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SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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I. INTRODUCTION

This article will examine cases decided by the Illinois Supreme Court and the Illinois Appellate Courts from November 1, 2003, through October 31, 2004, in both the private and public sectors.

The four cases decided by the supreme court examine the calculation of benefits under an election of early retirement as set forth in the Illinois Pension Code, whether a private right of action exists under the Illinois Personnel Code, when sovereign immunity will not protect individuals from prosecution and whether the hiring away of leased employees is a breach of contract.

The cases decided by the appellate court during the same time period covered many area of employment and labor law of interest to employers. Multiple cases further examining unemployment compensation, pensions, bonuses, commissions, vacation pay, employee handbooks and covenants not to compete were reviewed the court for this term providing more guidance for employers in its handling of employment relationship issues. One case of particular interest was the court's position on a due process complaint based on the inflexibility of a zero-tolerance drug policy.

II. ILLINOIS SUPREME COURT DECISIONS

A. Pension/Retirement

The method to calculate a law professor's retirement annuity under the State University Retirement System (SURS) was enumerated

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by the Illinois Supreme Court in *Mattis v. State Universities Retirement System*.[1] *Mattis* dealt with calculation of a retirement annuity in an early retirement situation under the Illinois Pension Code (the "Pension Code").[2] Section 15-136.2 of the Pension Code provides for early retirement without imposing a discount penalty on the retirement annuity.[3] Law professor Mattis retired in 1994 at 55 years and 8 months old, one year after he elected to retire early under the early retirement provisions of the Pension Code.[4] For early retirement, the Pension Code provides the employee and the employer must *each separately* make a one-time lump payment into the system.[5] In the *Mattis* case Mattis' employer made both the employee's and the employer's one-time lump sum payments.[6] When calculating Mattis' retirement under Rules 1 and 2 of section 15-136, SURS did not take into account the one-time employer lump sum payment in its calculation under Rule 2.[7] Mattis objected to the calculation and filed a claim with the SURS claims committee.[8] The committee found the one-time lump sum payment by the employer was not "accumulated normal contributions" under the formula in Rule 2 and the executive committee affirmed.[9] The trial court agreed with the SURS committees and affirmed the calculation omitting the employer lump sum payment.[10] The appellate court reversed reasoning that not taking the employer contribution into account created excess funds that should be used for the benefit of the participant.[11] The other counts in the complaint that had been dismissed were remanded for further proceedings.[12] While the circuit court was addressing the remanded and amended issues, the legislature enacted Public Act 91-887 which amended the section 5-136.[13] The amendment to section 5-136 (the "Amendment") specifically addressed Mattis' situation by creating a new Rule 5 limited to participants "who elected early retirement under

1. 212 Ill. 2d 58, 816 N.E.2d 303 (Ill. 2004), *reh'g denied*, October 4, 2004.
2. 40 ILL. COMP. STAT. 5/15-101 *et seq.* (2003).
3. *Mattis*, 212 Ill. 2d at 63, 816 N.E.2d at 306 (citing 40 ILL. COMP. STAT. 5/15-136.2 (2003)).
4. 212 Ill. 2d at 63, 816 N.E.2d at 306.
5. *Id. See also* 40 Ill. Comp. Stat. 5/15-136.2 (2003).
6. *Mattis*, 212 Ill. 2d at 64, 816 N.E.2d at 306.
7. *Id.* at 64-65, 816 N.E.2d at 306-07.
8. *Id*. at 65, 816 N.E.2d at 307.
9. *Id*. at 65-66, 816 N.E.2d at 307.
10. *Id*. at 66-67, 816 N.E.2d at 308.
11. *Id*. at 67-68, 816 N.E.2d at 308.
12. *Id.* at 62, 816 N.E.2d at 305.
13. *Id.* at 69, 816 N.E.2d 309.

the provisions of Section 15-136.2 and who, on or before February 16, 1995, brought administrative proceedings pursuant to the administrative rules adopted by the System to challenge the calculation of his or her retirement annuity."[14]

The circuit court held the Amendment unconstitutional and remanded the case to SURS to recalculate Mattis' pension as the appellate court had directed: using Rule 2 and including the employer one-time payment.[15] The second time the SURS claims committee calculated the pension, it decided to restore the parties to where they were before the employer's payment was made and recommended SURS pay the entire employer contribution with interest to Mattis. The committee offset the difference between the amount received by Mattis under the Rule 1 calculation and the amount he would have received under Rule 2 if the employer's contribution had not been made.[16] The circuit court held Mattis was entitled to the employer lump sum and interest, a larger monthly annuity, and also awarded attorneys fees in an amount more than $300,000.[17] SURS appealed to the Illinois supreme court.[18]

The Illinois supreme court rejected the conclusion that the early retirement option lump sum payment made by Mattis' employer must be taken into account when calculating his retirement benefits under Rule 2.[19] The Illinois supreme court also reversed the award of expenses and attorneys' fees.[20] Because the issue of calculating retirement benefits under Rule 2 was dispositive, the court did not address the constitutionality of Public Act 91-887.[21] The case was remanded to the circuit court to order SURS to recalculate Mattis' pension under the new Rule 5.[22] The dissenting opinion in *Mattis* criticized the majority for reviewing the appellate court's judgment on the merits after a petition for leave to appeal to the Illinois supreme

14. *Id.* at 70, 816 N.E.2d at 310.
15. *Id.* at 72, 816 N.E.2d at 311.
16. *Id.*
17. *Id.* at 73, 816 N.E.2d at 312.
18. *Id.*
19. *Id.* at 77-84, 816 N.E.2d at 313-17.
20. *Id*. at 84, 816 N.E.2d at 317.
21. *Id.* at 84, 816 N.E.2d at 318.
22. *Id*.

court was denied six years earlier.[23] It also criticized the Illinois General Assembly for amending the law in an effort to change the outcome of the appellate court's decision.[24]

B. Sovereign Immunity

As explained in *Fritz v. Johnston*,[25] sovereign immunity will not protect individuals from prosecution for their own criminal actions.[26] Harold Fritz was the deputy director of the Illinois Department of Veterans Affairs.[27] He was a finalist for the position of Director of Veterans Affairs.[28] John Johnston, who was also a finalist, was appointed to that position.[29] Prior to Johnston's appointment, Johnston and his secretary, Betty Bergstrom, contacted the Illinois State Police and reported Fritz had made physical threats against them and against Johnson's personal property.[30] No charges were brought.[31] Fritz was asked to resign by his supervisor, but he refused.[32] Fritz filed a lawsuit alleging counts of civil conspiracy against Johnston, Bergstrom, and two other employees, Elizabeth Gaffney and Diane Ford. The trial court dismissed the complaint, finding Fritz's claims were barred by the doctrine of sovereign immunity, which was affirmed by the appellate court.[33]

The Illinois Supreme Court first answered the question of whether the alleged actions were against the state allowing the defendants to invoke the doctrine of sovereign immunity.[34] Even though Fritz named individuals as liable, the action could still be against the state, depending upon which duty the individual is alleged to have breached,

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23. *Id.* at 85-87, 816 N.E.2d at 318-19.
24. *Id.* at 92, 816 N.E.2d at 322.
25. 209 Ill. 2d 302, 807 N.E.2d 461 (Ill. 2004).
26. *Id.*
27. *Id.* at 305, 807 N.E.2d at 464.
28. *Id.*
29. *Id.*
30. *Id.* at 305-06, 807 N.E.2d at 464-65.
31. *Id.*
32. *Id.*
33. *Id.* at 307, 807 N.E.2d at 464.
34. *Id.* at 310-11, 807 N.E.2d at 466-67.

and whether that duty arose independent of his state employment.[35] If the duty arose independently, sovereign immunity will not shield the employee.[36] Accepting Fritz's allegations as true, Johnston committed a criminal offense of disorderly conduct by falsely reporting Fritz.[37] The appellate court relied on an administrative order requiring state employees to report a violation of the criminal code.[38] However, the Illinois Supreme Court distinguished the fact that Johnston and Bergstrom made false reports.[39] Further, Fritz did not allege Johnston and Bergstrom violated the administrative order.[40] Instead, he alleged they violated the criminal code by making a false report independent of their state employment.[41] The breached duty did not arise from their state employment, therefore, sovereign immunity did not apply.[42] Fritz failed to state a claim for conspiracy against the other two employees, Gaffney and Ford, because in his complaint he pled a conclusory statement that conspiracy was committed, but did not plead any facts to support that conclusion.[43]

C. Illinois Personnel Code

The issue certified and answered in *Metzger v. DaRosa*,[44] was whether section 19c.1 of the Illinois Personnel Code (the "Personnel Code")[45] creates a private right of action.[46] Metzger was employed by the Illinois State Police.[47] Metzger reported attendance abuses to the Department of Internal Investigations who directed her to report them to her supervisor.[48] After making the report to her supervisor, Metzger was transferred to another division and had her 24-hour building access revoked.[49] Metzger alleged she was retaliated against by her supervisor

35. *Id*.
36. *Id.* at 311, 807 N.E.2d at 467.
37. *Id.*
38. *Id*. at 312, 807 N.E.2d at 467.
39. *Id*.
40. *Id.*
41. *Id.*
42. *Id.* at 314, 807 N.E.2d at 469.
43. *Id*. at 317-18, 807 N.E.2d at 470-71.
44. 209 Ill. 2d 30, 805 N.E.2d 1165 (2004).
45. 20 ILL. COMP. STAT. ANN. 415/10c.1 (West 2002).
46. *Metzger*, 209 Ill. 2d at 32, 805 N.E.2d at 1166.
47. *Id*.
48. *Id*.
49. *Id.* at 32-33, 805 N.E.2d at 1166.

and others, and the transfer adversely affected her chances for promotion and job advancement.[50] Defendants contended Metzger was transferred, and her 24-hour access privileges were revoked, due to Metzger's own attendance problems and suspicions that she was going through other employees' desks after work hours.[51] The trial court found a violation of section 19c.1 had occurred and awarded damages to Metzger.[52] The U.S. Court of Appeals for the Seventh Circuit certified the question to the Illinois Supreme Court.[53] The provision of the Personnel Code reviewed by the Illinois Supreme Court reads as follows:

