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SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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I. INTRODUCTION

This article analyzes cases decided by the Illinois Supreme Court and the Illinois Appellate Courts from November 2005 through October 2006 in both private and public sectors of interest to employers.

The Illinois Supreme Court reversed and remanded *Murray v. Chicago Youth Center*, but at the time this article was written the opinion was being modified and had not been released for publication. The other two cases involve contractual obligations of repayment of medical school scholarships absent working in a designated shortage area and mandatory arbitration policies and the standard to apply when reviewing such policies.

The appellate court cases decided during this same period include the areas of naming the proper party in complaints regarding unemployment insurance contributions and benefits, violations of the Wage Payment and Collection Act, line-of-duty disability pensions, transfer of service credit for retirement purposes, retaliatory discharge, joint employment, trade secrets, non-compete agreements, labor issues, at-will employment, and various employment agreement issues.

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II. ILLINOIS SUPREME COURT DECISIONS

A. Medical School Scholarships

Medical students have an unique opportunity for scholarships and repayment of those scholarships by practicing family medicine in areas with the greatest need for medical care through a program established by the Illinois Department of Public Health ("Department") pursuant to the Family Practice Residency Act ("Act").[1] The Supreme Court provides its opinion on a dispute between the Department and a former medical student who received such scholarships in *People ex rel. v. Wiley*.[2]

Thelma E. Wiley, M.D. ("Wiley") contracted with the Department for scholarships during each of her four years of medical school in 1985 –1989.[3] Her loans totaled $52,465.[4] The contracts contained a provision requiring Wiley "to serve as a full-time primary care physician in direct patient care in only the designated shortage areas in Illinois approved as a practice site(s)" in exchange for her receipt of the scholarships.[5]

Her contractual obligation to serve in a designated shortage area was to begin within thirty (30) days of obtaining her license, unless it was deferred pending completion of her residency, at which time it would begin within thirty (30) days of leaving the residency program.[6] The Act was incorporated into the terms and conditions of the contracts signed by Wiley.[7] The contracts provided that upon failure to fulfill the terms of the contract, the Department was entitled to three times the amount of the scholarships awarded to Wiley, which must be reimbursed to the Department within thirty (30) days of the failure to perform.[8]

After Wiley graduated from medical school, she began a three-year residency in internal medicine at the University of Illinois Medical Center at Chicago ("UIMCC"), and her obligations were deferred until the beginning of August 1992.[9] In January 1990, the Department sent Wiley a directory of

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1 . 110 ILL. COMP. STAT. ANN. 935/1 et seq. (West 2002).
2 . People *ex rel.* v. Wiley, 218 Ill. 2d 207, 843 N.E.2d 259 (2006).
3 . *Id.* at 211, 843 N.E.2d at 262.
4 . *Id.*
5 . *Id.*
6 . *Id.*
7 . *Id*. at 212, 843 N.E.2d at 262.
8 . *Id.*
9 . *Id*. at 212, 843 N.E.2d at 262–63.

designated shortage areas along with a letter advising her she could select and obtain approval up to eighteen (18) months in advance of the completion of her residency.[10] Instead, Wiley wanted to pursue a post-residency fellowship at UIMCC in gastroenterology.[11] On a couple of occasions, she discussed the post-residency with Tom Yocum ("Yocum") who was in charge of the Department scholarship program.[12] Yocum advised her it was not approved, but some agreement could be worked out for her repayment of the service.[13] Wiley understood Yocum to mean that she could work at UIMCC in the primary care field during or after her fellowship.[14] Wiley signed an agreement for the post-residency fellowship in September 1991.[15]

In January 1992, six (6) months prior to Wiley's residency ending, a letter was sent to her from the Department indicating she had not selected a designated shortage area for the post-residency obligation.[16] Wiley was to contact the Department, but did not.[17] Another letter was sent to Wiley in June 1992 advising her she needed to chose an approved practice area or repay monetarily.[18] Wiley did not respond.[19] Wiley began her fellowship at UIMCC on July 1, 1992.[20] In October 1992, another letter was sent to Wiley presuming that she wanted to repay her obligations $157,395 (three times the amount of the scholarships) instead of with her service in an approved designated shortage area.[21] Wiley did not respond.[22] In December 1992, the Department sent Wiley a 36-month repayment agreement.[23] Wiley did not respond.[24] In January 1993, Wiley was notified her account would be referred to a collection agency or the Illinois Attorney General ("Attorney General").[25] On February 13, 1993, the Department sent Wiley another letter requesting a check within the next fifteen (15) days.[26] Wiley did not respond.[27] After

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10 . *Id.* at 212, 843 N.E.2d at 263.
11 . *Id.*
12 . *Id.*
13 . *Id.* at 212–13, 843 N.E.2d at 263.
14 . *Id.*
15 . *Id.*
16 . *Id.*
17 . *Id.*
18 . *Id.*
19 . *Id.* at 214, 843 N.E.2d at 263.
20 . *Id.*
21 . *Id.* at 214, 843 N.E.2d at 264.
22 . *Id.*
23 . *Id.*
24 . *Id.*
25 . *Id.*
26 . *Id.* at 215, 843 N.E.2d at 264.
27 . *Id.*

refusing to deal with the Department's collection agency, the matter was referred to the Comptroller's office for an involuntary wage garnishment, and it was referred to the Attorney General.[28] The Attorney General sent Wiley an agreement to repay the money owed in installments.[29] The agreement provided a full release upon full payment of her obligations.[30] Wiley did not return the agreement or contact the Attorney General.[31]

Wiley was sent a letter advising her of an involuntary wage withholding and her right to protest which she did not file.[32] After the wage withholding began, Wiley signed the prior installment agreement and returned it along with the first installment.[33] The withholding continued because the payments were already in arrears.[34] After her fellowship, Wiley worked full-time at UIMCC and part-time at Veteran's Administration West Side Medical Center.[35] The Department filed a complaint against Wiley on August 17, 1995 alleging breach of the scholarship contracts.[36] The court granted the Department's Motion for Summary Judgment in the amount of $157,395.[37] The appellate court affirmed.[38]

The Supreme Court first analyzed Wiley's argument that the installment agreement was a settlement of any and all claims against her under the doctrine of compromise.[39] The Supreme Court rejected this argument concluding that the installment agreement was (a) expressly contemplated by the scholarship contract, (b) was a reaffirmation of her existing obligation and (c) was not a settlement of any and all claims against Wiley.[40] Wiley next argued that a statement in the Department's complaint was a binding admission.[41] The Supreme Court disagreed on the basis that parties are not bound by admissions regarding conclusions of law because it is for the court, not the parties, to determine.[42]

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28 . *Id.*
29 . *Id.* at 216, 843 N.E.2d at 265.
30 . *Id.*
31 . *Id.*
32 . *Id.*
33 . *Id.*
34 . *Id.* at 217, 843 N.E.2d at 265.
35 . *Id.* at 217, 843 N.E.2d at 266.
36 . *Id.* at 219, 843 N.E.2d at 266.
37 . *Id.*
38 . *Id.* at 219–20, 843 N.E.2d at 266–67.
39 . *Id.* at 221, 843 N.E.2d at 267.
40 . *Id.* at 221–22, 843 N.E.2d at 267–68.
41 . *Id.* at 222–23, 843 N.E.2d at 268.
42 . *Id*. at 223, 843 N.E.2d at 268–69.

Wiley next argued whether she breached the scholarship agreement is a material question of fact not subject to summary judgment.[43] The Supreme Court agreed that Wiley breached her scholarship contracts by not working as a full-time primary care physician in a designated shortage area within thirty (30) days of completion of her residency.[44] The Supreme Court also accepted Wiley's argument that the defense of *de minimus non curat lex* was available to her because the ordinary principles of contract applied.[45] However, the Supreme Court rejected this because the failure to fulfill her practice obligations were material breaches of the scholarship contracts.[46] The Supreme Court also rejected Wiley's argument that treble damages were improper under Illinois common law because treble damages were required under Section 10 of the Act.[47] The Supreme Court refused to follow *Department of Public Health v. Jackson*[48] and rejected Wiley's argument that she substantially performed her scholarship contracts by performing in a medically under served area.[49] The Act defines a designated shortage area as an area designated by the Department, which did not include UIMCC or the Veteran's Administration West Side Medical Center at which Wiley worked.[50]

The question of whether Wiley was working as a full-time primary care physician was not answered because not working in a designated shortage area was enough to find a breach of Section 10 of the Act warranting treble damages.[51] The appellate court decision was affirmed.

B. Local Governmental and Governmental Employees Tort Immunity

A decision out of the First District, *Murray v. Chicago Youth Center*,[52] was reviewed in the Summer 2005 issue of the *SIU Law Journal*. It was taken up on appeal to the Supreme Court and decided on July 5, 2006. The Supreme Court decision was modified on February 16, 2007. The case was reversed and remanded on February 16, 2007. The opinion has not been released for publication and was subject to modification at the time this article was written. It will be reviewed in the next survey.

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43 . *Id.* at 223–24, 843 N.E.2d at 269.
44 . *Id.* at 224, 843 N.E.2d at 269.
45 . *Id.* at 224–25, 843 N.E.2d at 269.
46 . *Id.* at 226–27, 843 N.E.2d at 270–71.
47 . *Id.* at 227–28, 843 N.E.2d at 271–72, 110 ILL. COMP. STAT. ANN. 935/10 (West 2002).
48 . Ill. Dep't of Health v. Jackson, 321 Ill. App. 3d 228, 747 N.E.2d 474 (4th Dist. 2001).
49 . *Wiley*, 218 Ill. 2d at 228–29, 843 N.E.2d at 272.
50 . *Id.* at 230–31, 843 N.E.2d at 272–73.
51 . *Id*. at 231, 843 N.E.2d at 273.
52 . Murray v. Chicago Youth Ctr. 352 Ill. App. 3d 95, 815 N.E.2d 746 (1st Dist. 2004).

C. Retaliatory Discharge "Enforcement of Arbitration Agreements"

The Illinois Supreme Court reversed and remanded the lower court's decision in *Melena v. Anheuser-Busch, Inc*.[53] The plaintiff, Joann Melena ("Melena"), began working for Anheuser-Busch in February 1999. In early 2000, Anheuser-Busch introduced a new arbitration policy, purporting to establish, as an agreed condition of employment, a requirement that employees submit all covered claims to its dispute resolution program. The policy claimed to comply with the Federal Arbitration Act ("FAA").[54] Anheuser-Busch employees, including Melena, received notice of this program in February 2000. In April 2001, Anheuser-Busch distributed a handbook to its employees including a description of the dispute resolution program and an acknowledgement and understanding page, which Melena signed and returned it to her employer.[55]

In September 2002, Melena was injured on the job. She filed a workers' compensation claim with the Illinois Industrial Commission. Melena began receiving temporary total disability ("TTD") benefits before Anheuser-Busch terminated her in March 2003. Plaintiff filed a complaint in the circuit court alleging her discharge was in retaliation of her exercise of rights provided under the Illinois Workers' Compensation Act ("the Act").[56]

Anheuser-Busch filed a motion to dismiss and moved to compel arbitration or, alternatively, stay the proceedings and compel arbitration. The circuit court denied the motion. The appellate court affirmed, finding the arbitration agreement would not be enforceable unless Melena entered into it knowingly and voluntarily. The appellate court found that no remand was necessary because "even if the plaintiff entered into the agreement knowingly, she did not do so voluntarily."[57]

The supreme court took the case on appeal to determine whether the mandatory arbitration provisions of the Anheuser-Busch dispute resolution program constituted an enforceable contract binding on Melena. Anheuser-Busch argued the appellate court erred in holding that the agreement was not enforceable unless it was entered into knowingly and voluntarily. Anheuser-Busch claimed the court should have applied the fundamental principles of

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53 . Melena v. Anheuser-Busch, Inc., 219 Ill. 2d 135, 847 N.E.2d 99 (2006).

54 . 9 U.S.C. § 1 et seq. (2000)

55 . *Melena*, 219 Ill. 2d at 138–39, 847 N.E.2d at 101–02.

56 . 820 ILL. COMP. STAT. ANN. 305/1 et seq. (West 2002).

57 . *Melena*, 219 Ill. 2d at 140, 847 N.E.2d at 102 (quoting *Melena v. Anheuser-Busch, Inc*., 352 Ill. App. 3d 699, 707, 816 N.E.2d 826, 833 (5th Dist. 2004)).

contract law in determining the enforceablility of the agreement.[58]

The court determined the standard of review of the section 2–619[59] motion to dismiss was *de novo*.[60] The court began its discussion by noting there was no disagreement between the parties that the FAA applied. Rather, the parties disagreed on whether the choice of litigating a claim for retaliatory discharge, based on statutory rights under the Act, could be relinquished through a "knowing and voluntary waiver."[61]

The appellate court likened the facts at issue in *Melena* to one where a retaliatory discharge claim was brought under Title VII of the Civil Rights Act of 1964 ("Title VII").[62] In 1974, the U.S. Supreme Court explained that an employee could not forfeit substantive rights under Title VII without a voluntary and knowing waiver. That is, the employee must understand and freely make the decision to give up the substantive right.[63]

The *Melena* Court observed the modern trend in courts treat arbitration agreements ever more favorably. Additionally, the U.S. Supreme Court has observed, at various times, that federal statutory claims may indeed be subject to arbitration agreements. One way to view arbitration agreements is as a forum choice, rather than a forfeiture of any federal statutory right. That is, the federal statutory rights are not waived. Rather, the parties have just agreed to address those rights in a different forum.[64]

The U.S. Supreme Court has further noted the statutory rights may be subject to mandatory arbitration if the arbitral forum permits the effective vindication of those rights.[65] However, to be valid, the agreement to arbitrate statutory claims must be "clear and unmistakable."[66]

The question in the instant case is what standard should the court use to determine the clarity of the Anheuser-Busch arbitration agreement. The U.S. Supreme Court had not decided this particular issue and the federal circuit courts are split. In the instant case, the appellate court noted the split and found persuasive the reasoning of a Ninth Circuit Court of Appeals case in

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58 . *Id.* at 140–41, 847 N.E.2d at 102–03.
59 . 735 ILL. COM. STAT. ANN. 5/2–619 (West 2000).
60 . *Melena*, 219 Ill. 2d at 141, 847 N.E.2d at 103.
61 . *Id.* at 142, 847 N.E.2d at 103–04.
62 . 42 U.S.C. § 2000 et seq. (2006).
63 . *Melena*, 219 Ill. 2d at 143, 847 N.E.2d at 104 (citing Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Pierce v. Atchison, Topeka & Santa Fe Ry. Co., 65 F.3d 562, 571 (7th Cir. 1995)).
64 . *Id.* at 143–44, 847 N.E.2d at 104–05.
65 . *Id.* at 144, 847 N.E.2d at 104–05 (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).
66 . *Id.* at 144, 847 N.E.2d at 105.

