This article originally appeared in the Summer 2004 edition of the *Southern Illinois University Law Journal*, Volume 28, Number 4, pages 705-779.

SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

Elaine Massock*
Debra Stegall**

1. INTRODUCTION

This article covers decisions from January 2002 through October 2003 related to employment and labor. During this time period, the Illinois Supreme Court decided twelve cases of importance to employers and employment lawyers. Tort immunity was again an area receiving attention both from the Illinois Supreme Court and the Illinois Appellate Court. The supreme court also weighed in on the consequences of felony convictions as they relate to retirement benefits. The supreme court refused to extend the corporate practice of medicine to nonlicensed, not-for-profit entities and held the employment agreement with a physician was void, unenforceable, and unassignable. Further, the supreme court provided some good insight into its analysis of independent contractors under section 212 of the Unemployment Insurance Act.

The appellate court decided several cases during this period that may not, at first sight, appear to be employment-related cases, but they were cases that we believed should be brought to the employers' and employment lawyers' attention. A case involving the reporting of sexual advances by a teacher/coach triggered an obligation of the school to report the matter to the Department of Children and Family Services ("DCFS") under the Abused and Neglected Child Reporting Act. Another case, involving eavesdropping under the Illinois Criminal Code, is not a typical employment-related case, but may be of interest to employers. Arbitration is examined by the courts in a variety of ways: the arbitrability of matters, the validity of awards, arbitration in a non-labor context, and injunctive relief to aid in arbitration. A number of covenants

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*. Elaine Massock is a partner in the Urbana, Illinois, office of Heyl, Royster, Voelker & Allen. She is a member of the ISBA Labor & Employment Law Section Council. She represents public, educational, and private employers in employment and civil rights matters.

**. Debra Stegall is of counsel with Heyl, Royster, Voelker & Allen in Peoria, Illinois. She concentrates her practice in the areas of employment law and transactional matters, including acquisitions, mergers and commercial contracts. She is a 1991 graduate of Southern Illinois University School of Law and is a member of the Employment Law Section of the Defense Research Institute.

not to compete were contested in the courts again. One case of particular interest distinguished the terms "medical practice" and "the practice of medicine" in its decision by holding the physician could continue to practice medicine within the restricted area because the physician had not established a medical practice within the restricted area. The court also examined how noncompete agreements may violate the Illinois Procurement Code in certain situations.

II. ILLINOIS SUPREME COURT DECISIONS

A. School Code

In 2001, the appellate court found in *Land v. Board of Education of the City of Chicago*[1] that sections 34–84 and 34–85 of the school code do not exempt tenured teachers from layoff, and section 34–18 of the code grants authority to the Board of Education to layoff tenured teachers. The appellate court found the Board could not delegate its authority to layoff the teachers and remanded the matter to determine whether the Board had delegated the decision to layoff. The Illinois Supreme Court reversed, holding the Board may delegate its authority to layoff the teachers, but, relying on section 34–8.1,[2] may not delegate such authority to principals.[3] The case was remanded to determine whether the Board followed its policy when it delegated its authority and whether the party receiving the delegated authority acted according to the policy.[4]

B. Tort Immunity

The scope of a government employer's liability has been limited in recent years by the increasing scope of the immunity afforded governmental employees and employers for discretionary policy decisions. Early in 2002, in *Arteman v. Clinton Community Unit School District No. 15*,[5] the Supreme Court of Illinois clarified the relationship between the Local Governmental and Governmental Employees Tort Immunity Act (the Tort Immunity Act) and a

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1. 325 Ill. App. 3d 294, 757 N.E.2d 912 (1st Dist. 2001).
2. 105 ILL. COMP. STAT. 5/34–8.1 (1998).
3. 202 Ill. 2d 414, 432, 781 N.E.2d 249, 260 (2002).
4. *Id.* at 434, 781 N.E.2d at 261.
5. 198 Ill. 2d 475, 763 N.E.2d 756 (2002).

line of case law that established a duty for schools to provide safety equipment for students in dangerous activities. A student in the Clinton Community School District broke two bones in his right leg while rollerblading in his physical education class.[6] The student and his father filed a personal injury complaint, alleging that the school failed to provide the students with necessary safety equipment and failed to provide rollerblades that were suitable for their intended use.[7]

The school district filed a motion to dismiss the suit, claiming that sections 2-201 and 3-108(a) of the Tort Immunity Act protected them from the suit.[8] The trial court granted the motion to dismiss, and held that section 3-108(a), which provides immunity for claims involving a failure to supervise, precluded the personal injury action.[9] The trial court further noted that the plaintiffs had failed to make allegations that would constitute willful and wanton conduct and thus avoid the immunity provided by 3-108(a).[10]

The appellate court disagreed with the trial court, explaining that section 3-108 should not apply because the nature of the complaint was not that the student was not supervised, but that he was not provided with safety equipment.[11] However, on review, the appellate court noted that, by itself, section 2-201 of the Tort Immunity Act should preclude the plaintiffs' claims.[12] At the same time, the court recognized the existence of a series of cases that had "recognized a cause of action for a school district's failure to fulfill its independent duty to provide appropriate safety equipment."[13] The court "hesitantly concluded that section 2-201 did not defeat the plaintiffs' claims, reversing and remanding 'in the hope that the supreme court, in this case or some other, will address the immunities and duties of school districts under the Act.'"[14]

The supreme court granted the plaintiffs' petition for leave to appeal and set out to explain whether the Tort Immunity Act would overrule the line of cases finding a duty to provide safety equipment in schools.[15] The supreme court determined that the appellate court's interpretation of the law "impermissibly elevates a common law duty over an applicable statutory

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6. *Id.* at 477, 763 N.E.2d at 758.
7. *Id.*
8. *Id.*, 763 N.E.2d at 758–59.
9. *Id.*, 763 N.E.2d at 759.
10. *Id.*
11. *Id.* at 477–78, 763 N.E.2d at 759.
12. *Id.* at 478, 763 N.E.2d at 759.
13. *Id.*
14. *Id.*
15. *Id.*

immunity."[16] The Court held that section 2-201 applied to the actions of the school in this case because the decision to not provide safety equipment to the students was a discretionary policy determination, and not a willful and wanton act.[17] The court noted that the absence of a duty to provide safety equipment to school children was unfavorable, but that "the plain language of section 2-201, however, is unambiguous, and we lack the power to restrict the Act's protective scope in order to protect students."[18] Section 2-201 provides absolute immunity, even if discretion is abused. Justice Kilbride dissented from the opinion because he viewed it as a departure from a long line of precedent finding that a school district has a duty to provide safety equipment to protect students from serious injury during school athletic events.[19]

The next month, in February of 2002, in another case in which the Illinois Supreme Court interpreted the Tort Immunity Act, the court determined that a claim against a defendant health care provider was not barred by the Act's one year statute of limitations because the defendant was not a public business.[20] This was so despite the level of government funding received by the defendant.[21] In *Carroll v. Paddock*, the court clarified the meaning of the term "public business," as used in the definition of a "local public entity" under the Tort Immunity Act.

In that case, Joshua Carroll attempted suicide and was taken to Paris Community Hospital, where, without being admitted, he was seen by a doctor and sent to the Human Resources Center of Edgar and Clark Counties.[22] Joshua received a psychological assessment his first morning at the center and killed himself later that morning.[23] Joshua's parents brought a wrongful death action against both the hospital and the center.[24] The trial court granted the motions of the defendants to dismiss the claims, finding that the center and the hospital were "local public entities" within the meaning of section 1-206 of the Tort Immunity Act.[25] The appellate court reversed this decision, holding that neither defendant constituted a "local public entity" because neither of them were sufficiently funded by government money.[26]

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16. *Id.* at 487, 763 N.E.2d at 764.
17. *Id.*
18. *Id.* at 487–88, 763 N.E.2d at 765.
19. *Id.* at 491, 763 N.E.2d at 766 (Kilbride, J., dissenting).
20. Carroll v. Paddock, 199 Ill. 2d 16, 764 N.E.2d 1118 (2002).
21. *Id.*
22. *Id.* at 18, 764 N.E.2d at 1120.
23. *Id.*
24. *Id.* at 19, 764 N.E.2d at 1120.
25. *Id.* at 21, 764 N.E.2d at 1122.
26. *Id.* at 22, 764 N.E.2d at 1122.

The supreme court began its analysis of the case by noting that "no Illinois court has specifically defined the phrase 'organized for the purpose of conducting public business'" under the Tort Immunity Act.[27] Under that Act, any entity that is found to be organized to carry on public business is protected from tort liability.[28] The supreme court determined that the appellate court had placed too much emphasis on government funding in deciding whether either defendant was a local public entity.[29]

The court determined that "to conduct 'public business' under the Act, a corporation must pursue an activity that benefits the entire community without limitation."[30] The court further noted that "the phrase 'public business' is commonly understood to mean the business of the government."[31] The court held that both the center and the hospital failed to meet the requirements of a local public entity because they were both "privately created and are privately managed."[32] In addition, the court found that both were conducting businesses commonly conducted in the private sector.[33] Finally, the court noted that "without evidence of governmental control, it cannot be said that a not-for-profit corporation conducts 'public business' for purposes of the Act."[34] This was so because the defendant was not subject to "regulations and control that are typical of other governmental units."[35] The court concluded that a public business must be "owned by or operated and controlled by a local governmental unit."[36]

In November of 2002, the supreme court responded to a challenge to the correctness of its *Carroll* decision in *Brugger v. Joseph Academy, Inc.*[37] In that case, a private, not-for-profit corporation serving special education students was sued for willful and wanton misconduct after a student seriously injured her knee in a game in a physical education class.[38] The academy had contracted with a number of public schools in the area to take on all of the special education students whose needs could not be met by the public

27. *Id.* at 23, 764 N.E.2d at 1123.
28. *Id.*
29. *Id.* at 25, 764 N.E.2d at 1124.
30. *Id.* at 25–26, 764 N.E.2d at 1124.
31. *Id.* at 26, 764 N.E.2d at 1124.
32. *Id.*
33. *Id.*
34. *Id.*, 764 N.E.2d at 1124–25.
35. *Id.*, 764 N.E.2d at 1125.
36. *Id.* at 27, 764 N.E.2d at 1125.
37. 202 Ill. 2d 435, 781 N.E.2d 269 (2002).
38. *Id.*, 781 N.E.2d at 270.

schools.[39] The trial court granted the academy's motion for summary judgment upon finding that the academy was entitled to immunity as a "local public entity" under the Immunity Act.[40] The appellate court reversed this ruling, finding that the academy did not meet the definition of a "local public entity" under the Act.[41]

One day after the Illinois Supreme Court granted the academy's appeal, the court filed its decision in *Carroll v. Paddock*, which refined the requirements of the Immunity Act.[42] In *Brugger*, on appeal to the supreme court, the academy attacked the interpretation of the Immunity Act found in *Carroll*.[43] The academy's first argument was that the test for determining whether an entity qualifies for tort immunity under the Act, as announced in *Carroll*, was overly restrictive.[44] The basis of this argument was that the new interpretation would allow only for governmental agencies to qualify for immunity, rendering the text of the Act that expanded immunity to non-profit organizations without meaning.[45] The court dismissed these challenges by examining the lack of authority behind each one, and then noting "that the academy has misconstrued our statement in *Carroll*."[46]

In *Brugger*, the Illinois Supreme Court adhered to its rationale and holding in *Carroll*. It confirmed that statutory immunity would be extended to private organizations only if the organization could show both that it pursued "an activity that benefits the entire community without limitation," and that it was "tightly enmeshed with government," for example, in the case of a security service for a public housing project that had to meet particular federal requirements.[47] The defendant academy argued that even under the *Carroll* test, it was still entitled to immunity as a local public entity. It argued that it was "tightly enmeshed" with the public school districts that made referrals to the defendant. It also argued that it was open to the public-at-large, benefitting the entire community through the placement procedures contained in the School Code. It was, after all, providing to those referred to it from the public schools the same free education mandated by the Illinois constitution.[48]

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39. *Id.* at 437, 781 N.E.2d at 270.
40. *Id.*, 781 N.E.2d at 271.
41. *Id.* at 437, 781 N.E.2d at 271.
42. *Id.*
43. *Id.* at 437, 781 N.E.2d at 271.
44. *Id.* at 437–38, 781 N.E.2d at 271.
45. *Id.* at 439, 781 N.E.2d at 272.
46. *Id.* at 444, 781 N.E.2d at 274.
47. *Id.* at 445, 781 N.E.2d at 275 (citing Carroll v. Paddock, 199 Ill. 2d 16, 764 N.E. 2d 1118 (2002)).
48. *Id.*

The academy argued that its special education facilities were controlled by the government because they were regulated by their contracts with public schools, by the Illinois Administrative Code, and numerous other identified Illinois statutes. The academy pointed to its contractual requirements to give the various school districts monthly attendance reports, tests and evaluation reports, and progress reports. It also was subject to required curriculum content, visits, inspections, and evaluations from the public schools. In addition, the school districts provided 95% of the defendant's operating funds.

Despite these links between the academy and the public school districts, the court found it was not tightly enmeshed with the public entities. The court emphasized that the academy was free to contract or refrain from contracting with public entities. Moreover, the academy had admitted that it maintained its autonomy in day to day operations. The academy's board was comprised solely of private individuals, with no public officials acting in their official capacity. The board could choose not to enter into contracts with public entities at any time.

In summary, the court in *Brugger* refused to afford tort immunity to a private entity contracting with public schools. Because the academy had retained its character as a private business, it was denied immunity under the Act.[49]

In yet another case, the Illinois Supreme Court analyzed the common law parental immunity doctrine rather than statutory tort immunity.[50] In *Wallace v. Smyth*, the Illinois Supreme Court determined that the parental immunity doctrine cannot be expanded to include the employees of residential child care facilities.[51] In that case, a child in the custody of Maryville Academy died of asphyxiation while he was being restrained by four of the facility's employees.[52] The child's mother sued for negligence, and the defendant employees asserted the parental immunity doctrine.[53] The trial court held that the employees should be given *in loco parentis* status, agreed that the doctrine shielded them from liability, and dismissed the case.[54] The appellate court reversed, noting that housing, caring for, and educating a child does not confer *in loco parentis* status on the facility or its employees.[55]

Before the ruling of the appellate court could be appealed, the Illinois

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49. *Id.* at 448, 781 N.E.2d at 277.
50. Wallace v. Smyth, 203 Ill. 2d 441, 786 N.E.2d 980 (2002).
51. *Id.*
52. *Id.* at 444, 786 N.E.2d at 982.
53. *Id.*, 786 N.E.2d at 982–83.
54. *Id.*, 786 N.E.2d at 983.
55. *Id.* at 445, 786 N.E.2d at 983.

Supreme Court decided *Nichol v. Stass*,[56] which expanded parental immunity to foster parents. The supreme court denied the defendant's petition in *Wallace*, and remanded the case back to the appellate court to decide the case in light of the recent *Nichol* opinion.[57] On remand, the appellate court compared the responsibilities of foster parents to those of the Maryville facility and found that the same immunity that applied in *Nichol* could equally apply in this case.[58] The appellate court vacated its previous opinion and remanded the case to allow the plaintiff to amend her complaint.[59] Instead of amending the complaint, however, the plaintiff successfully petitioned for appeal to the Illinois Supreme Court.

The supreme court decided that the lack of any parental relationship between the employees and the children at the facility would be contrary to the purpose of the doctrine.[60] According to the court, the employees of the facility "are not parents, however similar their responsibilities."[61] The court looked to both the nature of the conduct and the nature of the relationship in deciding that the parental immunity doctrine should not apply to the child care employees.[62] The court held that the application of the parental immunity doctrine should be limited by both the conduct at issue and the person who is performing those parental duties.[63] The court concluded that "[t]he corporation-child relationship simply does not mirror that parent-child relationship."[64]

In October of 2003, in *Van Meter v. Darien Park District*,[65] the supreme court ruled on the distinction between situations involving the making of a policy choice and the exercise of discretion. The plaintiffs, William and Patricia Van Meter, filed a complaint against various governmental entities and five individual defendants, alleging that surface water flooded their home upon completion of an adjacent municipal recreation area.[66] The defendants moved to dismiss pursuant to section 2-619(a)(9) under section 2-201 of the Tort Immunity Act.[67] The supreme court reversed the holdings of the circuit court

56. Nichol v. Stass, 192 Ill. 2d 233, 735 N.E.2d 582 (2000).
57. Wallace, 203 Ill. 2d at 445, 786 N.E.2d at 983.
58. *Id.* at 445–6, 786 N.E.2d at 983–4.
59. *Id.* at 446, 786 N.E.2d at 984.
60. *Id.* at 451, 786 N.E.2d at 986.
61. *Id.* at 452, 786 N.E.2d at 987.
62. *Id.* at 449, 786 N.E.2d at 985.
63. *Id.* at 451, 786 N.E.2d at 987.
64. *Id.* at 452–53, 786 N.E.2d at 987.
65. 207 Ill. 2d 359, 799 N.E.2d 273 (2003).
66. *Id.* at 362–63, 799 N.E.2d at 275–76.
67. *Id.* at 363, 799 N.E.2d at 276.

and appellate court. The supreme court held that it was not apparent from the face of the complaint that defendants' actions were discretionary or policy decisions.

Defendants approved a water drainage plan for a new park, which was adjacent to the plaintiffs' property.[68] According to this plan, the defendants contracted to have a storm water drainage and detention system created to restrict water from the park. Plaintiffs allege that defendants breached their duty to the plaintiffs to provide adequate drainage for the passage of water around plaintiff's property and that defendants knew or should have known, when they approved the park plans, that the alterations of the natural flow of water would cause flooding problems for neighboring residents.[69]

The Tort Immunity Act provides for immunity of public entities that, through their employees, exercise their judgment and discretion when they determine "how to design, plan, supervise, observe, or manage the construction" of a project (in this case, a park).[70] Both the trial court and the appellate court found defendants' actions to be discretionary, and therefore, governmental tort immunity applied.[71] Relying in large part on *Snyder v. Curran Township*,[72] the supreme court rejected an expansive definition of "discretionary immunity."[73] The court noted that it has addressed the distinction between discretionary and ministerial functions by defining discretionary acts as "those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to mandate of legal authority, and without reference to the official's discretion as to the propriety of the act."[74] The court further relied on *Harinek v. 161 North Clark Street Ltd. Partnership*[75] for the proposition that governmental tort immunity will not attach unless the plaintiff's injury result from an act performed or omitted by the public entity in determining policy and exercising discretion (emphasis added by court).[76] "Policy decisions" are "those decisions which require the municipality to balance competing interests and to make a judgment call as to

68. *Id.*, 799 N.E.2d at 275–76.
69. *Id.* at 364, 799 N.E.2d at 276.
70. *Id.* at 366, 799 N.E.2d at 277.
71. *Id.* at 365, 370, 799 N.E.2d at 277, 280.
72. 167 Ill. 2d 466, 657 N.E.2d 988 (1995).
73. *Van Meter*, 207 Ill. 2d at 371, 799 N.E.2d at 280.
74. *Id.* at 371–72, 799 N.E.2d at 281 (citing *Snyder*, 167 Ill. 2d at 474, 657 N.E.2d at 988).
75. 181 Ill. 2d 335, 692 N.E.2d 1177 (1998).
76. *Van Meter*, 207 Ill. 2d at 373, 799 N.E.2d at 281 (emphasis added by court).

what solution will best serve each of those interests."[77]

Ultimately, the supreme court found that the defendants had failed to establish either element in this case by affidavit or other evidentiary materials of record.[78] The court noted that the "affirmative matter" asserted by defendants to defeat plaintiff's viable claims was not apparent on the face of the complaint.[79] Hence, dismissal based on 2-201 immunity was not proper on the record presented.

In *Carver v. Sheriff of La Salle County*,[80] the supreme court held that "under Illinois law a sheriff in his or her official capacity has the authority to settle and compromise claims brought against the sheriff's office."[81] In *Carver*, plaintiffs were formal employees of the La Salle County Sheriff's Department and filed complaints against La Salle County, the La Salle County Sheriff's Department, and Anthony M. Condie, the Sheriff of La Salle County.[82] Defendants filed a motion to dismiss on the basis that the "Sheriff holds an independent office" and "the County had no control over the conduct or policies of the Sheriff's office and, therefore, the County could not be held vicariously liable for the alleged discriminatory conduct."[83] During a final break at trial, the "parties informed the court that they had reached a tentative settlement of the case and requested that the court enter a consent decree to reflect their agreement."[84] The consent decree stated that "[d]efendant Anthony M. Condie, Sheriff of La Salle County has agreed to the entry of judgment against him in the amount of $500,000 in compensatory damages for violations of title VII and section 1983."[85] The Sheriff was entering the decree in his official capacity and the judgment was regarded as an obligation of the office of the Sheriff of La Salle County.[86] Thus, the certified question from the Seventh Circuit to the supreme court was whether, and if so when, Illinois law requires counties to pay judgments entered against a Sheriff's office in an official capacity, whether settled or litigated.[87]

Central to this case was Article IX of the Tort Immunity Act entitled

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77. *Id.*, 799 N.E.2d at 281–82 (quoting West v. Kirkman, 147 Ill. 2d 1, 588 N.E.2d 1104 (1992)).
78. *Id.* at 374, 799 N.E.2d at 282.
79. *Id.* at 379, 799 N.E.2d at 285.
80. 203 Ill. 2d 497, 787 N.E.2d 127 (2003).
81. *Id.* at 499, 787 N.E.2d at 129.
82. *Id.*
83. *Id.* at 500, 787 N.E.2d at 129.
84. *Id.*, 787 N.E.2d at 130.
85. *Id.* at 500–01, 787 N.E.2d at 130.
86. *Id.* at 501, 787 N.E.2d at 130.
87. *Id.* at 506, 787 N.E.2d at 133.

