Motion to Dismiss pursuant to section 2-615 of the Code of Civil Procedure⁵⁹⁰ on the grounds the retaliatory discharge action was preempted by the Act.⁵⁹¹ The trial court dismissed the complaint. Callahan appealed.

On appeal, the court found no language in the Act or in the legislative history to explicitly or implicitly suggest the common law action of retaliatory discharge should be repealed or preempted by the Act.⁵⁹² The matter was reversed and remanded for further proceedings.⁵⁹³

K. School Law

The court in *Russell v. Board of Education of the City of Chicago*,⁵⁹⁴ decided the issue of whether a teacher's expunged records could be considered in determining if her conduct was irremediable in the aggregate. Russell, a tenured teacher, who had been a teacher for twenty-two years, twenty of them at Curtis School, was discharged in 2000 following numerous suspensions.⁵⁹⁵ After her discharge, she requested a review hearing.⁵⁹⁶ The hearing referee wrote in his decision,

"In my opinion the Target in this case, Ms[.] Russell, questioned various new policies or actions, she did not receive answer, if she didn't comply post haste with the Principal's demands she was slapped with insubordination charges. I belief [sic] she was baited, overwhelmed with disciplinary memos, [and] kept under suffocating surveillance to the detriment of her psychological as well as physical well being."⁵⁹⁷

588. *Callahan v. Edgewater Care & Rehab. Cent.*, 374 Ill. App. 3d 630, 872 N.E.2d 551 (1st Dist. 2007).

589. *Id.* at 631, 872 N.E.2d at 552; 210 ILL. COMP. STAT. 45/1-101 *et seq.* (2004).

590. 735 ILL. COMP. STAT. 5/2-615 (2004).

591. *Callahan*, 374 Ill. App. 3d at 631, 872 N.E.2d at 552, 740 ILL. COMP. STAT. 174/1 *et seq.* (2004).

592. *Id.* at 634, 872 N.E.2d at 553-54.

593. *Id.* at 635, 872 N.E.2d at 554.

594. *Russell v. Bd. of Educ. of City of Chicago*, 379 Ill. App. 3d 38, 883 N.E.2d 9 (1st Dist. 2007).

595. *Id.* at 40, 883 N.E.2d at 11.

596. *Id.*

597. *Id.* at 41, 883 N.E.2d at 12.

The Board was ordered to reinstate Russell and expunge all disciplinary memoranda from her file dating back to 1992. Russell's conduct persisted. She called the police to the school to investigate matters, left her class unsupervised, complained another teacher kicked her to which she asked her students to write down what they saw and she publicly shared them.⁵⁹⁸ The Board ordered her to undergo a fitness for duty evaluation pursuant to section 4–54 of the School Code (“Code”).⁵⁹⁹ The clinical psychologist found her fit, but she was required to follow up with him and his recommendations within thirty (30) days.⁶⁰⁰ She followed up by telephone.⁶⁰¹ She was released without any accommodations and referred to her family physician.⁶⁰² She was ordered to undergo a second evaluation and refused.⁶⁰³ The Board cited her for insubordination, examined her past disciplinary records that had been ordered to be expunged and began termination proceedings.⁶⁰⁴ The hearing officer found her conduct irreparable and did not require a warning prior to her discharge.⁶⁰⁵ Russell sought review of the Board's decision because it used the expunged records, the finding of her violation of a Board rule related to her fitness for duty evaluation was against the manifest weight of the evidence and her conduct was not irreparable.⁶⁰⁶

Section 34–85 of the Code provides that a tenured teacher cannot be discharged, unless given written warning specifically detailing the causes which, if not removed, may result in charge.⁶⁰⁷ However, if the conduct is irreparable or it is cruel, immoral, negligent, criminal or causes psychological or physical harm to a student, no written warning is required.⁶⁰⁸ The court reviewed the hearing referee's decision based on the fact that the Board simply adopted it as its own.⁶⁰⁹ The hearing officer reviewed conduct dating back to 1992 and partly basing his decision on the expunged records, he concluded her conduct was irreparable.⁶¹⁰ This was an error.⁶¹¹ The court surmised that since the expunged records were part of the decision, the hearing referee must not have believed the post-reinstatement conduct was enough to support irreparable conduct.⁶¹² The appellate court reversed the

598. *Id.*

599. *Id.*; 105 ILL. COMP. STAT. 5/1–1 *et seq.* (2006).