Prudential Ins. Co. of America v. Lai.[67]

In *Lai*, the Ninth Circuit reversed the district court's order compelling arbitration on a sexual discrimination claim where the employees had signed various forms at the start of their employment, one of which contained an agreement to arbitrate any disputes. The *Lai* Court noted that employees may agree to arbitrate statutory employment claims, but the question before it was whether the arbitration agreement at issue was binding. The agreement could not be binding unless the employees *knowingly* entered into it.[68]

The appellate court in *Melena* acknowledged federal courts do not universally accept the *Lai* approach. Several circuit courts, such as the Third, Fifth, Eighth, and Eleventh Circuit Courts of Appeal, reject the knowing and voluntary standard in determining whether the mandatory arbitration agreement is enforceable. Instead, these courts apply the fundamental principles of contract law to make this determination–including the usual maxim of contract law that a party to an agreement is charged with the knowledge of and assent to the agreement signed.[69]

In *Seus v. Nuveen & Co.*, the Third Circuit Court of Appeals found the employee at issue in its case signed a form whereby agreeing to arbitrate employment disputes. The court found that absent a showing of fraud, duress, mistake, or some other recognizable argument under contract law, the agreement should have been found enforceable.[70]

The *Melena* Court found *Seus* persuasive. It also notes the Seventh Circuit Court of Appeal's skepticism of the knowing and voluntary standard.[71] The Court found the FAA's plain language supports a finding that arbitration agreements are enforceable except for state-law ground for ordinary contract revocation.[72]

After determining the rules of contract should apply to govern an analysis of the Anheuser-Busch arbitration agreement, the *Melena* Court conducted its own analysis of the applicable Illinois law to the agreement. In Illinois, as in most states, an offer, an acceptance, and consideration are the basic ingredients of a contract. In the case at bar, Anheuser-Busch's mailing of the agreement and information on its Dispute Resolution Program constitutes an offer. By continuing Melena's employment with Anheuser-Busch, she accepted the offer

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67 . Prudential Ins. Co. of America v. Lai, 42 F.3d 1299 (9th Cir. 1994).

68 . *Melena*, 219 Ill. 2d at 146–47, 847 N.E.2d at 105–06 (citing Lai, 42 F.3d at 1303).

69 . *Id*. at 147–48, 150, 847 N.E.2d at 106–08 (citing Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998)).

70 . *Id*. at 148, 847 N.E.2d at 107 (citing *Seus*, 146 F.3d at 183–84).

71 . *See* Penn v. Ryan's Family Steak Houses, Inc., 269 F.2d 753, 758 (7th Cir. 2001).

72 . *Melena*, 219 Ill. 2d at 149–50, 847 N.E.2d at 107–08 (citing 9 U.S.C. § 2) (1994).

and provided the necessary consideration. The Court agreed with Anheuser-Busch's argument that continued employment is "sufficient consideration for the enforcement of employment agreements."[73] Plaintiff continued working for Anheuser-Busch for three (3) years after her employer introduced the initial program and for nearly additional two (2) years after she signed the arbitration agreement acknowledgment form. These facts, the Court found, supported a finding that the agreement is an enforceable contract.

The Court found unpersuasive the argument that Anheuser-Busch offered the agreement on a "take it or leave it" basis.[74] Even if there are inequities in bargaining power between employer and employee, that, alone, will not invalidate an otherwise enforceable agreement.[75]

Lastly, Melena argued that the arbitration of her grievance contravenes public policy, as it represents a retaliatory discharge based on the Act. Plaintiff relied on *Ryherd v. General Cable Co*. for the proposition that "the right to recovery for retaliatory discharge is derived from Illinois public policy and 'cannot be negotiated or bargained away.'"[76] The *Ryherd* Court did not interpret this statement to mean a party could not agree to submit such a claim to arbitration. Further, the underlying facts in *Ryherd* did not involve the issue of the enforceability of an agreement to arbitrate a statutory claim. Additionally, there is nothing in the Act suggesting a party may not waive a judicial forum of a retaliatory discharge claim.[77]

The Court concluded in finding that the arbitration of Melena's retaliatory discharge claims did not go against the public policy interests underlying the Act and did not contravene public policy. Further, the arbitration agreement at issue did not at all limit the remedies available to Melena in an arbitration. Additionally, with the exception of a $125 fee, the employer would bear all arbitration costs.[78]

Supreme Court Justice Kilbride wrote a dissent. His dissent did not advocate for the implementation of the knowing and voluntary standard. Rather, he attacked the majority's interpretation and application of Illinois contract law and public policy law to the facts of the case and the specific language of the Anheuser-Busch arbitration agreement.[79]

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73 . *Id.* at 152, 847 N.E.2d at 109.

74 . *Id*. at 152–53, 847 N.E.2d at 109.

75 . *Id*. at 153, 847 N.E.2d 109–10 (citing, among other cases, Streams Sports Club, Ltd. v. Richmond, 99 Ill. 2d 182, 191, 457 N.E.2d 1226, 1232 (1983)).

76 . Reyherd v. General Cable Co., 124 Ill. 2d 418, 426, 530 N.E.2d 431, 435 (1988).

77 . *Melena*, 219 Ill. 2d at 154–55, 847 N.E.2d at 110–11.

78 . *Id*. at 155–56, 847 N.E.2d at 110–11.

79 . *Id*. at 157–166, 847 N.E.2d. at 112–17.

D. Tort Immunity

The provisions of the Domestic Violence Act[80] and the Governmental Employees Tort Immunity Act (Tort Immunity Act)[81] were in conflict with respect to a police officer's duties in responding to an emergency call. While the Tort Immunity Act provides absolute immunity from liability arising out of the operation of government, the Domestic Violence Act creates a duty to use all reasonable means to prevent abuse or harassment against a "protected person" and only provides immunity if there is no willful or wanton misconduct by the officers.[82] It is against this backdrop that the Illinois Supreme Court decided *Moore v. Green*.[83]

The Court held that the Domestic Violence Act requires municipalities to enforce the Act and only provides limited immunity from tort claims associated with a breach of its duty.[84] In order to be liable under the Domestic Violence Act, the Court first ruled that a duty must exist. If a duty exists, then the court must determine whether the limited immunity applies.[85]

In *Moore*, Ronyale White obtained an order of protection against her husband, Louis Drexel. On May 3, 2002, White called 911 and informed them that Drexel was violating the order of protection. The dispatcher sent an officer to the scene. Witnesses state that the officers arrived, sat in the driveway for five minutes, and then left without assisting her. Drexel then shot and killed White. Moore, an independent executor of White's estate filed a complaint based on the Wrongful Death Act and Survival Act.[86]

Neither party disputed that a duty to protect White existed stemming from the Domestic Violence Act.[87] The issue was whether the absolute immunity provisions of the Tort Immunity Act or the limited liability provisions of the Domestic Violence Act applied. The court, in interpreting the statutes stated that when two statutes are in conflict, the intent of the legislature must be obtained. Usually the more recent and specific provision controls because that is a strong indication of the more recent legislative intent.[88] After briefly recounting the history and legislative purposes of the

80 . 750 ILL. COMP. STAT. ANN. 60/305 (West 2004).
81 . 745 ILL. COMP. STAT. ANN. 10/4–102, 4–107 (West 2004).
82 . Moore v. Green, 219 Ill. 2d 470, 478–90, 848 N.E.2d 1015, 1020 (2006).
83 . 219 Ill. 2d 470, 848 N.E.2d 1015 (2006).
84 . *Id.* at 490, 848 N.E.2d at 1027.
85 . *Id.* at 478, 848 N.E.2d at 1020.
86 . *Id.* at 474, 848 N.E.2d at 1018.
87 . *Id.* at 477, 848 N.E.2d at 1020.
88 . *Id.* at 480, 848 N.E.2d at 1021.

Domestic Violence Act, the court held that the ultimate purpose was to help victims of domestic violence to avoid further abuse and to expand the criminal and civil remedies for victims.[89] Thus, the court held, the Act "reflects a comprehensive statutory scheme for reform of the legal system's historically inadequate response to domestic violence" and that municipal employees are liable if their conduct constitutes willful and wanton act or omission.[90]

The defendant argued the Tort Immunity Act applies to local public entities and public employees and the Domestic Violence Act applies to law enforcement officers. Following this reasoning, municipal law enforcement officers have immunity under the Tort Immunity Act, while those who fall outside their provisions, like State Police, are protected under the Domestic Violence Act.[91] The court dismissed this contention holding that this interpretation would result in the Domestic Violence Act being simply advisory–telling municipal law enforcement officers what to do without providing enforcement mechanisms.[92]

Finally, the court held that because the Domestic Violence Act was crafted long after the Tort Immunity Act, it determined that the legislature's intent is squarely inconsistent with absolute immunity for municipalities under the Tort Immunity Act. Further, the Domestic Violence Act would not reduce city coffers as the municipality suggested, but was crafted to recognize domestic violence as a serious crime and require the legal system to effectively deal with it.[93] Thus, if there is a duty under the Domestic Violence Act and an officer fails to act, then only the limited immunity provisions of that Act apply and not the absolute immunity provisions of the Tort Immunity Act.[94]

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89 . *Id.* at 483, 848 N.E.2d at 1023 (citing Calloway v. Kinkelaar, 168 Ill. 2d 312, 320, 659 N.E.2d 1322, 1326 (1995)).
90 . *Id.* at 489, 848 N.E.2d at 1026.
91 . *Id.* at 487, 848 N.E.2d at 1025.
92 . *Id.* at 488, 848 N.E.2d at 1026.
93 . *Id.* at 490, 848 N.E.2d at 1027.
94 . *Id.*

III. ILLINOIS APPELLATE COURT DECISIONS

A. Compensation and Benefits

1. Unemployment

Failure to name the proper parties will result in a dismissal of a complaint. An analysis of Sections 3–103 and 3–107(a) of the Administrative Review Law ("Review Law")[95] was the focus of a couple of cases out of the First District.

In *Catamount Cargo Services, LLC v. Illinois Department of Employment Security*,[96] the plaintiff filed a complaint for administrative review of a decision resulting in an assessment of unemployment insurance contributions of $24,384.75 plus interest and penalties.[97] Plaintiff's complaint only named the Illinois Department of Employment Security ("Department"), but not the Director of Employment Security ("Director").[98] Defendant filed a Motion to Dismiss for lack of subject matter jurisdiction arguing the Director, not the Department, was the administrative agency to be named in the complaint as set forth in Section 3–107 of the Review Law.[99] The trial court disagreed with plaintiff's position that Sections 3–103 and 3–107(a) permitted it to amend its complaint to add the Director and dismissed plaintiff's complaint.[100] The appellate court reviewed the trial court's dismissal *de novo*.

Section 3–107(a) provides in part:

> "'No action for admininstrative review shall be dismissed for lack of jurisdiction based upon the failure to name an employee, agent, or member, who acted in his official capacity, of an administrative agency, board committee, or government entity, has been named as a defendant as provided in this section.'"[101]

The appellate court rejected the plaintiff's argument based on the language

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95 . 735 ILL. COMP. STAT. ANN. 5/3–103 and 5/3–107(a) (West 2004).
96 . Catamount Cargo Serv., LLC v. Ill. Dep't of Employment Sec., 366 Ill. App. 3d 1039, 853 N.E.2d 85 (1st Dist. 2006).
97 . *Id.* at 1040, 853 N.E.2d at 86.
98 . *Id.*
99 . *Id.*; 735 ILL. COMP. STAT. ANN. 5/3–107(West 2004).
100 . *Catamount*, 366 Ill. App. 3d at 1040, 853 N.E.2d at 86–87.
101 . 735 ILL. COMP. STAT. ANN. 5/3–107(a) (West 2004).

in Section 3–107(a) of the Review Law, that the Department is the administrative agency, plaintiff named the administrative agency and plaintiff is, therefore, not prohibited from amending the complaint to add an employee, the Director, of that administrative agency.[102] Relying on Section 3–101 defining administrative agency, the appellate court concluded that a person or a department could be an administrative agency.[103] The appellate court further relied on *E & E Truck Line, Inc. v. Dept. of Employment Security*[104] and made a distinction between the Department being an administrative agency and the Director being the administrative agency.[105] The appellate court affirmed the dismissal of the complaint and held the Director is the administrative agency to be named in a complaint for administrative review of the Director's decision.[106]

In *McGaw Medical Center of Northwestern University v. The Department of Employment Security*,[107] the plaintiff failed to name the Illinois Department of Employment Security Board ("Board") in its complaint to review the award of unemployment benefits to Laura Lucero.[108] Section 3–107 of the Administrative Review Law ("Review Law"),[109] provides that a complaint must name "the administrative agency and all persons, other than plaintiff, who were parties of record to the proceedings before the administrative agency."[110] McGaw failed to name the Board.[111] McGaw attempted to use Section 2–616(d) of the Code of Civil Procedure[112] to argue various points that it should be able to amend its complaint to add the Board thereby avoiding a dismissal.[113] McGaw argued both the 2002 amendment to the statute and the language of the first sentence in Section 2–616(d) which did not change with the 2002 amendment.[114] The court rejected both of these arguments because the amendment did not affect the applicability of Section 2–616(d) nor was any authority cited to overrule cases holding. Section 2–616(d) does not apply