"Payment of Claims and Judgment."[88] Specifically, section 9-102 sets forth the parameters within which a local public entity may compromise and settle claims filed against it, and empowers that entity to pay any tort judgment or settlement for compensatory damage for which the entity, or an employee of the entity acting within the scope of employment, is liable.[89] At issue in this case was whether Sheriff Condie, in his official capacity as a Sheriff of La Salle County, had the statutory authority pursuant to section 9-102 to enter into the settlement agreement and consent decree.[90] The supreme court ultimately concluded that because a county sheriff falls within the term "other local governmental bodies" contained in section 1-206 of the Tort Immunity Act, the Sheriff is therefore a "local public entity" for purposes of the Tort Immunity Act.[91] In coming to this conclusion, the court cited the Counties Code indicating that the Sheriff has the authority to appoint higher deputies and is vested with the authority to act as the county's supervisor of safety, and that the Sheriff's office was financed by public funds appropriated to that office by the county.[92] In short, the court noted that a county sheriff is an independently elected county official who performs functions essential to the operation of government and whose office is funded by public funds.[93] These factors led the court to conclude that the county sheriff is a "local governmental body" as the term is used in section 1-206 of the Tort Immunity Act.[94]

Next, the issue was whether the Sheriff as a local public entity should be liable for any judgment on the plaintiff's claims.[95] The court concluded the provision that states the "person vested by law or ordinance with authority to make over-all policy decisions for such entity considers it advisable to enter into such a settlement or compromise" gives him the power to settle for the Sheriff's office.[96] Furthermore, the supreme court found that under this statutory scheme, the county is obligated to provide funds to the county Sheriff to pay official capacity judgments entered against the Sheriff's office.[97] The court further held that the ruling was not affected by whether the case was settled or litigated.[98]

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88. *Id.* at 510, 787 N.E.2d at 135; 745 ILL. COMP. STAT. ANN. 10/9–101 (West 2000).
89. *Carver*, 203 Ill. 2d at 510-11, 787 N.E.2d at 135.
90. *Id.* at 511, 787 N.E.2d at 135–36.
91. *Id.* at 512, 787 N.E.2d at 136.
92. *Id.* at 513, 787 N.E.2d at 137.
93. *Id.* at 514-15, 787 N.E.2d at 137.
94. *Id.* at 515, 787 N.E.2d at 137–38.
95. *Id.*, 787 N.E.2d at 138.
96. *Id.*
97. *Id.* at 516, 787 N.E.2d at 138.
98. *Id.* at 517, 787 N.E.2d at 139.

C. Benefits

In *Devoney v. Retirement Board of the Policemen's Annuity & Benefit Fund*,[99] the Illinois Supreme Court affirmed that the police officer's felony conviction was "related to or [arose] out of or in connection with his service as a policeman" rendering him ineligible for pension benefits under the Illinois Pension Code.[100] Devoney's long-time relationship with a career criminal was the product of his status as a police officer, which created the opportunity for a fraudulent insurance scheme.[101] The Illinois Supreme Court upheld the appellate decision that Devoney's felony conviction was related to or arose out of or in connection with his service as a police officer under section 5–227 of the Illinois Pension Code.[102] The dissenting opinion criticizes the majority because of its "but for" analysis. The dissent believes such a holding will always allow a police officer to be connected to his status as an officer even though the crime is completely unconnected to his job as a police officer. The dissent's opinion is that if the legislature intended for section 5–227 to be a wholesale bar to pension benefits for any police officer convicted of a felony, it would have written the statute accordingly.[103]

The Illinois Supreme Court agreed to hear a case decided in 2002 regarding whether the phrase "catastrophic injury" used in the Public Safety Employee Benefits Act[104] is synonymous with an line-of-duty disability as used in the Illinois Pension Code.[105] The Court affirmed both the trial court and the appellate court decision in *Krohe v. City of Bloomington*[106] awarding Mr. Krohe continued health insurance premiums paid by the municipality. Deciding that the undefined term "catastrophic injury" was ambiguous, the supreme court used the legislative history and debates to aid in their interpretation of the phrase.[107] The legislative history provided unambiguous language that the legislators intended "catastrophic injury" to be synonymous with an injury resulting in a line-of-duty disability under section 4–110 of the Illinois Pension

99. 199 Ill. 2d 414, 769 N.E.2d 932 (2002), *reh'g denied*, May 29, 2002.
100. *Id.* at 415–16, 769 N.E.2d at 934; 40 ILL. COMP. STAT. 5/5–227 (1998).
101. *Devoney*, 199 Ill. 2d at 423, 769 N.E.2d at 938.
102. *Id.*, 769 N.E.2d at 938.
103. *Id.* at 429, 769 N.E.2d at 941 (Freeman, J., dissenting).
104. 820 ILL. COMP. STAT. ANN. 320/10 (West 2000).
105. 40 ILL. COMP. STAT. ANN. 5/4–110 (West 2000).
106. 204 Ill. 2d 392, 789 N.E.2d 1211 (2003).
107. *Id.* at 397, 789 N.E.2d at 1214.

Code.[108]

A third benefits case was decided by the supreme court in 2003: *Shields v. Judges' Retirement System of Illinois.*[109] Judge Shields was receiving retirement benefits when he was indicted and convicted on seven felony counts.[110] His retirement benefits were terminated pursuant to section 18–163 of the Illinois Pension Code.[111] The judge applied for a full refund of all of his contributions made to the fund totaling $113,222 plus interest, even though he had received benefits worth $75,349.[112] The Judges Retirement System Board only refunded him the difference of $37,873.[113] The circuit court set aside the Board's decision and awarded the judge a full refund.[114] The appellate court reversed.[115] The supreme court rejected the appellate court's analysis. Instead, the supreme court found the right to a refund of contributions was unconditional and, for the Board to only refund the difference, is incompatible with the unconditional language of section 18–163.[116] Unlike the appellate court, the supreme court reasoned that their ruling would not frustrate the purpose of the statute because, since the forfeiture, the judge had lost $600,000 in retirement benefits, which would continue to grow until his death and the death of his spouse.[117]

D. Employment Status

The Illinois Supreme Court in *Carpetland v. Illinois Department of Employment Security*[118] determined whether the carpet installers and the carpet measurers were independent contractors rather than employees for the purposes of Carpetland's unemployment insurance contributions under section 212 of the Unemployment Insurance Act.[119] The director of the Department of Employment Security found Carpetland owed approximately $40,000, plus interest and penalties, in unpaid contributions after finding that the carpet measurers and installers were employees rather than independent

108. *Id.* at 400, 789 N.E.2d at 1215.
109. 204 Ill. 2d 488, 789 N.E.2d 516 (2003).
110. *Id.* at 490, 789 N.E. 2d at 517.
111. *Id.*; 40 ILL. COMP. STAT. 5/18–163 (1992).
112. *Shields*, 204 Ill. 2d at 490, 789 N.E.2d at 517.
113. *Id.*
114. *Id.* at 491, 789 N.E.2d at 518.
115. *Id.*
116. *Id.* at 496–97, 789 N.E.2d at 521; 40 ILL. COMP. STAT. 5/18–163 (West 1992).
117. *Shields*, 204 Ill. 2d.at 497, 789 N.E.2d at 521.
118. 201 Ill. 2d 351, 776 N.E.2d 166 (2002), *reh'g denied*, Aug. 29, 2002.
119. 820 ILL. COMP. STAT. ANN. 405/212 (West 2000).

contractors.[120] The circuit court affirmed the director's decision.[121] The appellate court reversed.[122] The Illinois Supreme Court's opinion was a lengthy analysis of the application of section 212 and the factors set forth in the Illinois Administrative Code to determine whether the measurers and installers are exempt under section 212. Unemployment insurance contributions must be made, unless (A) the individual has been or will "continue to be free from control or direction over the performance of such services;" and (B) "such service is either outside the usual course of business for which such service is performed or that such service is performed outside of all places of business of the enterprise for which such service is performed;" and (C) "such individual is engaged in an independently established trade, occupation, profession, or business."[123] The employer must prove all three conditions exist to be exempt from paying the required contributions.[124]

A majority of the time, Carpetland arranged for the installation of its customers' new carpet. Carpetland entered into an agreement with their customer authorizing Carpetland to subcontract the customers' carpet installation. Under the clearly erroneous standard, the court reviewed the Department's report and the actual record. In order to review whether the installers and measurers were "free from control or direction," the court analyzed the list of twenty-five factors set forth in the Illinois Administrative Code.[125] After reviewing the twenty-five factors, the court found the Director was incorrect when she found the measurers and installers were not free from the control and direction of Carpetland.[126] However, when the court analyzed the measurers and installers under section 212(B), it found the measurers were representing Carpetland's interest when measuring for carpet, and therefore, were not independent contractors.[127] The final analysis was whether the installers were exempt under section 212(C). Again turning to the Administrative Code, the court analyzed thirteen factors to determine whether the installers were engaged in an independently established trade, occupation, profession, or business.[128] The installers were again found to be exempt. The

120. *Carpetland*, 201 Ill. 2d at 353, 776 N.E.2d at 169.

121. *Id.*

122. *Id.*

123. 820 ILL. COMP. STAT. ANN. 405/212 (West 2000).

124. *Carpetland*, 201 Ill. 2d at 355, 776 N.E.2d at 169–70 (citing Bradley v. Dep't of Employment Security, 146 Ill. 2d 61, 585 N.E.2d 123 (1991)).

125. *Carpetland*, 201 Ill. 2d at 374, 776 N.E.2d at 180; 56 ILL. ADMIN. CODE tit. 56 § 2732.200(g) (2001).

126. *Carpetland*, 201 Ill. 2d. at 383, 776 N.E.2d at 185.

127. *Id.* at 391, 776 N.E.2d at 189.

128. *Id.* at 392–96, 776 N.E.2d at 189–93.

supreme court affirmed the appellate court as related to the installers finding them exempt, but reversed as related to the measurers finding them to be employees of Carpetland. This opinion provides some good insight of the court's analysis of section 212 of the Unemployment Insurance Act in conjunction with the Administrative Code.

E. Corporate Practice of Medicine

In *Carter-Shields, M.D. v. Alton Health Institute,*[129] the Illinois Supreme Court affirmed the appellate court's holding that the employment agreement was void, unenforceable, and unassignable from its inception; however, it vacated the appellate court's holding regarding the non-compete provisions of the contract, finding the appellate court's opinion wholly advisory because the appellate court had already determined the employment contract void and unenforceable.[130] This case further examines the corporate practice of medicine exception decided in *Berlin v. Sarah Bush Lincoln Health Center*.[131] Dr. Carter-Shields entered into an employment agreement with Alton Heath Institute ("AHI"), which contained a covenant not to compete for two years after her termination within a twenty mile radius of AHI.[132] AHI is a non licensed, not-for-profit corporation.[133] AHI argued the exemption allowing licensed hospitals to employ physicians should be extended to nonlicensed, not-for-profit entities.[134] Both the appellate court and the Illinois Supreme Court refused to extend the exception. This decision reviews the corporate practice of medicine analysis used in the *Berlin* decision. Unfortunately, but correctly, the Illinois Supreme Court decision does not decide whether the covenant not to compete was valid and enforceable. Further, it expressly vacated the appellate court's commentary regarding the validity of the noncompetition clauses.[135]

III. ILLINOIS APPELLATE COURT DECISIONS

A. Sexual Harassment

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129. 201 Ill. 2d 441, 777 N.E.2d 948 (2002).
130. *Id.* at 464, 777 N.E.2d at 960.
131. 179 Ill. 2d 1, 688 N.E.2d 106 (1997).
132. *Carter-Shields*, 201 Ill. 2d at 442, 777 N.E.2d at 949.
133. *Id.*
134. *Id.* at 453–54, 777 N.E.2d at 955.
135. *Id.* at 464, 777 N.E.2d at 960.

1. Continuing Violation

In *Graves v. Chief Legal Counsel*,[136] petitioner challenged a determination by the Chief Legal Counsel that the Illinois Department of Human Rights did not have jurisdiction over sexual harassment claims occurring more than 180 days prior to petitioner filing charges.[137] Section 7A-102(A)(1) of the Illinois Human Rights Act requires that a charge must be brought within 180 days of the date the alleged act occurred.[138] The Chief Legal Counsel upheld the dismissal of petitioner's charge based solely on the time periods set forth in section 7A-102(A)(1).[139] Petitioner argues that although some of the acts occurred outside the 180 day period, the sexual harassment was continuous and the continuing violation doctrine should be applied.[140] Illinois courts recognize the continuing violation doctrine. To be considered an ongoing violation, the harassing actions outside the prescribed period must be sufficiently closely related to the harassing actions occurring within the same statutory time frame.[141] Three factors will be considered: "(1) whether the acts involve the same subject matter; (2) the frequency at which they occur; and (3) the degree of permanence of the alleged acts of discrimination, which would trigger an employee's awareness of and duty to assert his or her rights" under the Act.[142] The doctrine applies only when it would be unreasonable to expect the petitioner to sue before the statute ran out, such as a case in which the conduct could only be recognized as sexual harassment in light of events that occurred later.[143]

The appellate court held that the doctrine did not apply in this case because plaintiff's affidavit described multiple acts that would have supported a charge under the Act, but would have also placed her on notice that she had an actionable claim, and therefore, petitioner failed to bring her charge in a timely manner.[144]

2. Strict Adherence to Prescribed Procedural Requirements

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136. 327 Ill. App. 3d 293, 762 N.E.2d 722 (4th Dist. 2002).
137. *Id.* at 295, 762 N.E.2d at 723.
138. *Id.* at 296, 762 N.E.2d at 724.
139. *Id.* at 297, 762 N.E.2d at 725.
140. *Id.*, 762 N.E.2d at 725.
141. *Id.* at 298, 762 N.E.2d at 726.
142. *Id.* (internal quotation omitted).
143. *Id.*, 762 N.E.2d at 726.
144. *Id.* at 299, 762 N.E.2d at 726.

Employees failing to adhere strictly to the prescribed procedures necessary to file a petition for review of a decision by the Illinois Department of Human Rights will find their action dismissed. In *Dahman v. Illinois Department of Human Rights*[145] Brenda Dahman, petitioner, filed a charge of sexual harassment against James McCaslin, which was dismissed by the Department of Human Rights and upheld by the Chief Legal Counsel.[146] Ms. Dahman failed to name James McCaslin in her petition for review as a respondent.[147] Section 3–113(b) of the Administrative Review Act[148] specifically requires naming all parties of record in the petition for review. Ms. Dahman did not name Mr. McCaslin as a party as required, and her petition for review was dismissed.

3. Abused and Neglected Child Reporting Act

Doe v. Dimovski & Westmont Senior High School,[149] involves a lawsuit alleging a teacher and coach had inappropriate sexual relations with a student under 18 years of age.[150] Before the inappropriate relations, the teacher/coach had made sexual advances toward another female student, which were reported to two agents of the school board, but neither undertook a thorough investigation, reported it to anyone else, took preventative measures, or reported to DCFS.[151] The court ruled the Board was not vested with the discretion of what is "reasonable cause to believe" under the Abused and Neglected Child Reporting Act ("Act").[152] The court found that once the school suspected or should suspect sexual abuse, they no longer have the discretion to determine what constitutes "reasonable cause to believe" or if the abuse actually occurred.[153] The two agents did not have the choice and should have reported it to DCFS under the Act.[154] Therefore, the board is not immunized by section 2–201 of the Tort Immunity Act[155] for its failure to report to DCFS. The court further found section 3–108 of the Tort Immunity

145. 334 Ill. App. 3d 660, 778 N.E.2d 732 (4th Dist. 2002).
146. *Id.* at 661, 778 N.E.2d at 732.
147. *Id.*, 778 N.E.2d at 733.
148. 735 ILL. COMP. STAT. ANN. 5/3–113(b) (West 2000).
149. 336 Ill. App. 3d 292, 783 N.E.2d 193 (2d Dist. 2003), *appeal denied*, 204 Ill. 2d 658, 791 N.E.2d 1283.
150. *Id.* at 294, 783 N.E.2d at 195.
151. *Id.* at 294, 783 N.E.2d at 196.
152. *Id.* at 297, 783 N.E.2d at 198; 325 ILL. COMP. STAT. ANN. 5/1 *et. seq.* (West 2000).
153. *Doe*, 336 Ill. App. 3d at 297, 783 N.E.2d at 198.
154. *Id.*
155. 745 ILL. COMP. STAT. ANN. 10/2–201 (West 2000).

Act[156] did not apply because the complaint was based on the failure to report, rather than a failure to supervise.[157] However, the finding that the Board was not immunized under sections 2–201 and 3–108 was limited to plaintiff's failure to report claim.[158] The dismissal pursuant to section 2–619[159] was reversed, and the case was remanded for further proceedings.[160]

B. Tort Immunity

In *International Memory Products of Illinois v. Metropolitan Pier & Exposition Authority*,[161] the First District Appellate Court clarified what duties are applied to a government actor who is protected by the Tort Immunity Act. In that case, the Metropolitan Pier and Exposition Authority ("MPEA") was hosting a conference in the McCormick Place convention center in Chicago.[162] International Memory Products ("IMP") was one of the businesses that had contracted to set up a display at the conference.[163] Following the second day of the show, the emergency exit doors were left open, and strong winds caused the IMP display to fall, resulting in substantial damage to the display.[164] In the ensuing suit to recover the costs of the damages, MPEA asserted that it was immune as a protected entity under the Tort Immunity Act.[165] At the trial court, MPEA filed a motion for summary judgment, arguing that section 3-105 of the Tort Immunity Act entitled it to judgment.[166] The trial court granted the motion and found that MPEA owed no duty of care to IMP.[167]

On appeal, IMP argued that the trial court had erred in determining that

156. 745 ILL. COMP. STAT. ANN. 10/3–108 (West 2000).
157. *Doe*, 336 Ill. App. 3d at 297–98, 783 N.E.2d at 198.
158. *Id.* at 298, 783 N.E.2d at 199.
159. 735 ILL. COMP. STAT. ANN. 5/2–619 (West 2000).
160. *Doe*, 336 Ill. App. 3d at 300, 783 N.E.2d at 200.
161. 335 Ill. App. 3d 602, 781 N.E.2d 505 (1st Dist. 2002).
162. *Id.* at 603–04, 781 N.E.2d at 507.
163. *Id.* at 604, 781 N.E.2d at 407.
164. *Id.* at 607, 781 N.E.2d at 509–10.
165. *Id.* at 609–10, 781 N.E.2d at 511.
166. *Id.*
167. *Id.* at 611, 781 N.E.2d at 513.

MPEA owed no duty of care to the exhibitors at the conference.[168] MPEA was a public entity, and any duty that it would owe the plaintiff would be governed by the Tort Immunity Act.[169] The court determined that "[w]hile MPEA does have a duty under the Act to maintain its premises in a reasonably safe condition, it does not owe a duty of ordinary care to maintain its premises for the benefit of plaintiff under the facts of this case."[170] The court noted that "[u]nder section 3-102 of the Tort Immunity Act, governmental entities have a duty to exercise reasonable and ordinary care in maintaining public property."[171] In addition, the court held that there was no common law duty that would expand the duty of care owed to the plaintiff by MPEA.[172] Because MPEA had no duty to protect IMP from the high winds coming into the convention center, the only way that they could be held liable under the Tort Liability Act would be if the facts of the case indicated that MPEA had voluntarily undertaken a duty to protect IMP's display from the wind.[173] After reviewing the contract between MPEA and IMP, and the actions of both parties, the court held that no such duty was voluntarily undertaken.[174] The appellate court affirmed the decision of the trial court, finding that there was no duty owed by MPEA to IMP to protect the display from the high winds.[175]

In *Raintree Homes v. Village of Long Grove*,[176] the Second District Appellate Court examined the scope of the statute of limitations contained in the Local Governmental and Governmental Employee Tort Immunity Act.[177] In that case, Raintree Homes filed a complaint against the Village of Long Grove challenging the constitutionality of the impact fees that the village charged when issuing building permits.[178] These fees totaled over $7,000 per permit.[179] The suit that Raintree filed complained that the village did not have the statutory or constitutional authority to charge an applicant the excessive impact fees to obtain a building permit.[180] The defendant filed a section 2-615

168. *Id.* at 610, 781 N.E.2d at 512.
169. *Id.*
170. *Id.* at 611, 781 N.E.2d at 513.
171. *Id.*
172. *Id.* at 612, 781 N.E.2d at 513.
173. *Id.* at 614, 781 N.E.2d at 515.
174. *Id.*
175. *Id.* at 616, 781 N.E.2d at 516.
176. 335 Ill. App. 3d 317, 780 N.E.2d 773 (2d Dist. 2002), *aff'd in part, rev'd in part*, 2004 Ill. LEXIS 362 (Ill. Mar. 18, 2004).
177. *Id.*
178. *Id.* at 317–18, 780 N.E.2d at 774.
179. *Id.* at 318, 780 N.E.2d at 774.
180. *Id.*

motion to dismiss and asserted that the plaintiff's claims were barred by the one-year statute of limitations contained in the Tort Immunity Act.[181] The trial court granted the motion to dismiss, and the plaintiff appealed.[182]

On appeal, the plaintiff argued that the one-year statute of limitations was inapplicable to the case at hand.[183] The court noted that the Tort Immunity Act is not limited only to tort claims in its text, and even provided that the statute of limitations should apply to any "civil action."[184] Despite this language, the court found that the statute of limitations only applied to actions in tort.[185] The court explained that "it is clear that the Tort Immunity Act was enacted to circumscribe our local government entities' liability in tort."[186] Because the nature of the action in this case was constitutional rather than tortious, the trial court had erred in dismissing the complaint for violating the statute of limitations.[187]

In *Courson v. Danville School District No. 118*,[188] a shop teacher's actions were considered to be discretionary policy decisions. The District was therefore immune from suit.