600. *Russell*, 379 Ill. App. 3d at 42, 883 N.E.2d at 13.

601. *Id.*

602. *Id.*

603. *Id.*

604. *Id.*

605. *Id.*

606. *Id.* at 43, 883 N.E.2d at 13.

607. *Id.* at 45, 883 N.E.2d at 15; 105 ILL. COMP. STAT. 5/34–85 (2006).

608. *Id.*

609. *Id.* at 46, 883 N.E.2d at 16.

610. *Id.*

611. *Id.*

612. *Id.* at 48, 883 N.E.2d at 17–18.

decision, ordered the Board to reinstate Russell, and remanded it for determination of the Board's liability to Russell.

L. One Day Rest In Seven Act

We do not often see opinions regarding the One Day Rest in Seven Act⁶¹³ ("Act"), but in 2007, there were two such cases. This Act provides for twenty-four (24) consecutive hours of rest every calendar week, unless the employer obtains a limited permit from the Director of Labor. This Act also provides for at least twenty (20) minute meal period no later than five (5) hours after starting the work period for employees who are to work seven and one-half (7½) continuous hours.

In *Carty v. Suter Company, Inc.*⁶¹⁴ the Second District, in a matter of first impression, held that this Act provides a basis for a retaliatory discharge action. Jack Carty was employed by The Suter Company, Inc. ("Suter"). He alleged that from December 2000 to May 2006, he worked six days per week, eleven hours per day and rarely received a lunch break.⁶¹⁵ He confronted the manager on May 20, 2006 and was terminated May 22, 2006.⁶¹⁶ The trial court granted summary judgment to Suter holding the Act does not provide for a private right of action.⁶¹⁷ Considering a decision from Tennessee,⁶¹⁸ the appellate court reversed and remanded the matter on the grounds that the legislature has mandated a public policy to provide the meal periods, the employer is obligated to provide such breaks, and discharging an employee for reporting a violation of the Act, established a cause of action for retaliatory discharge.⁶¹⁹

The second case involving the One Day Rest in Seven Act ("Act"), *Illinois Hotel and Lodging Association v. Ludwig*⁶²⁰ is a case examining preemption of the Act by the National Labor Relations Act ("NLRA").⁶²¹ The Illinois Hotel and Lodging Association, plaintiff, filed a declaratory action seeking section 3.1 of the Act be declared unconstitutional in violation of the Illinois Constitution's prohibition against special legislation.⁶²² Plaintiff argued that section 3.1 which provides language for mandatory rest and meal breaks and requirements for a break room to protect hotel room attendants from overwork.⁶²³ The section, which is the reason for the controversy, in this

613. 820 ILL. COMP. STAT. 140/1 *et seq.*(2002).

614. *Carty v. Suter Co., Inc.*, 371 Ill. App. 3d 784, 863 N.E.2d 771 (2d Dist. 2007).

615. *Id.* at 785, 863 N.E.2d at 772.

616. *Id.*

617. *Id.* at 786, 863 N.E.2d at 773.

618. *Yates v. Hertz Corp.*, 285 F.Supp.2d 1104 (M.D. Tenn. 2003).

619. *Carty*, 371 Ill. App. 3d at 788, 863 N.E.2d at 775.

620. *Ill. Hotel & Lodging Ass'n v. Ludwig*, 374 Ill. App. 3d 193, 869 N.E.2d 846 (1st Dist. 2007).

621. 29 U.S.C. § 151 *et seq.* (2000).

622. *Ill. Hotel*, 374 Ill. App. 3d at 194, 869 N.E.2d at 849.