> (2) No disciplinary action shall be taken against any employee for the disclosure of any alleged prohibited activity under investigation or for any related activity. For the purposes of this Section, disciplinary action means any retaliatory action taken against an employee, including but not limited to reprimand, suspension, discharge, demotion or denial of promotion or transfer.[54]

The Illinois Supreme Court acknowledged that no express private right of action is set forth in section 19c.1, but analyzed whether there was an implied right of action using the four factor test set out in *Fisher v. Lexington Health Care, Inc.*[55] Those factors are: 1) whether the plaintiff is a member of the class whose benefit the Personnel Code was enacted; 2) whether plaintiff's injury is one the Personnel Code was designed to prevent; 3) whether a private right of action is consistent with the underlying purpose of the Personnel Code; and 4) whether implying a private right of action is necessary to provide an adequate remedy under the Personnel Code.[56] The Illinois Supreme Court concluded Metzger was not a member of the class because the Personnel Code was enacted to benefit the state and the people of Illinois to ensure competent governmental employees;[57] the statute's purpose is to protect injury to the public by protecting employees who report wrongdoing;[58] a private right of action is not consistent with the

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50. *Id.* at 33, 805 N.E.2d at 1166.
51. *Id*.
52. *Id*.
53. *Id*. at 34, 805 N.E.2d at 1167.
54. *Id*. at 35, 805 N.E.2d at 1167 (citing 20 ILL. COMP. STAT. 415/19c.1 (2003)).
55. *Id*. at 35, 805 N.E.2d at 1168 (citing Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455, 722 N.E.2d 1115 (Ill. 1999)).
56. *Id*. at 35-36, 805 N.E.2d at 1168.
57. *Id*. at 37-38, 805 N.E.2d at 1169.
58. *Id*. at 38-39, 805 N.E.2d at 1169-70.

underlying purpose because the Personnel Code is designed to protect the state and the people of Illinois;[59] and a private right of action is not necessary to provide an adequate remedy for violation of the Personnel Code.[60] The court reasoned that the Personnel Code provides Metzger could have filed a grievance, appealed to the Civil Service Commission and sought judicial review of the Commission's decision; therefore, a private right of action was not intended.[61] Since the first question was answered in the negative, the court did not need to answer the second certified question that if there is an implied right of action under section 19c.1 of the Personnel Code, is the action limited against the employer or may it also be brought against individual supervisors, managers, or other employees.[62]

D. Restrictive Covenants

In *H & M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc.*,[63] an appeal was filed with the Illinois Supreme Court for a breach of contract.[64] H & M leased truck drivers to other companies.[65] H & M entered into a contract with Fox Valley to provide drivers.[66] The agreement prohibited Fox Valley from hiring any H & M drivers for one year after termination of the agreement or pay H & M $15,000 in liquidated damages.[67] H & M leased James Booker to Fox Valley. Fox Valley hired him within one year and H & M filed a lawsuit alleging the hiring of Booker was a breach of the agreement.[68] Fox Valley admitted all of the relevant facts in its answer.[69] H & M moved for judgment on the pleadings.[70] The circuit court granted the motion and the appellate court affirmed.[71] The cases presented by Fox Valley were distinguishable, so the court analyzed a Wisconsin case, *Heyde Co. v.*

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59. *Id.* at 39, 805 N.E.2d at 1170.
60. *Id.* at 39-40, 805 N.E.2d at 1170.
61. *Id*. at 42-43, 805 N.E.2d at 1171.
62. *Id*. at 32, 45, 805 N.E.2d at 1166, 1173.
63. 209 Ill. 2d 52, 805 N.E.2d 1177 (Ill. 2004).
64. *Id.*
65. *Id.* at 54, 805 N.E.2d at 1178.
66. *Id*.
67. *Id*.
68. *Id*. at 55, 805 N.E.2d at 1178-79.
69. *Id.* at 55-56, 805 N.E.2d at 1179.
70. *Id*.
71. *Id.* at 56, 805 N.E.2d at 1179.

Dove Healthcare,[72] and a Virginia case, *Therapy Services, Inc. v. Crystal City Nursing Center, Inc.*,[73] for guidance. Deciding the Virginia Supreme Court case provided the most guidance, the court held the agreement language was not a covenant not to compete nor a restrictive covenant between a company and an employee.[74] Therefore, the court looked at whether the contract was a reasonable restraint on trade and whether it would be injurious to the public.[75] The court found the restrictions were not unreasonable, there was no injury to the public by creating a shortage of truck drivers, nor were the H & M employees unreasonably restricted or injured by the contract.[76] Further, Fox Valley was not unable to hire the drivers because the agreement provided for liquidated damages if it hired the drivers within one year.[77] Therefore, the court affirmed the appellate court.[78]

III. ILLINOIS APPELLATE COURT DECISIONS

A. Sexual Harassment

Applying the construction of Title VII found in *National R.R. Passenger Corp. v. Morgan,*[79] the Illinois appellate court held in *Gusciara v. Department of Human Rights*,[80] that the Chief Legal Counsel of the Illinois Department of Human Rights abused her discretion in dismissing the charge of sexual harassment because some acts alleged were found to have occurred within the 180-day period required in section 7A of the Illinois Human Rights Act ("Act").[81] The defendants argued the Illinois Supreme Court should follow *Graves v. Department of Human Rights*[82] and *Galloway v. General Motors Service Parts Operations*[83] which held acts outside the 180-day period may be untimely if the acts were not sufficiently related or if the acts were sufficient enough to place the claimant on notice that claimant had a

72. 258 Wis. 2d 28, 654 N.W.2d 830 (Wis. 2002).
73. 239 Va. 385, 389 S.E.2d 710 (Va. 1990).
74. *H & M*, 209 Ill. 2d at 63-4, 805 N.E.2d at 1183.
75. *Id*.
76. *Id.* at 64-65, 805 N.E.2d at 1184.
77. *Id.* at 64, 805 N.E.2d at 1184.
78. *Id.* at 64-65, 805 N.E.2d at 1184.
79. 536 U.S. 101, 122 S.Ct. 2061 (2002).
80. 346 Ill. App. 3d 1012, 806 N.E.2d 746 (2nd Dist. 2004).
81. *Id.* at 1013-14, 806 N.E.2d at 747; 775 ILL. COMP. STAT. ANN. 5/7A-102(A)(1) (West 2000).
82. 327 Ill. App. 3d 293, 762 N.E.2d 722 (4th Dist. 2002).
83. 78 F.3d 1164 (7th Cir. 2000)

claim.[84] The court refused to accept defendant's position and followed *Morgan* as it applies to the Act, except the court did not incorporate the equitable defenses set forth in *Morgan* leaving employers vulnerable by relying on its belief "that *Morgan's* holding will discourage potential claimants from undue delay in filing charges."[85]

B. Compensation and Benefits

1. Unemployment

One of the more frustrating costs of doing business for employers is unemployment insurance rates. It is particularly difficult for employers to consistently see their unemployment insurance rates increase due to the termination of employees for misconduct. The frustration for employers is the strictly construed definitions in the Unemployment Compensation Insurance Act (the "Insurance Act").[86] When an employee is fired for misconduct, the employer often first learns the definition of misconduct under the Act requires a deliberate and willful action on the part of the employee that is repeated conduct despite a warning or the employer must show it or an employee was harmed by the terminated employee's misconduct. Proving these are often difficult for the employer because the employee either has not repeated the misconduct or the employer has difficulty proving the harm caused by the misconduct. The intent of the Act is to "alleviate the economic hardship occasioned by involuntary unemployment"[87] and the Insurance Act will be liberally construed to assist the terminated employee.[88] In *Wrobel v. Department of Employment Security*, an employee was terminated for multiple violation of the attendance policy.[89] The initial determination made by the IDES was to deny benefits because oversleeping was within his control. The initial determination was upheld by the hearing referee, was upheld by the IDES Board of Review, was sustained by the circuit court but was

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84. *Gusciara*, 346 Ill. App. 3d at 1018-19, 806 N.E.2d at 750-51.
85. *Id.* at 1019-20, 806 N.E.2d at 752.
86. 820 ILL. COMP. STAT. ANN. 405/100 *et seq.* (West 2002).
87. Wrobel v. Ill. Dept. of Employment Sec., 344 Ill. App. 3d 533, 536, 801 N.E.2d 29,33 (1st Dist. 2003) (quoting Siler v. Dept. of Employment Sec., 192 Ill. App. 3d 971, 974, 549 N.E.2d 760 (1st Dist. 1989)).
88. *Id.* at 536, 801 N.E.2d at 33.
89. *Id.* at 534-35, 801 N.E.2d at 31-32.

finally reversed by the appellate court.[90] The employee was able to draw unemployment benefits because the court found oversleeping was not a conscious act on the part of the employee, and therefore, he did not willfully or deliberately violate a work rule resulting in misconduct as defined under the Insurance Act.