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102 . *Catamount*, 366 Ill. App. 3d at 1041, 853 N.E.2d at 87.
103 . *Id.* at 1042, 853 N.E.2d at 88.
104 . E & E Truck Line, Inc. v. Ill. Dep't of Employment Sec., 262 Ill. App. 3d 547, 634 N.E.2d 1191 (4th Dist. 1994)
105 . *Catamount*, 366 Ill. App. 3d at 1042–44, 853 N.E.2d at 88–89.
106 . *Id.* at 1044, 853 N.E.2d at 89.
107 . McGaw Med. Ctr. of Nw. Univ. v. Dep't of Employment Sec., 369 Ill. App. 3d 37, 860 N.E.2d 471 (1st Dist. 2006).
108 . *Id.* at 39, 860 N.E.2d at 473.
109 . 735 ILL. COMP. STAT. ANN. 5/3–107 (West 2004).
110 . *McGaw*, 369 Ill. App. 3d at 40, 860 N.E.2d at 474.
111 . *Id.* at 39, 860 N.E.2d at 474.
112 . 735 ILL. COMP. STAT. ANN. 5–2–616(d) (West 2000).
113 . *McGaw*, 369 Ill. App. 3d at 41–44, 860 N.E.2d at 475–77.
114 . *Id.* at 41–42, 860 N.E.2d at 475–76.

to actions brought under the Review Law.[115] The court further rejected the applicability of Section 2–616(d) based on the statute granting it jurisdiction to review such decisions.[116] Section 1100 of the Unemployment Insurance Act[117] provides the decisions of the Board are only reviewable in accordance with the Review Law.[118]

McGaw next relies on *Smida v. Illinois Municipal Retirement Fund*[119] for the proposition that it should be allowed to amend its complaint to add the Board under the provisions of Section 3–103 of the Review Law because the Board is a member of the governmental entity, the Illinois Department of Employment Security.[120] The appellate court disagreed with the *Smida* court's interpretation of the word "member" used in Section 3–103(2)[121] due to the exceptions provided in Section 3–107(a)[122] and the support of the prior decision in *Veazey v. Baker*.[123] The appellate court affirmed the dismissal of McGaw's complaint.

In *Nykaza v. Department of Employment Security*, the plaintiff filed for unemployment benefits "claiming that increased transportation distances and their associated costs caused him to quit his job."[124] Nykaza worked for Asplundh as a tree trimmer and left the job to start his own business.[125] The claims adjustor found that under section 601(A) of the Unemployment Insurance Act,[126] plaintiff's leaving did not constitute good cause.[127] Upon appeal to the Illinois Department of Employment Security, plaintiff attempted to raise a new argument. Namely, plaintiff argued that he was entitled to benefits under section 601(B)(2) of the act, which "provides that section 601(A) does not apply to someone who leaves work voluntarily to accept other *bona fide* work."[128]

After the referee affirmed the claims adjustor's decision, the plaintiff

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115 . *Id.* at 41–42, 860 N.E.2d at 475–76.
116 . *Id*. at 42–43, 860 N.E.2d at 476.
117 . 820 ILL. COMP. STAT. ANN. 405/1100 (West 2004).
118 . *McGaw*, 369 Ill. App. 3d at 42, 860 N.E.2d at 476.
119 . Smida v. Ill. Mun. Ret. Fund, 353 Ill. App. 3d 551, 820 N.E.2d 475 (2d Dist. 2004).
120 . *McGaw*, 369 Ill. App. 3d at 43–44, 860 N.E.2d at 477.
121 . 735 ILL. COMP. STAT. ANN. 5/3–103(2) (West 2004).
122 . 735 ILL. COMP. STAT. ANN. 5/3–107(a) (West 2004).
123 . *McGaw*, 369 Ill. App. 3d at 45, 860 N.E.2d at 477–78; Veazey v. Baker, 322 Ill. App. 3d 599, 749 N.E.2d 1060 (1st Dist. 2001).
124 . Nykaza v. Dep't of Employment Sec., 364 Ill. App. 3d 624, 625, 846 N.E.2d 1000, 1001 (3d Dist. 2006).
125 . *Id*. at 625, 846 N.E.2d at 1001.
126 . 820 ILL. COMP. STAT. 405/601(A) (West 2004).
127 . Nykaza, 364 Ill. App. 3d at 625–26, 846 N.E.2d at 1001.
128 . *Id.* at 625, 846 N.E.2d at 1000–01.

mailed two separate letters to the Board stating that he was entitled to benefits under section 601(B)(2) before the Board's cutoff date for arguments regarding his unemployment benefits. The Board denied plaintiff's appeal, and plaintiff filed a complaint for administrative review with the circuit court, which the court denied.[129]

The third district reversed the circuit court and held that plaintiff was entitled to have his argument heard regarding a section 601(B)(2) claim.[130] The question was whether plaintiff appropriately raised this argument at the administrative agency when his first request to present the argument was at the first appeal level. This was the appeal of the referee's decision to the Board.[131] Citing *Conant v. Office of Personnel Management*, a federal circuit case, the court held that for an issue to be raised before the administrative agency, it must be raised with "sufficient specificity and clarity that the tribunal is aware that it must decide the issue."[132]

In this case, the third district held that although plaintiff did not raise the issue at the hearing with the referee, he did send two letters to the Board long before the Board's argument submission cutoff date.[133] Thus, this was sufficient notice to the Board that the plaintiff intended to raise his section 610(B)(2) argument. The circuit court was reversed, and the case was remanded to consider plaintiff's section 601(B)(2) argument.[134]

In *Manning v. Department of Employment Security*,[135] the plaintiff left a profanity-laced voice mail message on a co-worker's home answering machine.[136] The plaintiff was unable to drive because she had lost her driver's license. She relied on this co-worker to drive her to work. When the co-worker left work to pick up her child, the plaintiff called her answering machine and left this profanity-laced message.[137] Although the plaintiff admitted she left this message, she claimed that the co-worker had also called her several times calling her "every name" in the book.[138] The employer fired Manning for misconduct, but Manning contended that the voice mail message did not harm the employer or other employees and she did not receive prior

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129 . *Id.* at 626–27, 846 N.E.2d at 1001–02.
130 . *Id.* at 628, 846 N.E.2d at 1003.
131 . *Id.* at 627, 846 N.E.2d at 1002.
132 . *Id.* at 1002 (quoting Conant v. Office of Pers. Mgmt., 255 F.3d 1371, 1375 (Fed. Cir. 2001)).
133 . *Id.* at 628, 846 N.E.2d at 1003.
134 . *Id.*
135 . Manning v. Dep't of Employment Sec., 365 Ill. App. 3d 553, 850 N.E.2d 244 (1st Dist. 2006).
136 . *Id.* at 554–55, 850 N.E.2d at 246.
137 . *Id.*
138 . *Id.* at 555, 850 N.E.2d at 247.

warnings.[139]

The court, in upholding the Board's decision based on a clearly erroneous standard of review, held that the plaintiff was properly discharged for misconduct because "she violate[d] a standard of behavior [the] employer ha[d] a right to expect."[140] In arriving at this conclusion, the court noted that individuals who are discharged for misconduct are ineligible to receive unemployment benefits. The employer has the burden of proving misconduct. The following three elements constitute misconduct: (1) "there was a 'deliberate and willful violation' of a rule or policy;" (2) the rule or policy was reasonable; (3) and "the violation has harmed the employer or was repeated by the employee."[141] The harm, however, must be viewed in the context of potential harm to the employer and not actual harm. In addition, the employer is not required to prove the existence of a rule or policy if there is a commonsense realization that certain conduct substantially disregards and employer's interests.[142]

In examining the facts of the case, the court noted that while the voice mail message did not directly harm the employer, it was potentially harmful to its interests because the message could create a hostile work environment. Also, several profane comments in the message directly related to coworkers and the work environment. Moreover, commonsense implies that the use of hostile language substantially disregards an employer's interests. Therefore, the Board was not clearly erroneous in discharging the plaintiff, and the Board's decision in denying unemployment benefits was upheld.[143]

2. Wage Payment and Collection Act

As a matter of first impression, the court in *Kim v. Citigroup, Inc.*,[144] examined whether an employee's voluntary forfeiture of earned compensation to purchase restricted stock was a violation of the Illinois Wage Payment and Collection Act ("Act"). In a class action with other former employees, Plaintiff, Alon Kim ("Kim") represented those who participated in various capital accumulation plans ("CAP").[145] As participants in the CAP plans, the employees elected to accept a portion of their wages in the form of restricted

139 . *Id.* at 556, 850 N.E.2d at 247.
140 . *Id.* at 558–59, 850 N.E.2d at 249.
141 . *Id.* at 557, 850 N.E.2d at 248.
142 . *Id.*
143 . *Id.* at 558, 850 N.E.2d at 249.
144 . Kim v. Citigroup, Inc., 368 Ill. App. 3d 298, 856 N.E.2d 639 (1st Dist. 2006)
145 . *Id.* at 299, 856 N.E.2d at 641.

stock ("CAP stock").[146] The stock was subject to a two-year forfeiture period.[147] At the time of the employees' termination, $722,088.87 of compensation paid by restricted stock had an appreciated market value of $1,628,916.02.[148] As part of Kim's voluntary participation in the CAP plan, he signed an irrevocable document providing for a percentage of his earned compensation to be in the form of CAP stock and for the forfeiture of any CAP stock, prior to the lapse of the restrictions thereon, if he voluntarily left his employment or if he was terminated for cause.[149] Kim voluntarily quit.[150] Citigroup kept all of Kim's unvested shares of CAP stock.[151] The trial court held that under the Act the restricted stock was earned compensation and could not be forfeited, but the value of the earned compensation was limited to the amount representing his earned compensation not the appreciated market value on the date of his termination.[152] Citigroup appealed.[153]

Sections 2, 5 and 9 of the Act[154] provides the basis for the appellate court's review. Section 2 of the Act[155] provides wages shall be defined as any compensation owed to an employee pursuant to an employment contract or agreement.[156] The appellate court agreed with the trial court's finding that the restricted stock was part of Kim's compensation governed by the Act.[157] As provided in Section 9 of the Act[158] there are exceptions to the employer's ability to make deductions from an employee's final compensation as provided in Section 5 of the Act.[159] Those exceptions allow employers to make deductions from an employee's final compensation if the deductions are: (a) required by law, (b) made for the benefit of the employee, (c) in response to a valid wage assignment or wage deduction order, or (d) made with the express written consent of the employee at the time the deduction is made.[160]

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146 . *Id.*
147 . *Id.*
148 . *Id.* at 300, 856 N.E.2d at 641.
149 . *Id.* at 300, 856 N.E.2d at 641–42.
150 . *Id.* at 300, 856 N.E.2d at 642.
151 . *Id.* at 300–01, 856 N.E.2d at 642.
152 . *Id.* at 301–02, 856 N.E.2d at 642–43.
153 . *Id.* at 304, 856 N.E.2d at 645.
154 . 820 ILL. COMP. STAT. ANN. 115/2, 5, 9 (West 2004).
155 . 820 ILL. COMP. STAT. ANN. 115/2 (West 2004).
156 . *Kim*, 368 Ill. App. 3d at 305, 856 N.E.2d at 645.
157 . *Id.* at 306, 856 N.E.2d at 646.
158 . 820 ILL. COMP. STAT. ANN. 115/9 (West 2004).
159 . *Id.*
160 . *Kim* , 368 Ill. App. 3d at 306, 856 N.E.2d at 646; 820 ILL. COMP. STAT. ANN. 115/9 (West 2004).

The appellate court maintained that the deductions were made pursuant to a valid wage deduction order with plaintiff's express written consent.[161] However, the court found Kim benefitted from the CAP stock because he had voting rights and received tax benefits.[162] It would be expected that the Illinois Department of Labor would interpret a wage deduction order differently and raise the question of the timing of the written consent by Kim.