623. *Id.* at 195, 869 N.E.2d at 849-50; 820 ILL. COMP. STAT. 140/3.1 (West Supp. 2005).

case, applies to counties with a population greater than three million.⁶²⁴ The Act provides for a private cause of action and the employees are protected against retaliation.⁶²⁵ The day after the effective date of section 3.1, the declaratory action was filed alleging violation of article IV of the Illinois Constitution which provides:

“The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.”⁶²⁶

The contention of plaintiff is that section 3.1 only applies to employees of hotels in Chicago, IL and there was no rational basis for such distinction.⁶²⁷ The appellate court pointed out that plaintiff raised the distinction between Chicago hotels and other hotels in its lobbying materials by describing the negative financial impact it would have on the smaller downstate hotels.⁶²⁸ There was a specific amendment to the bill as a compromise to the possible negative impact on smaller hotels.⁶²⁹ Since a rational basis existed for the special provision in section 3.1, it is not unconstitutional.⁶³⁰ Other statutes pertaining to specific counties or cities have also been upheld.⁶³¹ When plaintiff argued such reasoning was only speculative, the court cited two different quotations⁶³² indicating that if the court could conceive of any set of facts that distinguishes the class that the statute benefits or may hypothesize reasons for such legislation, it may uphold the legislation.⁶³³ Therefore, section 3.1 does not violate article IV of the Illinois Constitution.⁶³⁴

Plaintiff's second contention that section 3.1 violated equal protection failed for the same reasons.⁶³⁵ Plaintiff's final contention that section 3.1 is preempted by the NLRA.⁶³⁶ That argument failed because the conduct was not related to section 7 or section 8 of the NLRA as required under the Garman preemption doctrine.⁶³⁷ Section 3.1 sets forth a minimum labor standard for both union and nonunion employees and the Garman preemption does not

624. *Id.*; 820 ILL. COMP. STAT. 140/3.1(b) (West Supp. 2005).

625. *Id.*; 820 ILL. COMP. STAT. 140/3.1(f)(g) (West Supp. 2005).

626. Ill. Const. 1970, art. IV, § 13; *Ill. Hotel*, 374 Ill. App. 3d at 196, 869 N.E.2d at 850.

627. *Ill. Hotel*, 374 Ill. App. 3d at 197, 869 N.E.2d at 851.

628. *Id.*

629. *Id.* at 197–98, 869 N.E.2d at 851–52.

630. *Id.* at 198, 869 N.E.2d at 852.

631. *Id.*

632. *Crusius v. Ill. Gaming Bd.*, 216 Ill. 2d 315, 325, 837 N.E.2d 88, 94 (2005); *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 124, 703 N.E.2d 1, 4 (1998).

633. *Ill. Hotel*, 374 Ill. App. 3d at 199, 869 N.E.2d at 853.

634. *Id.*

635. *Id.*

636. *Id.*

637. *Id.* at 200, 869 N.E.2d at 853.

apply.⁶³⁸ Nor does section 3.1 proscribe or support strikes, lockouts, use of replacement workers or any other economic weapon of self-help thereby failing to fall within the Machinists preemption doctrine.⁶³⁹ The appellate court affirmed the circuit court's decision.⁶⁴⁰

M. Doctrine of Nonreview

In *Goldberg v. Rush University Medical Center*,⁶⁴¹ a physician unsuccessfully sought judicial relief against the defendant hospital, alleging tortious interference with contractual relations, tortious interference with prospective economic advantage, and breach of contract. The plaintiff was an orthopedic surgeon and a member of the medical staff at Rush. His staff membership was governed by bylaws which set forth a grievance procedure under which members could challenge conduct affecting their medical practice.⁶⁴²

Beginning in 1995, the plaintiff voiced complaints to Rush personnel about his assignments and treatment as a member of the medical staff. He initiated a formal grievance under the bylaws in 2003. The grievance committee dismissed several of plaintiff's complaints and the plaintiff withdrew his grievance on the remaining issues.⁶⁴³