The purpose of the Insurance Act is to provide unemployment compensation benefits to those employees who find themselves unemployed through no fault of their own.[91] Benefits are not awarded to those employees who voluntarily terminate their employment, unless the reason for the voluntary termination falls within one of the exceptions provided in the Insurance Act. One of the exceptions to receiving unemployment benefits under voluntarily leaving employment is found in section 601(B)(1).[92] Section 601(B)(1) provides:

> Because he is deemed physically unable to perform his work by a licensed and practicing physician, or has left work voluntarily upon the advice of a licensed and practicing physician that assistance is necessary for the purpose of caring for his spouse, child, or parent who is in poor physical health and such assistance will not allow him to perform the usual and customary duties of his employment, and he has notified the employing unit of the reasons for his absence.[93]

The plaintiff in *Jenkins v. Department of Employment Security*[94] was employed by Pilot Corporation ("Pilot") as a cashier.[95] Plaintiff gave two weeks notice, left on good terms and advised Pilot she needed to leave her job to care for her father who had numerous health problems.[96] Plaintiff filed for and was initially denied unemployment benefits.[97] She appealed and a hearing ensued.[98] The hearing referee, Frank Kaitis, affirmed the denial of benefits because plaintiff had not been advised by a doctor to leave her employment to care for her ailing father.[99] Plaintiff filed an appeal to the Board of Review.[100] Plaintiff

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90. *Id*. at 534, 801 N.E.2d at 31.
91. 820 ILL. COMP. STAT. 405/100 *et seq.* (2003).
92. *Id*. at § 601(B)(1).
93. *Id.*
94. 346 Ill. App. 3d 408, 805 N.E.2d 363 (1st Dist. 2004).
95. *Id*. at 409, 805 N.E.2d at 364.
96. *Id.* at 410, 805 N.E.2d at 364.
97. *Id.*, 805 N.E.2d at 365.
98. *Id.*
99. *Id.*
100. *Id.*

had a letter from her father's doctor stating she moved to help her father who has multiple medical problems and she was needed to assist him.[101] Plaintiff appealed after the Board of Review affirmed the denial of benefits and the circuit court affirmed the Board's decision.[102] The court decided the only question was whether the Board had interpreted the Insurance Act correctly, so a *de novo* standard of review was applicable.[103] The appellate court reversed the lower court because the Insurance Act does not require the doctor to specifically advise the employee to leave their job.[104] Rather, the Insurance Act provides the employee, upon the advice of a physician, is needed to assist a parent in poor physical health, which plaintiff presented along with advising her employer the needed assistance was the reason for leaving her job.[105]

Employees who are out of work because of a work stoppage or strike and are not participating in such work stoppage or strike are eligible for unemployment compensation benefits if they do not have a direct interest in the dispute and are not the same grade or class of employees who are participating in the work stoppage or strike.[106] In *International Union of Operating Engineers v. Department of Employment Security*,[107] the court reviewed the circuit court's reversal of the Department of Employment Security's ("Department") determination that the Local 148 members were ineligible for unemployment compensation benefits.[108] On appeal, the court considered the standing of the union and the eligibility of benefits.

There were two unions representing the employees of Central Public Service Company ("CIPS"), Local 148, and Local 702.[109] This appeal concerns benefits awarded to Local 148 members only. CIPS locked out both unions during contract negotiations.[110] A contract was reached with Local 148, however, Local 702 continued to picket and

101. *Id.*
102. *Id*. at 411, 805 N.E.2d at 365.
103. *Id*. at 411-12, 805 N.E.2d at 366.
104. *Id.* at 413, 805 N.E.2d at 367.
105. *Id*., 805 N.E.2d at 367-68.
106. 820 ILL. COMP. STAT. 405/604 (2005).
107. 345 Ill. App. 3d 382, 802 N.E.2d 289 (5th Dist. 2004), *petition for leave to appeal granted*, 208 Ill. 2d 538, 809 N.E.2d 1286 (2004).
108. *Id.* at 384, 802 N.E.2d at 292.
109. *Id*. at 384-85, 802 N.E.2d at 292.
110. *Id.* at 385, 802 N.E.2d at 292.

entered into an agreement about two (2) months later.[111] The Director of the IDES determined the Local 148 members were not eligible for benefits because they had a direct interest in the dispute between Local 702 and CIPS.[112] The circuit court found the Local 148 members did not have an interest in the dispute, nor were they of the same grade or class of Local 702.[113] IDES and CIPS appeal.[114]

The appellate court first addresses whether Local 148 has standing to bring this appeal on behalf of its members.[115] The court admits the doctrine of associational standing has not been adopted in Illinois and believes this is the case to do so.[116] While Local 148 cannot receive unemployment compensation, it can benefit from such compensation if its members receive unemployment compensation saving the union from paying strike pay to those members.[117] Further, without such benefits being paid to the members, the employer would have an unfair advantage in the collective bargaining process.[118] Distinguishing a 1999 Illinois case,[119] reviewing a 1987 California case,[120] and considering the dicta in a 1977 Illinois Supreme Court case,[121] the court concluded associational standing is appropriate in this case; therefore, Local 148 may bring the action on behalf of its members.[122] The court also held Local 148 had standing as a party which the IDES and CIPS argued was not proper because Local 148 was not a party of record or in the administrative proceedings.[123] The issue of whether unemployment compensation should be paid to the members of Local 148 turned on the answer to two questions: 1) did Local 148 have a direct interest in the outcome of Local 702's labor dispute, and 2) were Local 148 and Local 702 of the same class or grade.[124] The appellate court found there was no direct interest, and the unions were not of the

111. *Id.*
112. *Id* at 386, 802 N.E.2d at 293.
113. *Id.*
114. *Id.* at 384, 802 N.E.2d at 292.
115. *Id.* at 387, 802 N.E.2d at 294.
116. *Id.* at 388, 802 N.E.2d at 294.
117. *Id.*, 802 N.E.2d at 295.
118. *Id*.
119. Nolan v. Hillard, 309 Ill. App. 3d 129, 722 N.E.2d 736 (1st Dist. 1999).
120. Brotherhood of Teamsters v. Unemployment Ins. Appeals Bd., 190 Cal. App. 3d 1515 (1st Dist. 1987).
121. Underground Contractors Ass'n v. City of Chicago, 66 Ill. 2d 371, 362 N.E.2d 298 (1977).
122. *Int'l Union* 345 Ill. App. 3d at 391-92, 802 N.E.2d at 297.
123. *Id*. at 392-94, 802 N.E.2d at 298-99.
124. *Id*. at 394-98, 802 N.E.2d at 299-302.

same class or grade.[125] The court affirmed the circuit court reversing the decision of the Director of the IDES.[126]

2. Pension/Retirement

The first district Illinois appellate court addressed the question of whether a municipality has a right to participate in the hearing in which the award of a disability pension is to be decided in *Village of Stickney v. Board of Trustees of the Police Pension of the Village of Stickney*.[127] After applying for a disability pension, a hearing was held by the Board.[128] The Village of Stickney (the "Village") sought to participate in the hearing in order to cross-examine the police officer that had applied for the pension because of the economic effect of any pension awarded to the officer.[129] The Board of Trustees (the "Board") denied any participation of the Village in the hearing, but sent a letter to the Village attorney advising him to contact the Board if the Village wished to file a petition to intervene.[130] No petition was filed.[131] The Board's decision to award a pension was set aside, it was remanded for a new hearing, and the Village was to be allowed to participate in the new hearing.[132] The appellate court found nothing in the Illinois Pension Code[133] creating a right for a municipality to participate in a pension hearing.[134] It also concluded that the Board was not prohibited from allowing such participation.[135] Last, the Illinois appellate court found there was no abuse of discretion on the part of the Board in denying such participation at the hearing, nor was it reversible error because the Village was not prejudiced by its inability to cross examine the officer.[136]

In *Rhoads v. Board of Trustees of Calumet City Policemen's Pension Fund*,[137] the chief of police, Steven Rhoads, was terminated when a new

125. *Id.*
126. *Id.* at 399, 802 N.E.2d at 303.
127. 347 Ill. App. 3d 845, 807 N.E.2d 1078 (1st Dist. 2004).
128. *Id.* at 847, 807 N.E.2d at 1080.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 848, 807 N.E.2d at 1081.
133. 40 ILL. COMP. STAT. ANN. 5/1-101 *et seq.* (West 2002).
134. *Stickney*, 347 Ill. App. 3d at 849, 807 N.E.2d at 1082.
135. *Id.* at 852, 807 N.E.2d at 1084.
136. *Id.* at 852-53, 807 N.E.2d at 1084-85.
137. 348 Ill. App. 3d 835, 810 N.E.2d 573 (1st Dist. 2004).

mayor took office.[138] Prior to being terminated, Rhoads had applied for a line-of-duty disability, but the Board granted a not-on-duty disability pension.[139] A challenge ensued and the appellate court reversed the circuit court's decision while affirming the City of Calumet Board of Trustees's decision to grant the not-on-duty pension rather than the line-of-duty pension.[140] Section 3-116 of the Illinois Pension Code provides:

> A police officer whose duty is suspended because of a disability may be summoned to appear before the board, and to submit to an examination to determine fitness for duty. The officer shall abide by the board's decision. If a police officer retired for disability, except one who voluntarily retires after 20 years' service, is found upon medical examination to have recovered from disability, the board shall certify to the chief of police that the member is no longer disabled and is able to resume the duties of his or her position.[141]

In 2001, hearings were held to determine whether Rhoads was still disabled or whether he was able to resume chief of police duties.[142] Two different doctors provided medical reports stating Rhoads was not able to return to the duties of a police officer, but could perform administrative and supervisory duties.[143] Rhoads relied on these doctors' opinions to argue he was unable to return to the duties of a police officer, and since the mission statement of the police department states the police chief should be able to function as a police officer, there was proof he was still disabled.[144] However, both doctors reported Rhoads was able to perform administrative or supervisory type duties.[145] Therefore, the city ordinance describing the duties of the police chief submitted into evidence by Rhoads supported the Board's decision that Rhoads was no longer disabled and could resume his duties.[146] The Board disagreed with the holding of the trial court that since the chief of police position was no longer available, Rhoads could continue to receive the disability pension.[147] Relying on section 3-116

138. *Id.* at 836, 810 N.E.2d at 575.
139. *Id*.
140. *Id.*
141. *Id.* at 842, 810 N.E.2d at 579 (quoting 40 ILL. COMP. STAT. 5/3-116 (2003)).
142. *Rhoads*, 348 Ill. App. 3d at 836-37, 810 N.E.2d at 575.
143. *Id.* at 838-39. 810 N.E.2d at 576-77.
144. *Id.* at 842-43, 810 N.E.2d at 580.
145. *Id.* at 838, 810 N.E.2d at 576.
146. *Id.* at 843, 810 N.E.2d at 580.
147. *Id.*

and *Greenan v. Board of Trustees of the Police Pension Fund*,[148] and rejecting the cases relied upon by Rhoads,[149] the appellate court reversed the trial court by holding there was no legal support for continuing the disability pension simply because the position was no longer available.