The court next addressed whether granting the plaintiff's motion for summary judgment that the forfeiture provision violated public policy was proper.[163] After the court's review of *Golden Bear Family Restaurants v. Murray*[164] and various out-of-state cases,[165] it held Kim's voluntary forfeiture of earned compensation did not violate public policy.[166]

3. Pensions

a. Line-of-Duty (Firefighter)

In *Bowlin v. Murphysboro Firefighters Pension Board of Trustees*,[167] the court reviewed an application filed by Mr. Bowlin for duty disability pension benefits. Bowlin injured his back on two occasions while working for the Murphysboro Fire Department.[168] These injuries are undisputed as work-related injuries.[169] Bowlin also suffered from congenital spondylolisthesis at the 05–S1 level of his lumbar spine.[170] Bowlin's doctor, Dr. Kitchens, placed a permanent work restriction on Bowlin to occasionally lift 20–50 pounds and to occasionally bend, twist and climb.[171] Two other doctors, Dr. Furry and a psychiatrist, gave the opinion that Bowlin had permanent restrictions.[172]

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161 . *Kim*, 368 Ill. App. 3d at 306, 856 N.E.2d at 646.
162 . *Id.*
163 . *Id.* at 307, 856 N.E.2d at 647.
164 . Golden Bear Family Rests. v. Murray, 144 Ill. App. 3d 459, 494 N.E.2d 581 (5th Dist. 1986).
165 . Milhollin v. Salomon Smith Barney, Inc., 272 Ga. App. 267, 612 S.E.2d 72 (2005), Schachter v. Citigroup, Inc., 126 Cal. App. 4th, 726, 23 Cal. Rptr. 3d 920 (2005), McCarthy v. Citigroup Global Markets, Inc., 2005 WL 3447958 (December 15, 2005), Schunkewitz v. Prudential Sec., Inc. 99 Fed. Appx. 353 (3d Cir. 2004) (unpublished opinion), Welland v. Citigroup, Inc., 116 Fed.Appx. 321 (2d Cir. 2004) (unpublished opinion) and Marsh v. Prudential Sec., Inc., 1 N.Y.3d 146, 802 N.E.2d 610 (2003).
166 . *Kim*, 368 Ill. App. 3d at 309, 856 N.E.2d at 648–49.
167 . Bowlin v. Murphysboro Firefighters Pension Bd. of Tr., 368 Ill. App. 3d 205, 857 N.E.2d 777 (5th Dist. 2006).
168 . *Id.* at 206, 857 N.E.2d 778.
169 . *Id.*
170 . *Id.*
171 . *Id.* at 207, 857 N.E.2d 779.
172 . *Id.*

Bowlin applied for line of duty disability pension benefits based on the two injuries.[173]

The Pension Code[174] ("Code") provides that the board of trustees may choose three physicians to examine Bowlin.[175] The Board of Trustees ("Board") chose Dr. Robert Martin, Dr. David Fletcher and Dr. Sherwyn Wayne.[176]

Dr. Martin and Dr. Fletcher both found Bowlin to be disabled as a result of a line of duty act.[177] However, Dr. Fletcher also found he was able to perform modified duties or serve as a fire investigator. Dr. Wayne reported Bowlin had a preexisting condition, spondylolisthesis, that he was not a candidate for surgery, and made a statement that his return related entirely on Bowlin's level of comfort and motivation.[178] A hearing was held before the Board on the duty disability.[179]

Bowlin's medical records and a videotape of a white rafting trip were admitted into evidence.[180] Bowlin's testimony at the hearing was that his restrictions at the time, at the white rafting trip, were that he was prohibited from lifting, pulling, pushing or tugging more than 50 pounds and he did not exceed those restrictions.[181] There was another witness who also testified for Bowlin with regard to the white water rafting trip.[182]

The Board denied Bowlin's application for duty disability pension benefits based on the fact that two of the three physicians reported that Bowlin was not disabled from service to the fire department.[183] Both Dr. Wayne and Dr. Fletcher's reports indicate that Bowlin could do some jobs for the fire department.[184] The Board also believed that Bowlin and the other witness misrepresented the physical exertion of Bowlin after review the videotape of the white water rafting trip.[185] The Board found that Bowlin was not permanently disabled from working at the fire department, which is a requirement under the Code for the duty disability pension under section

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173 . *Id.*
174 . 40 ILL. COMP. STAT. ANN. 5/4–112 (West 2000).
175 . *Bowlin*, 368 Ill. App. 3d at 207, 857 N.E.2d at 779.
176 . *Id.* at 207–08, 857 N.E.2d at 779.
177 . *Id.* at 207, 857 N.E.2d at 779.
178 . *Id.* at 208, 857 N.E.2d at 779.
179 . *Id.*
180 . *Id.* at 208, 857 N.E.2d at 779–80.
181 . *Id*, 857 N.E.2d at 780.
182 . *Id.*
183 . *Id.* at 209, 857 N.E.2d at 780.
184 . *Id.*
185 . *Id.*

4–110.[186]

The appellate court was asked to review the Board's decision denying the duty disability pension benefits.[187] The court reviewed the Board's decision to determine if it was against the manifest weight of the evidence which requires an opposite conclusion to be clearly evident.[188]

The court examined the provisions of 4–110 and 4–112 of the Code.[189] The court also found the Board's reliance on *Peterson v. Board of Trustees of the Fireman's Pension Fund of the City of Des Plaines*[190] to be inapplicable to this case because Bowlin was not found to be disabled, and there was no evidence presented by the Board of other available jobs in the department.[191] Further, the court did not agree with Bowlin's position that since Dr. Wayne's report was prepared for the workers' compensation carrier and not specifically for the Board, it should not be given as much weight.[192] However, the court concluded that Dr. Wayne's report was inconsistent with five (5) other physician's, two (2) of which were chosen by the Board and refused to simply rubber stamp the Board's sole reliance on Dr. Wayne's report.[193] Last, the court did not like the apparent influence Bowlin's recreational activities had on the Board.[194] The court believed the Board had substituted its own opinions for those of the physicians.[195] The Board's denial of line of duty pension benefits was reversed based on the totality of the evidence.[196]

b. Line-of-Duty Disability Pension (Police)

The First District analyzed the decision to award line-of-duty pension benefits to Officer Richey A. Hare ("Hare") in *Village of Stickney v. Board of Trustess of the Police Pension Fund of the Village of Stickney.*[197] Beginning in 1996, Hare was treated for panic attacks as a result of work-related stress from working undercover, a heavy case load and insufficient on-the-job

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186 . *Id.*; 40 ILL. COMP. STAT. ANN. 5/4–110 (West 2000).
187 . *Bowlin*, 368 Ill. App. 3d at 209, 857 N.E.2d at 781.
188 . *Id.* at 210, 857 N.E.2d at 781.
189 . 40 ILL. COMP. STAT. ANN. 5/4–110, 5/4–112; *Bowlin*, 368 Ill. App. 3d at 210, 857 N.E.2d at 781.
190 . Peterson v. Board of Trs. of the Fireman's Pension Fund of the City of Des Plaines, 5 Ill. App. 3d 180, 281 N.E.2d 368 (1st Dist. 1971).
191 . *Bowlin*, 368 Ill. App. 3d at 210–11, 857 N.E.2d at 781–82.
192 . *Id.* at 211, 857 N.E.2d at 782.
193 . *Id.*
194 . *Id.* at 212, 857 N.E.2d at 783.
195 . *Id.* at 213, 857 N.E.2d at 783.
196 . *Id.* at 213, 857 N.E.2d at 784.
197 . Vill. of Stickney v. Bd.of Trs. of the Police Pension Fund of the Vill. of Stickney, 363 Ill. App. 3d 58, 842 N.E.2d 180 (1st Dist. 2006).

protection.[198] While Hare was still being treated for panic attacks, his boss died.[199] Hare assumed the additional duty of being in charge of the evidence locker.[200] Hare reported the missing items from the evidence locker to his new boss, Chief Zitek ("Zitek").[201] Hare's request for an independent audit was denied by Zitek.[202] Hare was told not to make an issue of it.[203] Hare refused money from Zitek on two occasions.[204] Hare's symptoms increased.[205] Zitek failed to fire a radio operator for forging Hare's computer signature after he told Hare he would.[206] Hare reported the forging incident along with other incidents of corruption to the mayor and a village trustee.[207] Upon disbandment of the detective unit, Hare was reassigned as a shift commander which he considered a demotion.[208] Hare was ostracized.[209] Hare was told by a victim of an alleged rape that Zitek had offered her gifts in exchange for filing a sexual assault case against Hare.[210] Hare's panic attacks became constant and extreme.[211] Hare left work and did not return.[212] Hare believed that everything happening to him was a direct result of Zitek and not anything else.[213] Reports and disability certificates from Dr. Meyers, Dr. Baron and Dr. Sheik were entered into evidence.[214] The Board granted Hare a line-of-duty disability pension and the circuit court affirmed the Board's decision.[215] The Village of Stickney ("Village") appealed.

Police officers are awarded different levels of disability benefits depending upon the nature of their disability. If awarded a line-of-duty disability pension, the officer will receive 65% of his salary as opposed to a non-duty disability pension which is only 50% of the officer's salary.[216] Section

198 . *Id.* at 59, 842 N.E.2d at 182.
199 . *Id.*
200 . *Id.*
201 . *Id.*
202 . *Id.*
203 . *Id.*
204 . *Id.*
205 . *Id.*
206 . *Id.* at 59–60, 842 N.E.2d at 182.
207 . *Id.* at 60, 842 N.E.2d at 182.
208 . *Id.*
209 . *Id.*
210 . *Id.*
211 . *Id.*
212 . *Id.* at 60, 842 N.E.2d at 183.
213 . *Id.*
214 . *Id.* at 60–61, 854 N.E.2d at 183–84.
215 . *Id.* at 61–62, 842 N.E.2d at 184.
216 . *Id*. at 62, 842 N.E.2d at 184.

3–114.1 of the Illinois Pension Code ("Code")[217] provides the basis for awarding a line-of-duty disability pension.[218] A line-of-duty pension will be awarded to an officer if, "as a result of sickness, accident or injury incurred in or resulting from the performance of an act of duty, is found to be physically or mentally disabled for service in the police department, so as to render necessary his or her suspension or retirement from the police service."[219]

An act of duty is defined in part as, "any act of police duty inherently involving special risk, not ordinarily assumed by a citizen in the ordinary walk of life" in Section 5–113 of the Code.[220] Relying on *Robbins v. Bd. of Trustees of the City of Carbondale, Illinois*,[221] the question to be answered was whether Hare's disability was incurred in or resulted from a specific act of police duty not from something ordinarily performed by a citizen.[222] Stress from the general nature of police work or stress not unique to police officers has resulted in the denial of a line-of-duty disability pension.[223] On the other hand, when specifically related to the performance of a police duty, as in *Knight v. Village of Barlett* (disability related to his participation in undercover drug operations)[224] and *Alm v. Lincolnshire Police Pension Board* (injury while pedaling a bicycle while on patrol),[225] the courts have awarded line-of-duty pensions.[226]

All three of the physicians who examined Hare found his disability was related to his police duties.[227] The Village argued that Hare's statement about everything happening to him being the direct result of his boss was proof that it was not related to a specific police duty and his line-of-duty pension should be denied.[228] The court did not agree following *Alm* and finding Hare faced risks performing his job that ordinary citizens did not face.[229]

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217 . 40 ILL. COMP. STAT. ANN. 5/3–114.1 (West 2002).

218 . *Vill. of Stickney*, 363 Ill. App. 3d at 62, 842 N.E.2d at 184.

219 . *Id.*; 40 ILL. COMP. STAT. ANN. 5/3–114.1 (West 2002).

220 . *Vill. of Stickney*, 363 Ill. App. 3d at 62, 842 N.E.2d at 184; 40 ILL. COMP. STAT. ANN. 5/5–113 (West 2002).

221 . Robbins v. Bd. of Trs. of the City of Carbondale, Ill., 177 Ill. 2d 533, 687 N.E.2d 39 (1997).

222 . *Vill. of Stickney*, 363 Ill. App. 3d at 63, 842 N.E.2d at 185.

223 . *Id.* at 63–4, 842 N.E.2d at 185–86, *See* Robbins v. Bd. of Trs. of the City of Carbondale, Ill., 177 Ill. 2d 533, 687 N.E.2d 39 (1997), Ryndak v. River Grove Police Pension Bd., 248 Ill. App. 3d, 618 N.E.2d 606 (1993), Coyne v. Milan Police Pension Bd., 347 Ill. App. 3d 713, 807 N.E.2d 1276 (2004) and Batka v. Bd. of Trs. of the Vill. of Orland Park Police Pension Fund, 186 Ill. App. 3d 715, 542 N.E.2d 835 (1989).

224 . Knight v. Vill. of Barlett, 338 Ill. App. 3d 892, 788 N.E.2d 205 (2003).

225 . Alm v. Lincolnshire Police Pension Bd., 352 Ill. App. 3d 595, 816 N.E.2d 389 (2004).

226 . *Vill. of Stickney*, 363 Ill. App. 3d at 64–65, 842 N.E.2d at 186–87.

227 . *Id.* at 65, 842 N.E.2d at 187.

228 . *Id.*

229 . *Id.* at 66, 842 N.E.2d at 187–88.

The appellate court determined the Board's decision was not against the manifest weight of the evidence and affirmed the circuit court's denial of the Village's complaint.[230]

The Fourth District also reviewed a line-of-duty disability pension decision in *McKee v. The Board of Trustees of the Champaign Police Pension Fund*.[231] In September 1998, Eric McGee ("McGee"), a Champaign police officer, along with other officers, tried to put a combative suspect in the squad car.[232] The next morning McGee woke up with severe back pain.[233] On September 18, 1998, he saw a nurse-practitioner whose notes indicated McGee knew of no injury, but had lifted a man into his patrol car two days earlier.[234] The notes also indicated McGee played golf on September 16, but McGee denied playing golf and denied telling the nurse-practitioner he had.[235] McGee's recreational activities of golf and scuba diving were noted in the file. The nurse-practitioner restricted him from work until September 21, told him to take ibuprofen, and call in two weeks if he was not feeling better.[236] McGee went on light duty after an MRI showed a bulging disc and a problem with an exiting nerve root.[237] He stopped working for the police department in February 1999.[238] McGee saw nine physicians and two chiropractors from November 1998 through August 2000.[239] Dr. Harms saw McGee and diagnosed a herniated disc at L4–L5 and saw some premature degenerative disc disease, but expressed that most people improve within six–twelve weeks.[240] Dr. Harms saw McGee again in late March 1998 and believed McGee was better, but signed a certificate of disability.[241] McGee had two epidural steroid injections between June and August 1999.[242] In April 2000, Dr. Harms noted while 80% of people recover within a few months, he could not determine the extent of McGee's injuries.[243]

McGee saw Dr. Hogan at the request of the workers' compensation

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230 . *Id.* at 66, 842 N.E.2d at 188.
231 . McKee v. The Bd. of Trs. of the Champaign Police Pension Fund, 367 Ill. App. 3d 538, 855 N.E.2d 571 (4th Dist. 2006).
232 . *Id.* at 540, 855 N.E.2d at 573.
233 . *Id.*
234 . *Id.*
235 . *Id.*
236 . *Id.*
237 . *Id.*
238 . *Id.*
239 . *Id.* at 540, 855 N.E.2d at 574.
240 . *Id.*
241 . *Id.*
242 . *Id.* at 541, 855 N.E.2d at 574.
243 . *Id.*

administrator.[244] There was a small disc herniation at L4–L5, but the doctor concluded it could have happened during the night or from golf, since McGee was asymptomatic for 48 hours.[245] Dr. Hogan noted in May 2000 that McGee told him he had not played golf.[246]

McGee was seen by Dr. Carlson on April 8, 1999.[247] Dr. Carlson determined McGee was temporarily disabled and signed a certificate of disability.[248]