In *Courson*, the plaintiff, an eighth-grade student, was injured while using a table saw during shop class.[189] The shop teacher permanently removed the saw's safety shield before the plaintiff was injured.[190] The case was previously before the court on the trial court's grant of summary judgment to defendant school district.[191] The trial court had held that the actions of the school district and its employees in failing to provide a safety shield on the saw were discretionary actions which came within the immunity afforded by the Tort Immunity Act.[192] On appeal, the court reversed the summary judgment, as the shop teacher's deposition had not been taken. The parties deposed the shop teacher, and based on his deposition, the trial court again entered summary judgment in favor of the school district. The student appealed.[193]

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181. *Id.*
182. *Id.*
183. *Id.* at 319, 780 N.E.2d at 775.
184. *Id.* at 319–20, 780 N.E.2d at 775.
185. *Id.* at 320, 780 N.E.2d at 776.
186. *Id.*
187. *Id.*
188. 333 Ill. App. 3d 86, 775 N.E.2d 1022 (4th Dist. 2002).
189. *Id.* at 87, 775 N.E.2d at 1023.
190. *Id.*
191. *Id.*
192. *Id.*, *appeal granted*, 202 Ill. 2d 600, 787 N.E.2d 155 (2002); 745 ILL. COMP. STAT. ANN. 10/2–201 (West 2000).
193. *Courson*, 333 Ill. App. 3d at 87, 775 N.E.2d at 1023.

In affirming the lower court's decision, the appellate court concluded, after considering similar cases, that the shop teacher's actions were a discretionary policy determination, and the immunity of section 2-201 applied.[194] Based on the shop teacher's deposition, the court determined that the decision to remove the safety shield was a decision unique to the "public office" of shop teacher.[195] The shop instructor was charged with balancing various interests that might compete for the time and resources of the shop class, including the interests of efficiency and safety. A shop teacher, in warning students and providing safety equipment, has to consider each student's abilities, balance these interests against the resources available, and make a judgment how best to perform this teaching duties.[196]

The student's complaint also alleged the school district failed to properly maintain the saw, but the court concluded that the intentional removal of a safety shield cannot be characterized as a failure to maintain property.[197]

A dissenting opinion stated that section 2-201 immunity should not apply under Illinois case law because the shop teacher did not occupy an executive or administrative position in the school district, and the action of removing the safety guard was not a policy decision, but rather a maintenance decision.[198]

Defendants appeal from a trial court granting of summary judgment to plaintiff raising the question whether the trial court failed to apply the immunities available to the defendants in *Valentino v. Hilquist*.[199] Plaintiff was the director of facilities.[200] Plaintiff's direct supervisor was Mr. Hilquist, whom Plaintiff alleged subjected him to physical and verbal abuse.[201] Plaintiff filed an action against both Mr. Hilquist and the Board of Trustees alleging battery, intentional infliction of emotional distress, and breach of contract.[202] While orders denying summary judgment are not reviewable because of merger by law, defendants' tort immunity arguments were not presented to the jury.[203] The appellate court agreed with the defendants that section

194. *Id.* at 92, 775 N.E.2d at 1027.
195. *Id.*
196. *Id.* at 91, 775 N.E.2d at 1026.
197. *Id.* at 92, 775 N.E.2d at 1027.
198. *Id.* at 93, 775 N.E.2d at 1028.
199. 337 Ill. App. 3d 461, 785 N.E.2d 891 (1st Dist. 2003), *appeal denied*, 204 Ill. 2d 684, 792 N.E.2d 314 (2003).
200. *Id.* at 464, 785 N.E.2d at 894.
201. *Id.*, 785 N.E.2d at 895.
202. *Id.*, 785 N.E.2d at 894–95.
203. *Id.* at 467, 785 N.E.2d at 897.

3–108(a)[204] applied and immunized the Board of Trustees from liability.[205] On the other hand, Hilquist argued section 2–201[206] immunized his actions.[207] The appellate court rejected Hilquist's spin that his conduct was merely criticism of plaintiff as part of his discretionary evaluation.[208] Section 2–201 of the Tort Immunity Act did not immunize Hilquist.[209]

Does the Tort Immunity Act[210] protect a township board member against defamation and tortious interference claims? Under the facts of *Clarage v. Kuzma*[211] the answer is no. Mr. Scully published a defamatory letter to the township board member and asserted his actions were protected under sections 201 and 206 of the Tort Immunity Act.[212] The appellate court disagreed, holding section 2–201 did not apply because Mr. Scully was not granting or withholding a license when he published the defamatory statement.[213] The court also found section 2–201 did not protect Mr. Scully because his conduct did not fall within the parameters of the section requiring him to either determine a policy or exercise his discretion under an official policy.[214]

Defendants appealed a $1.14 million judgment in *Ozik v. Gramins.*[215] Police officers allowed an underage intoxicated driver to retake control of a vehicle, resulting in the death of a passenger. Plaintiffs sought recovery under section 2–202,[216] which carves out willful and wanton conduct.[217] Section 1–201 defined willful and wanton 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."[218] Among other things, defendants contend they were immune

204. 745 ILL. COMP. STAT. 10/3–108(a) (1996).
205. *Valentino*, 337 Ill. App. 3d at 468, 785 N.E.2d at 898.
206. 755 ILL. COMP. STAT. 10/2–201 (1996).
207. *Valentino*, 337 Ill. App. 3d at 472, 785 N.E.2d at 901.
208. *Id.* at 473, 785 N.E.2d at 901.
209. *Id.*
210. 745 ILL. COMP. STAT. ANN. 10/2–201 (West 2002).
211. 342 Ill. App. 3d 573, 795 N.E.2d 348 (3d Dist. 2003).
212. *Id*. at 585, 795 N.E.2d at 358.
213. *Id.*
214. *Id.*
215. 345 Ill. App. 3d 502, 799 N.E.2d 871 (1st Dist. 2003).
216. 745 ILL. COMP. STAT. ANN. 10/2–202 (West 2002).
217. *Ozik*, 345 Ill. App. 3d at 512, 799 N.E.2d at 879.
218. 745 ILL. COMP. STAT. ANN. 10/1–102 (West 2004).

under sections 4–102 and 4–107[219] of the Tort Immunity Act.[220] The appellate court affirmed the circuit court's decision, reasoning that defendant's interpretation of post-*Doe*[221] case law was flawed and ignored the plain language of section 2–202.[222]

C. Labor

1. Managerial Employees

In *American Federation of State, County & Municipal Employees, Council 31 v. Illinois State Labor Relations Board*,[223] the Fifth District Appellate Court determined that assistant appellate defenders were managerial employees under the Illinois Public Labor Relations Act. In 1998, the American Federation of State, County, and Municipal Employees ("AFSCME") petitioned and was named the exclusive bargaining agent for most of the employees of the Office of the State Appellate Defender ("OSAD"), including the assistant appellate defenders.[224] When the time came for a new collective bargaining agreement to be negotiated, the Illinois Supreme Court had decided a series of cases which OSAD thought would require the assistant appellate defenders to be classified as managerial employees, and therefore outside of the bargaining unit.[225] The union disagreed with this new classification, and the case was brought before an administrative law judge.[226] The administrative law judge found that the assistant appellate defenders were managerial employees and should properly be excluded from the bargaining unit, and the unfair labor practice charges should be dismissed.[227] The union appealed this matter to the Labor Relations Board, who modified the findings of the administrative law judge, but agreed with the outcome.[228] Finally, the case was appealed to the Fifth District

219. 745 ILL. COMP. STAT. ANN. 10/4–102 (West 2004); 745 ILL. COMP. STAT. ANN. 10/4–107 (West 2004).
220. *Ozik*, 345 Ill. App. 3d at 504, 799 N.E.2d at 873.
221. Doe v. Calumet City, 161 Ill. 2d 374, 641 N.E.2d 498 (1994).
222. *Ozik*, 345 Ill. App. 3d at 517–18, 799 N.E.2d at 884.
223. 333 Ill. App. 3d 177, 775 N.E.2d 1029 (5th Dist. 2002), *appeal denied*, 202 Ill. 2d 597, 787 N.E.2d 154 (2002).
224. *Id.* at 179–80, 775 N.E.2d at 1030–31.
225. *Id.* at 180, 775 N.E.2d at 1031.
226. *Id.*
227. *Id.* at 180–81, 775 N.E.2d at 1031.
228. *Id.* at 181, 775 N.E.2d at 1031.

Appellate Court.[229]

On appeal, the union argued that the law regarding the classification of the assistant appellate defenders had not changed, and therefore, OSAD had waived that issue when it negotiated the bargaining unit when it was first formed.[230] To determine if there was a change in the law to justify the attempted change in the bargaining unit, the appellate court looked to the Illinois Supreme Court's decision in *Chief Judge of the Sixteenth Judicial Circuit v. Illinois State Labor Relations Board*,[231] in which it was determined that assistant public defenders are managerial employees.[232] The court found that this determination constituted a change in the law sufficient to account for the proposed change in the bargaining unit.[233]

The court also found "no principled distinction between the statutory duties of the assistant appellate defenders and their counterparts at the trial level, the assistant public defenders ...."[234] Due to these similarities, the court held that the assistant appellate defenders were also managerial employees.[235]

The court looked at three elements that would allow the assistant appellate defenders to be characterized as managerial employees: (1) the degree to which the assistant appellate defenders were identified with their employer, (2) the degree to which the assistant appellate defenders and their employer share professional interests, and (3) the degree to which assistant appellate defenders are able to act on behalf of their employer.[236] In weighing these factors, the court determined that the assistant appellate defenders must be considered managerial employees.[237] The court made it clear that its decision was limited to the unique situation presented in this case, and that not all attorneys would necessarily be found to be managerial employees.[238]

2. Confidential Employees

In *One Equal Voice v. Illinois Educational Labor Relations Board*,[239]

229. *Id.*
230. *Id.* at 181, 775 N.E.2d at 1032.
231. 178 Ill. 2d 333, 687 N.E.2d 795 (1997).
232. *Am. Fed'n*, 333 Ill. App. 3d at 182, 775 N.E.2d at 1032–33.
233. *Id.*
234. *Id.* at 183, 775 N.E.2d at 1033.
235. *Id.*
236. *Id.* at 185, 775 N.E.2d at 1035.
237. *Id.* at 187, 775 N.E.2d at 1036.
238. *Id.* at 184, 775 N.E.2d at 1034.
239. 333 Ill. App. 3d 1036, 777 N.E.2d 648 (1st Dist. 2002), *appeal denied*, 202 Ill. 2d 674, 787 N.E.2d 174 (2003).

the First District Appellate Court examined the definition of "confidential employees" under the Illinois Educational Labor Relations Act.[240] In that case, a union that desired to represent the academic staff of the College of Lake County disputed the classification of two of the employees at the college as "confidential employees" who were unable to vote in the representation election.[241] Before the two employees in question, Warchal and Dempsey, were found to be unable to vote, the union had won the election 103 votes to 102.[242] After the employees were determined to be "confidential employees," the union lost the election.[243]

The dispute was submitted to an administrative law judge, who found that Dempsey and Warchal were confidential employees as defined under section 2(n) of the Educational Labor Relations Act.[244] This decision was affirmed by the Educational Labor Relations Board.[245] The decision of the Board was appealed by the union and is the subject of this case.[246]

On appeal, the union argued that "the Board's determination that Warchal and Dempsey are 'confidential employees' is contrary to law because it is based solely on their alleged future duties and not on their present responsibilities and is against the manifest weight of the evidence."[247] Under section 2(n) of the Educational Labor Relations Act,[248] a confidential employee is one who "assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies with regard to labor relations," or who "has access to information relating to the effectuation or review of the employer's collective bargaining policies."[249] The definition of a "confidential employee" fails to take into account any possibility of future job duties, and courts have been reluctant to consider future responsibilities as evidence in these cases.[250] However, the "reasonable expectation" test has been adopted by the Labor Relations Board and has been recognized by the Illinois Supreme Court as a method by which to consider future job duties in cases where it can be reasonably expected that confidential duties will be

240. *Id.* at 1038, 777 N.E.2d at 650.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 1041, 777 N.E.2d at 652.
245. *Id.*
246. *Id.*
247. *Id.*
248. 115 ILL. COMP. STAT. ANN. 5/2(n) (West 2000).
249. *One Equal Voice*, 333 Ill. App. 3d.at 1042, 777 N.E.2d at 653.
250. *Id.* at 1042–43, 777 N.E.2d at 653–54.

assumed by an employee.[251] The court went on to apply the "reasonable expectation" test in this case and found that both Dempsey and Warchal would be expected to come into contact with confidential information in the scope of their positions.[252]

Because the department where both employees work was undergoing substantial restructuring and because neither employee had been in their current positions when collective bargaining was taking place, "it would be fruitless for the decision-maker to examine solely the employee's and supervisor's current job tasks."[253] Because of that, the court remanded the matter to the Labor Relations Board with instructions to apply the "reasonable expectation" test to the facts of the case.[254]

D. Compensation and Benefits

1. Unemployment Benefits

In *Veazey v. Doherty*,[255] the court again addresses the necessity to follow specific requirements of Administrative Review Act.[256] Plaintiff, Darryl Veazey, appealed a court decision affirming he was ineligible for unemployment benefits.[257] Mr. Veazey failed to name and serve Tele-Communications, Inc. as a party of record to the administrative proceeding.[258] The appellate court dismissed Mr. Veazey's complaint for his failure to strictly adhere to the procedural requirements of the Act.

The misconduct definition in the Unemployment Insurance Act[259] is difficult for employers to overcome when they fire an at-will employee with the expectation they will not have to pay unemployment benefits. The following case is an example of how the definition of misconduct under the Unemployment Insurance Act ("Act") is literally interpreted. After finding mixed questions of law and fact requiring a review for clear error, the appellate court reversed and remanded the circuit court's affirmation of the agency's decision to deny unemployment compensation benefits in *Oleszczuk*

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251. *Id.* at 1043, 777 N.E.2d at 654.
252. *Id.* at 1044, 777 N.E.2d at 655.
253. *Id.*
254. *Id.* at 1044–45, 777 N.E.2d at 655.
255. 327 Ill. App. 3d 522, 763 N.E.2d 816 (1st Dist. 2002).
256. 735 ILL. COMP. STAT. 5/3–107 (1998).
257. *Veazey*, 327 Ill. App. 3d at 523, 763 N.E.2d at 817.
258. *Id.* at 523–24, 763 N.E.2d at 817–18.
259. 820 ILL. COMP. STAT. 405/602A (1998).

v. Department of Employment Security.[260] The Act provides the definition for misconduct. Oleszczuk was terminated for insubordination and for yelling.[261] The Department of Employment Security referee held that she was fired due to misconduct.[262] The Act clearly sets out what is required under the misconduct exception: (1) the employer has a reasonable work rule, (2) the employee deliberately and willfully violates the work rule, and (3) there was harm to the employer or other employees, or the employee has violated the work rule after having been previously warned.[263] The referee failed to identify a work rule that was violated, failed to explain how the employer was harmed, and had no evidence that Oleszczuk had been previously warned.[264] The appellate court reversed and remanded to conduct a hearing on the amount of unemployment benefits to be awarded Oleszczuk.[265] Employers should be more successful contesting the payment of unemployment benefits, if the definition of misconduct is expanded as presented in House Bill 1426.

In *Horton v. Department of Employment Security,*[266] Steevy Horton was terminated after losing his driver's license because he had three traffic violations within a twelve-month period. Having a valid driver's license was a condition of employment.[267] The unemployment benefits adjuster denied Mr. Horton unemployment compensation benefits for violating a company rule under section 602(A) of the Unemployment Insurance Act.[268] On appeal, the referee affirmed the denial of benefits, but did so under section 601(A) for leaving work voluntarily for reasons not attributable to the employer.[269] The circuit court reversed and awarded Mr. Horton unemployment benefits, and the Board appealed.[270] Applying the clearly erroneous standard, the appellate court found the record indicates Mr. Horton could no longer meet a necessary condition of employment after losing his license, therefore, he left voluntarily without good cause attributable to his employer.[271] Under section 601(A), Mr.

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260. 336 Ill. App. 3d 46, 782 N.E.2d 808 (1st Dist. 2002).
261. *Id.* at 48, 782 N.E.2d at 810.
262. *Id.* at 49, 782 N.E.2d at 810–11.
263. 820 ILL. COMP. STAT. ANN. 405/602(A) (West 2000).
264. *Oleszczuk*, 336 Ill. App. 3d at 51, 782 N.E.2d at 813.
265. *Id.* at 52, 782 N.E.2d at 813.
266. 335 Ill. App. 3d 537, 781 N.E.2d 545 (1st Dist. 2002).
267. *Id.* at 538, 781 N.E.2d at 546.
268. *Id.* at 539, 781 N.E.2d at 546 (referring to 820 ILL. COMP. STAT. ANN. 405/601(A) (West 2000)).
269. *Id.* at 540, 781 N.E.2d at 547 (referring to 820 ILL. COMP. STAT. ANN. 405/601(A) (West 2000)).
270. *Id.* at 540, 781 N.E.2d at 547.
271. *Id.* at 541, 781 N.E.2d at 548.

Horton is ineligible for unemployment compensation benefits.[272]

A plaintiff's failure to issue a summons within the requisite time period for administrative review will be fatal to his or her complaint, unless the plaintiff provides evidence of a good faith attempt to have the summons issued. In *Blumhorst v. Illinois Department of Employment Security*,[273] Mr. Blumhorst was denied benefits and the denial was affirmed by the Department's board of review. Under the Unemployment Insurance Act, Mr. Blumhorst was to file his complaint in accordance with the provisions of the Administrative Review Law.[274] Mr. Blumhorst filed a timely complaint; however, the circuit court did not issue the summons to the defendants within the thirty-five day period.[275] Defendants filed a motion to dismiss, which was denied by the circuit court.[276] In its *de novo* review, the appellate court reversed the circuit court, finding Mr. Blumhorst did not request issuance of the summons until after the thirty-five day period.[277] The court explained that merely assuming the clerk will issue a summons will not meet the proof required to show a good faith attempt to issue the summons.[278]

In *Marzano v. Department of Employment Security*,[279] the appellate court affirmed a decision that a former full-time teacher is not eligible for unemployment benefits if the teacher has a reasonable assurance of future work as a substitute teacher. After teaching full-time for one year, the school did not renew Mr. Marzano's full-time teaching position for the following school year.[280] However, the school was interested in having Mr. Marzano perform substitute teaching services for the school year, and he did so.[281] At the end of the 2001 school year, Mr. Marzano filed for unemployment compensation benefits.[282] It was determined he was ineligible because he had not received a letter of discharge from the school.[283] The court further relied on the Department regulations for its interpretation of "reasonable assurance"[284] and the presumption of reasonable assurance based upon a

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272. *Id.*, 781 N.E.2d at 548.
273. 335 Ill. App. 3d 1075, 783 N.E.2d 654 (4th Dist. 2002).
274. *Id.* at 1078, 783 N.E.2d at 656.
275. *Id.* at 1077, 783 N.E.2d at 656.
276. *Id.* at 1076, 783 N.E.2d at 655.
277. *Id.* at 1079, 783 N.E.2d at 657.
278. *Id.*, 783 N.E.2d at 657.
279. 339 Ill. App. 3d 858, 791 N.E.2d 1250 (1st Dist. 2003).
280. *Id.* at 860, 791 N.E.2d at 1251.
281. *Id.*
282. *Id.*
283. *Id.*
284. *Id.* at 862, 791 N.E.2d at 1253 (referring to ILL. ADMIN. CODE tit. 56, § 2915.1 (2000)).

pattern from one academic year to another.[285] Since Mr. Marzano had not been terminated or laid off, and there was a past pattern of conduct between him and the school district whereby the school would send him a letter each August regarding substitute teaching, the appellate court affirmed the trial court and the board of review in denying benefits.[286]

Are stock options and group insurance benefits "wages" for purposes of determining whether an individual is eligible for unemployment compensation? The court in *Hmelyar v. Phoenix Controls & the Board of Review of the Department of Employment Security*[287] examined the Unemployment Insurance Act ("Act"),[288] marriage dissolution, and tax liabilities to answer the question as it relates to the stock options.[289] Unvested and unexercised stock options are not wages.[290] Group insurance benefits are not wages under the express exclusion of section 235(B) of the Act.[291] The court also examined whether severance pay is salary, thereby determining whether an individual is "unemployed" for purposes of the Act.[292] The test is whether the payments are fixed based on the employee's future conduct and needs, and not as a result of his past performance.[293]