Shortly thereafter, the plaintiff filed a lawsuit, seeking damages for tortious interference with contractual relations, tortious interference with prospective economic advantage, and breach of contract. Plaintiff contended he had been denied his equitable share of trauma call, access to orthopedic surgery residents in Rush operating rooms, appropriate teaching duties, and participation in developing proposed revisions to the surgery rules of governance. He also alleged that emergency room cases involving hand traumas had been diverted from him, and that his promotion to Assistant Attending Physician and renewal of his lease had been unduly delayed. The trial court dismissed the plaintiff's complaint, finding the conduct underlying his claims was not subject to judicial review.⁶⁴⁴

On appeal, the court reaffirmed the judicially created doctrine of nonreview. That doctrine provides that internal staffing decisions of private hospitals are not subject to judicial review as a matter of public policy. The court acknowledged that a limited exception to the doctrine exists when a physician's staff privileges are revoked, suspended, or reduced. The plaintiff

638. *Id.* at 200–01, 869 N.E.2d at 854–55.

639. *Id.* at 203, 869 N.E.2d at 855.

640. *Id.*, *appeal denied*, 225 Ill. 2d 633, 875 N.E.2d 1111 (Ill. Sept. 26, 2007).

641. *Goldberg v. Rush Univ. Med. Ctr.*, 371 Ill. App. 3d 597, 863 N.E.2d 829 (1st Dist. 2007), *appeal denied*, 224 Ill. 2d 574 (2007).

642. *Id.* at 599, 863 N.E.2d at 832.

643. *Id.*

644. *Id.* at 600, 863 N.E.2d at 833.

conceded that exception was inapplicable, but nonetheless contended the doctrine applied solely to staffing decisions involving hospital appointments and privileging.⁶⁴⁵

The court rejected the plaintiff's argument, finding the doctrine applied when a hospital decision merely impacted a physician's ability, but not his right, to exercise his privileges.⁶⁴⁶ In reaching this conclusion, the court relied on *Garibaldi v. Applebaum*,⁶⁴⁷ wherein the Illinois Supreme Court found the hospital's decision to enter into an exclusive contract for the performance of open-heart surgery with a practice group did not constitute a revocation, suspension, or reduction of the plaintiff's privileges. Because the exclusive contract only impacted the plaintiff's ability to exercise privileges, there had been no revocation, suspension, or reduction of his privileges and the nonreview doctrine barred the plaintiff's action.⁶⁴⁸

Relying on *Garibaldi*, the court in *Goldberg* affirmed the trial court's decision and found the nonreview doctrine extended to the hospital staffing decisions underlying the plaintiff's complaint. In support of its conclusion, the court noted that the doctrine of nonreview "is grounded on the idea that courts are not well equipped to review the action of hospital authorities in rendering medical staffing decisions because those decisions involve specialized medical and business considerations that are uniquely within the province of the medical community and hospital administrators."⁶⁴⁹ The principle, moreover, recognizes that hospital administrators should be free to make decisions impacting patient care and the allocation of resources without judicial intervention.⁶⁵⁰

N. Tort Immunity

In *Smith v. Waukegan Park District*,⁶⁵¹ plaintiff, Gregory Smith ("Smith"), brought a retaliatory discharge action against the Waukegan Park District ("Park District") alleging retaliatory harassment for his employer's requirement that he be tested for alcohol and drugs under its policy.⁶⁵² He was fired soon afterward. Smith's complaint also alleged he was discharged in retaliation for filing a workers' compensation claim.⁶⁵³ The trial court dismissed the complaint, holding the Park District was immune under the

645. *Id.* at 602, 863 N.E.2d at 835.

646. *Id.*

647. *Garibaldi v. Applebaum*, 194 Ill. 2d 438, 742 N.E.2d 279 (2000).

648. *Goldberg*, 371 Ill. App. 3d at 603, 863 N.E.2d at 835 (citing *Garibaldi*, 194 Ill. 2d at 449, 749 N.E.2d at 279).

649. *Id.* at 603, 863 N.E.2d at 835–36.

650. *Id.* at 603, 863 N.E.2d at 836.

651. *Smith v. Waukegan Park Dist.*, 373 Ill. App. 3d 626, 869 N.E.2d 1093 (2d Dist. 2007), *appeal allowed*, 225 Ill. 2d 677, 875 N.E.2d 1124 (Ill. Sept. 26, 2007).