Dr. Leventhal saw McGee on April 12, 1999.[249] He diagnosed a bulging disc at L4–L5.[250] The doctor believed it was medically probable that the September 15th injury caused a tear, and it was related to his employment.[251] Dr. Leventhal completed a certificate of disability on August 16, 2000, but noted there was a 75% chance McGee could return to duty six months after surgery.[252]

Dr. Gragnini examined McGee on April 18, 2000, finding no indications to explain the severe pain complained of by McGee.[253]

The Board of Trustees ("Board") selected Drs. Leventhal, Harms, Carlson and Hogan as the board-selected physicians for purposes of examining McGee's condition.[254] Dr. Carlson retired and McGee's attorney suggested Dr. Gragnini be selected to replace Dr. Carlson.[255]

On May 21, 2003, McGee was denied disability benefits.[256] The Board gave more weight to the opinions of Drs. Harm and Gragnini.[257] Further, only two of the selected physicians certified McGee was disabled.[258] The Board alternatively held there was no proof that the disability was a result of the September 15, 1998, incident with the combative suspect.[259] The circuit court affirmed the denial of benefits.[260]

McGee's position was that Section 3–115 of the Illinois Pension Code

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244 . *Id.*
245 . *Id.*
246 . *Id.*
247 . *Id.*
248 . *Id.*
249 . *Id.*
250 . *Id.*
251 . *Id.*
252 . *Id.*
253 . *Id.*
254 . *Id.* at 541–42, 855 N.E.2d at 574.
255 . *Id.* at 542, 855 N.E.2d at 574–75.
256 . *Id.* at 542, 855 N.E.2d at 575.
257 . *Id.*
258 . *Id.*
259 . *Id.*
260 . *Id.*

("Code")[261] required the Board to find him disabled because three physicians, Drs. Harm, Leventhal, and Carlson, had signed disability certificates.[262] The Board argued Carlson was replaced, so there were only two disability certificates.[263] The appellate court agreed with McGee that three certificates were obtained from board-selected physicians.[264]

After reviewing cases from the first, second and third districts,[265] the appellate court found that three certificates must be obtained for a claim to go forward.[266] However, the Board is not required to award a disability pension merely because three certificates are presented.[267] The Board may require other evidence under Section 3–115, including additional physician certificates.[268] Further, there is no requirement that three physicians file a certificate, if a disability pension is not paid.[269]

Drs. Hogan and Gragnini did not find McGee to be disabled. Drs. Carlson and Harms signed disability certificates, but their records indicate their belief that McGee's injury was not severe.[270] The appellate court refused to overturn the Board's finding that McGee was not disabled because it was not against the manifest weight of the evidence presented even though three physicians signed certificates of disability.[271]

McGee also argued that since the Board refused the line-of-duty disability, the Board erred when it refused to consider a non-duty disability pension.[272] Even if McGee had requested the alternative disability pension, the Board could not have granted him one because McGee did not prove any disability requiring his retirement.[273]

The trial court's decision upholding the denial of a line-of-duty disability pension was affirmed by the appellate court.

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261 . 40 ILL. COMP. STAT. ANN. 5/3–115 (West 1998).
262 . *McKee*, 367 Ill. App. 3d at 543, 855 N.E.2d at 576.
263 . *Id.*
264 . *Id.* at 545, 855 N.E.2d at 577.
265 . *See* Coyne v. Milan Police Pension Bd., 347 Ill. App. 3d 713, 807 N.E.2d 1276 (3d Dist. 2004), Wade v. City of North Chicago Police Pension Bd., 359 Ill. App. 3d 224, 833 N.E.2d 427 (2d Dist. 2005), and Marconi v. Chicago Heights Police Pension Bd., 361 Ill. App. 3d 1, 836 N.E.2d at 705 (1st Dist. 2005).
266 . *McKee*, 367 Ill. App. 3d at 544–45, 855 N.E.2d at 576–77.
267 . *Id.* at 545, 855 N.E.2d at 577.
268 . *Id.* at 545, 855 N.E.2d at 577, 40 ILL. COMP. STAT. ANN. 5/3–115 (West 1998).
269 . *McKee*, 376 Ill. App. 3d at 546, 855 N.E.2d at 578.
270 . *Id.*
271 . *Id.*
272 . *Id.*
273 . *Id.*

c. Transfer of Retirement Service Credit

Raymond E. Arthurs, Jr. ("Arthurs") was hired as police chief in 1990 by the Village of Willowbrook ("Village"). Prior to his retirement with the Village of Willowbrook, he served as a police officer in Palos Heights.[274] In 1991, Arthurs requested a transfer of his police pension from both the Village and Palos Heights to the Illinois Municipal Retirement Fund ("IMRF") Sheriff's Law Enforcement Employee Plan ("IMRF Fund").[275] Palos Heights transferred $89,608.38 plus 18 years and 9 months of service credit into the IMRF Fund.[276] The Village transferred $13,601.22 plus one year and 5 months service credit.[277] An overage of $11,786.32 was received and retained by the IMRF Fund and credited to the Village and the IMRF Fund reserves.[278] Arthurs retired in January 2000 and began receiving retirement benefits in February 2000.[279] The IMRF Fund advised the Village in June 2001 that the Village's plan had negative assets of $306,453 and would need to make a monthly contribution of $2,464.75 until the deficit was eliminated either by paying it off or as a result of additional contributions due to the enrollment of new members.[280] The Village appealed the decision.[281] The IMRF Board approved the required additional monthly contribution to the IMRF Fund.[282] The trial court remanded the matter for a recalculation after it found that the IMRF was correct in using a "state-wide" average contribution rate to calculate the contributions necessary to the IMRF Fund, but erred in not adding interest for each year transferred.[283] Even after recalculating a lower amount on remand, the IMRF Board still affirmed its earlier decision.[284] The trial court declared its earlier order as final and appealable and the parties appealed and cross-appealed.[285]

In reviewing the IMRF's decision, the appellate court examined Section 7–139(a)(9) of the Illinois Pension Code ("Code").[286] Section 7–139(a)(9)

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274 . Vill. of Willowbrook v. Bd. of Trs. of Ill. Mun. Ret. Fund, 366 Ill. App. 3d 1097, 1098, 852 N.E.2d 882, 884 (2d Dist. 2006).
275 . *Id.*
276 . *Id.*
277 . *Id.*
278 . *Id.* at 1098–99, 852 N.E.2d at 884.
279 . *Id.*
280 . *Id.* at 1099, 852 N.E.2d at 884.
281 . *Id.*
282 . *Id.*
283 . *Id.*
284 . *Id.*
285 . *Id.*
286 . *Id.* at 1099–1100, 852 N.E.2d at 885; 40 ILL. COMP. STAT. ANN. 5/7–139(a)(9) (West 2004).

provides in part:

> payment by the member of the amount by which (1) the employer and the employee contributions that would have been required if he had participated in this Fund as a sheriff's law enforcement employee during the period for which credit is being transferred, plus interest thereon at the effective rate for each year, compounded annually, from the date of the termination of the service for which credit is being transferred to the date of payment, exceeds (2) the amount actually transferred to the Fund.[287]

Agreeing with the IMRF, the appellate court found Section 7–139(a)(9) does not require interest to be paid because the termination date and payment date were in the same year.[288]

The appellate court further examined and relied on Section 3–110.3(a) of the Code to support its conclusion regarding interest.[289] The trial court's remand to the IMRF for a calculation of interest was reversed.[290] However, the appellate court remanded the matter to the IMRF to calculate a separate municipality contribution rate as required by Section 7–172 of the Code[291] instead of its use of a state-wide average contribution rate.[292]

B. Retaliatory Discharge

Retaliatory discharge actions can sometimes involve a failure to promote when a plaintiff believes he is entitled to a promotion based on a public body's past actions.[293] In *Schlicher v. Board of Fire and Police Commissioners of the Villiage of Westmont,* the plaintiff, a police officer, sued the Board of Fire and Police Commissioners of the Village of Westmont (Board) and various other defendants in the police department and village, for failing to promote him to sergeant.[294] The plaintiff specifically alleged that the Board maintained a promotion eligibility list ranking the top seven candidates to promote to sergeant. Usually, the candidate ranked first on the list was promoted to

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287 . 40 ILL. COMP. STAT. ANN. 5/7–139(a)(9) (West 2004).

288 . *Willowbrook*, 366 Ill. App. 3d at 1100, 852 N.E.2d at 885. Based on this interpretation of Section 7–139(a)(9), it appears there should have been interest calculated on the transfer from Palos Heights to the IMRF Fund.

289 . *Id.* at 1101, 852 N.E.2d at 886.

290 . *Id.* at 1102, 852 N.E.2d at 887.

291 . 40 ILL. COMP. STAT. ANN. 5/7–172 (West 2004).

292 . *Willowbrook*, 366 Ill. App. 3d at 1102–03, 852 N.E.2d at 887.

293 . Schlicher v. Bd. of Fire and Police Comm'rs of the Vill. of Westmont, 363 Ill. App. 3d 869, 845 N.E.2d 55 (2d Dist. 2006).

294 . *Id.* at 872, 845 N.E.2d at 58.

sergeant. For part of the time, the plaintiff was on this list, and he served as a union representative. Soon after serving as union representative, he discovered that the police chief had altered his evaluation points and that his rank during the time he was serving as union representative would have been higher but for the deduction. The Village also passed an ordinance which reduced the number of sergeants from seven to six. Later, when one sergeant retired and plaintiff was first on the list, the Board promoted the second ranked officer on the list.[295] Plaintiff, in his complaint, first sought administrative review of his failure to be promoted, alleged the ordinance constituted intentional interference with prospective economic advantage, and alleged that the ordinance was enacted in retaliation for his union activities.[296]

The court ruled that although the Board had a historical policy of promoting the officer ranked first on the list, the Board's rules were changed, which required the Board to take into account the top 3 candidates on the list. This was not arbitrary and capricious.[297] Further, the court held that plaintiff's arguments that he had a vested right to promotion were without merit. The Board had discretion to bypass the top candidate; thus, plaintiff had no vested right.[298] The court also rejected plaintiff's argument that the ordinance interfered with plaintiff's prospective economic advantage as public entities and public employees are absolutely immune under the Tort Immunity Act.[299] Even if plaintiff alleged willful and wanton conduct, the court held that the Tort Immunity Act provided absolute immunity to public employees and entities. It is only when the legislature specifically limits immunity to cover only negligence and not willful and wanton misconduct that there is limited liability. When the legislature has done so, it has done so unambiguously. Because it had not done so unambiguously in this case, there can be no liability for willful and wanton misconduct.[300]

Plaintiff further alleged a Section 1983 claim based on a violation of his first amendment rights for retaliation for his union activities. While the court held that a state law could not provide immunity for deprivation of a Constitutional violation, it held that the United States Supreme Court has found that legislators are absolutely immune under section 1983 for their legislative activities. Thus, the Village could not be liable for enactment of the ordinance reducing the number of sergeants and changing the way that officers

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295 . *Id.* at 872–73, 845 N.E.2d at 59.
296 . *Id.* at 873, 845 N.E.2d at 59.
297 . *Id.* at 875, 845 N.E.2d at 61.
298 . *Id.*
299 . *Id.* at 877, 845 N.E.2d at 63.
300 . *Id.* at 877–78, 845 N.E.2d at 63.

are promoted to sergeant.[301] However, the court allowed plaintiff's section 1983 claims for violation of his first amendment rights to stand against the individual defendants. The court held that because union activities are clearly established first amendment rights and the complaint adequately alleged a deprivation of those rights, the plaintiff could show that the individual defendant's actions resulted in a deprivation of those rights.[302] Finally, the court held that the individual defendant's could not be sued in their official capacities because there was no official custom, policy, or practice alleged.[303] Thus, the judgment of the circuit court granting the motion to dismiss was affirmed in part and reversed and remanded in part.[304]

In *Krum v. Chicago National League Ball Club, Inc.*,[305] the appellate court affirmed the circuit court's finding that an employee could not bring a claim for retaliatory discharge based on the employer's refusal to renew a fixed-term employment contract.[306] The *Krum* Court also affirmed the circuit court's denial of plaintiff's motion for leave to file an amended complaint.