The good-faith exception may apply in some situations, thereby relaxing strict compliance with prescribed procedures. In *Burns v. Department of Employment Security*,[294] an employee, who had been terminated, served her complaint for administrative review of a denial of unemployment compensation on a designated agent hired by her former employer to handle her unemployment benefits claim.[295] Under the Administrative Review Law, Ms. Burns was required to file a complaint and issue a summons within thirty-five days of the date she received service of the decision.[296] Defendant employer argues they were not properly served because the complaint was not served at their last known place of residence or principal place of business as set forth in the statute.[297] However, the agent designated by the employer

285. *Id.* at 862–63, 791 N.E.2d at 1253 (referring to ILL. ADMIN. CODE tit. 56 § 2915.20 (2000)).
286. *Id.* at 863, 791 N.E.2d at 1253.
287. 339 Ill. App. 3d 700, 791 N.E.2d 695 (2d Dist. 2003).
288. 820 ILL. COMP. STAT. ANN. 405/239 (West 2000).
289. *Hmelyar*, 339 Ill. App. 3d at 705–07, 791 N.E.2d at 700–01.
290. *Id.* at 706, 791 N.E.2d at 701.
291. *Id.* at 705, 791 N.E.2d at 699–700.
292. *Id.* at 707, 791 N.E.2d at 701–02.
293. *Id.* at 708, 791 N.E.2d at 702.
294. 342 Ill. App. 3d 780, 795 N.E.2d 972 (1st Dist. 2003).
295. *Id.* at 783, 795 N.E.2d at 974.
296. *Burns*, 342 Ill. App. 3d at 786, 795 N.E.2d at 977.
297. *Id.* at 789, 795 N.E.2d at 979.

received service in a timely manner, and the employer was not prejudiced by service at its agent's address rather than its principal place of business.[298] Further, Ms. Burns made a good-faith effort to comply with the statutes and administrative regulations.[299] Therefore, the appellate court found the good-faith exception applied, and reversed the dismissal of Ms. Burns' complaint and remanded for further proceedings.[300]

2. Pension/Retirement

It is sometimes necessary to examine the legislative history to interpret ambiguous provisions of a statutory provision. In *Krohe v. City of Bloomington*,[301] the trial court relied on the legislative debate transcripts to interpret the term catastrophic injury.[302] Bill Krohe received a line-of-duty disability pension as a result of his injuries as a firefighter for the City of Bloomington, Illinois. Mr. Krohe also wanted the city to pay his health insurance premiums and filed a declaratory judgment action for such payments under section 10 of the Public Safety Employee Benefits Act ("Act").[303] Section 10 of the Act provides that the employer must pay the health insurance premiums for a firefighter who suffers a catastrophic injury or is killed in the line-of-duty.[304] The legislative transcripts for the Act provide statements by the bill's sponsor (expressly made for the record) and described a catastrophic injury.[305] The transcripts described a catastrophic injury as an injury sustained by a firefighter who, due to his injuries, has been forced to take a line-of-duty disability.[306] Mr. Krohe was injured on the job as a firefighter and was awarded a line-of-duty disability pension; therefore, the appellate court affirmed the trial court's judgment that the City of Bloomington pay Mr. Krohe's health insurance premiums. The dissent's opinion does not approve of the majority's reliance upon one legislator's statement during a bill debate, its improper analysis of the term catastrophic, and the decisions from

298. *Id.* at 792–95, 795 N.E.2d at 981–83.
299. *Id.* at 795, 795 N.E.2d at 984.
300. *Id.* at 795–96, 795 N.E.2d at 984.
301. 329 Ill. App. 3d 1133, 769 N.E.2d 551 (4th Dist. 2002), *aff'd*, 204 Ill. 2d 392, 789 N.E.2d 1211 (2003).
302. *Id.* at 1135, 769 N.E.2d at 552.
303. *Id.* at 1134–35, 769 N.E.2d at 551–52 (referring to 820 ILL. COMP. STAT. ANN. 320/10 (West 2000)).
304. *Id.* at 1134, 769 N.E.2d at 552 (citing 820 ILL. COMP. STAT. ANN. 320/10(a) (West 2000)).
305. *Id.* at 1135, 769 N.E.2d at 552 (citing 90th Ill. Gen. Assem., Senate Proceedings, Nov. 14, 1997, at 136 (statements of Sen. Donahue)).
306. *Id.* at 1135, 769 N.E.2d at 552.

other jurisdictions.[307]

Law firms may use restrictive covenants to prohibit a lawyer from practicing after termination for purposes of retirement benefits. In *Hoff v. Mayer, Brown & Platt*,[308] plaintiff resigned from defendant, and under the retirement plan, would have been entitled to retirement benefits based on his association with the firm and his years of service.[309] However, plaintiff founded a new firm and continued to practice law. Defendant's retirement plan specifically provided, "the attorney must substantially cease the active practice of law on a permanent basis or the post-retirement practice of law is determined by the firm to be consistent with his or her status as a retiree."[310] Also, Rule 5.6 of the Illinois Rules of Professional Conduct provides an exception to the general rule that lawyers may not be prohibited from competing.[311] The exception provides that an agreement to confer retirement benefits may require the attorney to actually cease practicing.[312] The court found plaintiff relinquished the retirement benefits by resigning and continuing to practice.[313] The court also found defendant's plan did not violate public policy because plaintiff was free to practice law and clients were not restricted in choosing their counsel.[314]

In *Rizzo v. Village of Evergreen Park Police Pension Fund*,[315] police officer Rizzo applied for a line of duty disability pension due to an injury to his ankle in the police station parking lot.[316] Section 30–115 of the Illinois Pension Code[317] requires a sworn physician's certificate from three physicians selected by the Board stating the officer was disabled before he could receive a disability pension.[318] One physician certified Officer Rizzo was not disabled.[319] Therefore, the Board denied Officer Rizzo disability benefits. The court held that under the clear language of the statute, the Board correctly interpreted section 3–115 by denying the application for disability pension

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307. *Id.* at 1139–43, 769 N.E.2d at 555–58.
308. 331 Ill. App. 3d 732, 772 N.E.2d 263 (1st Dist. 2002), *appeal denied*, 201 Ill. 2d 567, 786 N.E.2d 183 (2002).
309. *Id.* at 734, 772 N.E.2d at 265.
310. *Id.* at 734–35, 772 N.E.2d at 266.
311. ILL. RULES OF PROF'L CONDUCT R. 5.6.
312. *Hoff*, 331 Ill. App. 3d at 735–36, 772 N.E.2d at 266.
313. *Id.* at 740, 772 N.E.2d at 270.
314. *Id.*, 772 N.E.2d at 270.
315. 338 Ill. App. 3d 490, 788 N.E.2d 1196 (1st Dist. 2003), *appeal denied*, 201 Ill. 2d 567, 803 N.E.2d 479 (2003).
316. *Id.* at 491, 788 N.E.2d at 1197.
317. 40 ILL. COMP. STAT. 5/3–115 (1996).
318. *Rizzo*, 338 Ill. App. 3d at 493, 788 N.E.2d at 1199.
319. *Id.*, 788 N.E.2d at 1199.

benefits.[320]

The appellate court again decided whether a municipal employee convicted of a felony relating to or arising out of their employment disqualified them from pension benefits under the Illinois Pension Code. In *Bloom v. Municipal Employees' Annuity & Benefit Fund of Chicago*,[321] an alderman pled guilty to filing a false tax return.[322] Mr. Bloom requested annuity payments, but after a hearing, the Board disqualified him for benefits under section 8–251 of the Illinois Pension Code.[323] The circuit court affirmed the Board's denial.[324] The circuit court used the Illinois Supreme Court's decision in *Devoney v. Retirement Board of the Policemen's Annuity & Benefit Fund*[325] and the appellate decision in *Goff v. Teachers' Retirement System*[326] in analyzing whether there was a nexus between the employee's crime and the performance of his official duties.[327] The court concluded the "but for" test in *Devoney* is merely one acceptable method of establishing such nexus.[328] The court relied upon the "substantial factor" test used in *Goff*, and affirmed the denial of benefits because the improper payments paid to him as an alderman as bribes and kickbacks were connected to his public service when they were reported as rental payments through his personal realty business.[329]

In *Sola v. Roselle Police Pension Board*, upon the death of her husband, plaintiff, Jeannette Sola, applied for and received a 3% cost-of-living increase in her survivor pension benefit.[330] She received an annual increase each year from 1993 until 2001.[331] After an audit by the Department of Insurance, the Village wrote a letter advising her she would no longer receive an increase after 2001.[332] The plaintiff received a notice that a hearing would be held by the Pension Board that may affect her pension benefits.[333] The court enjoined the Pension Board from proceeding with its hearing to review plaintiff's annual

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320. *Id.* at 495, 788 N.E.2d 1200.
321. 339 Ill. App. 3d 807, 791 N.E.2d 1254 (1st Dist. 2003), *appeal denied*, 205 Ill. 2d 576, 803 N.E.2d 479 (2003).
322. *Id.* at 809, 791 N.E.2d at 1255.
323. *Id.* at 810, 791 N.E.2d at 1256; 40 ILL. COMP. STAT. ANN. 5/8–251 (West 1998).
324. *Bloom*, 339 Ill. App. 3d at 811, 791 N.E.2d at 1256.
325. 199 Ill. 2d 414, 769 N.E.2d 932 (2002).
326. 305 Ill. App. 3d 190, 713 N.E.2d 1091 (1999), *appeal denied*, 185 Ill. 2d 623 (1999).
327. *Bloom*, 339 Ill. App. 3d at 814–16, 791 N.E.2d at 1259–60.
328. *Id.* at 816, 791 N.E.2d at 1260.
329. *Id.* at 815–16, 791 N.E.2d at 1260–61.
330. Sola v. Roselle Police Pension Bd., 342 Ill. App. 3d 227, 794 N.E.2d 1055 (2d Dist. 2003).
331. *Id.* at 229, 794 N.E.2d at 1056.
332. *Id.*
333. *Id.* at 229, 794 N.E.2d at 1056–57.

3% increase due to its lack of jurisdiction.[334] The appellate court affirmed based on the expiration of the thirty-five day period to review final administrative decisions.[335] Also, the Board argued they could modify plaintiff's pension due to an error under section 3–144.2 of the Illinois Pension Code.[336] The appellate court held a change in the Pension Board's interpretation of the Illinois Pension Code did not qualify as an error under section 3–144.2.[337] Although argued by the Village, the appellate court did not answer the question whether the Illinois Pension Code provides for a cost-of-living increase for surviving spouses because it was not before them.[338]

In *Knight v. Village of Bartlett*,[339] the Village Police Pension Board denied Officer Knight a disability pension under the Illinois Pension Code.[340] Two psychologists and three out of four psychiatrists found Knight was unfit for duty. The three psychiatrists found his disability was a duty-related disability.[341] Further, the Board's own statements regarding Knight's mental state and the police department's removal of Officer Knight contradicted the position that Knight should not be awarded disability pension benefits.[342] The appellate court reversed and remanded with instructions to grant Officer Knight a duty-related pension.[343]

3. Wages and Compensation

a. Overtime

In *People ex rel. Department of Labor v. Skoog Landscape & Design*,[344] the courts continued to provide for determining whether an individual is an independent contractor or employee. Home health care nurses may be employees rather than independent contractors. If found to be employees, they must be paid overtime for hours worked in excess of forty hours per week under the Illinois Minimum Wage Law ("Act").[345] The

334. *Id.* at 230, 794 N.E.2d at 1057.
335. *Id.* at 231, 794 N.E.2d at 1057–58.
336. *Id.*, 794 N.E.2d at 1058; 40 ILL. COMP. STAT. ANN. 5/3–144.2 (West 2002).
337. *Sola*, 342 Ill. App. 3d at 231, 794 N.E.2d at 1058.
338. *Id.* at 233, 794 N.E.2d at 1059.
339. 338 Ill. App. 3d 892, 788 N.E.2d 205 (1st Dist. 2003).
340. 40 ILL. COMP. STAT. ANN. 5/3–114.1 (West 2000).
341. *Knight*, 338 Ill. App. 3d at 903, 788 N.E.2d at 213.
342. *Id.* at 901–02, 788 N.E.2d at 212.
343. *Id.* at 906, 788 N.E.2d at 215.
344. 337 Ill. App. 3d 232, 785 N.E.2d 992 (2003).
345. 820 ILL. COMP. STAT. ANN. 105/4(a) (West 2000).

appellate court analyzed whether the nurses were independent contractors or employees using a six-factor test in *Department of Labor v. MCC Home Health*.[346] The six factors are found in section 210.110 of the Illinois Administrative Code.[347] The Department hearing officer found that three of the six factors supported an employee-employer relationship, and MCC owed back pay for overtime of $193,560.46.[348] MCC would not pay the overtime, and the Department filed a complaint alleging the Department should have used the common law "right to control" test rather than the six-factor test.[349] Summary judgment was granted to MCC, however, the circuit court used the six-factor test and found contrary to the hearing officer.[350] The appellate court found the six-factor test incorporates the common law test of control and should be used.[351] Because the trial court failed to address two of the factors and the evidence presented genuine issues of material fact with respect to the other four factors, the appellate court reversed and remanded.[352]

b. Prevailing Wage Act

In *Skoog*, the Sterling Park District established prevailing hourly wages, filed an ordinance with the Illinois Secretary of State, and published a notice in the daily newspaper of general circulation receiving no objections.[353] Skoog Landscaping entered into a contract to install an irrigation system and paid its employees according to the wages established by the ordinance.[354] After the project was finished, the Department of Labor informed Skoog it had not paid its employees prevailing wages and owed it workers $11,156.08 and penalties.[355] Skoog filed for summary judgment asserting the Department did not challenge the ordinance in a timely manner and could not retroactively impose its own prevailing wage.[356] The appellate court upheld the lower court's summary judgment in favor of Skoog because the Department did not properly challenge its objection to the rate under the Prevailing Wage Act and could not pursue Skoog for paying its employees under the wages established

346. 339 Ill. App. 3d 10, 790 N.E.2d 38 (1st Dist. 2003).
347. ILL. ADMIN. CODE tit. 56, § 210.110 (1996).
348. *MCC Home Health*, 339 Ill. App. 3d at 16, 790 N.E.2d at 41–42.
349. *Id.*, 790 N.E.2d at 42.
350. *Id.* at 17, 790 N.E.2d at 42.
351. *Id.* at 20–25, 790 N.E.2d at 46–47.
352. *Id.* at 27–29, 790 N.E.2d at 50–52.
353. *Skoog*, 337 Ill. App. 3d 232, 234–35, 785 N.E.2d 992, 993 (3d Dist. 2003).
354. *Id.* at 235, 785 N.E.2d at 993–94.
355. *Id.*, 785 N.E.2d at 994.
356. *Id.* at 236, 785 N.E.2d at 994.

by the ordinance.[357]

c. Vacation Pay and Statute of Limitations

How long does the Department of Labor have to bring a lawsuit for failure to pay vacation pay to an individual? The court in *People ex rel. Illinois Deptartment of Labor v. Tri State Tour, Inc.* determined the Department had five years to bring an action under the Illinois Wage Payment and Collection Act ("Act").[358] The first question the court had to answer was whether the right the Department was attempting to assert was a public or a private right.[359] To determine whether it is a public or private right, three factors must be examined: "(1) the effect of the interest on the public; (2) the obligation of the governmental entity to act on behalf of the public; and (3) the extent to which public funds must be expended."[360] Following the reasoning of the court in *People ex rel. Hartigan v. Agri-Chain Products, Inc.*,[361] the court found actions brought by the Department to enforce the Act involve private rights.[362] The next question the court had to answer was whether a two year statute of limitations or a five year statute of limitations should apply.[363] Reasoning that it depends upon the type of injury, the court looked to the complaint.[364] The Department did not allege any physical or mental injury, so section 13–202[365] was inapplicable.[366] Since the Act is silent with regard to a statute of limitations, the Department had five years to bring its action under the "catch-all" period in section 13–205.[367] The court reversed the circuit court and remanded the action.

357. *Id.* at 238, 785 N.E.2d at 995–96.
358. 342 Ill. App. 3d 842, 795 N.E.2d 990 (1st Dist. 2003).
359. *Tri State Tour*, 342 Ill. App. 3d at 845, 795 N.E.2d at 993.
360. *Id.*
361. 224 Ill. App. 3d 298, 586 N.E.2d 535 (1991).
362. *Tri State Tour*, 342 Ill. App. 3d at 847, 795 N.E.2d at 995.
363. *Id.* at 848, 795 N.E.2d at 995.
364. *Id.*
365. 735 ILL. COMP. STAT. ANN. 5/13–205 (West 2000).
366. *Tri State Tour*, 342 Ill. App. 3d at 848, 795 N.E.2d at 996.
367. *Id.*; 735 ILL. COMP. STAT. ANN. 13–205 (West 2000).

E. Discrimination and Retaliation

1. Gender Discrimination

In *Anderson v. Chief Legal Counsel*,[368] Anderson filed a charge of discrimination alleging she was paid less than a similarly situated male employee. Her charge was dismissed and such dismissal was upheld by the Chief Legal Counsel, resulting in this appeal in which Anderson argues an abuse of discretion.[369] Anderson established her prima facie case, so the burden shifted to her employer, RSM McGladrey, Inc., to articulate a reason for the difference in pay.[370] McGladrey explained the two employees had dissimilar experience, duties, and responsibilities, and the burden shifted back to Anderson to prove those reasons were a pretext for discrimination.[371] Anderson asserted comments about sensitivity to woman's issues showed she was paid less because she was a woman, but she did not otherwise prove those comments were connected to her pay or that McGladrey's reasons were pretextual.[372] The appellate court held the Chief Legal Counsel did not abuse her discretion by sustaining the dismissal of Anderson's charge.[373]

2. Timeliness

Amendments to charges filed with the Illinois Department of Human Rights must be filed in a timely manner, unless they relate back to the original charge to cure technical defects or provide additional facts or allegations related to the original subject matter. In *Weatherly v. Illinois Human Rights Commission*,[374] the petitioner amended her discrimination charge more than 180 days after her discharge.[375] At the same time, she withdrew her race discrimination claim.[376] The Department of Human Rights filed a complaint with the Commission. The Commission ruled it did not have jurisdiction

368. 334 Ill. App. 3d 630, 778 N.E.2d 258 (1st Dist. 2002).
369. *Id.* at 632, 778 N.E.2d at 260.
370. *Id.* at 635, 778 N.E.2d at 262.
371. *Id.*
372. *Id.*
373. *Id.*
374. 338 Ill. App. 3d 433, 788 N.E.2d 1175 (1st Dist. 2003), *appeal denied*, 2003 Ill. LEXIS 1818 (2003).
375. *Id.* at 435–36, 788 N.E.2d at 1177.
376. *Id.* at 436, 788 N.E.2d at 1177.

because the retaliation claim was filed more than 180 days after her discharge.[377] The appellate court agreed with the Commission, deciding the amendment was filed outside the 180 day period and it did not relate back because retaliation is distinct from a claim of race discrimination and must be considered a new charge.[378] The court also considered saving the amendment under the doctrine of equitable tolling because petitioner alleged one of the Department's investigators misled her by telling her the amendment was timely.[379] However, the court found even if the investigator misled the petitioner the 180-day period had already expired and any such misleading conduct did not cause the petitioner to fail to file her amendment in a timely manner.[380]

In *Moren v. Illinois Department of Human Rights*,[381] the court recognizes the conflict between the Administrative Review Law and the Illinois Department of Human Rights regarding when the time period begins to run for determining whether a party has filed a timely petition for rehearing.[382] The Department mailed their decision to petitioner.[383] The court originally denied the petition as untimely.[384] Petitioner argued she had an additional five days to file her petition.[385] The Illinois Human Rights Act contains no method for serving a decision.[386] The court determined the Department's regulation providing receipt occurs on the fifth day after mailing[387] governs the interpretation of section 113 of the Administrative Review Law.[388] The court further remarked it would be unfair to penalize petitioner for relying upon the Department's owns regulations.[389]

3. Disability Discrimination

Allegations of a handicap discrimination under the Illinois Human Rights

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377. *Id.*, 788 N.E.2d at 1178.
378. *Id.* at 438, 439, 788 N.E.2d at 1179, 1180.
379. *Id.* at 440–41, 788 N.E.2d at 1181.
380. *Id.* at 441, 788 N.E.2d at 1181.
381. 338 Ill. App. 3d 906, 790 N.E.2d 86 (1st Dist. 2003).
382. *Id.* at 908–09, 790 N.E.2d at 88–89.
383. *Id.* at 908, 790 N.E.2d at 88.
384. *Id.*
385. *Id.*
386. *Id*. at 909, 790 N.E.2d at 88; 775 ILL. COMP. STAT. 5/7101.1(A) (2000), 775 ILL. COMP. STAT. ANN. 5/78–111(A)(1) (West 2000).
387. ILL. ADMIN. CODE tit. 56, § 2520.20 (2002).
388. *Moren*, 338 Ill. App. 3d at 909–10, 790 N.E.2d at 89; 735 ILL. COMP. STAT. ANN. 5/3–113(a) (West 2000).
389. *Moren*, 338 Ill. App. 3d. at 910, 790 N.E.2d at 89.