Examining two cases, *Tonkovic* and *Swoope*,[150] in conjunction with section 6-140 of the Illinois Pension Code (the "Pension Code"),[151] the appellate court affirmed the trial court's award of enhanced annuity benefits to a widow of duty-related annuity benefits in *Bertucci v. The Retirement Board of the Firemen's Annuity & Benefit Fund of Chicago.*[152] James Bertucci, a fireman, was permanently injured when he fell from a fire truck.[153] A board physician determined he would never be able to return to work, was permanently disabled, and would not improve.[154] Bertucci later died from lung cancer, and his wife applied for widow's duty-related annuity benefits.[155] The Board denied the application, but awarded the widow non-duty-related benefits because her husband died of lung cancer, not a duty-related injury under section 6-141.1 of the Pension Code.[156] The court provides a detailed analysis as to its reasoning and interpretation of section 6-140 of the Pension Code with a focus on the permanence of the disability from injuries sustained while on duty.[157] In this case, plaintiff provided evidence of the permanency through the Board's own doctor. In making its decision, the court fully explains its reconciliation of *Tonkovic*, *Swoope*, and the Pension Code.

A fourth case regarding a disability pension was decided in *Coyne*

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148. 40 ILL. COMP. STAT. ANN. 5/3-116 (West 2004); 213 Ill. App. 3d 179, 185, 573 N.E.2d 825, 829 (4th Dist. 1991).

149. Iwanski v. Steamwood Police Pension Bd., 232 Ill. App. 3d 180, 596 N.E.2d 691 (1st Dist. 1992); Thurow v. Police Pension Bd., 180 Ill. App. 3d 683, 536 N.E.2d 155 (2d Dist. 1989); Terrano v. Retirement Bd. of Policemen's Annuity and Benefit Fund, 315 Ill. App. 3d 270, 733 N.E.2d 905 (1st Dist. 2000).

150. Tonkovic v. Retirement Board of the Firemen's Annuity, 282 Ill. App. 3d 876, 668 N.E.2d 1126 (1st Dist. 1996); Swoope v. Retirement Board of the Policemen's Annuity & Benefit Fund, 323 Ill. App. 3d 526, 752 N.E.2d 505 (1st Dist. 2001).

151. 40 ILL. COMP. STAT. ANN. 5/6-140 (West 2004).

152. 351 Ill. App. 3d 368, 813 N.E.2d 1021 (1st Dist. 2004), *reh'g denied*, July 27, 2004, *appeal denied*, 212 Ill. 2d 528, 824 N.E.2d 282 (Ill. Nov. 24, 2004).

153. *Id.* at 369, 813 N.E.2d at 1022.

154. *Id.*

155. *Id.*, 813 N.E.2d at 1022-23.

156. *Id.* at 370, 813 N.E.2d at 1023.

157. *Id.* at 371-74, 813 N.E.2d at 1024-26.

v. Milan Police Pension Board.[158] Several issues were analyzed by the court. The first was whether having a village employee serve on the Board created a conflict of interest because the village had an interest in not expending funds for a pension.[159] The court-affirmed finding no conflict because no prejudice or bias was proved by Coyne, and the fact that the village clerk served on the Board was not reversible error.[160] Second, the court reviewed whether Coyne was disabled from performing police work. Six doctors examined Coyne and provided opinions on his abilities, or lack thereof.[161] All but one doctor opined Coyne was disabled and could not perform police work.[162] However, the Board chose to rely on that one opinion.[163] The appellate court remanded the case for an explanation as to why the lone opinion was given more credibility than that other five.[164] Third, the court affirmed the denial of a line-of-duty pension because his disability resulted from "generalized police stress of multiple origins" and not a specific traumatic incident.[165] Fourth, the court remanded the issue of whether Coyne refused treatment, thereby losing the right to the pension.[166] The Board relied on the opinion of one doctor instead of reviewing Coyne's entire course of treatment.[167] The final issue addressed by the court was whether section 3-115 of the Pension Code[168] required a unanimous decision by the physicians as interpreted by the Board.[169] The appellate court reversed the Board's decision on this issue because the Board's interpretation was "absurd and unconstitutional."[170]

A felony conviction in one municipal position will not affect the pension benefits of a concurrent municipal position. In *Taddeo v. Board of Trustees of the Illinois Municipal Retirement Fund*,[171] Taddeo assumed

158. 347 Ill. App. 3d 713, 807 N.E.2d 1276 (3d Dist. 2004).
159. *Id.* at 721, 807 N.E.2d at 1283.
160. *Id.* at 721-22, 807 N.E.2d at 1282-83.
161. *Id.* at 717-21, 807 N.E.2d at 1279-83.
162. *Id.* at 723, 807 N.E.2d at 1284.
163. *Id.*
164. *Id.* at 723-24, 807 N.E.2d at 1284-85.
165. *Id.* at 724-25, 807 N.E.2d at 1285-86 (quoting Robbins v. Bd. of Trustees of the Carbondale Police Pension Fund, 177 Ill. 2d 533, 687 N.E.2d 39 (1997)).
166. *Id.* at 727, 807 N.E.2d at 1288.
167. *Id.* at 725, 807 N.E.2d at 1286-87.
168. 40 ILL. COMP. STAT. ANN. 5-3-115 (West 2004).
169. *Coyne*, 347 Ill. App. 3d at 727-28, 807 N.E.2d at 1287-88.
170. *Id.* at 728-29, 807 N.E.2d at 1288-89.
171. 353 Ill. App. 3d 48, 817 N.E.2d 1015 (1st Dist. 2004), *appeal granted*, **213 Ill. 2d 576, 829 N.E.2d 794 (Ill.** Jan. 26, 2005).

dual positions of Proviso town supervisor and mayor of Melrose Park. He held the township supervisor position for more than 30 years.[172] He also earned concurrent Illinois Municipal Retirement Fund ("IMRF") service credit for 19 years and 9 months for his concurrent service as mayor.[173] Taddeo pled guilty to felony offenses of extortion because he admitted that as mayor he appointed a village attorney in exchange for cash payments, which he did not report on his federal income tax returns.[174] The Board terminated his IMRF pension benefits for both his township supervisor and mayoral positions.[175] The circuit court reinstated his benefits, finding the Board misinterpreted section 7-219 of the Pension Code when it terminated the benefits Taddeo was receiving for his township supervisor position because there was no nexus to the felonious conduct as mayor.[176] The Board appealed, and the appellate court affirmed the circuit court, refusing to accept the broad interpretation of section 7-219 presented by the Board.[177]

The last pension case reviewed is *Alm v. Lincolnshire Police Pension Board*.[178] A police officer was assigned to the bicycle patrol unit.[179] On a particular morning, he experienced pain and swelling in his right knee.[180] Thereafter, his physical activities were restricted, even after several surgeries.[181] Two doctors examined the officer, with one doctor report stating there was a question as to whether it was a cumulative stress injury or a specific injury, but speculated it started with a torn cartilage and evolved due to his work.[182] The other doctor found his police activity was the cause of an abnormality.[183] Section 3-114.1 of the Illinois Pension Code ("Code")[184] provides that if an officer is physically disabled as the result of performing an act of duty, he or she is entitled to a line-of-duty pension.[185] Act of duty is defined in the

172. *Id.* at 50, 817 N.E.2d at 1016.
173. *Id*.
174. *Id*.
175. *Id*.
176. *Id*. at 50-51, 817 N.E.2d at 1017 (citing 40 ILL. COMP. STAT. ANN. 5/7-219 (West 2004)).
177. *Id*. at 52-53, 817 N.E.2d at 1017-18.
178. 352 Ill. App. 3d 595, 816 N.E.2d 389 (2d Dist. 2004), *reh'g denied*, October 20, 2004, *appeal denied*, 213 Ill. 2d 553, 829 N.E.2d 786 (Ill. Jan. 26, 2005).
179. *Id.* at 596, 816 N.E.2d at 390.
180. *Id.*
181. *Id.* at 596-97, 816 N.E.2d 390.
182. *Id.* at 597, 816 N.E.2d 390-91.
183. *Id*., 816 N.E.2d at 391.
184. 40 ILL. COMP. STAT. ANN. 5/3-114.1 (West 2004).
185. *Alm*, 352 Ill. App. 3d at 598, 816 N.E.2d at 392.

Code in part as, "any act of police duty inherently involving special risk, not ordinarily assumed by a citizen . . . ."[186] The Board awarded nonduty benefits because it concluded pedaling his bicycle did not involve any special risk when compared to the general public.[187] The court examined several cases, but focuses on two of them: *Johnson v. Retirement Board of the Policemen's Annuity & Benefit Fund*[188] and *White v. City of Aurora.*[189] The court reversed the circuit court and held the bicycle patrol involved special risk. Therefore, the officer was entitled to line-of-duty benefits rather than nonduty benefits.[190] The dissenting opinion by J. Bowman disagreed due to his belief that general bicycle patrol did not involve a special risk entitling the officer to line-of-duty disability benefits.[191]

3. Bonuses and Commissions

In *Zabinsky v. Gelber Group, Inc.,*[192] the court reviews the issue of whether an employee should be awarded an earned bonus under the Illinois Wage Payment and Collection Act ("Act").[193] After many arguments put forth by the defendants, the court affirmed the trial court in favor of the plaintiff. Plaintiff had a verbal agreement that he would earn a bonus each quarter among other benefits.[194] Defendants argue there was no enforceable contract.[195] The Illinois appellate court found Section 2[196] uses the words employment contract or agreement, and therefore, does not require a valid, enforceable contract.[197] The court also examined the definition of employer in Sections 2 and 13 of the Act[198] as it related to the hiring of plaintiff because defendants alleged they were not employers under the Act.[199] The court held plaintiff was entitled to his bonus of $200,297.70 for the first quarter of 1990 earned