From 2001 until 2004, the plaintiff ("Krum") worked as an assistant athletic trainer for the Chicago National League Ball Club ("the Cubs"). At some point, though it is unclear exactly when, Krum discovered that the Cubs' head athletic trainer was not properly licensed under the Illinois Athletic Trainers Practice Act ("ATPA").[307] In August 2004, Krum met with the Cubs' general manager to discuss this discovery, along with several other complaints Krum had about the head trainer. About a month after the meeting, Krum was informed that he was being "terminated." However, Krum continued to receive his salary until his one-year employment contract expired in December of 2004.[308]

Krum filed a complaint alleging retaliatory discharge. The circuit court granted the Cubs' motion to dismiss, finding that the Illinois Whistleblower Act[309] preempted Krum's claim for retaliatory discharge. The court found that Krum failed to establish a claim under the Illinois Whistleblower Act. The court further found that even if the Illinois Whistleblower Act did not preempt Krum's retaliatory discharge claim, his claim still would fail, as the ATPA could not satisfy the policy element of a cause of action sounding in retaliatory

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301 . *Id.* at 878–79, 845 N.E.2d at 64.
302 . *Id.* at 882, 845 N.E.2d at 67.
303 . *Id.* at 883, 845 N.E.2d at 67–68.
304 . *Id.* at 883–84, 845 N.E.2d at 68.
305 . Krum v. Chicago Nat. League Ball Club, Inc., 365 Ill. App. 3d 785, 851 N.E.2d 621 (1st Dist. 2006).
306 . *Id*. at 788, 851 N.E.2d at 624.
307 . 225 ILL. COMP. STAT. ANN. 5/4 et seq. (West 2004).
308 . *Krum*, 365 Ill. App. 3d at 787, 851 N.E.2d at 623.
309 . 740 ILL. COMP. STAT. ANN. 174/1 et seq. (West 2004).

discharge.[310]

Krum appealed, claiming that the circuit court had erred in holding that the failure to renew an employment contract for a fixed duration could not serve as a basis for a retaliatory discharge claim. The appellate court disagreed. The *Krum* Court noted that a retaliatory discharge cause of action is a "very narrow exception to the doctrine of employment at-will."[311]

Krum argued that because his employment was subject to a contract of fixed duration, he was not an at-will employee. However, Krum cited no case law where an Illinois court permitted a plaintiff to bring a retaliatory discharge claim on the basis of a fixed-term employment contract. Krum further argued: "Illinois courts have long recognized that retaliatory discharge actions for failure to rehire or recall are valid."[312] The *Krum* Court noted that all of the underlying claims at issue in the Illinois cases cited by Krum for this proposition were brought under the Worker's Compensation Act.[313] The court also noted that the out-of-state cases relied upon by Krum were all brought pursuant to state statutes expressly permitting retaliatory discharge claims. The ATPA contains no language prohibiting retaliatory employment conduct.[314]

The only other issue remaining before the *Krum* Court was whether the circuit court erred in denying Krum's motion for leave to file an amended complaint. The *Krum* Court noted it would review this decision for abuse of discretion. The court noted Krum's failure to propose any type of amendment. The court quickly found that even if Krum had been permitted to amend his complaint, he would be unable to allege any facts to support a claim for retaliatory discharge.[315]

The court in *Bajalo v. Northwestern University*[316] refused to expand retaliatory discharge to include an employer's decision not to renew a contract. Northwestern University ("Northwestern") was required to comply with the Federal Animal Welfare Act ("Act")[317] governing its medical research performed on live laboratory animals.[318] Under the Act, Northwestern had to register with the United States Department of Agriculture and establish an oversight committee, Northwestern University Animal Care and Use

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310 . *Krum*, 365 Ill. App. 3d at 788, 851 N.E.2d at 624.
311 . *Id.*
312 . *Id.* at 789, 851 N.E.2d at 625.
313 . 820 ILL. COMP. STAT. ANN. 310/4(h) (West 2004).
314 . *Krum*, 365 Ill. App. 3d at 789–90, 851 N.E.2d at 625.
315 . *Id.* at 790, 851 N.E.2d at 625–26.
316 . Bajalo v. Northwestern Univ., 369 Ill. App. 3d 576, 860 N.E.2d 556 (1st Dist. 2006).
317 . 7 U.S.C. §§ 2131– 2159 (2002).
318 . *Bajalo*, 369 Ill. App. 3d at 577, 860 N.E.2d at 557.

Committee ("NUACUC").[319] Plaintiff, Nedeljka Bajalo ("Bajalo") was hired May 1, 2000 to work in the Center for Comparative Medicine ("Center").[320] Bajalo's contract was twice renewed for one-year terms expiring on April 30, 2003.[321] Beginning in September 2001, Bajalo began raising her concerns with billing irregularities, improper laboratory procedures, and other things with members of the NUACUC, her supervisors, inspectors with the Department of Agriculture and various other Northwestern employees.[322] In early January 2003, Bajalo received a letter of insubordination.[323] Later in January 2003, Bajalo advised the United States Department of Health and the National Institute of Health of her concerns about animal care and caretaker safety.[324] In February 2003, Northwestern advised Bajalo her contract would not be renewed and she should not return to the Center or either of Northwestern's campuses for the remainder of her term.[325]

Bajalo filed a complaint alleging she was retaliatorily discharged for exercising her rights under the Act.[326] Northwestern's answer denied retaliation and denied it even terminated Bajalo because she continued to be employed and received all of her compensation and benefits until the end of her contract.[327] The trial court denied Northwestern's motion for judgment on the pleadings in which it argued a failure to renew an expired contract is not recognized by Illinois law as a claim for retaliatory discharge.[328] Pursuant to Supreme Court Rule 308, the trial court certified the following question for interlocutory appeal: "[m]ay a contract employee who engaged in protected whistle blowing activity bring a cause of action for retaliatory discharge when the employer fails to renew the employee's written contract [?]"[329]

The appellate court's analysis begins with a review of the elements required to establish a retaliatory discharge claim: (1) plaintiff was discharged, (2) "in retaliation for her activities," and (3) her discharge violated public policy.[330] Following a long line of cases refusing to expand the tort of retaliatory discharge beyond termination for exercising rights for workers'

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319 . *Id.* at 578, 860 N.E.2d at 558.
320 . *Id.*
321 . *Id.*
322 . *Id.*
323 . *Id.*
324 . *Id.*
325 . *Id.*
326 . *Id.*
327 . *Id.* at 579, 860 N.E.2d at 559.
328 . *Id.*
329 . *Id.*
330 . *Id.* at 580, 860 N.E.2d at 559.

compensation and for whistle blowing, the appellate court refused to equate an employer's failure to rehire with a discharge.[331]

Bajalo also argued that in spite of the court's reasoning of the common law of retaliatory discharge, she had a private right of action under the Act as set forth in Section 2.32(c)(4) of the regulations[332] which bars discrimination or reprisal for reporting violations.[333] An unpublished decision in the Southern District of New York[334] found the primary aim of Section 2.32(c)(4) was to expose animal abuse in research facilities and, while it indirectly protects whistleblowers, the court declined to imply a private right of action.[335] The appellate court agreed with the New York court's rationale and rejected Bajalo's private right of action argument.[336] The trial was reversed, the certified question was answered in the negative and the matter was remanded for the trial court to determine if any viable causes of action remained.[337]

C. Non-Union Arbitration

In *Galasso v. KNS Companies, Inc.*,[338] the first district decided whether an arbitrator's decision would stand or be vacated. A father, Nicholas Galasso, was the president and director, and his son, Jeffrey Galasso, was the executive vice president and treasurer, of a closely held corporation, KNS Companies, Inc. ("KNS").[339] In April 2002, KNS made the decision to relieve Nicholas of his duties and make him president emeritus, but agreed to pay him through December 2002.[340] In May 2002, KNS suspended both Nicholas and Jeffrey pending an audit.[341] Nicholas and Jeffrey demanded arbitration alleging a breach of their employment contracts.[342] The employment agreements contained the following provision:

> Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration in accordance with the rules

331 . *Id.* at 580–84, 860 N.E.2d 559–63.
332 . 9 C.F.R. § 2.32 (c) (1994).
333 . *Bajalo*, 369 Ill. App. 3d at 588, 860 N.E.2d at 566.
334 . Moor-Jankowski v. The Bd. of Trs. of N.Y., 96 Civ. 5997, 1998 WKL 474084 (S.D.N.Y. August 10, 1998) (unreported decision).
335 . *Bajalo*, 369 Ill. App. 3d at 588–89, 860 N.E.2d at 566–67.
336 . *Id.* at 589, 860 N.E.2d at 567.
337 . *Id.* at 590, 860 N.E.2d at 568.
338 . Galasso v. KNS Companies, Inc., 364 Ill. App. 3d 124, 845 N.E.2d 857 (1st Dist. 2006).
339 . *Id.* at 126, 845 N.E.2d at 859.
340 . *Id.* at 127, 845 N.E.2d at 859.
341 . *Id*.
342 . *Id*.

> then obtaining of the American Arbitration Association, and judgment upon the award rendered may be entered in any Court having jurisdiction thereof.[343]

The arbitrator found both had employment agreements and neither Nicholas nor Jeffrey had breached the terms or conditions of those agreements.[344] Nicholas was awarded $194,000 for compensation, $3,500 for business expenses, $2,666.74 for insurance, and $3,263.55 for medical expenses he had incurred prior to the end of December 2002.[345] Jeffrey was awarded $101,000 for compensation, $7,968.40 for medical expenses and insurance.[346] They were also entitled to $80,000 for reasonable attorneys fees.[347] KNS was also liable for $24,900 advanced by Nicholas and Jeffrey for fees and expenses of the arbitration process.[348] KNS filed a motion to vacate the arbitrator's award.[349]

KNS first argued a court was the only entity that could determine whether a contract existed.[350] Had KNS properly brought the existence into question before the court as provided in Section 2 of the Uniform Arbitration Act ("Act")[351] this argument may have been successful. However, KNS did not argue the existence of an agreement, but instead argued the validity of the agreements before the arbitrator.[352] The appellate court found the validity of the agreement was properly before the arbitrator.[353]

KNS next argued the arbitrator exceeded his authority by granting Nicholas and Jeffrey more wages than their contracts provided and accordingly the court should vacate the award.[354] The Act provides circumstances under which a court may vacate an arbitrator's award: (1) if the award was obtained by corruption or fraud, (2) if the arbitrator was not impartial, (3) if the arbitrator exceeded his authority, (4) if the arbitrator unreasonably refused to postpone the hearing or refused to hear material evidence, and (5) if there was no arbitration agreement.[355] The court may also vacate an award if the award

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343 . *Id.*
344 . *Id.*
345 . *Id*.
346 . *Id.*
347 . *Id.* at 127, 845 N.E.2d at 860.
348 . *Id.*
349 . *Id.*
350 . *Id.* at 128, 845 N.E.2d at 860.
351 . 710 ILL. COMP. STAT. ANN. 5/2 (West 2002).
352 . *Galasso*, 364 Ill. App. 3d at 130, 845 N.E.2d at 861.
353 . *Id.*, 845 N.E.2d at 857.
354 . *Id.*, 845 N.E.2d at 862.
355 . *Id*. at 131, 845 N.E.2d at 862.

is a gross error of law or fact on its face or if there is a failure to dispose of all matters before the arbitrator.[356] The appellate court concluded the arbitrator's award was reasonable under the employment contracts and could not be vacated by the circuit court.[357]

KNS again argued the arbitrator exceeded his authority when he awarded attorneys fees because neither the employment agreement nor the Act provides for attorney fees.[358] However, the court again pointed out that KNS could have submitted this issue to a court to determine whether is was a question for arbitration, but KNS did not do so.[359] In fact, KNS did not even challenge it before the arbitrator. Instead, KNS attempted to raise it for the first time before the circuit court when it asked the court to vacate the award for attorneys fees, but in making its argument before the court it conceded the arbitrator could decide the issue and forfeited its position that the arbitrator exceeded his authority.[360]

KNS' last argument is that the court should have modified the award because it was miscalculated.[361] The Act provides for modification of awards when (1) there is an evident miscalculation or an error in description, (2) the court can correct the award without affecting the merits of the decision, or (3) the award is in imperfect form.[362] The appellate court upheld the circuit court's refusal to modify the award because the error argued by KNS was not evident on the face of the award.[363]

The appellate court affirmed the circuit court's affirmation of the arbitrator's award in its totality.

D. Illinois Human Rights Act

1. Joint Employment

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356 . *Id.*
357 . *Id.* at 132, 845 N.E.2d at 863.
358 . *Id.*
359 . *Id.*, 845 N.E.2d at 864.
360 . *Id.* at 133, 845 N.E.2d at 864.
361 . *Id.* at 133–34, 845 N.E.2d at 864.
362 . *Id.* at 134, 845 N.E.2d at 864–65; 710 ILL. COMP. STAT. ANN. 5/13(a) (West 2002).
363 . *Galasso*, 364 Ill. App. 3d at 134, 845 N.E.2d at 865.

In *Mitchell v. Department of Corrections*,[364] Jerome Mitchell ("Mitchell") and the Illinois Department of Human Rights ("IDHR") filed a complaint alleging the Illinois Department of Corrections ("DOC") and Private Health Services ("PHS") discriminated against Mitchell because of race.[365] PHS and Mitchell settled.[366] The administrative law judge determined the DOC had discriminated against Mitchell and recommended Mitchell be awarded damages and attorney's fees.[367] The Illinois Human Rights Commission ("IHRC") adopted the recommended order.[368] Both parties appealed.[369] Mitchell's appeal was based on the amount of attorney's fees awarded.

Mitchell, an African-American, was not promoted to the dental director position.[370] Instead, the DOC hired a Caucasian.[371] Mitchell alleged he was discriminated against by the DOC and PHS.[372] The IDHR found substantial evidence to support a claim of race discrimination and issued a complaint to the IHRC. The complaint named the DOC and PHS as joint employers of Mitchell.[373] In its answer, the DOC admitted it was an employer pursuant to the definition provided in the Illinois Human Rights Act ("Act"), but it was not Mitchell's employer.[374] PHS settled and was dismissed from the case.[375] There were some facts mutually agreed upon by Mitchell and the DOC: (1) the DOC and PHS had contracted for PHS to provide health services to the DOC, (2) PHS hired Mitchell to provide services under such contract, (3) the DOC denied its employees had input in the decision not to hire Mitchell, and (4) PHS admitted it was bound by the DOC's approval or disapproval of PHS' hiring decisions.[376] Once a hiring decision was made by PHS and approved by the DOC, the employees were subject to certain requirements of the DOC.[377] The employees were subject to a background check, a minimum standard of performance, training by the DOC, and to signing in and out of work at the DOC.[378]

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364 . Mitchell v. Dep't of Corr., 367 Ill. App. 3d 807, 856 N.E.2d 593 (1st Dist. 2006).
365 . *Id.* at 807, 856 N.E.2d at 595.
366 . *Id.*
367 . *Id.* at 808, 856 N.E.2d at 595.
368 . *Id.*
369 . *Id.*
370 . *Id.*
371 . *Id.*
372 . *Id.*
373 . *Id.*
374 . *Id.*
375 . *Id.*
376 . *Id.* at 808–09, 856 N.E.2d at 596.
377 . *Id.* at 809, 856 N.E.2d at 596.
378 . *Id.*

The administrative law judge recommended back pay and attorneys fees.[379] The IHRC accepted and entered the recommended order.[380] The DOC appealed the finding it was Mitchell's employer.[381] The DOC's position was based on the fact that it did not exercise control over Mitchell except to ensure the safe operations of the prison and because Mitchell was paid by PHS, not the DOC.[382]