Act is resolved by the court in *Deen v. Lustig*.[390] In 1997, Officer Deen's behavior resulted in a mandatory psychological exam.[391] The state police's doctor determined the officer was incapable of performing his duties.[392] The state police had a policy requiring a medical release from the employee's physician in order to be returned to duty.[393] On September 29, 1999, Officer Deen advised the state police he was ready to return to work subject to the following accommodations: (1) continued use of his medication, (2) future consultation with his personal doctor, and (3) no overnight travel.[394] The state police did not return him to work because he could not perform the essential functions of the job with or without accommodations and disputed that the accommodations sought by Officer Deen were reasonable or necessary.[395] Officer Deen filed a charge with the Illinois Department of Human Rights.[396] The charge was dismissed because documentation supported that he could not perform the essential functions of the job and he did not need accommodation to take medication or see his doctor.[397] Further, the request for no overnight travel was not related to his job.[398] Deen requested review two times; the last of which was for failure to return him to work and failure to accommodate.[399] The Chief Legal Counsel sustained the dismissal.[400] Based on the *Raintree*[401] decision, the court did not apply the burden-shifting test, but instead only needed to decide whether Officer Deen could perform the job because the reasons for the adverse job action were not disputed.[402] Deen would have had to prove he was fit for duty, but the medical documentation did not support that position. Any medical documentation Officer Deen had from a doctor showing he was fit for duty was dated after the last date alleged in his charge.[403] Therefore, the State Police did not have them at the time Officer Deen presented himself for work. The Chief Legal Counsel cannot look beyond the charge.[404] The court affirmed the dismissal.

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390. 337 Ill. App. 3d 294, 785 N.E.2d 521 (4th Dist. 2003).
391. *Id.* at 297, 785 N.E.2d at 525.
392. *Id.*
393. *Id.* at 299, 785 N.E.2d at 526.
394. *Id.* at 297, 785 N.E.2d at 525.
395. *Id.* at 297–98, 785 N.E.2d at 525–26.
396. *Id.* at 298, 785 N.E.2d at 526.
397. *Id.* at 299, 785 N.E.2d at 527.
398. *Id.*
399. *Id.* at 300, 785 N.E.2d at 528.
400. *Id.* at 301, 785 N.E.2d at 526.
401. Raintree v. Ill. Human Rights Comm'n, 173 Ill. 2d 469, 481, 672 N.E.2d 1136 (1996).
402. *Deen*, 337 Ill. App. 3d at 302, 785 N.E.2d at 529.
403. *Id.* at 304, 785 N.E.2d at 531.
404. *Id.* at 305, 785 N.E.2d at 532.

F. Arbitration

1. Arbitrability

In *Chicago Teachers Union v. Illinois Educational Labor Relations Board*,[405] the First District Appellate Court interpreted section 4.5(a) of the Illinois Educational Labor Relations Act to determine that an arbitral award was enforceable because grievances about summer school positions were arbitrable. That section of the Act requires that matters involving class staffing and assignment are to be decided solely by the educational employer and are not subject to bargaining.[406] However, the appellate court found rejection from a summer school position involved more than a course assignment.

In this case, the grievances involved four teachers who applied for summer school positions, but were not selected.[407] Two separate elementary schools were involved in the dispute, and in both cases the principal denied the grievance of the complaining teacher.[408] In both cases, the grievance was appealed to the Board of Education's chief executive officer, who denied the grievance again.[409] Both cases went to arbitration, where the arbitrator found both schools had violated the collective bargaining agreement.[410] The Board of Education refused to implement the arbitration awards in both cases, and the matter was combined into one unfair labor practice charge.[411] The case went before an administrative law judge, where the inquiry was limited to whether the arbitration award should be binding on the school.[412] The administrative law judge determined the decisions about summer school assignments were solely the decision of the school district, and should not be grieved or arbitrated.[413] The union filed exceptions to appeal the ALJ's decisions, but the Educational Labor Relations Board affirmed the ALJ's

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405. 334 Ill. App. 3d 936, 778 N.E.2d 1232 (1st Dist. 2002), *appeal denied*, 202 Ill. 2d 668, 787 N.E.2d 171 (2003).
406. *Id.* at 937–38, 778 N.E.2d at 1233–34.
407. *Id.*
408. *Id.* at 939–40, 778 N.E.2d at 1234–35.
409. *Id.*
410. *Id.*
411. *Id.* at 940–41, 778 N.E.2d at 1236.
412. *Id.* at 941, 778 N.E.2d at 1236.
413. *Id.*

holdings.[414]

On appeal, the appellate court reversed. The court held that "the issue of whether one has a job is different from the issue of which class one is assigned to teach."[415] According to the court, "[t]hese grievances did not concern how a class is staffed . . . or what class is assigned to a particular teacher nor did they contest a particular staffing assignment or lack of assignment."[416] "Rather, the grievances involved whether to hire these teachers for additional employment during the summer."[417] The court found the opportunity for teachers to teach summer school courses was more like working a second job and not merely the opportunity for teachers who were already employed to teach additional courses.[418]

A subsequent case, *Chicago Teachers Union v. Illinois Educational Labor Relations Board*,[419] answers the question whether the transfer of a teacher (Greer) from a permanent position to a reassigned teachers pool is a matter of class staffing and assignment under the Illinois Educational Labor Relations Act ("IELRA").[420] Mr. Greer was removed from his permanent position and put into a pool, which could have led to eventual termination. Since this involved an issue of job retention, it is not a prohibited subject of bargaining under section 4.5(a)(4) of the IELRA.[421] Therefore, it is subject to arbitration.[422]

The defendant, the Illinois Fraternal Order of Police Labor Council, and the plaintiffs, St. Clair County and the St. Clair County sheriff, were parties to a collective bargaining agreement in *County of St. Clair v. Illinois Fraternal Order of Police Labor Council*.[423] During negotiations of the terms of the collective bargaining agreement, the parties were unable to resolve several issues, including whether the plaintiffs or the officers would determine whether overtime is paid in cash or in compensatory time.[424] The matter proceeded to arbitration, and the arbitrator issued an award ruling the officers would have the right to determine whether overtime is paid in cash or in compensatory

414. *Id.*
415. *Id.* at 944, 778 N.E.2d at 1239.
416. *Id.*
417. *Id.*
418. *Id.* at 945, 778 N.E.2d at 1239.
419. 338 Ill. App. 3d 90, 787 N.E.2d 224 (1st Dist. 2003).
420. *Id.* at 92, 787 N.E.2d at 225.
421. *Id.* at 100, 787 N.E.2d at 232; 115 ILL. COMP. STAT. ANN. 5/4.5(a)(4) (West 2000).
422. *Chi. Teachers Union*, 338 Ill. App. 3d.at 102, 787 N.E.2d at 233.
423. 338 Ill. App. 3d 738, 789 N.E.2d 451 (5th Dist. 2003).
424. *Id.* at 739–40, 789 N.E.2d at 452.

time.[425] The plaintiffs filed a petition to vacate the arbitration award in the circuit court, and the circuit court entered a judgment denying the plaintiffs' petition.[426] The plaintiffs appealed the circuit court's order and raised the following issues: (1) "whether the arbitration award should be vacated as lacking authority and violating public policy because the issue involved inherent managerial policy not subject to mandatory arbitration" and (2) "whether the arbitration award was sufficiently based upon the requisite factors."[427] The court affirmed.[428]

As an initial matter, the court determined that it need not address the defendant's argument that the circuit court lacked authority to vacate the arbitration award because the court ruled for the defendant.[429] In addressing whether the election of the form of overtime is a matter of inherent managerial policy, the court followed the three-prong test adopted by the Illinois Supreme Court in *Central City Education Ass'n, v. Illinois Educational Labor Relations Board*.[430] The court determined that a review of the arbitrator's decision and the trial court's order revealed that both were cognizant of the concerns underlying the test set fort in *Central City Education Ass'n*.[431]

The plaintiffs argued that the arbitrator's award was contrary to *Christensen v. Harris County*.[432] *Christensen* dealt with the compelled use of accumulated compensation time and the limits an employer may place upon such an accumulation under the Fair Labor Standards Act of 1938.[433] In *Christensen*, the petitioner pointed to a section in the Standards Act requiring an employer to honor an employee's request to use compensatory time within a reasonable period after the request is made.[434] From this, the petitioner argued that the section precluded other methods of spending compensatory time. The Court, in *Christensen*, rejected this argument, finding instead that the section merely provided a "minimal guarantee" that an employer may not deny a request for reasons other than those provided in 29 U.S.C. § 207(o)(5).[435]

The court concluded that mandatory arbitration of the election of the form

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425. *Id.* at 740, 789 N.E.2d at 452.
426. *Id.* at 740, 789 N.E.2d at 452–53.
427. *Id.* at 739, 789 N.E.2d at 452.
428. *Id.*
429. *Id.* at 740, 789 N.E.2d at 453.
430. 149 Ill. 2d 496, 523, 599 N.E.2d 892, 905 (1992).
431. *County of St. Clair*, 338 Ill. App. 3d at 741–42, 789 N.E.2d at 454.
432. 529 U.S. 576 (2000).
433. *Id.* at 578.
434. *Id.* at 581.
435. *County of St. Clair*, 338 Ill. App. 3d at 742-43, 789 N.E.2d at 454-55.

of overtime was consistent with the reading in *Christensen* of the Standards Act as providing minimal guarantees. The Standards Act does not prohibit bargaining on the issue of the election of the form of overtime. It provides minimum guidelines that cannot be violated by an agreement.[436]

Lastly, the plaintiffs argued that the arbitrator failed to sufficiently address the requisite factors set forth in 14(h) of the Public Labor Relations Act (5 ILCS 315/14(h) (West 2000)). The court concluded that the record supported the arbitrator's decision because the plaintiffs provided no indication that the other factors announced in 14(h) weighed against the arbitrator's decision or were even applicable.[437]

In *Town of Cicero v. Illinois Association of Firefighters, Local 717*,[438] the defendant, a firefighter's union, appealed an order from the circuit court of Cook County which vacated and remanded an arbitral award in the union's favor, finding the award to have been arbitrary and capricious. The facts are as follows. The union, as bargaining representative of all firefighters employed by the plaintiff, proposed to eliminate the town's residency requirement.[439] The union subsequently invoked its right to arbitration on the issue of residency.[440] The arbitrator issu proed his opinion and award in favor of the union by adopting the union's last posal to modify the residency requirement.[441] After the arbitrator reaffirmed his original decision to adopt the union's proposal, to the town of Cicero filed a petition for review that asked the circuit court to vacate the arbitrator's opinion and award.[442] The circuit court found the arbitral award to have been arbitrary and capricious and in excess of the arbitrator's authority.[443] Accordingly, the union appealed, contending that the trial court improperly substituted its judgment for that of the arbitrator, misapplied the arbitrary and capricious standard of review, and repeatedly misstated the arbitrator's reasoning.[444]

The first issue is determining whether the topic is a mandatory subject of collective bargaining. According to Illinois law, a matter is a mandatory subject of bargaining (1) if it concerns wages, hours, and terms and conditions of employment, and (2) is either not a matter of inherent managerial authority

436. *Id.* at 743, 789 N.E.2d at 455.
437. *Id.* at 744, 789 N.E.2d at 456.
438. 338 Ill. App. 3d 364, 788 N.E.2d 286 (1st Dist. 2003).
439. *Id.* at 367, 788 N.E.2d at 288.
440. *Id.* at 368, 788 N.E.2d at 289.
441. *Id.* at 369, 788 N.E.2d at 289.
442. *Id.*
443. *Id.* at 369, 788 N.E.2d at 289–90.
444. *Id.* at 370, 788 N.E.2d at 290.

or is a matter of inherent managerial authority, but the benefits of the bargaining outweigh the burdens bargaining imposes on the employer's authority, and thus determining whether an arbitrator lacks jurisdiction over the dispute.[445] The court concludes that the town of Cicero's failure to explain why bargaining over the issue of residency would be an impermissible burden upon its authority leads to the conclusion that the arbitrator had jurisdiction to decide this dispute.[446] The court found the residency requirements did not touch on a matter of inherent managerial authority and the benefits of bargaining for union members outweighed the burdens to the town.[447]

The standard of review for arbitral awards is "highly deferential."[448] In this vein, the appellate court concluded the conclusion and the reasoning employed by the arbitrator was not irrational.[449] The court further found that the arbitrator gave adequate consideration to mandatory factors in the case.[450]

2. Awards

i. Valid

In *City of Harvey v. American Federation of State, County & Municipal Employees, Council 31, Local 2404*,[451] the First District Appellate Court held to its consistent view that the judicial review of an arbitral award is extremely limited. In that case, the City of Harvey employee was terminated following an incident in which the employee allegedly made threatening remarks to his supervisor.[452] The union representing the employee and the City of Harvey were parties to a collective bargaining agreement, which included procedures for the filing of grievances.[453] The employee filed a grievance after his termination, and at the arbitration hearing, the arbitrator found that the employee was removed without just cause, but ordered him to serve a suspension.[454] The City of Harvey subsequently filed suit in the Circuit Court of Cook County and moved to have the arbitrator's award

445. *Id.*
446. *Id.* at 371, 788 N.E.2d at 291.
447. *Id.*
448. *Id.*
449. *Id.* at 374, 788 N.E.2d at 293.
450. *Id.* at 374–76, 788 N.E.2d at 293–95.
451. 333 Ill. App. 3d 667, 776 N.E.2d 683 (1st Dist. 2002), *appeal denied*, 202 Ill. 2d 602, 787 N.E.2d 156 (2002).
452. *Id.* at 669, 776 N.E.2d at 684.
453. *Id.*
454. *Id.*

vacated.[455] The union responded to the suit and moved to confirm the arbitrator's award.[456] The trial court denied the City of Harvey's motion and confirmed the arbitration award; the City of Harvey appealed the trial court's decision.[457]

The City of Harvey's first contention was that the trial court erred in granting the union's motion to confirm because the arbitrator did not have proper jurisdiction to rule on the matter because the employee failed to follow proper procedures when filing his grievance.[458] The court, citing the Illinois Uniform Arbitration Act, 710 ILL. COMP. STAT. ANN. 5/12 (West 1994), noted that judicial disturbance of an arbitral award would only occur in instances of fraud, corruption, partiality, misconduct, mistake, or failure to submit the questions to arbitration.[459] The court further noted it is duty bound to enforce a labor arbitration award if the arbitrator acts within the scope of his or her authority and the award draws its essence from the parties' collective bargaining agreement.[460] The court continued that any question regarding the interpretation of a collective bargaining agreement is to be answered by the arbitrator, and the arbitrator's construction of the agreement will not be overruled merely because the court's interpretation may differ from the arbitrator's.[461] The court held the decision of the arbitrator was within the scope of his authority and the award drew its essence from the parties' collective bargaining agreement, and as such, the trial court's decision was proper.[462]

The City of Harvey's next contention was that the trial court erred because the arbitrator's award violated public policy.[463] The court agreed there is a public policy exception to vacate arbitral awards which otherwise derive their essence from a collective bargaining agreement.[464] The court explained the application of the public policy exception requires a two step analysis.[465] The threshold question is whether a well-defined and dominant public policy can be identified.[466] If so, the court must determine whether the

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455. *Id.*
456. *Id.*
457. *Id.*
458. *Id.* at 672, 776 N.E.2d at 686.
459. *Id.* at 674, 776 N.E.2d at 687–88.
460. *Id.* at 674, 776 N.E.2d at 688.
461. *Id.*
462. *Id.* at 675, 776 N.E.2d at 689.
463. *Id.*
464. *Id.* at 675-76, 776 N.E.2d at 689.
465. *Id.* at 676, 776 N.E.2d at 689.
466. *Id.*

arbitrator's award, as reflected in his interpretation of the agreement, violated the public policy.[467]

The City of Harvey maintained two sources from which the court could identify Illinois public policy favoring the safety of employees in the workplace, the Illinois Health and Safety Act and Illinois case law recognizing a cause of action for negligent retention of an employee.[468] The court agreed.[469] However, the court found the arbitrator took into consideration the facts of the incident and made a rational finding that the employee could capably return to and perform his duties without creating a dangerous work environment.[470] The court held the arbitrator made a determination and considered the ramifications his decisions would have with Illinois public policy, and as such the court affirmed the trial court's decision.[471]

In *Collinsville v. Illinois State Labor Relations Board & International Union of Operating Engineers*,[472] the Fifth District Appellate Court affirmed the judgment of the Illinois State Labor Relations Board on a petition for administrative review by the City of Collinsville.[473] The City of Collinsville and the union had a long term collective bargaining relationship. The agreement between the parties included section 3.4, which allowed existing employees to transfer into vacant bargaining unit positions.[474] The parties' agreement expired on April 30, 1998, and prior to that, in March 1998, the parties commenced negotiations for a successor contract.[475] After several bargaining sessions, the union made a proposal, and in July 1998, the City approved the union's proposal and forwarded three originals of the executed contract to the union. The union then attempted to make four revisions to the contract executed by the City.[476] The City responded by considering the changes a counter offer and a rejection of the council approved contract, and therefore withdrew the signed contract noting it would consider the counteroffer of the union in additional bargaining.[477] The union brought an unfair labor practice charge alleging the City refused to abide by section 3.4 of the agreement, alleged violations of the Illinois Public Labor Relations Act on the part of the

467. *Id.*
468. *Id.*
469. *Id.*, 776 N.E.2d at 690.
470. *Id.* at 679-80, 776 N.E.2d at 692.
471. *Id.* at 680, 776 N.E.2d at 692.
472. 329 Ill. App. 3d 409, 767 N.E.2d 886 (5th Dist. 2002).
473. *Id.* at 422, 767 N.E.2d at 896.
474. *Id.* at 412, 767 N.E.2d at 888–89.
475. *Id.* at 413, 767 N.E.2d at 889.
476. *Id.*
477. *Id.* at 414, 767 N.E.2d at 890.

City by refusing to bargain in good faith over filling job vacancies, and further alleged that the City's refusal to abide by section 3.4 of the agreement was a repudiation of that provision and also an unfair labor practice.

The administrative law judge conducted an evidentiary hearing and found the transfer procedure in the agreement was not preempted by the Illinois Civil Service Statute, the transfer of employees was a mandatory bargaining subject because it involved terms and conditions of employment, the City failed to bargain in good faith about the parties' established transfer procedure in violation of the Act, and the City was in violation of the Act when it unilaterally discontinued the established transfer procedure.[478] It should be noted the administrative law judge never expressly stated whether the parties formed a valid collective bargaining agreement; however, the court found that the foregoing order showed the administrative law judge implicitly determined that a contract between the parties existed.[479] Both parties filed exceptions to the administrative law judge's recommended decision and the board heard oral arguments.[480] The board determined that the parties had entered into a valid collective bargaining agreement, the code did not preempt section 3.4 of the agreement, the City violated the act by unilaterally discontinuing its long established practice regarding the transfer of employees, and also violated the act by refusing to bargain in good faith with the union about the transfer procedures.[481] The board then ordered the City to abide by and apply section 3.4 of the agreement.[482] The City filed a timely petition for administrative review.[483]

On appeal, the City first claimed the board erroneously held that an agreement existed between the City and the union[484] The court, while recognizing a collective bargaining agreement is not an ordinary contract, found nonetheless it is a contract and the question of a formation of the agreement should be treated as a question of fact.[485] The court then held that considering the City's conduct and a meeting of the minds that resulted in the culmination of an agreement, the court could not find the board's determination that a collective bargaining agreement had been formed was against the

478. *Id.* at 415, 767 N.E.2d at 890–91.
479. *Id.*, 767 N.E.2d at 891.
480. *Id.*
481. *Id.*
482. *Id.* at 415–16, 767 N.E.2d at 891.
483. *Id.* at 416, 767 N.E.2d at 891.
484. *Id.*
485. *Id.* at 417, 767 N.E.2d at 892.

manifest weight of the evidence.[486]

The City then contended the agreement they forwarded to the union was an offer and that the union rejected this offer.[487] The court held the collective bargaining agreement was formed between the parties, and the union's attempt to change the language in the agreement was not a rejection of the offer, but was in fact a belated attempt at a counteroffer, and counteroffers made after contract formation had no effect on the contract's validity.[488]

The City next claimed a contract was not executed because the parties' agreement was not reduced to a signed document, arguing a formally executed contract was a condition precedent to the existence of a collective bargaining agreement.[489] The court, referring to federal court decisions, noted the existence of a collective bargaining agreement did not depend on its reduction in writing, but can be shown by conduct manifesting an intention to abide by agreed upon terms.[490]

Next, the City claimed if a collective bargaining agreement between the parties existed, section 3.4's transfer provision is not enforceable because it was pre-empted by the code.[491] The court found that nothing in the code prohibited the filling of positions by transfer and found, as the Board found, the code does not govern procedures for existing employees to transfer into vacant positions.[492]

Next the City claimed the Board erred in determining section 3.4 was a mandatory subject of bargaining because that section does not involve wages, hours, and other conditions of employment.[493] The court held the transfer provisions in section 3.4 of the agreement clearly impacted workers' opportunities, and hence it concerned conditions of employment as that term is used in the Act.[494] The court held that the Board's finding that section 3.4's transfer provision was a mandatory subject of bargaining was not clearly erroneous.[495]

Finally, the City also claimed it could not have violated its duty to bargain with the union over section 3.4 because the union never made a demand for