186. *Id.* at 599, 816 N.E.2d at 392 (citing 40 ILL. COMP. STAT. ANN. 5/5-113 (West 2004)).
187. *Id.* at 597, 816 N.E.2d at 391.
188. 114 Ill. 2d 518, 502 N.E.2d 718 (1986)
189. 323 Ill. App. 3d 733, 753 N.E.2d 1244 (2d Dist. 2001).
190. *Alm*, 352 Ill. App. 3d at 601, 816 N.E.2d at 394.
191. *Id.* at 603-04, 816 N.E.2d at 396.
192. 347 Ill. App. 3d 243, 807 N.E.2d 666 (1st Dist. 2004).
193. 820 ILL. COMP. STAT. ANN. 115/1 *et seq.* (West 1994).
194. *Zabinsky*, 347 Ill. App. 3d at 246, 807 N.E.2d at 679.
195. *Id*. at 248-49, 807 N.E.2d at 617.
196. 820 ILL. COMP. STAT. ANN. 115/2 (West 2000).
197. *Zabinsky*, 347 Ill. App. 3d at 250, 807 N.E.2d at 617.
198. 820 ILL. COMP. STAT. ANN. 115/2 (West 2000), 820 ILL. COMP. STAT. ANN. 115/13 (West 2000).
199. *Zabinsky*, 347 Ill. App. 3d at 249-50, 807 N.E.2d at 617-72.

prior to his termination.[200]

A sales representative group which keeps the commissions of another representative group may receive an unfavorable ruling against it in a lawsuit alleging conversion. In *Bill Marek's The Competitive Edge v. Mickelson Group, Inc.*,[201] the sales commission earned by the Mickelson Group was erroneously paid by Union Underwear Company, Inc. ("Union") to the successor sales representative, Marek.[202] Union later filed bankruptcy.[203] Mickelson made numerous demands upon Marek for the return of the commissions.[204] The evidence showed the commissions were the property of Mickelson and Marek refused to pay the amount of Mickelson.[205] The trial court found Marek committed an act of conversion which was affirmed by the appellate court.[206]

4. Vacation and Severance Pay

The Illinois appellate court again distinguished "earned in arrears" and "future-oriented" vacation policies and how they apply to employees whose employment is voluntarily or involuntarily terminated.[207] In *Illinois Department of Labor v. General Electric*[208] the court examined the two different types of policies. Two retiring employees made a claim under the Illinois Wage Payment and Collection Act[209] for General Electric's failure to pay them unused vacation upon their retirement. General Electric had paid them their unused vacation days for the then current year. However, the employees filed a claim for a pro rata share of their vacation for the year following their retirement date alleging it was earned in the current year. The court analyzed this case under *Prettyman v. Commonwealth Edison Co.*[210] and *Mueller Co. v. Department of Labor.*[211]

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200. *Id*. at 250, 807 N.E.2d at 672.
201. 346 Ill. App. 3d 996, 806 N.E.2d 280 (2d Dist. 2004) *reh'g denied*, April 12, 2004, *appeal denied*, 211 Ill. 2d 571, 813 N.E.2d 963 (Ill. Oct. 6, 2004).
202. *Id*. at 999, 806 N.E.2d at 282.
203. *Id.*, 806 N.E.2d at 283.
204. *Id.*
205. *Id*. at 1006, 806 N.E.2d at 288.
206. *Id.*
207. Ill. Dept. of Labor v. General Electric, 347 Ill. App. 3d 72, 806 N.E.2d 1143 (1st Dist. 2004).
208. *Id.*
209. 820 ILL. COMP. STAT. ANN. 115/1 et seq. (West 2002).
210. 273 Ill. App. 3d 1090, 653 N.E.2d 65 (1st Dist. 1995).
211. 187 Ill. App. 3d 519, 543 N.E.2d 518 (4th Dist. 1989).

The court examined the language of the vacation policies, testimony and internal memorandum regarding the payment of prorated vacation to conclude General Electric's vacation policy

was an "earn in arrears" policy and the two retired employees were owed the prorated vacation for the following year.[212]

In *Andrews v. Kowa Printing*,[213] separate companies with related business purposes and the sole officer and director of the companies were all sued by former union employees for vacation and severance pay when one of the companies closed due to financial problems.[214] When Kowa Printing's bank foreclosed on loans and seized it assets, it sent all of the employees home.[215] The Department of Labor would not make a determination with regard to vacation or severance pay due to the employees because it believed it had no jurisdiction, since a collective bargaining agreement covered those amounts and it would be preempted by federal law.[216] The employees of Kowa Printing filed a lawsuit in state court against Kowa Printing for vacation and severance pay which the Defendant tried to remove to federal court.[217] The federal court remanded it to the state court finding the Labor Management Relations Act ("LMRA")[218] did not preempt the claims. The appellate court addressed four questions of law: 1) whether the state court has subject matter jurisdiction; 2) whether the defendants were employers under the Illinois Wage Payment and Collection Act ("Act");[219] 3) whether defendants wilfully violated the Act; and 4) whether awards of prejudgment interest and attorneys fees were proper.[220] Normally, the interpretation of a collective bargaining agreement will be subject to federal preemption. However, in this case, the plaintiffs and Kowa Printing presented a stipulation to the trial court naming the plaintiffs and the amounts owed to each one.[221] Therefore, the matter is not preempted by the LMRA; there was no need to interpret the collective bargaining because the parties had

212. *General Electric*, 347 Ill. App. 3d at 84, 806 N.E.2d at 1152.
213. 351 Ill. App. 3d 668, 814 N.E.2d 198 (4th Dist. 2004).
214. *Id.* at 671, 814 N.E.2d at 201.
215. *Id.*
216. *Id.*, 814 N.E.2d at 201-02.
217. *Id.*
218. 29 U.S.C. § 185 (1994).
219. 820 ILL. COMP. STAT. ANN. 115/1 *et seq.* (West 2000).
220. *Andrews*, 351 Ill. App. 3d at 672, 814 N.E.2d at 202.
221. *Id.* at 675, 814 N.E.2d at 204.

already done so in the stipulation.[222]

Plaintiffs named Kowa Printing, Thomas Kowa and Huston-Patterson as defendants in the lawsuit.[223] The court reviewed the definition of employer as set forth in section 2 the Act.[224] Relying on the analysis in a Colorado Supreme Court case,[225] holding an officer or agent of a corporation is not an employer under the Act.[226] The court analyzed whether Huston-Patterson was an employer of Plaintiffs under *McLaughlin v. Lunde Truck Sales, Inc.*[227] which focused on the "economic reality" by determining the factors set forth in *Karr v. Strong Detective Agency, Inc.*[228] which all centered around sharing employees or the control of employees.[229] The appellate court reversed the finding that Huston-Patterson was an employer.[230] Even though the Kowa Printing and Huston-Patterson had a management agreement it was not enough to make them joint employers of the Plaintiffs.[231]

The appellate court reversed the trial court's finding that Thomas Kowa was individually liable because the Act provides personal liability of an officer requires a knowing and willful violation of Act.[232] The bank seized Kowa Printing's assets and terminated Kowa's employees.[233] Thomas Kowa did not use the money for other purposes to avoid paying the employees.[234]

The appellate affirmed the prejudgment interest, although from a different date than the trial court and awarded attorneys fees under the Attorneys Fees in Wage Actions Act.[235] The fact that the required demand letter was sent to Thomas Kowa because Kowa Printing was no longer in business was sufficient.[236]

5. Attorneys Fees in Wage Actions Act

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222. *Id.*
223. *Id.* at 670-72, 814 N.E.2d at 200-02.
224. *Id.* at 676-77, 814 N.E.2d at 205-06 (citing 820 ILL. COMP. STAT. ANN. 115/2 (West 2000)).
225. Leonard v. McMorris, 63 P.3d 323 (Colo. 2003)
226. *Andrews*, 351 Ill. App. 3d at 678-80, 814 N.E.2d at 207-08.
227. 714 F. Supp. 920 (N.D. Ill. 1989).
228. 787 F.2d 1205 (7th Cir. 1986).
229. *Andrews*, 351 Ill. App. 3d at 680-81, 814 N.E.2d at 208-09.
230. *Id.* at 682, 814 N.E.2d at 209.
231. *Id.*
232. *Id.* at 678, 814 N.E.2d at 207 (citing 820 ILL. COMP. STAT. ANN. 115/13-14(a) (West 2000)).
233. *Andrews*, 351 Ill. App. 3d at 678, 814 N.E.2d at 207.
234. *Id.*
235. *Id.* at 682-83, 814 N.E.2d at 210 (citing 705 ILL. COMP. STAT. ANN. 225/0.01 *et seq.* (West 2000)).
236. *Id.* at 683-84, 814 N.E.2d at 210-11.

Plaintiff in *Zabinsky v. Gelber Group, Inc.*,[237] cross-appealed for attorneys fees under the Attorneys Fees in Wage Action Act (the "Fees Act").[238] Defendants argued several theories: failure to comply with the statute of limitations, failure to provide a proper written demand and failure to plead a separate count.[239] The court affirmed the trial court's holding that the original complaint requested attorneys fees and was filed within the five-year statute of limitations. Therefore, the claim under the Fees Act related back to the original complaint.[240] The court reversed and remanded holding that the original written wage claim filed with the Illinois Department of Labor and received by the Defendants was sufficient to meet the notice requirement in the Fees Act.[241] The last argument failed because Defendants showed no supporting case law nor any prejudice.[242]

Following *Scoby v. Civil Service Commission*,[243] fees under the Fees Act[244] are not applicable to claims for back wages in wrongful discharge lawsuits. The court in *Bill v. Board of Education of Cicero School District 99*,[245] held the teacher who was terminated without proper notice was improperly awarded attorneys fees in the circuit court.[246] The court followed the reasoning of the *Scoby* court that back wages are not earned for work actually performed, and, therefore do not fall within the strict construction of the Act.[247]

C. Jurisdiction

A matter of proper jurisdiction is the substance of the holding in *Meehan v. Illinois Power Co.*[248] Plaintiff filed this lawsuit in the circuit court of St. Clair County, Illinois alleging his employer violated the

237. 347 Ill. App. 3d 243, 807 N.E.2d 666 (1st Dist. 2004).
238. 705 ILL. COMP. STAT. ANN. 225/0.01 *et seq.* (West 2000).
239. *Zabinsky*, 347 Ill. App. 3d at 251, 807 N.E.2d at 672-73.
240. *Id.*
241. *Id.* at 251, 807 N.E.2d at 673.
242. *Id.*
243. 253 Ill. App. 3d 416, 624 N.E.2d 439 (5th Dist. 1993).
244. 705 ILL. COMP. STAT. ANN. 225/0.01 *et seq.* (West 2000).
245. 351 Ill. App. 3d 47, 812 N.E.2d 604 (1st Dist. 2004).
246. *Id.* at 65, 812 N.E.2d at 619.
247. *Id.*
248. 347 Ill. App. 3d 761, 808 N.E.2d 555 (5th Dist. 2004)