To determine the authority of the IHRC since the DOC denied Mitchell was its employee, the appellate court examined Mitchell's remuneration and the common law factors of: (1) the amount of control and supervision, (2) the right of discharge, (3) the method of payment, (4) the skill required, (5) the source of the tools, material, or equipment to perform the work, and (6) the work schedule, giving the most weight to the control of the manner in which the work by Mitchell was done.[383]

The appellate court reviewed the IHRC decision using the clearly erroneous standard.[384] On appeal, the first question was whether the DOC was Mitchell's employer within the meaning of the Act. The Act defines "employee" as "[a]ny individual performing services for remuneration within this State for an employer."[385] The appellate court determined that it should also consider the common law factors in determining Mitchell's status as an employee. These include "the amount of control and supervision, the right of discharge, the method of payment, the skill required in the work to be done, the source of tools, material or equipment, and the work schedule."[386]

For guidance, the *Mitchell* Court looked to two federal cases: *Zinn v. McKune* out of the Tenth Circuit[387] and a recent Seventh Circuit case, *Hojnacki v. Klein-Acosta*.[388]

The underlying facts in *Zinn* involved a nurse employed by a private corporation contracting with the Kansas Department of Corrections to provide medical services. Zinn filed a federal employment discrimination claim against the Kansas Department. To survive summary judgment, the court

379 . *Id.* at 809–10, 856 N.E.2d at 596–97.
380 . *Id.* at 810, 856 N.E.2d at 597.
381 . *Id.*
382 . *Id.*
383 . *Id.* at 811, 856 N.E.2d at 598 (citing Bob Neal Pontiac-Toyota, Inc. v. Indus. Comm'n, 89 Ill. 2d 403, 433 N.E.2d 678 (1982).
384 . *Id.*
385 . 775 ILL. COMP. STAT. ANN. 5/2–101(A) (West 2002).
386 . *Mitchell*, 367 Ill. App. 3d at 811, 856 N.E.2d at 598 (quoting Bob Neal Pontiac-Toyota, Inc. v. Indus. Comm'n, 89 Ill. 2d 403, 410, 433 N.E.2d 678 (1982)).
387 . 143 F.3d 1353 (10th Cir. 1998).
388 . 285 F.3d 544 (7th Cir. 2002).

noted Zinn had to show that the Kansas Department was her employer and she was its employee. The Kansas common-law factors relating to employment status considered by the *Zinn* Court are similar to the same factors established by Illinois's common-law. In addition to common-law factors, the *Zinn* Court further noted the terms of the contract entered into by the private corporation and the Kansas Department. The contract "explicitly provided that the corporation's employees were not employees of the Kansas department."[389]

Although the corporation's employees were required to comply with Kansas Department rules, the corporation was responsible for its employees' salaries and benefits. Additionally, the corporation made all hiring and firing decisions. The Tenth Circuit Court of Appeals affirmed the lower court's dismissal of Zinn's Complaint, finding that Zinn had failed to present sufficient evidence of her status as an employee of the Kansas Department.[390]

Hojnacki addressed a discharged physician's complaint against a private corporation and the Department of Corrections. The physician, Hojnacki, was employed by the private corporation contracting with the Department. Hojnacki's job was to provide medical services to inmates. After she was terminated, Hojnacki filed suit against the Department on a number of bases, including sex and age discrimination. The federal district court found that Hojnacki was not a department employee and, hence, dismissed her complaint. In that case, too, the court noted the explicit language of the contract entered into by the private corporation and the Department, providing that the physician was not a Department employee.[391] The Seventh Circuit Court's analysis focused on the element of control. Despite finding that the Department set, among other things, the physician's working and on-call hours, the Department did not control the manner in which the physician was to perform her duties.[392]

Next, the *Mitchell* Court noted that the Illinois Supreme Court's test for determining the existence of joint employment is:

> whether two employers exert significant control over the same employees such that they share those matters governing essential terms and conditions of employment. Factors to consider in making such a determination include the employer's role in hiring and firing, in promoting and demoting, in setting wages and hours, in disciplining the workers and in providing actual day-to-day supervision and direction. Again, in this context, the essential element in the analysis is 'whether a putative joint employer's control over employment

389 . 367 Ill. App. 3d at 812, 856 N.E.2d at 599 (discussing *Zinn*, 143 F.3d at 1358).
390 . *Id*. at 812-13, 856 N.E.2d at 599 (discussing *Zinn*, 143 F.3d at 1358).
391 . *Id*. at 813–14, 856 N.E.2d at 599–600 (discussing *Hojnacki*, 285 F.3d at 551).
392 . *Id*. at 814, 856 N.E.2d at 600 (discussing *Hojnacki*, 285 F.3d at 551).

matters is direct and immediate.'[393]

The *Mitchell* Court concluded that the facts of its case were essentially the same as those at issue in *Zinn*, *Hojnacki*, and *American Federation*. That is, the Department's control over Mitchell did not extend beyond its contractual rights to do so. However, the Department did not control the manner in which Mitchell performed his duties. Hence, the Department was not Mitchell's employer for purposes of the Act and the Commission's finding to the contrary was reversed.[394]

2. Stating a Cause of Action for Sex Discrimination & Retaliation Under the Illinois Human Rights Act

The plaintiff and appellant in *Hoffelt v. Illinois Department of Human Rights* was an aviation security officer for the City of Chicago.[395] In 2003, Hoffelt filed a six-count charge against the City alleging she had been subjected to discrimination and harassment. Hoffelt essentially alleged that she had been harassed on the basis of sex and the subject of harassment in retaliation of her complaints of sexual harassment. She further alleged that she was given less desirable assignments and denied holiday and compensatory time pay. Hoffelt further alleged inaccurate performance evaluations.[396]

The Department of Human Rights dismissed Hoffelt's charge for lack of substantive evidence. The chief legal counsel subsequently upheld the dismissal. Hoffelt's appeal followed.

Initially, the appellate court noted that the chief legal counsel's decisions would be upheld unless the decision was arbitrary, capricious, or an abuse of discretion. The *Hoffelt* Court also noted the term "substantial evidence" is defined as "evidence which a reasonable mind accepts as sufficient to support a particular conclusion and which consists of more than a mere scintilla but may be somewhat less than a preponderance."[397]

Upon review, the *Hoffelt* Court affirmed the chief legal counsel's decision to dismiss the three counts based on sex discrimination. However, the court did find an abuse of discretion in the counsel's findings relating to Hoffelt's three other counts. The court reversed the three claims based upon Hoffelt's claim

393 . *Id*. at 815, 856 N.E.2d at 601 (quoting Am. Fed'n of State, County and Mun. Employees, Council 31 v. State Labor Relations Bd., 216 Ill. 2d 569, 580, 839 N.E.2d 479, 487 (2005)).
394 . *Id*. at 816, 856 N.E.2d at 602.
395 . 367 Ill. App. 3d 628, 867 N.E.2d 14 (1st Dist. 2006).
396 . *Id*.
397 . *Id*.

of retaliation based upon her opposition to unlawful discrimination.[398]

First, the *Hoffelt* Court reviewed the claims of sex discrimination. This review included a summary of what it takes to state a competent claim of sex discrimination under the Illinois Human Rights Act ("Act").[399] Illinois courts have adopted the same analytical framework for actions brought pursuant to the Act as those brought under Title VII of the Civil Rights Act of 1964.[400]

A complainant may establish discrimination through either a direct or indirect method. To make a *prima facie* case of discrimination, a plaintiff must demonstrate the following: (1) she engaged in a protected activity that was known by the respondent; (2) the respondent subsequently took some adverse action against the complainant; and (3) there is a causal connection between the protected activity and the disadvantageous employment action.[401]

In reviewing the record before it, the *Hoffelt* Court concluded that the plaintiff had failed to show that the City "committed a material adverse act against her." The court noted that regardless of whether a complainant proceeds under the direct or indirect method of discrimination, there must be a showing of a materially adverse employment action. That is, an employment action must constitute a severe or pervasive change in the daily conditions of employment. Such action is "more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that may be unique to a particular situation."[402]

The court found that Hoffelt did not establish a severe or pervasive change in the daily conditions of her employment. Hence, the court concluded that Hoffelt did not suffer a materially adverse employment action sufficient to support the three counts of her complaint sounding in sex discrimination.

Next, the *Hoffelt* Court addressed the retaliation claims. The court noted that a *prima facie* case of retaliation under the Act requires a showing that: (1) the complainant was engaged in a protected activity; (2) her employer committed a material adverse act against her; and (3) a causal nexus existed between the protected activity and the adverse act.[403]

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398 . *Id*.

399 . 775 ILL. COMP. STAT. ANN. 5/1–101 *et seq*. (West 2004).

400 . 42 U.S.C. § 2000 *et seq*. (2006).

401 . *Hoffelt*, 367 Ill. App. 3d 628, 867 N.E.2d 14 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

402 . *Id*. (citing Traylor v. Brown, 295 F.3d 783, 788 (7th Cir. 2002)).

403 . *Id*. at 406 (citing Stone v. Dep't of Human Rights, 299 Ill. App. 3d 306, 316, 700 N.E.2d 1105, 1112 (4th Dist. 1998)).

Similar to sex discrimination claims, the Illinois Human Rights Commission often looks to analogous federal cases brought under Title VII as guidance in retaliation claims brought under the Act. During its analysis of Hoffelt's retaliation claims, the court primarily relied on two cases. First, the court noted the holding from a recent U.S. Supreme Court decision, *Burlington Northern and Santa Fe Ry. Co. v. White*.[404] The court also reviewed the analysis of the Seventh Circuit Court in *Washington v. Illinois Department of Revenue*.[405] Both the *White* and *Washington* Courts noted the broad array of actions that may constitute adverse employment. However, both of these cases also emphasized that for retaliation to be actionable, it must produce an injury or harm. The retaliation must be material when using an objective standard. As the *White* Court noted, "the significance of any given act of retaliation will often depend upon the particular circumstances."[406]

In reviewing the particular circumstances alleged in the case before it, the *Hoffelt* Court found that Hoffelt had met the standard set forth in *White* and *Washington*. Hoffelt met her burden of showing substantial evidence of an adverse employment action in, among other things, alleging sexist name-calling perpetrated by her superiors, being assigned to less desirables assignments, being denied compensatory time off requests, where similar requests had been granted in the past, and receiving lowered performance ratings.[407]

The court went on to explain that Hoffelt established she was engaged in a protected activity and demonstrated that a causal nexus existed between the protected activity and the adverse act. Hoffelt was also able to show a short time span between the filing of her discrimination charge and the employer's adverse action. The court noted a *prima facie* case of retaliation creates a rebuttable presumption of unlawful retaliation. As such, the *Hoffelt* Court reversed the chief counsel's findings and remanded the case for further investigation.[408]

E. Trade Secrets, Non-Compete Agreements, and Restrictive Covenants

The appellate court affirmed in part and reversed in part the lower court's order in *Arcor, Inc. v. Haas*.[409] The underlying case involved an employer,

404 . Burlington N. and Santa Fe Ry. Co. v. White, -- U.S. -- , 126 S.Ct. 2405 (U.S. 2006).
405 . 420 F.3d 658 (7th Cir. 2005).
406 . *Hoffelt*, 367 Ill. App. 3d at 628, -- N.E.2d – (citing *White*, -- U.S. --, 126 S.Ct. at 2415)).
407 . *Id*.
408 . *Id*.
409 . Arcor, Inc. v. Haas, 363 Ill. App. 3d 396, 842 N.E.2d 265 (1st Dist. 2005).

ARCOR, Inc. ("Arcor"), suing a former employee, David Haas ("Haas") and his business associates (collectively referred to by the court as "defendants") alleging the misappropriation of trade secrets and breaches of two non-competition covenants. Haas worked for Arcor, a company that manufacturers metal spiral tubes per customer specification, from 1983 until he resigned in 2004. During his tenure at Arcor, Haas signed two non-competition covenants, one containing a confidentiality agreement and the other containing a restrictive shareholder's agreement.[410]

Shortly after Haas resigned on November 29, 2004, he learned that Arcor was having problems paying some of its metal suppliers. Haas contacted one of Arcor's customers as well as a supplier. The three, all named as defendants in Arcor's lawsuit, formed a new company with Haas acting its general manager. The new company began producing and selling the same type of metal tubing as Arcor. In the process of getting the new company up and running, Haas modified two Meltog brand machines, which were the same type of machines used by Arcor.

A few months later, Arcor filed suit, requesting a temporary restraining order ("TRO"), claiming Haas misappropriated trade secret modifications in modifying the Meltog machines. Arcor further alleged Haas breached both of the non-competition covenants. The court initially entered a TRO and held a hearing on Arcor's motion for a preliminary injunction a few weeks later. In reviewing the non-competition covenants at issue, the trial court found both overbroad and unenforceable. However, the trial court did find a likelihood of success that Arcor's customer information was protected as a trade secret. As such, it entered a preliminary injunction against the use and disclosure of customer information. The court subsequently entered an order enjoining defendants from "[s]elling to, or soliciting sales of any spiral wound center tube produced by [defendants] from any customer of Arcor that purchased any produce from Arcor prior to November 29, 2004."[411] Defendants appealed the court's finding that Arcor's customer information was a trade secret. Arcor cross-appealed the court's finding the two non-competition covenants were unenforceable.