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486. *Id.* at 418, 767 N.E.2d at 893.
487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.* at 419, 767 N.E.2d at 894.
493. *Id.*
494. *Id.* at 421, 767 N.E.2d 895.
495. *Id.*

bargaining.[496] The court held there was absolutely no evidence that the parties negotiated the issue, that the City simply announced it would no longer implement section 3.4, and at that point it would have been futile for any further demand for bargaining from the union.[497] The court noted the union took the appropriate measures at that point, which included filing an unfair labor practice charge with the Board.[498]

In *City of Northlake v. Illinois Fraternal Order of Police*,[499] a collective bargaining agreement existed which contained a provision describing the terms under which accumulated sick leave would be paid to a separated officer. Northlake paid the officers as it interpreted the collective bargaining agreement.[500] The officers filed a grievance, which was referred to binding arbitration. The union presented language which they represented as a negotiated settlement of the grievance.[501] Northlake argued the language was for a new, subsequent contract, not the one under which the grievance was brought.[502] The arbitrator ordered Northlake to pay additional sick leave pay as argued by the union.[503] The trial court vacated the arbitrator's decision, holding the arbitrator exceeded his authority. The appellate court reversed, holding the arbitrator found the additional writing of the parties was a tentative agreement, to explain what the parties had intended in the original collective bargaining agreement which was ambiguous, and, therefore, the arbitrator was acting within the scope of his authority by accepting the settlement agreement.[504]

The parties agreed to binding arbitration, but later one party refused to abide by the arbitrator's decision. The City, in *City of Loves Park v. Illinois Labor Relations Board*,[505] advised a member of the union they were going to suspend him, file charges, and seek his termination.[506] A grievance was filed. A hearing was also conducted before the Civil Service Commission; however, the union waived representation of the union member because a grievance had been filed.[507] After agreeing to binding arbitration, the City was

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496. *Id.*
497. *Id.*
498. *Id.* at 421–22, 767 N.E.2d at 896.
499. 333 Ill. App. 3d 329, 775 N.E.2d 1013 (1st Dist. 2002).
500. *Id.* at 332, 775 N.E.2d at 1016.
501. *Id.*
502. *Id.*
503. *Id.* at 333, 775 N.E.2d at 1017.
504. *Id.* at 338, 775 N.E.2d at 1021.
505. 343 Ill. App. 3d 389, 798 N.E.2d 150 (2d Dist. 2003).
506. *Id.* at 391, 798 N.E.2d at 151.
507. *Id.*

ordered to reinstate the employee with full seniority, back pay, and benefits.[508] The City filed a declaratory judgment complaint that the City did not have the authority to contract away the Illinois Municipal Code because it was a non-home-rule entity and because the arbitrator did not have jurisdiction.[509] The Union filed an unfair labor charge with the Illinois Labor Relations Board ("ILRB").[510] The ALJ found the City committed an unfair labor practice, and the Board adopted the decision.[511] The City argued, under the municipal code, it was required to conduct a civil service hearing which would only be reviewable by the courts.[512] The City further argued that only after the union employee's termination could he seek arbitration.[513] The appellate court disagreed with the City's position, finding the pairing of section 8.2 of the collective bargaining agreement and the section 10–1–18(a)[514] of the Municipal Code allowed the employee to file a grievance before he was officially terminated, removing jurisdiction from the Civil Service Commission.[515] The Board found the City's refusal to abide by the arbitrator's order a wrongful repudiation of the award.[516] The Board also found the City's attempt to have the grievance arbitration clause nullified exhibited the City's repudiation of a contractual term of the collective bargaining agreement.[517] The appellate court confirmed the Board's decision.

ii. Vacate

In *Amalgamated Transit Union, Local 241 & Local 308 v. Chicago Transit Authority*,[518] the appellate court reviewed an arbitral award arising out of a collective bargaining agreement between a union and the employer. In *Amalgamated*, the union brought an action to vacate an arbitration award interpreting a provision in the collective bargaining agreement with the employer, the Chicago Transit Authority ("CTA").[519] The circuit court found that the arbitrator had exceeded his authority under the collective bargaining

508. *Id.*
509. *Id.* at 392, 798 N.E.2d at 153.
510. *Id.*
511. *Id.*
512. *Id.* at 393, 798 N.E.2d at 154.
513. *Id.* at 393–94, 798 N.E.2d at 154.
514. 65 ILL. COMP. STAT. ANN. 5/10–1–18(a) (West 2000).
515. *City of Loves Park*, 343 Ill. App. 3d at 394, 798 N.E.2d at 154.
516. *Id.* at 395, 798 N.E.2d at 155.
517. *Id.*
518. 342 Ill. App. 3d 176, 794 N.E.2d 861 (1st Dist. 2003).
519. *Id.* at 177, 794 N.E.2d at 862.

agreement and granted summary judgment in favor of the union.[520] The dispute arose between a union and the CTA over the interpretation of the term "total earnings" in the retirement plan as applied to part time union officers, "pertaining to the formula for calculating pension contributions for CTA employees serving as part-time officers of the union."[521] After the arbitrator ruled that "a reasonable limit on 'total earnings' paid to individuals in part-time Union positions is required and will be imposed," the union filed an action to vacate the arbitration award.[522] The circuit court found the arbitrator had exceeded his authority and granted the union's motion for summary judgment and vacated the arbitration award.

The appellate court had to decide whether the arbitration award drew its essence from the collective bargaining agreement, and had to determine whether the arbitrator limited himself to interpreting the collective bargaining agreement.[523] Further noting "even where the award is based upon the arbitrator's misreading of the contract, the court must uphold the award so long as the arbitrator's interpretation is derived from the language of the contract."[524] However, an arbitral award "will be overturned as not drawing its essence from the collective bargaining agreement where the arbitrator based his award on a body of thought, feeling, policy, or law *outside* of the contract."[525] Against this backdrop, the court found the arbitrator had improperly disregarded the agreement itself by "resurrecting" a fixed-cap formula, which had clearly been discarded under the collective bargaining agreement retirement plan.[526] Additionally, the court noted the collective bargaining agreement provided that the arbitrator had "no authority to add to, subtract from or amend the terms of the agreement."[527] Nonetheless, the arbitrator was found to have "ignored the clear language and intent of the collective bargaining agreement and improperly injected his notions of fairness into the decision by adding, modifying, and changing the agreement."[528] Therefore, the arbitral award did not draw its essence from the collective bargaining agreement, as the arbitrator based the award on some body of thought, feeling, policy or law outside the contract.[529] Accordingly, the

520. *Id.*
521. *Id.*
522. *Id.* at 178–79, 794 N.E.2d at 863.
523. *Id.* at 180, 794 N.E.2d at 864.
524. *Id*
525. *Id.*
526. *Id.* at 180–81, 794 N.E.2d at 865.
527. *Id.* at 181, 794 N.E.2d at 865.
528. *Id.* at 182, 794 N.E.2d at 866.
529. *Id.*

appellate court affirmed the circuit court's order to vacate the portion of the arbitral award capping the "total earnings" of part-time Union officers.[530]

iii. Standing and Due Process

A union member does not have the individual right to bring an action to vacate an award of an arbitrator. In *Casanova v. City of Chicago*,[531] a police officer entered into a Last Chance Agreement that subjected him to random testing for drugs and alcohol and waived any rights to contesting the drug or alcohol screening.[532] He failed a test and was terminated.[533] A grievance ensued and the arbitrator denied the grievance.[534] The police officer filed a petition to vacate the arbitrator's award.[535] He alleged the Last Chance Agreement gave him an individual right separate from his rights under the collective bargaining unit, which would have required the suit to be brought by a party to the collective bargaining agreement.[536] Finding the Last Chance Agreement was a supplement to the collective bargaining agreement, the only way the police officer would have been able to bring an action individually is if he could show the union breached its duty of fair representation.[537] The police officer was unable to show a breach of the union duty of fair representation because he did not allege such a breach and because the labor board found the union did not breach its duty when it declined to file a petition to challenge the arbitrator's award.[538] Finally, the police officer alleged the arbitrator's denial of his grievance was a taking of a property interest without due process.[539] The court also affirmed the City's failure to give the police officer a urine test to confirm the results of his breathalyzer test was not a violation of his due process rights.[540]

3. Non-Labor Contractual

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530. *Id.*
531. 342 Ill. App. 3d 80, 793 N.E.2d 907 (1st Dist. 2003).
532. *Id.* at 82–83, 793 N.E.2d at 910–11.
533. *Id.* at 83, 793 N.E.2d at 911.
534. *Id.*
535. *Id.* at 85, 793 N.E.2d at 912.
536. *Id* at 87, 793 N.E.2d at 914.
537. *Id.* at 88–89, 793 N.E.2d at 915.
538. *Id.* at 90, 793 N.E.2d at 916.
539. *Id.* at 91, 793 N.E.2d at 917.
540. *Id.* at 93, 793 N.E.2d at 919.

In *Menard County Housing Authority v. Johnco Construction, Inc.*,[541] the appellate court found that the issue of whether arbitration was sought in a timely manner in accordance with the arbitration provision in the contract was a procedural issue best determined by the arbitrator. In *Menard County Housing Authority ("MCHA")*, the defendant was hired to renovate the MCHA public housing building. The contract between the parties had an optional arbitration clause, a liquidated-damages provision, and provided the defendant would "proceed diligently" with performance of the contract. The defendant did not provide the plaintiff with "close-out documents," which were necessary for the plaintiff to administratively complete the project and be able to secure funding for the project.[542] Further, the contract's arbitration clause provided that when the contracting officer made a final decision regarding a claim arising under or relating to the contract, defendant could appeal that decision to an arbitrator or mediator, but had to do so within 30 days of the contracting officer's decision. The plaintiff thus filed its complaint for declaratory judgment and for further relief in circuit court.[543] The defendant responded with a motion to stay and to compel arbitration pursuant to the contract's arbitration provision.[544] The trial court denied defendant's motion to compel arbitration because it found that plaintiff's contracting officer had made a final decision and thirty days had passed without defendant referring the appeal to an arbitrator.[545] Therefore, defendant could no longer invoke arbitration pursuant to the contract.[546]

The sole issue on appeal was whether a sufficient showing was made to sustain the order of the trial court to deny the motion to compel arbitration.[547] Initially, the appellate court noted that whether a contract to arbitrate exists must be determined by the court, not an arbitrator.[548] The court ruled that "where there is an arbitration agreement, but it is unclear whether the subject matter of the dispute falls within the scope of the arbitration agreement, the question of the substantive arbitrability should initially be decided by the arbitrator."[549] The court then emphasized that an arbitrator's skilled judgment to resolve ambiguity is consistent with the purpose of arbitration overall.[550]

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541. 341 Ill. App. 3d 460, 793 N.E.2d 221(4th Dist. 2003).
542. *Id.* at 461, 793 N.E.2d at 223.
543. *Id.* at 462, 793 N.E.2d at 224.
544. *Id.*
545. *Id.* at 462–63, 793 N.E.2d at 224.
546. *Id.* at 463, 793 N.E.2d at 224.
547. *Id.*
548. *Id.*
549. *Id.* at 463, 793 N.E.2d at 224–25.
550. *Id.*, 793 N.E.2d at 225.

The court held that the existence of a condition precedent to arbitration is a question for the court to decide, as opposed to procedural issues, which are best resolved by an arbitrator who would construe the contract as a whole in light of the customs and practice of the industry. Thus, the issue becomes the distinction between a condition precedent and a procedural requirement.[551] In short, timeliness is a procedural issue for the arbitrator to decide, not the circuit court.

In *Acme-Wiley Holdings, Inc. v. Buck*,[552] an employee entered into an employment agreement containing an arbitration requirement.[553] When Mr. Buck was terminated, they offered him a separation agreement which did not contain an arbitration provision.[554] A dispute arose between the parties.[555] Acme initiated arbitration proceedings and plaintiff filed an action to stay such arbitration proceedings.[556] The trial court denied Mr. Buck's motion to stay arbitration. Relying on other jurisdictions for guidance, the appellate court found that the settlement agreement released any and all claims related to Mr. Buck's employment, therefore, the employment agreement containing the arbitration clause was no longer effective.[557] Because the settlement agreement had no arbitration clause, Mr. Buck must have his claim decided by a court, not an arbitrator.[558] The appellate court reversed and remanded with instructions for the lower court to determine whether Mr. Buck was under duress when he entered into the settlement agreement.[559] If under duress, the settlement agreement is invalid, and the matter may proceed to arbitration under the terms of the original employment agreement.[560] If Mr. Buck was not under duress when he signed the settlement agreement, the court is instructed to grant his motion to stay the arbitration proceedings.[561]

4. Injunction

In *American Federation of State, County & Municipal Employees,*

551. *Id.* at 465, 793 N.E.2d at 226.
552. 2003 Ill. App. LEXIS 1184, 799 N.E.2d 337 (1st Dist. 2003).
553. *Id.* at *2, 799 N.E.2d at 338.
554. *Id.* at *3–4, 799 N.E.2d at 338–39.
555. *Id.* at *4, 799 N.E.2d at 339.
556. *Id.* at *5, 799 N.E.2d at 339.
557. *Id.* at *20, 799 N.E.2d at 344.
558. *Id.*
559. *Id.* at *21, 799 N.E.2d at 344.
560. *Id.* at *22, 799 N.E.2d at 344.
561. *Id.*, 799 N.E.2d at 344.

Council 31 v. Schwartz,[562] the American Federation of State, County and Municipal Employees, Council 31 ("AFSCME") filed a complaint for declaratory and injunctive relief to aid its arbitration against the State of Illinois Department of Central Management Services ("CMS") and its director, Michael S. Schwartz in his official capacity.[563] In short, AFSCME requested that a one-day state wide furlough be enjoined pending a decision by an arbitrator on the grievance it filed under the collective bargaining agreement.[564] In response, defendant filed a motion to compel AFSCME to grieve and arbitrate its disputes, ask the court to stay the injunction hearing, and object to the entry of an order compelling immediate arbitration.[565] The circuit court entered a temporary restraining order restraining the implementation of the one-day furlough plan, but granted defendants' objection to AFSCME's request for an order compelling immediate arbitration.[566] Defendants subsequently brought the interlocutory appeal to challenge the entry of this order enjoining the defendants from implementing their one-day furlough.[567]

The parties had met to negotiate a furlough program, but no agreement was reached.[568] CMS decided to use a layoff provision in the collective bargaining agreement.[569] AFSCME filed a grievance protesting CMS' actions, alleging they were in violation of the collective bargaining agreement.[570] CMS refused to schedule a grievance, so AFSCME brought an action. Exmaining the exception in *Aluminum Workers International*,[571] the court would permit the injunction if AFSCME could establish (1) the parties were contractually bound to arbitrate the issue, and (2)(a) employer's breach is an ongoing matter, (b) the union will suffer irreparable harm, or (c) the union will suffer more than the employer.[572] The court focused its analysis on "AFSCME's position that if a favorable arbitration award is obtained . . . it would afford no relief to improperly laid-off employees because, given the enormity of the damages and the impact upon the budget of the state, CMS

562. 343 Ill. App. 3d 553, 797 N.E.2d 1087 (5th Dist. 2003).
563. *Id.* at 555, 797 N.E.2d at 1088.
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.*, 797 N.E.2d at 1089.
568. *Id.* at 558, 797 N.E.2d at 1090.
569. *Id.*
570. *Id.*
571. Aluminum Workers Int'l Union v. Consol. Aluminum Corp., 696 F.2d 437 (6th Cir. 1982).
572. *Schwartz*, 343 Ill. App. 3d at 561, 797 N.E.2d at 1092.

would move to vacate the award as a violation of public policy."[573] The court characterized the issue in this case as whether there was sufficient evidence of irreparable harm presented for this court to conclude that the trial court did not abuse its discretion in granting the preliminary injunction.[574] AFSCME set forth five reasons why it had no adequate remedy at law.[575] Defendants countered that AFSCME has already grieved arbitrated lay off disputes for the last twenty years and lay offs had never been stayed pending arbitration or for any other reason.[576] Defendants further state that AFSCME cannot show irreparable harm because make-whole relief is mandated by statute. The court ultimately concluded that:

> "in those atypical instances where the potential adverse arbitration award against the State is so enormous that it would cause the State to request that the court vacate or modify the terms of the award on the grounds that it would prevent a public agency from discharging its duties and thus arguably violate public policy, there is a sufficient showing to justify a finding of irreparable harm to the affected employees." [577]

The court further noted that the loss to the defendants is not greater than the potential loss to AFSCME.[578]

The appellate court further rejected defendants' contention that the suit was barred by the doctrine of sovereign immunity because section 8 of the Illinois Public Labor Relations Act states that grievance and arbitration provisions of any collective bargaining agreement are subject to the Uniform Arbitration Act and section 16 of the Illinois Public Labor Relations Act authorizes suits by parties to a collective bargaining agreement.[579] The court also cited section 25 of the Illinois Public Relations Act for the proposition that "[f]or purposes of this Act, the State of Illinois waives sovereign immunity."[580]

The court also found defendants reliance on section 2(d) of the Uniform Arbitration Act[581] misplaced because AFSCME never refused to arbitrate and therefore defendant's motion to compel arbitration was properly

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573. *Id.* at 562, 797 N.E.2d at 1093.
574. *Id.*
575. *Id.*
576. *Id.* at 563, 797 N.E.2d at 1094.
577. *Id.*
578. *Id.* at 563–64, 797 N.E.2d at 1094.
579. *Id.* at 565, 797 N.E.2d at 109; 5 ILL. COMP. STAT. ANN. 315/16 (West 2002).
580. *Schwartz*, 343 Ill. App. 3d at 565.
581. 710 ILL. COMP. STAT. ANN. 5/2(d) (West 2002).

rejected.[582] Lastly, the court held that the Illinois Public Labor Relations Act did not divest the circuit court of jurisdiction over AFSCME's complaint.[583] The court states that "the Illinois Public Labor Relations Act . . . . explicitly provides that 'the grievance and arbitration provisions of any collective bargaining agreement shall be subject to the Illinois Uniform Arbitration Act.' The question of whether a dispute clearly falls within the scope of an arbitration agreement is to be resolved by the circuit courts and the circuit courts are explicitly granted the power to compel or stay arbitrations."[584]

G. Unfair Labor Practice

After the filing of an unfair labor practice charge, the Illinois Labor Relations Board issued a subpoena which raises the issue addressed in *Illinois Labor Relations Board v. Chicago Transit Authority*.[585] The subpoena requested "any and all bargaining notes taken by" and "any and all notes or memoranda concerning collective bargaining with Local 241 for a successor agreement, except those privileged as attorney client communications or attorney work product."[586] As expected, this was a problem for Chicago Transit Authority ("CTA"). CTA filed a motion with the Illinois Labor Relations Board ("ILRB") to revoke the subpoena.[587] The ALJ ordered the documents be produced to another ALJ with the ILRB in camera.[588] Again, CTA was concerned and refused to comply. After the ILRB filed a petition, the trial court order CTA to comply with the subpoena; however, the trial court stayed its enforcement pending the appeal by CTA.[589] Following the reasoning in *Homer*[590] and the similarities between section 11 of the Illinois Labor Relations Act[591] and section 15 of the Illinois Educational Labor Relations Act,[592] the appellate court reversed the circuit court and remanded

582. *Schwartz*, 343 Ill. App. 3d at 565, 797 N.E.2d at 1095–96.

583. *Id.* at 565, 797 N.E.2d at 1096.

584. *Id.* at 566, 797 N.E.2d at 1096 (quoting Bd. of Educ. of Warren Township High Sch. Dist. 121 v. Warren Township High Sch. Fed'n of Teachers, 128 Ill. 2d 155,164, 538 N.E.2d 524, 528 (1989) (citations omitted)).

585. 341 Ill. App. 3d 751, 793 N.E.2d 730 (1st Dist. 2003).

586. *Id.* at 753, 793 N.E.2d at 731.

587. *Id.*

588. *Id.*

589. *Id.* at 753–54, 793 N.E.2d at 732.

590. Ill. Educ. Labor Relations Bd. v. Homer Cmty. Consol. Sch. Dist. No. 208, 132 Ill. 2d 29, 547 N.E.2d 182 (1989).

591. 5 ILL. COMP. STAT. 315/11 (2000).

592. 115 ILL. COMP. STAT. ANN. 5/1 (West 2000).

the matter for further proceedings concluding the circuit court is uniquely detached from the Illinois Labor Relations Board and possess greater expertise in ruling on matters with regard to privilege.[593]

H. National Labor Relations Act ("NLRA")

Is the common law of false imprisonment preempted by the NLRA? Not necessarily, as answered in *Russell v. Kinney Contractors, Inc.*[594] The plaintiffs, union journeymen, filed a complaint alleging false imprisonment after entering the defendant's premises, and defendant proceeded to block the exit and summoned law enforcement.[595] Defendant contended plaintiffs were attempting to enforce their rights under the NLRA, so the action was preempted by the NLRA.[596] Defendant's motion to dismiss was granted. The appellate court found the tort of false imprisonment is not necessarily preempted by the NLRA, and, therefore, reversed the circuit court and remanded the matter for further proceedings.[597]

I. Covenants Not to Compete

The courts again uphold the enforceability of covenants not to compete in the medical profession. In *Prairie Eye Center v. Butler*,[598] Dr. Butler was an ophthalmologist who had a clinical practice at the Southern Illinois University School of Medicine ("SIU"). In 1997, Dr. Butler entered into an employment agreement containing a covenant not to compete. In 1999, Dr. Butler left his employment with Prairie Eye Center and began working with Sangamon Eye Associates in violation of his non-compete. Prairie filed a complaint, and the trial court entered a preliminary injunction in favor of Prairie, except as to the patients with a preexisting relationship with Dr. Butler when he worked at SIU. Prairie appealed, and the appellate court reversed with directions to enter a preliminary injunction enforcing the entire covenant without the exception of patients with prior relationships established while at SIU. The trial court found that the noncompete agreement was enforceable,

593. 341 Ill. App. 3d at 756–57, 793 N.E.2d at 734.
594. 342 Ill. App. 3d 666, 795 N.E.2d 340 (5th Dist. 2003).
595. *Id.* at 668, 795 N.E.2d at 342.
596. *Id.* at 669, 795 N.E.2d at 342.
597. *Id.* at 675–76, 795 N.E.2d at 347.
598. 329 Ill. App. 3d 293, 768 N.E.2d 414 (4th Dist. 2002), *appeal denied*, 202 Ill. 2d 661, 787 N.E.2d 169 (2002).