652. *Id.* at 627, 869 N.E.2d at 1095.

653. *Id.*

Local Governmental and Governmental Employees Tort Immunity Act (“Act”).⁶⁵⁴

Smith was a seasonal park maintenance worker, who was injured on the job, and filed a workers’ compensation claim for his injury.⁶⁵⁵ After he was released to return to work, the Park District required he take a drug and alcohol test, which he refused.⁶⁵⁶ He was fired soon thereafter.⁶⁵⁷ Smith sued alleging he was really fired for filing a workers’ compensation claim instead of his refusal to submit to the testing.⁶⁵⁸ The Park District moved to have the complaint dismissed based on the language of section 2–201 and section 2–109 of the Act.⁶⁵⁹ Section 2–201 provides, “Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.”⁶⁶⁰ Section 2–109 provides, “A local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable.”⁶⁶¹

The Park District contended that since Smith was fired as both a discretionary act by the Park District’s employee, Michael Trigg (“Trigg”) and it was a policy determination, Trigg was immune under section 2–201 of the Act making the Park District immune under section 2–109 of the Act.⁶⁶²

Smith argued two points: (1) that section 2–109 protects entities from vicarious liability for its employees torts, not from its own torts, and retaliatory discharge is an employer liability not an employee liability, and (2) until the court decided whether Trigg’s firing of Smith was a discretionary policy determination it would be premature to dismiss the complaint.⁶⁶³

On appeal the court examined the language of the section 2–109 and found the language to be unambiguous.⁶⁶⁴ Further, relying on *Buckner v. Atlantic Plant Maintenance, Inc.*,⁶⁶⁵ a retaliatory discharge action may only be brought against the employer not the employer’s agent.⁶⁶⁶ The appellate court reasoned that because Trigg was not liable then the Park District would not be liable under section 2–109.⁶⁶⁷ Smith argued *Buckner* back to the court that only the employer has the power to fire and it is only carried out by its agent

654. *Id.*; 745 ILL. COMP. STAT. 10/1–101 *et seq.* (2002).

655. *Smith*, 373 Ill. App. 3d at 627, 869 N.E.2d at 1094.

656. *Id.*

657. *Id.*

658. *Id.*

659. *Id.* at 627, 869 N.E.2d at 1095.

660. 745 ILL. COMP. STAT. 10/2–201 (2002).

661. 745 ILL. COMP. STAT. 10/2–109 (2002).

662. *Smith*, 373 Ill. App. 3d at 627, 869 N.E.2d at 1095.

663. *Id.* at 628, 869 N.E.2d at 1095.

664. *Id.* at 629, 869 N.E.2d at 1096.

665. *Buckner v. Atlantic Plant Maint., Inc.*, 182 Ill. 2d 12, 694 N.E.2d 565 (1998).

666. *Smith*, 373 Ill. App. 3d at 629, 869 N.E.2d at 1096.

667. *Id.* at 629–30, 869 N.E.2d at 1097.

thereby implying a retaliatory discharge cannot result from the act of the employee but rather it is an act of the employer.⁶⁶⁸

The appellate court held that “because an employee act effectuates the injury and because an employee can never be liable for retaliatory discharge, pursuant to the plain language of section 2–109, a local public entity is immune to actions for retaliatory discharge.”⁶⁶⁹ The court continued by pointing out that if a local public entity fails to assert immunity under section 2–109 it can be waived.⁶⁷⁰ It is the appellate court’s opinion that a local public entity has complete immunity for retaliatory discharge under the Act.⁶⁷¹ The trial court decision was affirmed.⁶⁷²

IV. CONCLUSION

Highlighting these cases is always informative. It is often difficult for us to determine which cases are the most interesting. We hope they benefit other attorneys as well.

668. *Id.*

669. *Id.* at 630, 869 N.E.2d at 1097.

670. *Id.* at 631, 869 N.E.2d at 1098.

671. *Id.*

672. *Id.* at 636, 869 N.E.2d at 1102.