Age Discrimination in Employment Act ("ADEA").[249] Defendants argued the circuit court lacked subject matter jurisdiction relying on the jurisdictional provision of the Illinois Human Rights Act.[250] Having found the plaintiff had exhausted his administrative remedies, the trial court held it had jurisdiction and ruled in favor of plaintiff.[251] The appellate court vacated the trial court's judgment holding the Illinois Human Rights Act (the "Rights Act") is the exclusive remedy for employment discrimination claims in the state of Illinois.[252] Relying on *Cahoon v. Alton Packaging Corp.*,[253] the court held claims brought for civil rights violations under the federal ADEA statute may not ignore the state legislative provisions of the Act which confers exclusive jurisdiction to the Illinois Human Rights Commission.[254]

D. Retaliatory Discharge

In *Chicago Commons Association v. Hancock*,[255] Darrell Hancock ("Hancock") alleged he was fired in retaliation for defending a lawsuit against him for unjust enrichment and wrongful withholding of an overpayment in wages. In Illinois, retaliatory discharge has been limited to filing or anticipating the filing of a workers compensation claim and whistle blowing.[256] Hancock asked the court to consider another category and expand retaliatory discharge.[257] The courts in Illinois have been asked on many occasions to consider and expand retaliatory discharge to allow other categories, but Illinois courts continue to limit the scope of retaliatory discharge.

In *Ausman v. Arthur Andersen, LLP*,[258] Susan Ausman was terminated from her job as in-house counsel, and filed a lawsuit alleging retaliatory discharge because of her efforts to ensure compliance with SEC regulations.[259] Ausman was essentially asking the appellate court

249. *Id.* at 761-62, 808 N.E.2d at 558; 29 U.S.C. § 621 (2002).
250. *Meehan*, 347 Ill. App. 3d at 762, 808 N.E.2d at 558; 775 ILL. COMP. STAT. ANN. 5/8-111(C) (West 2002).
251. 347 Ill. App. 3d at 762, 808 N.E.2d at 559.
252. *Id.* at 764, 808 N.E.2d at 560.
253. 148 Ill. App. 3d 480, 499 N.E.2d 522 (5th Dist. 1986).
254. *Meehan*, 347 Ill. App. 3d at 763-64, 808 N.E.2d at 559-60.
255. 346 Ill. App. 3d 326, 804 N.E.2d 703 (1st Dist. 2004).
256. *Id*. at 328-29, 804 N.E.2d at 705.
257. *Id*. at 329, 804 N.E.2d at 705.
258. 348 Ill. App. 3d 781, 810 N.E.2d 566 (1st Dist. 2004).
259. *Id.* at 782, 810 N.E.2d at 568.

to overrule the 1991 Illinois Supreme Court case *Balla v. Gambro, Inc.*[260] The court refused to do so.[261] In *Balla*, an in-house attorney had information that the president of the company was going to accept defective dialyzers.[262] Shortly after confronting the president, the attorney was fired.[263] The attorney sued alleging retaliatory discharge.[264] The court held that in-house counsel could not sue their employer for retaliatory discharge because of the chilling effect it would have on the attorney-client relationship between the attorney and the employer.[265] Further, because the attorney has a duty under the Professional Rules of Conduct ("Rules") to withdraw from representation if continued representation would violate the Rules, there was no need to expand the circumstances in which an employee may bring a retaliatory action.[266] The appellate court in *Ausman* refused to overrule *Balla* and affirmed the circuit court's dismissal of Ausman's retaliatory discharge.[267]

E. Sovereign Immunity

In *Williams v. Davet*,[268] plaintiff's decedent was arrested for disorderly conduct.[269] While in police custody, he attempted to injure himself and tried to hang himself. He was taken to a hospital, where he was placed in physical restraints. A physician at the hospital contacted the social work to arrange a transfer of the decedent to the mental health center. The social worker accepted the transfer to the mental health center and reviewed decedent's history. However, decedent was released to plaintiff's custody without treatment. After returning home, decedent hung himself, resulting in his death. Plaintiff, special administrator of decedent's estate, filed suit against the social worker and the mental health facility. Defendants' motion to dismiss on the basis of sovereign immunity was granted by the trial

260. 145 Ill. 2d 492, 584 N.E.2d 104 (Ill. 1991).
261. *Ausman*, 348 Ill. App. 3d at 787-88, 810 N.E.2d at 572-73.
262. *Balla*, 145 Ill. 2d at 496, 584 N.E.2d at 106.
263. *Id.* at 497, 584 N.E.2d at 106.
264. *Id.*
265. *Id.* at 497-503, 584 N.E.2d at 106-09.
266. *Id.* at 504-05, 584 N.E.2d at 110.
267. *Ausman*, 348 Ill. App. 3d at 787-88, 810 N.E.2d at 572-73.
268. 345 Ill. App. 3d 595, 802 N.E.2d 1255 (1st Dist. 2003).
269. *Id.* at 596-97, 802 N.E.2d at 1257.

court, and the plaintiff appealed.[270]

The court concluded that sovereign immunity barred the plaintiff from suing the mental health facility despite the fact that the facility was not listed in section 8(d) of the Court of Claims Act.[271] The court stated that because the mental health facility was under the jurisdiction of the Department of Human Services and was state operated, the facility was an arm of the state.[272] The mental health facility was not a nominal defendant in the case because the complaint alleged that the facility, acting though its agents, committed tortious acts resulting in the death of the plaintiff's decedent. The complaint sought damages from the facility and therefore constituted a present claim that could subject the State to liability.[273] Finally, no exceptions to the sovereign immunity doctrine applied.[274] The court did not decide whether the social worker was entitled to sovereign immunity because the trial court erred when it denied his motion to dismiss pursuant to section 2-1010 of the Code of Civil Procedure.[275]

F. Tort Immunity

In *Fender v. Town of Cicero*,[276] two negligence actions were brought by the family and an administrator against the Town of Cicero and the individual police officers for the failure to attempt a rescue of victims of a residential fire. The circuit court dismissed the cases and a consolidated appeal was filed.[277] The actions against the individual officers were dismissed and affirmed as barred by the one-year time limitation in section 8-101 of the Local Governmental and Governmental Employees Tort Immunity Act ("Act").[278] The Town of Cicero was dismissed and affirmed relying on the decision in *Kavanaugh v. Midwest Club, Inc.*,[279] interpreting section 4-102[280] of the Act to provide immunity for "service," which could include the police

270. *Id.*, 802 N.E.2d at 1257-58.
271. *Id.* at 598-600, 802 N.E.2d at 1259-60 (citing 705 ILL. COMP. STAT. ANN. 505/1(West 2000)).
272. *Williams*, 345 Ill. App. 3d at 599-600, 802 N.E.2d at 1259-60.
273. *Id.* at 600, 802 N.E.2d at 1259.
274. *Id.* at 596-600, 802 N.E.2d at 1257-59.
275. *Id.* at 602, 802 N.E.2d at 1261.
276. 347 Ill. App. 3d 46, 807 N.E.2d 606 (1st Dist. 2004).
277. *Id.* at 49-51, 807 N.E.2d at 609-10.
278. *Id.* at 52, 807 N.E.2d at 611 (citing 745 ILL. COMP. STAT. ANN. 10/8-101 (West 2000)).
279. 164 Ill. App. 3d 213, 517 N.E.2d 656 (2d Dist. 1987).
280. 745 ILL. COMP. STAT. ANN. 10/4-102 (West 2000).

officers' service at the residential fire as in this case.[281]

The appellants also argued that the officers' refusal to attempt the rescue, knowing victims were trapped inside the burning residence, was willful and wanton conduct and would fall under an exception to immunity.[282] The court affirmed the circuit court finding that even if willful and wanton, section 2-201[283] of the Act would still immunize the officers because they had to make a policy decision and exercised their discretion not to attempt the rescue.[284]

Another First District case reversed summary judgment granted in favor of the City of Chicago and remanded it for further proceedings.[285] City police officers found an injured victim found after responding to a 9-1-1 call.[286] At least one person who attempted to help the victim was told to leave the area by the police officers.[287] Although the officers called for an ambulance about one and one-half hours after arriving, a doctor gave an opinion that if the victim had been helped within an hour his chances of surviving would have increased by fifty percent (50%).[288] The appellate court found the City voluntarily assumed a duty to the victim by responding to the 9-1-1 call.[289] There was evidence presented by the Plaintiff of willful and wanton misconduct.[290] The court also found section 4-102 of the Local Governmental and Governmental Employee Tort Immunity Act did not provide immunity to the officers for their alleged conduct.[291]

A third First District case reviewing the Local Governmental and Governmental Employee Tort Immunity Act ("Act")[292] involves an eighth grade student who was injured in an extracurricular tumbling program supervised by an employee, James Collins ("Collins") of the Chicago Youth Center ("CYC"). In *Murray v. Chicago Youth Center*,[293] Ryan Murray landed on his chest after flipping off of a mini-trampoline

281. *Fender*, 347 Ill. App. 3d at 52-53, 807 N.E.2d at 611-12.
282. *Id.* at 53-54, 807 N.E.2d at 612.
283. 745 ILL. COMP. STAT. ANN. 10/2-201 (West 2000).
284. *Fender*, 347 Ill. App. 3d at 54-55, 807 N.E.2d at 612-13.
285. Torres v. City of Chicago, 352 Ill. App. 3d 533, 816 N.E.2d 815 (1st Dist. 2004), *appeal denied*, 213 Ill. 2d 576, 829 N.E.2d 794 (Ill. Jan. 26, 2005).
286. *Id*., 816 N.E.2d at 817.
287. *Id.* at 534, 816 N.E.2d at 817.
288. *Id.*
289. *Id.* at 536, 816 N.E.2d at 819.
290. *Id.*
291. *Id;* 745 ILL. COMP. STAT. ANN. 10/4-102 (West 2000).
292. 745 ILL. COMP. STAT. ANN. 10/1-101 *et seq.* (West 2000).
293. 352 Ill. App. 3d 95, 815 N.E.2d 746 (1st Dist. 2004).