Dr. Butler had violated the agreement, Prairie was damaged by Dr. Butler's intentional and repeated violations of the agreement and of the injunction, and Dr. Butler was in contempt of court and should be enjoined from practicing in the prohibited areas. Attorneys fees, damages, and lost profits were awarded to Prairie. Dr. Butler appealed.

Dr. Butler claims the noncompetition agreement is unenforceable as against public policy, citing the *Carter-Shields v. Alton Health Institute*[599] case, which relied on the public policy analysis of *Dowd v. Gleason*.[600] This Fourth District appellate court declined to follow *Carter-Shields*, making a distinction between the codification of Rule 5.6 of the Rules of Professional Conduct and the fact that section 9.2 of the Opinions of Council on Ethical & Judicial Affairs of the American Medical Association was advisory only. The court decided to follow the precedent of finding non-compete agreements enforceable in the medical profession.

Dr. Butler also argues that even if the non-compete is enforceable, it should not apply to the patients he had a preexisting relationship with from his practice at SIU.[601] The court found Dr. Butler's former patients were exactly what Prairie had negotiated for in Dr. Butler's employment agreement and had Dr. Butler wanted to preserve any rights to his former patient relationships, he should have negotiated it.[602]

The court awarded both injunctive relief and monetary damages, reasoning they were both awarded to put Prairie where it would have been had Dr. Butler not violated the restrictive covenant.[603] The monetary damages were for lost profits, and the injunctive relief was to provide Dr. Butler's replacement with the agreed upon time period to allow him to establish patients.

Another case involving a physician's covenant not to compete was resolved in favor of the physician. In *Marwaha v. Woodridge Clinic*,[604] an employment agreement containing a covenant not to compete expired, but the doctor continued to work for the clinic until he received a notice of termination.[605] Although the covenant not to compete provided that it survived the termination of the employment agreement, the trial court held the word employment in the phrase "upon termination of the Doctor's employment"

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599. 317 Ill. App. 3d 260, 739 N.E.2d 569 (5th Dist. 2000).
600. 181 Ill. 2d 460, 693 N.E.2d 358 (1998).
601. *Prairie Eye Ctr.*, 329 Ill. App. 3d at 300, 768 N.E.2d at 421.
602. *Id.* at 302, 768 N.E.2d at 422.
603. *Id.* at 304–05, 768 N.E.2d at 423–24.
604. 339 Ill. App. 3d 291, 790 N.E.2d 974 (2d Dist. 2003), *appeal denied*, 2003 Ill. LEXIS 2202.
605. *Id.* at 293, 790 N.E.2d at 976.

used in the covenant referred to employment under the employment agreement, which agreement had expired five years earlier.[606] Therefore, the trial court held the non-compete clause was not triggered by the doctor's recent termination, starting the clock on the two year restriction.[607] The Clinic asserted the survival language used in the non-compete provision relates to any employment of the Doctor, including employment beyond the term of the employment agreement.[608] The appellate court rejected that argument based on the fact that restrictive covenants are strictly construed and any ambiguity is construed against the party attempting to enforce a covenant not to compete.[609] The appellate court affirmed, holding the Doctor's termination five years after the expiration of his employment agreement did not trigger the covenant not to compete.[610]

The appellate court distinguished "medical practice" and "the practice of medicine" as the terms were used in a non-compete agreement in its decision in *Joliet Medical Group, Inc. v. Ensminger*.[611] Plaintiff and defendant entered into a non-compete agreement.[612] They agreed defendant would not operate a medical practice within a two mile radius of plaintiff's principal offices for three years.[613] Defendant resigned and established two offices outside the restricted geographic area, but maintained staff privileges within the restricted geographic area.[614] Plaintiff filed an injunctive action seeking to prevent defendant from practicing medicine in violation of the non-compete agreement.[615] The court held the non-compete agreement prevented defendant from establishing a medical practice, not from practicing medicine and distinguished the two in its decision.[616]

Covenants not to compete may violate other acts, such as the Illinois Procurement Code if they prohibit others from bidding on state contracts. The issue of whether a non-competition agreement violates the Illinois Procurement Code[617] or the Illinois Antitrust Act[618] is answered in *Health*

606. *Id.*
607. *Id.*
608. *Id.* at 294, 790 N.E.2d at 977.
609. *Id.*
610. *Id.* at 294–95, 790 N.E.2d at 977.
611. 337 Ill. App. 3d 1076, 787 N.E.2d 879 (3d Dist. 2003).
612. *Id.* at 1077, 787 N.E.2d 880.
613. *Id.*
614. *Id.*
615. *Id.* at 1078, 787 N.E.2d at 880.
616. *Id.* at 1079, 787 N.E.2d at 881.
617. 30 ILL. COMP. STAT. ANN. 500/50–25 (West 2000).
618. 740 ILL. COMP. STAT. ANN. 10/3(1)(c) (West 2000).

Professionals, Ltd. v. Johnson.[619] Defendants sold their shares to plaintiff and the parties entered into a non-compete agreement, excluding specific facilities.[620] Within a few months, plaintiff filed injunctive action to enforce the non-compete agreement.[621] The court held the non-compete, as it related to contracts with the State of Illinois, was a violation of the Procurement Code, and therefore, void as to prohibiting the defendant from bidding on Illinois Department of Corrections contracts.[622] However, the Procurement Code does not apply to county jails or correctional institutions in other states.[623] Analyzing the bar committee comments regarding section 11 and section 3(1)(c) of the Illinois Antitrust Act, the court also held that a non-compete agreement will not be a per se violation the Illinois Antitrust Act.[624] After resolving those issues, the court proceeded to analyze the non-compete under the usual criteria of reasonableness as to geographic scope, restricted activity, duration, and injury to the public or undue hardship. There is a less stringent test for reasonableness when the non-competition agreement is associated with the sale of a business because, generally, the non-compete is to protect a legitimate business interest such as the goodwill that is purchased.[625] The court examined the relationship plaintiff had established in the geographic areas protected by the non-compete agreement.[626] For injunctive purposes, it ruled Illinois and Wisconsin were valid geographic areas; however, Missouri and Indiana were not because plaintiff's level of business did not extend its goodwill that far.[627] The court would not make a final decision as to the reasonableness, but instead left that issue for the trial court.[628] The activity restricted must be closely related to the legitimate business interests of the company being protected by the non-compete agreement. Three years is not an unreasonable amount of time in light of evidence provided by the plaintiff regarding the time it takes to develop a client base.[629] Defendants argue they wanted to service more customers in the restricted territories; however, the

619. 339 Ill. App. 3d 1021, 791 N.E.2d 1179 (3d Dist. 2003), *appeal denied*, 2003 Ill. LEXIS 2096 (2003).
620. *Id.* at 1025, 791 N.E.2d at 1185.
621. *Id.* at 1026, 791 N.E.2d at 1185.
622. *Id.* at 1027, 791 N.E.2d at 1186.
623. *Id.* at 1028, 791 N.E.2d at 1187.
624. *Johnson*, 339 Ill. App. 3d at 1031, 791 N.E.2d at 1189; 740 ILL. COMP. STAT. 10/11 (2000), 740 ILL. COMP. STAT. 10/3(1)(c) (2000).
625. *Johnson*, 339 Ill. App. 3d at 1031-32, 791 N.E.2d at 1189–90.
626. *Id.* at 1032–34, 791 N.E.2d at 1190–92.
627. *Id.* at 1034, 791 N.E.2d at 1191–92.
628. *Id.*, 791 N.E.2d at 1192.
629. *Id.* at 1036–37, 791 N.E.2d at 1193–94.

court noted they sold their portion of the business and were compensated for it.[630] Further, there was no evidence that they could not earn a living nor was competition eliminated.[631] Defendants were also unsuccessful in their claim that the non-compete agreement violated section 3(2) of the Illinois Antitrust Act by contracting or conspiring to restrain trade or commerce.[632]

J. At-Will employment

Section 2-65(a) of the Property Tax Code grants a township assessor the authority to appoint one or more persons as deputies and as employees for the operation of the assessor's office.[633] In *Harris v. Eckersall*,[634] plaintiff filed suit alleging that she was transformed into an employee of the Township because they continued to pay her salary during the time the Assessor position was vacant.[635] The Township Assessor was the one with the power to hire or fire the employees, not the Township Board.[636] The fact that the Township continued to pay plaintiff did not transform her from an employee of the Township Assessor to an employee of the Township itself.[637] Moreover, the Township Code provides, "[t]he township board may employ and fix the compensation of township employees that the board deems necessary, *excluding the employee of the offices* of general assistance, township collector, and *township assessor*."[638] Plaintiff was not an employee of the Township. Further, since there was no employment contract or legislative or administrative provisions to the contrary, she was a public employee with no property interest in her employment and could be terminated at any time by the Township Assessor.[639]

In *Geary v. Telular Corp.*,[640] the employer unilaterally amended the way it paid Mr. Geary. Mr. Geary was an employee-at-will and objected at the time of the change. Less than one year later, Mr. Geary was terminated. He

630. *Id.* at 1037, 791 N.E.2d at 1194.
631. *Id.*
632. *Id.* at 1038–39, 791 N.E.2d at 1195.
633. 35 ILL. COMP. STAT. 200/2–65(a) (1996).
634. 331 Ill. App. 3d 930, 771 N.E.2d 1072 (1st Dist. 2002).
635. *Id.* at 932, 771 N.E.2d at 1073.
636. *Id.* at 933, 771 N.E.2d at 1073.
637. *Id.*, 771 N.E.2d at 1074.
638. *Id.* at 933, 771 N.E.2d at 1074 (alteration in original); 60 ILL. COMP. STAT. 1/100–5(a) (1996).
639. *Harris*, 331 Ill. App. 3d at 934, 771 N.E.2d at 1075.
640. 341 Ill. App. 3d 694, 793 N.E.2d 128 (1st Dist. 2003), *reh'g denied*, 2003 Ill. App. LEXIS 1069.

filed a complaint alleging breach of agreement to pay commissions and retaliatory discharge. The trial court granted summary judgment to defendant, Telular, and denied Mr. Geary's motion to reconsider.[641] Mr. Geary argued he had already "earned" commissions before Telular changed it compensation plan.[642] The record established commissions were not earned until they were shipped so long as the employee remained employed at the time of shipment.[643] There was no product sold by Mr. Geary that was shipped prior to the implementation of the revised compensation plan, so no commissions under the old plan were due to Mr. Geary.[644] Further, Mr. Geary continued to work under the new plan for nearly nine months, signifying his acceptance of the unilaterally revised plan.[645]

Mr. Geary also alleges he was discharged in retaliation for demanding payments under the former plan. The court has repeatedly held retaliatory discharge in Illinois is a narrow exception to the at-will employment status and used in only two situations: (1) discharge in violation of a worker's compensation claim and (2) discharge for whistle-blowing.[646] While the appellate court disagreed with the circuit court's statement in its opinion that an employee's discharge in retaliation for asserting rights under the Illinois Wage Payment and Collection Act[647] is against public policy, the appellate court still affirmed summary judgment for defendant for the retaliatory discharge count because there was no genuine issue of material fact.[648]

K. Breach of Contract

Employers must follow the language of their own agreements to avoid a breach of contract claim. Plaintiff, Michael Klein, entered into an employment agreement with Caremark International, Inc. as an at-will employee.[649] He was later provided an incentive of a golden parachute type of severance agreement, which provided for specific severance benefits if Klein was terminated outside certain procedures.[650] If, however, the Board of Directors

641. *Id.* at 697, 793 N.E.2d 131.
642. *Id.* at 698–99, 793 N.E.2d at 132.
643. *Id.* at 699, 793 N.E.2d at 132.
644. *Id.* at 700, 793 N.E.2d at 133.
645. *Id.*
646. *Id.* at 700–01, 793 N.E.2d at 133–34.
647. 820 ILL. COMP. STAT. ANN. 115/1 *et seq.* (West 2000).
648. *Geary*, 341 Ill. App. 3d at 702, 793 N.E.2d at 135.
649. Klein v. Caremark Int'l, Inc., 329 Ill. App. 3d 892, 895, 771 N.E.2d 1, 4 (1st Dist. 2002).
650. *Id.* at 895–96, 771 N.E.2d at 4.

determined Klein was no longer a key executive and gave him notice of this determination prior to any change in control of the company, he would not get these benefits.[651] Klein was informed on July 12, 1996, by management, that he would be terminated effective August 6, 1996, for performance reasons.[652] Subsequently, on August 21, 1996, Klein was provided notice he was no longer a key executive.[653] A letter dated August 22, 1996, attempted to reinstate Klein until August 31, 1996.[654] Klein rejected his unilateral reinstatement.[655] A change of control of the company occurred September 5, 1996.[656] Klein filed suit and the trial court found Klein was entitled to severance benefits in the amount of $756,556.[657] The appellate court found Caremark breached the contract when it terminated Klein prior to the Board of Directors determining he was no longer a key executive, as provided in the agreement.[658] It failed to follow the provisions of its own agreement when it terminated Klein. Further, the severance agreement altered the at-will language in Klein's original employment agreement by setting forth a definite period of employment, incorporating the terms and conditions of the original employment agreement, except where the severance agreement specifically changed it.[659] The severance agreement specifically changed the at-will employment to a term of one year ending November 30, 1996.[660]

L. Sovereign Immunity

The court again makes it clear that the Illinois Human Rights Act is the exclusive source of a remedy for employment discrimination claims. In *Cooper v. Illinois State University*,[661] Cooper, a state employee, was terminated and filed an action alleging gender and age discrimination under the Age Discrimination in Employment Act[662] and Title VII.[663] Cooper further

651. *Id.* at 896, 771 N.E.2d at 4.
652. *Id.* at 898, 771 N.E.2d at 5.
653. *Id.* at 897, 771 N.E.2d at 4–5.
654. *Id.* at 897, 771 N.E.2d at 5.
655. *Id.*
656. *Id.*
657. *Id.* at 899, 771 N.E.2d at 6.
658. *Id.* at 900–01, 771 N.E.2d at 7.
659. *Id.* at 902, 771 N.E.2d at 8–9.
660. *Id.*, 771 N.E.2d at 9.
661. 331 Ill. App. 3d 1094, 772 N.E.2d 396 (4th Dist. 2002).
662. 29 U.S.C. § 621–34 (2004).
663. 42 U.S.C. § 2000e–2000e–17 (2004).

alleged he had exhausted all of his administrative remedies.[664] Illinois State University ("ISU") filed a motion alleging sovereign immunity precluded Cooper's claims.[665] The appellate court agreed. Illinois has consented to claims based upon age discrimination, but only if brought pursuant to the provisions of the Illinois Human Rights Act. Since Mr. Cooper did not follow the administrative framework established by the legislature, his action was barred.

The City of Carbondale brought an action against a state employee, the Department of Revenue, and the Department of Transportation in *City of Carbondale v. Bower*[666] to restrain and enjoin them from disbursing funds.[667] Since plaintiff brought the action against state employees in their individual capacity, it must be determined whether the state employees acted outside the scope of their authority, whether they breached their duty to the public, and whether the complained of matters are outside the employees' normal and official functions.[668] Plaintiff did not allege the employees acted outside the scope of their authority, so the three-part test was not met as to the employees in their individual capacity.[669] As actors for the state, therefore, sovereign immunity applies to the state employees as well as to the Department of Revenue and Department of Transportation, and the Court of Claims had exclusive jurisdiction.[670]

The Illinois Department of Transportation had a rule that stated, "[a] second suspension or revocation of an employee's driver's license while employed by the Department shall be cause for discharge."[671] Plaintiff had been charged with DUIs and had his license suspended both times.[672] Both suspensions were rescinded.[673] Plaintiff sought a declaratory judgment because with the rescission of his DUI, he did not violate the rule.[674] Although sovereign immunity protects the state in many situations, it does not bar an action seeking declaratory judgment to invalidate an administrative rule or

664. *Cooper*, 331 Ill. App. 3d at 1096, 772 N.E.2d at 397.
665. *Id.*, 772 N.E.2d at 397.
666. 332 Ill. App. 3d 928, 773 N.E.2d 182 (5th Dist. 2002).
667. *Id.* at 930, 773 N.E.2d at 184.
668. *Id.* at 933–34, 773 N.E.2d at 186.
669. *Id.* at 934, 773 N.E.2d at 187.
670. *Id.*
671. Applegate v. Ill. Dep't. of Transp., 335 Ill. App. 3d 1056, 1059, 783 N.E.2d 96, 100 (4th Dist. 2002).
672. *Id.* at 1058–59, 783 N.E.2d at 100.
673. *Id.*
674. *Id.* at 1060, 783 N.E.2d at 101.

recover attorney's fees.[675]

In *Evans v. Page*,[676] plaintiff, who is a paraplegic, was a prisoner in the custody of the Department of Corrections at Menard, where defendant was a warden. Plaintiff filed a complaint asserting violations of Title II of the Americans With Disabilities Act, ("ADA"). The warden filed a motion to dismiss on the ground that the inmate's claim was barred by sovereign immunity.[677]

The court concluded that sovereign immunity barred the inmate's Title II claim. Illinois never consented to be sued in a circuit court by prisoners based on Title II violations. Almost every federal circuit court held that Title II did not constitute a valid abrogation of state sovereign immunity under the fourteenth amendment of the United States Constitution because Congress had not identified a history and pattern of unconstitutional discrimination by the states against the disabled.[678]

M. School Code

In *Board of Education of Joliet Township v. Illinois State Board of Education*,[679] the appellate court examined what conduct is remedial under section 24–12 of the Illinois School Code.[680] Ms. Betts took two personal days to attend a four-day conference.[681] She had told her supervisor she would return after the first two days and miss the final two days.[682] However, she had her husband call the school and tell them she was sick so she could stay for the entire conference.[683] She told her supervisor what she had done and the school subsequently converted her two personal days to professional leave, but were silent as to the days she took as sick days.[684] The next year she did not even attempt to take the leave as professional leave, but rather told the school her sister was sick and needed her.[685] She was fired for taking sick

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675. *Id.* at 1061, 783 N.E.2d at 101.

676. 341 Ill. App. 3d 486, 792 N.E.2d 805 (5th Dist. 2003), *appeal denied*, 2003 Ill. LEXIS 2443 (Ill. 2002).

677. *Id.* at 487–88, 792 N.E.2d at 806.

678. *Id.* at 490–91, 792 N.E. 2d at 808-09.

679. 331 Ill. App. 3d 131, 770 N.E.2d 711 (3d Dist. 2002), *appeal denied*, 201 Ill. 2d 561, 786 N.E.2d 180 (2002).

680. 105 ILL. COMP. STAT. ANN. 5/24–12 (West 1998).

681. *Bd. Of Educ. Of Joliet Township*, 331 Ill. App. 3d at 133, 770 N.E.2d at 713.