causing him to be a quadriplegic.[294] A lawsuit was filed and amended alleging the CYC and Collins knowingly and intentionally or with reckless disregard failed in many respects and the Chicago Board of Education ("Board") was willful and wanton in its failure to provide safety equipment and gym mats.[295] The trial court ruled in favor of Collins, CYC and the Board under sections 3-108(a) and 2-201 of the Act.[296] The Plaintiffs appealed arguing the Defendants were not immune under section 3-108, but instead were liable under section 3-109(c)(2).[297] While the appellate court disagreed with the holding in *Johnson v. Decatur Park District*,[298] it chose to follow the guidance provided by *Epstein v. Chicago Board of Education*,[299] in reviewing when sections such as 3-108(a) and 2-201 are overridden by other sections of the Act.[300] The court agreed that the plaintiff could bring a lawsuit under section 3–109(c)(2).[301] However, it went on to again express its disagreement with the decision in *Johnson*, stating the case failed to "address the significance of the specific exception language found in section 3-108(a)."[302] Section 1-210 of the Act provides a definition for willful and wanton which the court refused to apply to Defendants.[303] The definition requires "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 . . . ."[304] The appellate court affirmed the trial court because it could not find the conduct of the Defendants reached the level of blame worthiness required by section 1-210 in order to be exempt from the immunity provided by the Act.[305]

G. Employee Handbooks

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294. *Id.* at 98, 815 N.E.2d at 748.
295. *Id*. at 99-100, 815 N.E.2d at 749-50.
296. *Id.* at 100, 815 N.E.2d at 750.
297. *Id.* at 102, 815 N.E.2d at 751.
298. 301 Ill. App. 3d 798, 704 N.E.2d 416 (4th Dist. 1998).
299. 178 Ill. 2d 370, 687 N.E.2d 1042 (1997).
300. Murray v. Chicago Youth Center, 352 Ill. App. 3d 95, 103–05, 815 N.E.2d 746, 752–53 (1st Dist. 2004).
301. *Id.* at 105, 815 N.E.2d at 754.
302. *Id.*
303. *Id.*
304. *Id.* at 106, 815 N.E.2d at 754.
305. *Id.*

Whether an employee handbook is a contract of employment or whether the employee is an employee-at-will are questions that often reach the court. In *Denis v. P & L Campbell, Inc.*,[306] the questions are again addressed by the court. P & L Campbell ("Campbell") had an employee handbook containing general provisions and provisions specific to individual employees.[307] One of the general provisions provided for progressive discipline up to and including termination.[308] After telling his employer to stick books "up her ass," Denis was immediately terminated.[309] Denis filed suit alleging the handbook provisions were not followed.[310] Both parties filed cross motions for summary judgment which were both denied because the provisions were subject to different interpretations and should be decided by a jury.[311] The lower court ruled the employee handbook was a contract, that Denis' behavior was outside the handbook and he had been properly fired.[312] Examining the lower court orders and analyzing the matter under *Duldulao v. Saint Mary of Nazareth Hospital Center*,[313] the appellate court found the disciplinary language in the handbook was ambiguous and could not have conveyed an offer to Denis.[314] The court found the handbook at issue was not a contract and affirmed the lower court's ruling that Denis was fired properly.[315]

H. Covenants Not to Compete

In *Riggs v. Woman to Woman*,[316] Plaintiff was employed and signed an employment agreement containing a covenant not to compete.[317] She resigned approximately two years later and filed a declaratory action seeking a judgment that her covenant not to compete was unenforceable because the employment agreement was void from the

306. 348 Ill. App. 3d 391, 809 N.E.2d 773 (5th Dist. 2004).
307. *Id*. at 392, 809 N.E.2d at 775.
308. *Id*. at 393, 809 N.E.2d at 775.
309. *Id*. at 392, 809 N.E.2d at 774-75.
310. *Id*. at 393, 809 N.E.2d at 775.
311. *Id.*
312. *Id*. at 393-94, 809 N.E.2d at 775-76.
313. 115 Ill. 2d 482, 505 N.E.2d 314 (1987).
314. *Denis*, 348 Ill. App. 3d at 396-397, 809 N.E.2d at 777-78.
315. *Id*. at 397, 809 N.E.2d at 778.
316. 351 Ill. App. 3d 268, 812 N.E.2d 1027 (2d Dist. 2004).
317. *Id*. at 270, 812 N.E.2d at 1029.

date of conception.[318] The lower court granted Plaintiff's motion for summary judgment finding her employment contract was void from the beginning rendering the covenant not to compete unenforceable.[319] However, the court certified two questions to be answered by the appellate court: 1) whether the Professional Services Corporation Act ("Services Act")[320] was enacted to protect the public; and 2) whether a failure to register under the Act rendered an employment agreement containing a noncompete provision was void from the beginning.[321] The trial court held the Services Act was not intended to protect the public.[322] It is a permissive statute to allow professionals the ability to incorporate to receive benefits that other incorporated entities would receive and to reduce potential liability.[323] Further, statutes drafted to protect the public typically contain provisions related to licensing requirements and other means of regulatory elements.[324] Following *Joseph P. Sorton, P.C. v. Becker*,[325] the plaintiff would not be excused from her covenant not to compete, unless she could show she was prejudiced by the fact that defendant did not register under the Act.[326] Plaintiff attempts to argue the employment agreement found to be unenforceable in *Carter-Shields v. Alton Health Institute*[327] because of Carter-Shields failure to comply with the licensing requirements is a basis for finding her employment agreement is void.[328] The court rejected this argument.[329]

I. Arbitration

A question of whether attorneys' fees are proper under section 14 of the Uniform Arbitration Act[330] was answered in *International Federation of Professional & Technical Engineers, Local 153 v. Chicago Park*

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318. *Id.*
319. *Id.* at 271, 812 N.E.2d at 1030.
320. 805 ILL. COMP. STAT. ANN. 10/1-19 (West 2002).
321. *Riggs*, 351 Ill. App. 3d at 269, 812 N.E.2d 1029.
322. *Id.* at 271-72, 812 N.E.2d at 1031.
323. *Id.* at 273, 812 N.E.2d at 1031.
324. *Id.* at 272-74, 812 N.E.2d at 1031-33.
325. 341 Ill. App. 3d 337, 792 N.E.2d 384 (2d Dist. 2003).
326. *Riggs*, 351 Ill. App. 3d at 276, 812 N.E.2d at 1034.
327. 201 Ill. 2d 441, 777 N.E.2d 948 (2002).
328. *Riggs*, 351 Ill. App. 3d at 276-77, 812 N.E.2d at 1034-35.
329. *Id.* at 277, 812 N.E.2d at 1035.
330. 710 ILL. COMP. STAT. ANN. 5/1-23 (West 2000).

District.[331] The Uniform Arbitration Act provides,

> [u]pon the granting of an order confirming, modifying or correcting an award, judgment shall be entered in conformity therewith and be enforced as any other judgment. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court as to the court seems just.[332]

Local 153 took the position that the word disbursement included attorney's fees.[333] Reviewing the definition of disbursement in Black's Law Dictionary, the specific language of the Arbitration Act, the American Rule of disallowing attorneys fees unless specifically provided in a statute, and Illinois case law, the appellate court affirmed the trial court's denial of the Local 153's petition for attorneys fees because the Act does not specifically provide for attorneys' fees.[334]

J. Administrative Procedure

Failing to file a timely verified response without showing good cause will result in an admission of all allegations contained in the complainant's charge of discrimination. In *Ferrari v. Illinois Department of Human Rights*,[335] Nancy Ferrari filed a charge of sex discrimination on June 26, 2002, after she was terminated from her job.[336] On November 4, 2002, respondent filed a verified response dated October 1, 2002.[337] Respondent's filing was outside the sixty-day time period provided by the Illinois Human Rights Act.[338] The Illinois Department of Human Rights (the "Department") accepted the untimely verified response. Complainant made several attempts to get the Department to issue a notice to show cause for the late filing, advised the Department Complainant would not attend the fact-finding conference unless and until the Department addressed the failure to file a timely verified response or to show cause, and filed a motion to strike the untimely verified response.[339] The Department ignored the repeated requests to

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331. 349 Ill. App. 3d 546, 812 N.E.2d 407 (1st Dist. 2004), *appeal denied*, 2004 Ill. LEXIS 1539 (2004).
332. 710 ILL. COMP. STAT. ANN. 5/14 (West 2000).
333. *Int'l Fed'n*, 349 Ill. App. 3d at 549, 812 N.E.2d at 410.
334. *Id.* at 550-53, 812 N.E.2d 410-412.
335. 351 Ill. App. 3d 1099, 815 N.E.2d 417 (4th Dist. 2004).
336. *Id.* at 1100, 815 N.E.2d at 419.
337. *Id.* at 1101, 815 N.E.2d at 420.
338. 775 ILL. COMP. STAT. ANN. 5/7A-102(B) (West 2002).
339. *Ferrari*, 351 Ill. App. 3d at 1101-02, 815 N.E.2d at 419-20.

force the Respondent to show cause. Further, the Department refused to address the motion to strike advising Complainant it is not a motion entertaining body again not addressing the Complainant's demand for action regarding the late filing.[340] The Department held the fact-finding conference which the Complainant did not attend.[341] The complaint was dismissed for Complainant's failure to attend.[342] A timely request for review was filed by Complainant.[343] The Chief Legal Counsel affirmed the dismissal because Complainant did not attend the fact-finding conference.[344] The appellate court addresses the question of whether the Department has the discretion to accept the verified response that is not filed in a timely manner if no good cause is shown.[345] Finding the 60-day time period for filing a verified response statutory rather than jurisdictional, the Department must promulgate a rule providing a mechanism for complainants to raise the issue with the Department.[346] The Chief Legal Counsel exceeded the Department's authority because the Department has no discretion to accept a verified response that is filed late without a showing of good cause.[347] Complainant's refusal to attend the fact-finding conference does not affect the Department's duty to require the Respondent to show cause for its late filing.[348] The court reversed the dismissal, reinstated the charge of discrimination, and remanded it to the Chief Legal Counsel to determine if good cause for the late filing existed.[349]

K. Labor

In Village of Bolingbrook v. Bolingbrook Firefighters Association & Illinois Labor Relations Board,[350] the village filed an appeal asking the court to find that the Illinois Labor Relations Board ("ILRB") erred when it did not grant a variance allowing the Village to file a late

340. *Id*. at 1102, 815 N.E.2d at 420.
341. *Id*.
342. *Id*.
343. *Id*. at 1102, 815 N.E.2d at 421.
344. *Id*.
345. *Id*. at 1103, 815 N.E.2d at 421.
346. *Id.* at 1106, 815 N.E.2d at 423-24.
347. *Id.* at 1107, 815 N.E.2d at 424.
348. *Id.* at 1107, 815 N.E.2d at 424-25.
349. *Id.* at 1108, 815 N.E.2d at 425.
350. 347 Ill. App. 3d 434, 806 N.E.2d 1266 (3d Dist. 2004), *appeal denied*, 209 Ill. 2d 575, 808 N.E.2d 1006 (2004).

answer, that the firefighters did not allege an unfair labor practice, and that the remedy ordered by the ILRB exceeded its authority.[351] The unfair labor practice charge alleged Jerry Carley was lobbying for a foreign fire insurance board and was removed from his station commander position and terminated in retaliation for his attempt to establish the foreign fire insurance board.[352] The establishment of a foreign fire insurance board would provide tax revenue for the benefit of the fire department versus the Village's general revenue fund.[353]

Section 1220.40 of the Illinois Administrative Code ("Code") required an answer to the complaint to be filed by the Village within fifteen (15) days of receipt of the complaint.[354] The Village filed it eleven (11) days late.[355] Section 1200.160 of the Code sets forth three factors that would allow the ILRB to waive the time period, "1) the provision from which the variance is granted is not statutorily mandated, 2) no party will be injured by the granting of the variance, and 3) the rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome."[356] The first factor was met in *Village of Bolingbrook*.[357] The appellate court believed the respondents had a right to a speedy conclusion even though the Village argued the delay did not injure the respondents based on the fact that respondents did not attempt to expedite their case between the time the charge was filed and the complaint was issued.[358] The court believed the delay in filing the answer somewhat prejudiced the respondents.[359] The court was also critical of the Village because it did not seek leave to file a late answer and had no good reason for the delay.[360] The court found the ILRB did not abuse its discretion in denying the variance.[361]

Since the Village filed its answer late, all allegations in the complaint were accepted as true, including the allegations that Jerry Carley was a public employee, engaged in protect activity and was

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351. *Id*. at 435, 806 N.E.2d at 680.
352. *Id*. at 436, 806 N.E.2d at 680-81.
353. *Id*.
354. *Id*. at 437, 806 N.E.2d at 681 (citing ILL ADMIN. CODE tit. 80 §1220.40(b)(3) (2003)).
355. *Village of Bolingbrook*, 347 Ill. App. 3d at 437, 806 N.E.2d at 681.
356. *Id*. at 438, 806 N.E.2d at 682 (citing ILL ADMIN. CODE tit. 80 § 1220.160 (2003)).
357. *Id.* at 438, 806 N.E.2d at 682.
358. *Id*.
359. *Id*. at 439, 806 N.E.2d at 682.
360. *Id.*, 806 N.E.2d at 683.
361. *Id.*

terminated in retaliation for his participation in protected activity.[362] The court held the IRLB's decision to default the Village was proper.[363]

Finally, the Village argues the remedy of reinstatement and back pay exceeded the authority of the ILRB because the complaint did not ask for those remedies.[364] The appellate court disagreed with the Village and found the complaint requested those remedies and the ILRB had the power to order them.[365]

L. School Code

Section 24–11 of the Illinois School Code Provides a full-time teacher not completing the last year of the probabionary year or a full-time teacher employed not later than January 1 of the school term must receive written notice at least forty-five days before the end of the school term advising the teacher that he or she will not be rehired the following school term.[366] In *Bill v. Board of Education of Cicero School District* 99,[367] the court disagreed with the school district's position that the employment agreement itself provided Marie Bill with adequate notice.[368] Since the teacher was seeking other employment, the school district argued she knew she would not be re-hired.[369] However, the court disagreed with the school board, making a distinction between "not knowing whether she would be rehired and knowing, in fact, she would not be rehired."[370]

M. Breach of Contract

In *Unterschuetz v. City of Chicago*,[371] the plaintiff was terminated for not being a resident of the city as required by an ordiance.[372] After a

362. *Id.* at 440, 806 N.E.2d at 683-84.
363. *Id.*, 806 N.E.2d at 684.
364. *Id.* at 440-41, 806 N.E.2d at 684.
365. *Id.*
366. 105 ILL. COMP. STAT. ANN. 5/24–11 (West 2000).
367. 351 Ill. App. 3d 47, 812 N.E.2d 604 (1st Dist. 2004), *appeal denied*, 823 N.E.2d 962 (Ill. Oct. 6, 2004).
368. *Id.* at 64-65, 812 N.E.2d at 618.
369. *Id.* at 65, 812 N.E.2d at 618.
370. *Id.*
371. 346 Ill. App. 3d 65, 803 N.E.2d 988 (1st Dist. 2004).
372. *Id.* at 67, 803 N.E.2d at 990.

hearing before personnel board, he was reinstated to his former position and awarded full back pay.[373] Thereafter, the plaintiff brought a lawsuit against the city for breach of contract which was dismissed and amended twice before naming the city and alleging five sections of the city's ordinances created the contractual relationship that was breached by the city.[374] After being dismissed again for failure to state a cause of action and because of the immunity provided by the Local Governmental and Governmental Employees Tort Immunity Act, the only question to be answered on appeal was whether the trial court erred in dismissing a breach of contract action based upon failure to state a cause of action.[375] The court first addressed the city's argument that a presumption exists that laws do not create a contractual right.[376] The court found the ordinances alleged by plaintiff to have been breached by the city were merely policies and goals and did not contain the elements necessary to create a contract.[377] In plaintiff's breach of contract claim, he was suing for attorneys fees and pension fund losses during the time he was appealing his discharge.[378] The court reviewed the City's municipal code and found the personnel board had awarded plaintiff everything provided by the code.[379] There were no ordinances providing for attorneys' fees or pension losses, so no breach could have occurred.[380] The trial court's dismissal of the breach of contract complaint was affirmed.[381]

N. Zero Tolerance Drug Policy

Zero-tolerance drug policies must be applied rationally. In *Garrido v. Cook County Sheriff's Merit Board*,[382] a deputy sheriff was terminated after approximately eleven years of employment for failing a random

373. *Id.*
374. *Id.* at 67-68, 803 N.E.2d at 990-91.
375. *Id.* at 68-69, 803 N.E.2d at 991–92 (citing 745 ILL. COMP. STAT. ANN. 10/2–109 (West 2000)).
376. *Id.* at 71, 803 N.E.2d at 993 (citing Fumarolo v. Chicago Board of Education, 142 Ill. 2d 54, 566 N.E.2d 1283 (1990)).
377. *Id.* at 72-73, 803 N.E.2d at 994.
378. *Id.* at 67, 803 N.E.2d at 990.
379. *Id.* at 75, 803 N.E.2d at 997.
380. *Id.* at 75, 803 N.E.2d at 996.
381. *Id.* at 76, 803 N.E.2d at 997.
382. 349 Ill. App. 3d 68, 811 N.E.2d 312 (1st Dist. 2004).

drug test by seven nanograms.[383] The sheriff's department had a drug-free workplace policy providing a confirmed positive drug test would result in seeking dismissal by the Merit Board.[384] The department had also published a notice that employees were responsible for insuring any herbal or over-the-counter remedies did not contain a controlled or illegal substance.[385] In August 1999, Garrido and her husband, who was a police officer in the narcotics section for fifteen years, adopted a baby in Peru.[386] While in Peru, a doctor recommended a tea, Mate de Coca, for the baby, who was ill.[387] The doctor assured the couple the tea contained no cocaine.[388] After returning to the United States, Garrido drank the tea when she was ill.[389] Upon returning to work after having the flu, she was selected for a random drug test which she initially failed and again failed upon retesting.[390] She was dismissed from employment for cause.[391]

Garrido claimed she was fired in violation of her constitutional right to due process.[392] Finding no claim for procedural due process, the court analyzed whether she was terminated in violation of substantive due process rights using the rational basis test.[393] The drug free policy had to have a "reasonable relationship to the public interest intended to be protected, and the means adopted must be a reasonable method of accomplishing the desired objective."[394] The reason for the sheriff's department having such a policy was apparent.[395] The court reversed the Merit Board's dismissal finding the sheriffs department's application of the policy and the Merit Board's decision were too inflexible and did not consider the evidence and circumstances surrounding the positive test results.[396] The case was remanded with

383. *Id.* at 71, 811 N.E.2d at 314.
384. *Id.* at 70, 811 N.E.2d at 314.
385. *Id.* at 72, 811 N.E.2d at 315.
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.* at 73, 811 N.E.2d at 315.
390. *Id.* at 73-74 811 N.E.2d at 316–17.
391. *Id.* at 76, 811 N.E.2d at 318.
392. *Id.*
393. *Id.* at 76-77, 811 N.E.2d at 319.
394. *Id.* at 77, 811 N.E.2d at 319 (quoting Russell v. Dept. of Natural Resources, 183 Ill. 2d 434, 701 N.E.2d 1056 (1998)).
395. *Id.* at 78, 811 N.E.2d at 320–22.
396. *Id.* at 79-81, 811 N.E.2d at 320-22.

instructions to reinstate the deputy.[397]

CONCLUSION

We can continue to expect the courts to allow claimants to be successful in filing charges for hostile work environments after the time limitations set forth in the statutes, if the claimants are able to allege the connection required under *Morgan*, even though they may sit on their rights well beyond the time limits. Time will tell if *Morgan* will in fact discourage potential claimants from undue delay as the courts have predicted.

397. *Id.* at 81, 811 N.E.2d at 322.