682. *Id.*

683. *Id.*

684. *Id.*

685. *Id.* at 134, 770 N.E.2d at 713.

leave to attend the conference.[686] After a hearing, it was determined that Ms. Betts' conduct was remediable under section 24–12 and she could not be terminated without having received a written warning.[687] The circuit court affirmed. The Board appealed. The appellate court did not condone Ms. Betts' actions, but affirmed the hearing officer's decision and the circuit court finding that Ms. Betts' conduct could have been changed by a warning, and therefore, was remedial under section 24–12.[688]

The Illinois School Code ("School Code") contains provisions for the dismissal of a principal for cause. Section 34–85 provides "[n]o principal employed by the Board of Education during his or her performance shall be removed except for cause . . . ."[689]

In addition to being removed for cause, the School Code also provides for notice and hearings before termination occurs. When reviewing the charges in the hearings, the hearing officer must determine whether the conduct was remediable or irremediable. If conduct is remediable, a principal cannot be terminated without a formal warning giving an opportunity to correct the conduct. However, irremediable conduct has already caused significant damage and cannot be remediated. In *Prato v. Paul Vallas*,[690] Maria Prato was a high school principal charged with wrongfully obtaining and using student information.[691] She was also charged with violating the section of the School Code for retaliation under the Whistle Blower Protection section.[692] Since the decision of whether the conduct is remediable or not is a question of fact, the appellate court defers to the discretion of the Board's finding that the conduct was irremediable.[693]

The *Prato* decision includes an issue of first impression.[694] Plaintiff alleges section 34–85 violates her Illinois and United States Constitutional due process rights.[695] The appellate court found no violation of plaintiff's constitutional due process rights, since she was given notice and an evidentiary

686. *Id.*
687. *Id.*
688. *Id.* at 136, 770 N.E.2d at 715.
689. 105 ILL. COMP. STAT. 5/34–85 (1996).
690. 331 Ill. App. 3d 852, 771 N.E.2d 1053 (1st Dist. 2002), *appeal denied*, 201 Ill. 2d 613, 786 N.E.2d 199 (2002), *motion denied*, 123 S. Ct. 2125, 155 L. Ed. 1058 (2003), *request denied*, 123 S. Ct. 2162, 156 L. Ed. 107 (2003).
691. *Id.* at 857–58, 771 N.E.2d at 1056–57.
692. *Id.* at 858, 771 N.E.2d at 1057; 105 ILL. COMP. STAT. ANN. 5/34–2.4c (West 1998).
693. *Prato*, 331 Ill. App. 3d at 864, 771 N.E.2d at 1061.
694. *Id*. at 867, 771 N.E.2d at 1064.
695. *Id.*

hearing in which to be heard.[696]

In *Board of Education v. Spangler*,[697] the school board adopted a remediation plan for Spangler, who was a tenured teacher.[698] The remediation period was one year. Plaintiff was dismissed after receiving an unsatisfactory rating for the remediation year.[699] Plaintiff was given notice and a bill of particulars was attached.[700] Plaintiff requested a hearing as provided in section 24–12 of the Illinois School Code ("School Code").[701] The hearing officer decided the Board failed to show by a preponderance of the evidence that plaintiff's unsatisfactory rating was deserved.[702] The trial court affirmed the hearing officer's decision.[703] The Board appealed, asserting the hearing officer exceeded his authority under the School Code by superseding the Board's judgment calling for plaintiff's dismissal.[704] The Board only has an investigatory/charging function after the hearing function was placed with an impartial hearing officer by amendment to section 24–12 of the School Code in 1975.[705] The purpose of establishing an impartial hearing officer was to eliminate "the potential for abuse present where a local board of education itself decides whether it had just cause to remove a tenured teacher from its employment."[706] The appellate court held the hearing officer had full authority over the decision and the Board's decision is not a final order of dismissal, but instead begins the process by which a teacher may exercise his rights to a hearing.[707] The dismissal does not become final until after the hearing officer renders his or her decision.[708]

The Illinois School Code requires periodic evaluations of teachers.[709] Ms. Buchna was placed on a one-year remediation plan after receiving a "Does

696. *Id.* at 867–70, 771 N.E.2d at 1064–66.
697. 328 Ill. App. 3d 747, 767 N.E.2d 452 (1st Dist. 2002).
698. *Id.* at 749, 767 N.E.2d at 454.
699. *Id.* at 749–50, 767 N.E.2d at 455.
700. *Id.* at 750, 767 N.E.2d at 455.
701. *Id.*; 105 ILL. COMP. STAT. ANN. 5/24–12 (West 1998).
702. *Spangler*, 328 Ill. App. 3d at 751, 767 N.E.2d at 456.
703. *Id.*
704. *Id.* at 752, 767 N.E.2d at 457.
705. *Id.* at 753, 767 N.E.2d at 457–58.
706. *Id.* at 754, 767 N.E.2d at 458 (quoting Bd. of Educ. v. File, 89 Ill. App. 3d 1132, 412 N.E.2d 1030 (1980)).
707. *Id.* at 757, 767 N.E.2d at 461.
708. *Id.*
709. 105 ILL. COMP. STAT. ANN. 5/24A–5(c) (West 1996).

Not Meet District Expectations" rating.[710] She was to receive evaluations each quarter. After the fourth quarter, she was terminated because she failed to progress under the remediation plan.[711] Ms. Buchna moved for directed hearing because the District did not use the ratings set forth in section 24A–5(c).[712] The hearing officer denied her motion and the circuit court affirmed. Section 24A–5(c) mandates a three-tiered rating system and the District only used two, ignoring the clear statutory language.[713] The appellate court held that since Ms. Buchna never received an "unsatisfactory" rating, she was never rightfully subjected to a remediation plan.[714] The District made several arguments in an attempt to convince the court their system was consistent with the statute, but the court rejected them for not following the clear directive provided in the statute.[715] The court reversed the circuit court.[716]

Teachers reporting to work under the influence of marijuana should not rely on the argument that their conduct is remediable, and therefore, they should not be dismissed. In *Younge v. Board of Education of the City of Chicago,*[717] two teachers were suspected of being under the influence of marijuana while on the job at school. Both teachers were tested and were positive for THC, a marijuana metabolite.[718] The court agreed with the hearing officer that there was cause for dismissal in both cases. The plaintiffs argue their cause of dismissal was remediable.[719] Relying on many cases and section 34–85 of the Illinois School Code,[720] the court affirmed the hearing officers' decisions that a warning would have served no purpose.[721]

N. Retaliatory Discharge

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710. Buchna v. Ill. Bd. of Educ., 342 Ill. App. 3d 934, 935, 795 N.E.2d 1045, 1046 (3d Dist. 2003) *modifying* 2003 Ill. App. LEXIS 239 (3d Dist. 2003), *appeal denied*, 2003 Ill. LEXIS 2568 (2003).

711. *Id.*

712. *Id.* at 935–36, 795 N.E.2d at 1046; 105 ILL. COMP. STAT. ANN. 5/24A–5(c) (West 1996).

713. *Buchna*, 342 Ill. App. 3d at 936, 795 N.E.2d at 1046; 105 ILL. COMP. STAT. ANN. 5/24A–5(c) (West 1996).

714. *Buchna*, 342 Ill. App. 3d. at 938, 795 N.E.2d at 1048.

715. *Id.* at 939, 795 N.E.2d at 1048.

716. *Id.* 795 N.E.2d at 1049.

717. 338 Ill. App. 3d 522, 788 N.E.2d 1153 (1st Dist. 2003).

718. *Id.* at 528, 788 N.E.2d at 1158.

719. *Id.* at 531–32, 788 N.E.2d at 1160–61.

720. 105 ILL. COMP. STAT. ANN. 5/34–85 (West 1996).

721. *Younge*, 338 Ill. App. 3d at 532–33, 788 N.E.2d at 1161–62.

In *Vorpagel v. Maxwell*,[722] the defendant argues that Vorpagel is attempting to expand the tort of retaliatory discharge by filing a complaint alleging he was terminated because he provided information to the police about his immediate supervisor's nonwork-related criminal activity.[723] Vorpagel assisted the state's attorney with a written statement regarding incriminating statements his supervisor had made regarding sexual offenses.[724] Shortly after his supervisor's attorney was apprised of the statement, Vorpagel was terminated by his supervisor.[725] The appellate court reversed, holding the conduct reported does not have to be work-related and Vorpagel established a causal connection between his protected activity and his discharge.[726]

In a second case which appears to be expanding the tort of retaliatory discharge in Illinois is *Bea v. Bethany Home, Inc.*[727] Historically, the tort of retaliatory discharge has been allowed when an employee is fired for filing a worker's compensation claim or is fired for whistleblowing.[728] In this case, the employee was going to testify that an allegation of child abuse was false and the Department of Children and Family Services was not receiving accurate information.[729] Plaintiff, an at-will employee, was subsequently terminated. Plaintiff alleges his termination was in violation of public policy under section 9.1 of the Abused and Neglected Child Reporting Act ("Act").[730] The court reasoned that the Act has a dual purpose of protecting children and the alleged abuser from false reports.[731] Since plaintiff was going to testify to protect the alleged abuser from a false report, his actions were consistent with public policy.[732] Therefore, the court reversed and remanded, holding plaintiff had successfully stated a cause of action for retaliatory discharge.[733]

O. Retaliatory Failure to Rehire

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722. 333 Ill. App. 3d 51, 775 N.E.2d 658 (2d Dist. 2002), *appeal denied*, 202 Ill. 2d 664, 787 N.E.2d 170 (2002).
723. *Id.* at 53, 775 N.E.2d at 660.
724. *Id.* at 52, 775 N.E.2d at 659.
725. *Id.* at 53, 775 N.E.2d at 660.
726. *Id.* at 56, 775 N.E.2d at 662.
727. 333 Ill. App. 3d 410, 775 N.E.2d 621 (3d Dist. 2002).
728. *Id.* at 413, 775 N.E.2d at 623.
729. *Id.* at 412, 775 N.E.2d at 622–23.
730. *Id.* at 414, 775 N.E.2d at 624; 325 ILL. COMP. STAT. ANN. 5/9.1 (West 2000).
731. *Bea*, 333 Ill. App. 3d at 414, 775 N.E.2d at 624.
732. *Id.*
733. *Id.* at 416, 775 N.E.2d at 625.

A retaliatory failure to rehire claim under the Illinois Workers' Compensation Act[734] is not an appropriate cause of action for an employee-at-will to bring after being discharged. In *Klinkner v. County of DuPage*,[735] Rosanne Klinkner was terminated for slapping a patient.[736] The trial court held her wrongful termination and retaliatory discharge counts were barred for failure to exhaust her administrative remedies.[737] Plaintiff only appealed the dismissal of her retaliatory failure to rehire claim, which was dismissed for failure to state a claim.[738] Relying on the reasoning of *Webb v. County of Cook*,[739] the court found that because Klinkner was terminated for striking a patient and because Illinois is an at-will employment state, plaintiff had no reasonable expectation of rehire.[740] Therefore, plaintiff was unable to state a cause of action for retaliatory failure to rehire under section 4(h) of the Illinois Workers' Compensation Act.[741]

P. Miscellaneous

1. Compelled Production of Voice Exemplar

Plaintiff, Darryl Veazey, brought an action against his employer, LaSalle Telecommunications, Inc., when the employer terminated him for his refusal to provide a sample of his voice for comparison purposes to threatening phone calls received by Veazey's immediate supervisor.[742] Mr. Veazy's complaint consisted of three counts: retaliatory discharge, civil conspiracy, and negligent spoilation of evidence.[743] The circuit court dismissed all three counts and this appeal followed.

Retaliatory discharge must be based on a violation of public policy. Mr.

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734. 820 ILL. COMP. STAT. ANN. 305/1 *et seq.* (West 1999).
735. 331 Ill. App. 3d 48, 770 N.E.2d 734 (2d Dist. 2002).
736. *Id.* at 49, 770 N.E.2d at 735.
737. *Id.* at 50, 770 N.E.2d at 736.
738. *Id.*
739. 275 Ill. App. 3d 674, 656 N.E.2d 85 (1st Dist. 1995).
740. *Klinkner*, 331 Ill. App. 3d at 52, 770 N.E.2d at 737.
741. *Id.*
742. Veazey v. LaSalle Telecomm., Inc., 334 Ill. App. 3d 926, 928, 779 N.E.2d 364, 366–67 (1st Dist. 2002).
743. *Id.* at 928–29, 779 N.E.2d at 367.

Veazey argued that requiring him to provide a sample of his voice was a violation of the Fifth Amendment to the United States Constitution guaranteeing him the privilege of self-incrimination.[744] Mr. Veazey was only asked to provide a reading of a message that had already been left on his supervisor's voice mail for comparison purposes.[745] The appellate court dismissed Count I because the constitutional protection asserted by Mr. Veazey restricts only governmental conduct, and even if it would have been applied to this situation, LaSalle was not asking Mr. Veazey to testify against himself, but only to provide a voice exemplar.[746]

Count II, civil conspiracy, requires Mr. Veazey to plead that two or more persons intentionally combined for the agreed purpose and in a concerted action of either an unlawful purpose or a lawful purposes by unlawful means.[747] Since the court decided in Count I that there was no retaliatory discharge, then there is no wrongful act to support Mr. Veazey's civil conspiracy action.[748] Mr. Veazey also alleged the conspiracy to terminate him was because of his race.[749] The Illinois Human Rights Act provides for the redress of civil rights violations such as the one alleged by Mr. Veazey, therefore, the circuit court lacked jurisdiction to consider the claim and the appellate court concluded Mr. Veazey failed to state a claim and dismissed Count II.

Negligent spoilation of evidence was Mr. Veazey's third count, which was also dismissed.[750] The appellate court found that but for LaSalle's loss or destruction of evidence, Mr. Veazey had a reasonable probability of succeeding on his actions. However, since the court had already dismissed Counts I and II for other reasons, Mr. Veazey could not meet his burden to plead facts to support his action for negligent spoilation of evidence.[751]

2. Timeliness of the Use of Written Warnings

In *Ress v. Office of the State Comptroller*,[752] plaintiff appeals a decision by the State Comptroller's Merit Commission ("Commission") requiring the

744. *Id.* at 930, 779 N.E.2d at 368.
745. *Id.* at 931, 779 N.E.2d at 369.
746. *Id.*, 779 N.E.2d at 369.
747. *Id.* at 933, 779 N.E.2d at 370.
748. *Id.*, 779 N.E.2d at 370.
749. *Id.*, 779 N.E.2d at 370.
750. *Id.* at 934–35, 779 N.E.2d at 371–72.
751. *Id.* at 935, 779 N.E.2d at 372.
752. 329 Ill. App. 3d 136, 768 N.E.2d 255 (1st Dist. 2002).

Commission's interpretation of the Illinois Administrative Code ("Code") pertaining to the discipline, discharge, and demotion of public officials and employees.[753] Plaintiff received various warnings under the progressive discipline required.[754] After plaintiff's discharge, a hearing was conducted.[755] The hearing officer found that plaintiff was improperly terminated under sections 500.295(a) and (b) of the Code, because the Comptroller had improperly considered some old warnings that were outside the twelve month period set forth in section (b).[756] Section (b) provides written warnings in personnel files may be used in considering further discipline when such action occur within twelve months of the date of issuance of the written warning.[757] The hearing officer recommended plaintiff be suspended without pay instead of discharged.[758] The Commission affirmed the Comptroller's decision discharging the plaintiff.[759] Plaintiff unsuccessfully made several filings in the circuit court and then appealed. The appellate court agreed with the hearing officer's interpretation of the Code and reversed and remanded it back to the Commission to review plaintiff's discharge excluding the written warnings that were outside the twelve month period.[760]

3. Eavesdropping

The Illinois Criminal Code provides that a principal may be civilly liable for an agent's eavesdropping even if the principal is not criminally liable.[761] In *Morris v. Ameritech Illinois*,[762] an Ameritech security manager conducted surveillance on Mr. Morris' home noticing he was home during working hours.[763] The security manager checked Morris' home phone records and found he was falsifying work records.[764] He was fired and rehired the same

753. ILL. ADMIN. CODE tit. 80 § 500.295(a), (b) (2001).
754. *Ress*, 329 Ill. App. 3d at 138, 768 N.E.2d at 258.
755. *Id*. at 138–39, 768 N.E.2d at 258.
756. *Id.* at 139, 768 N.E.2d at 258.
757. ILL. ADMIN. CODE tit. 80 § 500.295(b) (2001).
758. 320 Ill. App. 3d at 139, 768 N.E.2d at 258.
759. *Id.*
760. *Id.* at 143, 768 N.E.2d at 261.
761. 720 ILL. COMP. STAT. ANN. 5/14–6(1)(b) (West 1994).
762. 337 Ill. App. 3d 40, 785 N.E.2d 62 (1st Dist. 2003).
763. *Id.* at 42-43, 785 N.E.2d at 64.
764. *Id.*

year.[765] Michael Morris sued his employer Ameritech Illinois for invasion of privacy and eavesdropping.[766] The security manager had no authority to eavesdrop on Mr. Morris' calls.[767] Further, Ameritech had a policy to fire employees who are found to have eavesdropped.[768] The Illinois Criminal Code provides that a corporation may be prosecuted for a misdemeanor if an agent of the corporation is acting within the scope of their employment and prosecuted for a felony if the offense is authorized, requested, commanded, or performed by the board of directors or a high managerial agent of the corporation acting within the scope of their employment on behalf of the corporation.[769] Mr. Morris was unable to provide evidence that the security manager was a high managerial agent or that any high managerial agent authorized, requested, or commanded the security manager to eavesdrop on Mr. Morris.[770] Since Ameritech did not know that its employee was eavesdropping, the appellate court affirmed the summary judgment in favor of Ameritech on the eavesdropping count.[771] The court also found Ameritech had a property interest in not paying employees for time when they are not working, therefore, they had a right to use its records to protect its rights and property.[772] Using its records for that purpose was not an invasion of Mr. Morris' privacy.[773]

4. Recruitment Fees

In *Vinzenz v. Hintzche Fertilizer, Inc.*,[774] the court provides good information regarding recruiters and their fees when a recruiter identifies a possible candidate and the employer subsequently hires the candidate. Plaintiff was given parameters regarding salary and location.[775] Plaintiff presented a candidate, but defendant advised him that the candidate did not fit within the

765. *Id.*
766. *Id.* at 40, 785 N.E.2d at 62.
767. *Id.* at 44, 785 N.E.2d at 65.
768. *Id.*
769. 720 ILL. COMP. STAT. 5/5–4(a) (1994).
770. *Morris*, 337 Ill. App. 3d at 46, 785 N.E.2d at 66–67.
771. *Id.* at 48, 785 N.E.2d at 68.
772. *Id.* at 50, 785 N.E.2d at 70.
773. *Id.*
774. 336 Ill. App. 3d. 468, 783 N.E.2d 1087 (2d Dist. 2003).
775. *Id.* at 470, 783 N.E.2d at 1088.

criteria and they were not interested in hiring the candidate.[776] Later, another recruiter presented the same candidate.[777] Defendant called the second recruiter who suggested candidate may be willing to take a salary cut, and the recruiter facilitated communications between the two leading the Defendant hiring the candidate.[778] Cross-motions for summary judgment were filed by plaintiff and defendant.[779] The parties agreed that three Illinois cases governed the issue of recruitment fees.[780] Generally, the term of a recruitment contract is considered to be one year even if not expressly stated in the contract.[781] Four criteria resulted from *Snedden*:[782] (1) the agency must have discussed the applicant with the employer, (2) the employer must have agreed to interview the applicant, (3) the applicant must have agreed to interview with the employer, and (4) the agency or the employer must have set the arrangements in motion for the interview.[783] Further, the court in *Polytechnical Consultants*[784] held that the recruiter must also be a motivating factor leading to the hiring. Plaintiff only met the first one.[785] While he may have been the first to introduce the candidate, the second recruiter was the motivating factor in the other three criteria.[786] Therefore, the court affirmed summary judgment in favor of the defendant.

5. Illinois Trade Secrets Act

In *Carus Chemical v. CalciQuest, Inc.*,[787] the court reversed the lower court's decision and dissolved a preliminary injunction based on the actions of the plaintiff. Mr. Charlton worked for Carus Chemical Company. He had access to trade secrets and confidential information, and had signed a

776. *Id.*, 783 N.E.2d at 1089.

777. *Id.*

778. *Id.*

779. *Id.* at 471, 783 N.E.2d at 1089.

780. *Id.*, 783 N.E.2d at 1090; *see* Clark v. Gen. Foods Corp., 81 Ill. App. 3d 74, 400 N.E.2d 1027 (1980); Snedden v. Gen. Radiator Div. of Chromalloy Am. Corp., 111 Ill. App. 3d 128, 443 N.E.2d 1158 (1982); Polytechnical Consultants, Inc. v. All-Steel, Inc., 34 Ill. App. 3d 187, 479 N.E.2d 1069 (1985).

781. *Vinzenz*, 336 Ill. App. 3d at 472–73, 783 N.E.2d at 1090.

782. *See supra* n. 780.

783. *Vinzenz*, 336 Ill. App. 3d at 473, 783 N.E.2d at 1091, (quoting, *Snedden*, 111 Ill. App. 3d at 130, 443 N.E.2d at 1160.).

784. *See supra* n. 780.

785. *Vinzenz*, 336 Ill. App. 3d at 475, 783 N.E.2d at 1092.

786. *Id.*, 783 N.E.2d at 1093.

787. 341 Ill. App. 3d 897, 793 N.E.2d 931 (3d Dist. 2003).

confidentiality agreement.[788] Charlton left his employment and went to work for a competitor, CalciQuest.[789] He mailed a letter to a customer comparing CalciQuest's product to Carus' product.[790] Carus filed an action to enjoin defendants from disclosing its trade secrets.[791] The court ordered a temporary restraining order ("TRO").[792] However, after entering the TRO, Carus proceeded to attach a copy of Charlton's letter to a letter which it mailed to its customers bragging about its product being used as a benchmark.[793] Defendants moved for a dismissal of the TRO, but the trial court denied their motion.[794] The appellate court reversed because of Carus' own disclosure of Charlton's letter.[795] The court further found the TRO an unreasonable restraint on competition.[796]

IV. CONCLUSION

During the period January 2002 through 2003, the supreme and appellate courts decided cases covering many subject matters related to labor and employment. We have provided summaries of the supreme court's review of some of the appellate court decisions in this same article.

Retaliatory discharge has historically been found in only two situations in Illinois: being fired for filing a worker's compensation claim and whistleblowing. In 2002, the appellate court expanded this tort to conduct that has a causal connection between a protected activity and the discharge and to employees terminated in violation of a public policy.

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788. *Id.* at 898, 793 N.E.2d at 932.
789. *Id.*
790. *Id.* at 899, 793 N.E.2d at 932-33.
791. *Id.*, 793 N.E.2d at 933.
792. *Id.*
793. *Id.*
794. *Id.*
795. *Id.* at 900, 793 N.E.2d at 933-34.
796. *Id.* at 900–01, 793 N.E.2d at 934.