The *Arcor* Court reiterated what a party seeking a preliminary injunction must prove: (1) a clear right or interest needing protection; (2) no adequate remedy at law; (3) irreparable harm if the injunction is not granted; and (4) a reasonable likelihood of success on the merits. A reviewing court will not set aside the trial court's decision to grant a preliminary injunction unless there

410 . *Id*. at 398, 842 N.E.2d at 267.
411 . *Id*. at 399, 842 N.E.2d at 268.

has been an abuse of discretion. The standard of review for this is to examine whether the trial court's findings were against the manifest weight of the evidence.[412]

The appellate court looked to the Illinois Trade Secrets Act ("Act")[413] to determine whether Arcor presented a "fair question" as to a clearly ascertainable right, that being the protection of its customer information. A *prima facie* case under the Act must allege the information at issue was: (1) a trade secret (as defined by §2(d) the Act and the common law of Illinois); (2) misappropriated; and (3) used in the defendant's business.[414]

For guidance, the appellate court examined three recent Illinois decisions: *Liebert*, *Multiut*, and *Stampede*.[415] Combined, the court found that customer information may not be a trade secret if the company does not take "reasonable steps" to keep the information confidential. For example, reasonable steps may include advising employees verbally or in writing that customer information is confidential, having employees sign a confidentiality agreement, limiting access to both printed and computer-stored copies of the customer information.[416]

The *Arcor* Court noted the evidence presented at the preliminary hearing concerning customer information was the testimony of an Arcor employee. The employee testified that the only step Arcor took to keep the list confidential was having employees sign an employment and confidentiality agreement. The employee admitted that there was not an actual list of customers. Rather, the names of Arcor's customers were generally known to Arcor employees in its sales, marketing, and billing departments.[417]

The court found that Arcor had presented adequate testimony showing Arcor's customer information was sufficiently secret to derive economic value from not being known to other people. However, there was insufficient evidence showing Arcor took reasonable steps to keep the information secret. A confidentiality agreement alone, the court found, was not enough. As the courts in *Liebert*, *Multiut*, and *Stampede*, discussed, an employer must take

412 . *Id*. at 400, 842 N.E.2d at 269.

413 . 765 ILL. COMP. STAT. ANN. 1065/1–1065/9 (West 2002).

414 . *Arcor*, 363 Ill. App. 3d at 400, 842 N.E.2d at 269. *See* Delta Med. Sys. v. Mid-America Med. Sys., Inc., 331 Ill. App. 3d 777, 790–91, 772 N.E.2d 768, 780 (1st Dist. 2002) (discussing the common law factors courts may consider in determining whether a trade secret exists).

415 . *See* Liebert Corp. v. Mazur, 357 Ill. App. 3d 265, 827 N.E.2d 909 (1st Dist. 2005); *see also* Multiut Corp. v. Draiman, 359 Ill. App. 3d 527, 536, 834 N.E.2d 43 (1st Dist. 2005); Stampede Tool Warehouse, Inc. v. May, 272 Ill. App. 3d 580, 651 N.E.2d 209 (1st Dist. 1995).

416 . *Arcor*, 363 Ill. App. 3d at 401, 842 N.E.2d at 270.

417 . *Id*. at 401–02, 842 N.E.2d at 270–71.

additional steps.[418]

In its cross-appeal, Arcor further argued that the trial court erred by refusing to uphold its two non-competition covenants. Haas signed in December 1987 Arcor's "Employment and Confidentiality Agreement." In 1998, Haas signed a "Restrictive Shareholders' Agreement." The trial court considered both agreements, despite the 1998 agreement's preemptive language. In analyzing the terms of the agreements, the court found the 1987 agreement's application too broad in limiting business activities throughout Canada and the United States. The trial court found this to constitute a blanket prohibition on competition for the period of one year. The time period was reasonable, but the geographic area was not. The trial court also found the 1998 shareholder agreement to be overbroad and unenforceable, though it was to stay in effect for three years.[419]

On appeal, Arcor argued the shareholder agreement was an agreement ancillary to the sales of a business. Consequently, the trial court had improperly analyzed that agreement using the stricter standard applied to scrutinizing employment agreements. The appellate court agreed that restrictive covenants based on employment contracts are analyzed under a different standard from covenants ancillary to the sale of a business.[420]

Covenants ancillary to the sale of a business must only be reasonable as to time, geographical area, and the scope of the prohibited business activity. In addition to these factors, covenants based on an employment agreement must also show, among other things, a near-permanent relationship between employers and their customers and that the employees would not have had any contact with the customers "but for" their association with the employer.[421]

The appellate court reached the same conclusion as the trial court: the shareholders' agreement, though not really a covenant ancillary to the sale of a business, was unenforceable under even the more liberal standard because it contained no geographic limitation and constituted a blanket prohibition on competition. The agreement prohibited Haas from being involved in "any business or venture that sells product competitive to those of Arcor." This language constituted an impermissible blanket prohibition on competition. The

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418 . *Id*. at 402, 842 N.E.2d at 271.

419 . *Id*. at 403–04, 842 N.E.2d at 271–72.

420 . *Id*. at 404, 842 N.E.2d at 272 (citing Central Water Works Supply Inc. v. Fisher, 240 Ill. App. 3d 952, 956, 608 N.E.2d 618, 621 (4th Dist. 1993)).

421 . *Id*. at 404, 842 N.E.2d at 273 (citing C*entral Water Works*, 240 Ill. App. 3d at 956, 608 N.E.2d at 621).

court would not enforce such a covenant. [422]

Lastly, Arcor asked the court to modify the covenants so that they could be enforced. Illinois law permits courts to modify a restrictive covenant to correct their defects. However, the *Arcor* Court found that the covenants before it would effectively have to be rewritten to render them reasonable and enforceable. The court refused to do that. Hence, the court reversed the trial court's decision finding Arcor's customer information constituted a trade secret and affirmed the trial court's findings that both non-competition covenants were unenforceable.

F. Labor

1. Union Certification and Unfair Labor Practice

The appeal of *Board of Education, Granite City Community Unit School District No. 9 v. Sered*[423] consisted of a petition for administrative review of an order and opinion of the Illinois Educational Labor Relations Board ("Board") on the issue of unfair labor practices. The Granite City Community Unit School Dist. No. 9 ("District") appealed the Board's decision affirming the findings of an administrative law judge ("ALJ"). The ALJ found the District engaged in unfair labor practices by failing to bargain in good faith with teachers. The appellate court affirmed the Board's findings.

Though later consolidated, the Granite City Federation of Teachers, Local 743, IFT-AFT, AFL-CIO ("Union") originally filed separate charges against the District alleging violations of two sections of the Illinois Educational Labor Relations Act ("Act").[424] The Union's allegations were that the District failed to bargain in good faith when it, among other things, reneged on a tentative collective bargaining agreement ("CBA") arising out of a lengthy mediation process.[425]

In May 2001, the Union and the District began mediation with the goal of negotiating a new CBA as the prior agreement would expire in September. Initially, the parties tried interest-based bargaining, which consisted of brainstorming and discussions on issues including teacher salaries, evaluations, "duties," and "dock days". One of the ground rules was that every person on

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422 . *Id.* at 405–06, 842 N.E.2d at 273–74.

423 . Bd. of Educ. Granite City Cmty. Unit Sch. Dist. No. 9 v. Sered, 366 Ill. App. 3d 330, 850 N.E.2d 821 (1st Dist. 2006).

424 . 115 ILL. COMP. STAT. ANN. 5/14(a)(5); (a)(1) (West 2002).

425 . *Sered*, 366 Ill. App. 3d at 332, 850 N.E.2d at 824.

the Union team and District team possess authority to make binding agreements. No agreement was met by September and the District teachers went on strike. The parties abandoned the interest-based bargaining method, but continued negotiating. All of the negotiation ground rules remained the same.[426]

In early October, the Union filed its first unfair labor practice charge with the Board, alleging a failure to bargain in good faith. A few days later, on October 6, 2001, two each of the District and Union negotiators were selected to isolate themselves and come up with an agreement. Later that day, the selected negotiators emerged with an oral agreement. A District employee reduced all of the oral agreement to writing, titled "Tentative Agreement." The Union team announced to its membership that a meeting had been set later that same day to ratify the Tentative Agreement.[427]

At the meeting, the District explained it was required to get four school board members to approve the Tentative Agreement, before it could be ratified. However, the District could not muster the required votes. Additionally, the District made numerous hand-written edits, many perceived to be substantive, to the Tentative Agreement. The Union cried foul, accusing the District of reneging on the Tentative Agreement.[428]

The strike ended on October 11, 2001, when the parties agreed to ratify another agreement, reserving a couple of remaining issues for later resolution.[429] The ALJ held a hearing in mid-October, finding the District witnesses "less than credible." Among other complaints, members of the District's team of negotiators did not possess authority to make binding agreements without school board approval. Union witnesses testified that the District negotiators indicated they possessed such authority. The ALJ issued a recommended decision and order finding the District had violated sections 14(a)(5) and 14(a)(1) of the Act.[430] The ALJ further found that an agreement had, indeed, been reached as a result of the October 6 negotiations. The Board subsequently affirmed the ALJ's recommended order, which included rescinding all policies and procedures contained in the October 11, 2001 agreement that were inconsistent with the October 6, 2001 agreement. In early November, the Union filed its second charge against the District.[431]

Without citing any case law, the appellate court began its analysis by

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426 . *Id*. at 332–35, 850 N.E.2d at 824–27.
427 . *Id*. at 334, 850 N.E.2d at 825.
428 . *Id*. at 334–35, 850 N.E.2d at 825–26.
429 . *Id*. at 334–35, 850 N.E.2d at 826.
430 . 115 ILL. COMP. STAT. ANN. 5/14(a)(5); (a)(1) (West 2002).
431 . *Sered*, 366 Ill. App. 3d at 334–35, 850 N.E.2d at 826–27.

stressing the importance of good faith collective bargaining. These initial comments set a clear tone for the rest of the court's analysis, which is quite critical of the District's actions and arguments.[432]

The court next notes that an administrative agency's findings on questions of fact are deemed *prima facie* true and correct and should be upheld unless they are against the manifest weight of the evidence. The court also notes that the Board's determination that unfair labor practices had been committed presented a mixed question of law and fact, which is subject to the clearly erroneous standard of review.

The District argued that the Board had erroneously found that an agreement had been reached on October 6, 2001. The District argued that there had been no meeting of the minds and, additionally, the purported agreement was not initially reduced to writing.[433] The court was not persuaded, finding that the technical rules of contract law did not apply to labor agreements: whether a CBA existed was a question of fact and the existence of a CBA did not depend on its reduction in writing.[434] The court held there was sufficient evidence to support a finding that the District team and the Union team entered into an agreement on October 6, 2001.[435]

The District next argued that even if an agreement was reached on October 6, it was not binding because the District team members who negotiated the agreement lacked actual and apparent authority to bind the District. The court, again, found the record supported the Board's findings that the District team members possessed such authority. The court first pointed to the ground rules the parties agreed to prior to beginning the negotiations. The court also relied on a National Labor Relation Board case, holding that "a designated agent taking part in CBA negotiations is deemed to have apparent authority to bind the principal absent affirmative, clear, and timely notice to the contrary."[436]

The District further argued that it could not "cloak its negotiators with apparent authority because such an act would be contrary to sections 10–6 and 10–7 of the School Code."[437] The court quickly disposed of this argument, noting that the unfair labor practice claims arose under the Act, not the School Code. It further found all the case law cited by the District to be contrary to the

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432 . *Id*. at 335–36, 850 N.E.2d at 827.

433 . *Id*. at 336, 850 N.E.2d at 827.

434 . *Id*. at 336–37, 850 N.E.2d at 827–28 (citing City of Collinsville, 329 Ill. App. 3d 409, 417, 767 N.E.2d 886, 893 (4th Dist. 2002)).

435 . *Id*. at 337, 850 N.E.2d at 828.

436 . *Id*. (quoting Kasser Distiller Prod. Corp., 307 NLRB 899 (1992)).

437 . *Id*. at 337–38, 850 N.E.2d at 828–29 (relying on 105 ILL. COMP. STAT. ANN. 5/10–6; 10–7 (West 2002)).

District's "tenuous" argument.[438]

Next, the District argued that the doctrines of *res judicata* and *collateral estoppel* prevented the court from relitigating issues resolved by the arbitrated agreement entered into by the parties on October 11, 2001. The court did not find either doctrine applicable. First, the court noted the October 11, 2001 arbitration award was not admitted into evidence and was included in the record only as an offer of proof. Additionally, the unfair labor practice claim arose from the District's repudiation of the October 6, 2001 agreement. The issue presented to the Board was whether the District engaged in unfair labor practices by refusing to bargain in good faith, not the issues resolved by the October 11, 2001 agreement.[439]

Lastly, the District complained that the Board's remedy was inappropriate, harsh, and punitive. The court observed that a remedial order of the Board is reviewed under an abuse of discretion standard. The Act empowers the Board to "'issue an order requiring the party charged to stop the unfair practice, and may take additional affirmative action.'"[440] This language, the *Sered* Court found, grants the Board wide discretion and substantial flexibility in fashioning an appropriate remedy. The court found no abuse of discretion and affirmed the Board's decision.

In *Alton Community Unit School District. No. 11 v. Illinois Educational Labor Relations Board*,[441] the appellate court reviewed a teacher's allegations of unfair labor practices after she had been terminated by Alton Community Unit School District No. 11 ("District"). The teacher argued she had been impermissibly terminated her because of union activities.

The teacher filed a motion with the administrative law judge ("ALJ"), asking the ALJ to deem admitted the allegations of her initial complaint, as the District had allegedly failed to file a timely answer. She also asked that the ALJ recommend she be reinstated. The ALJ granted these requests and the Illinois Educational Labor Relations Board ("IELRB") subsequently entered a final order adopting the ALJ's recommended decision and order. District appealed the IELRB's order asking for administrative review of a number of different issues.

First, the District argued that the IELRB's decision to grant the teacher's motion to amend her complaint resulted in the District having fifteen days from the receipt of that complaint to finalize an answer to the amended

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438 . *Id*. at 338, 850 N.E.2d at 829.

439 . *Id*. at 340, 850 N.E.2d at 830.

440 . *Id*. (quoting 115 ILL. COMP. STAT. ANN. 5/15 (West 2002)).

441 . Alton Cmty. Unit Sch. Dist. No 11 v. Ill. Educ. Labor Relations Bd., 362 Ill. App. 3d 663, 839 N.E.2d 1131 (4th Dist. 2005).

complaint. Second, the District argued that the IELRB erred in finding the District's answer to the initial complaint was untimely. Third, even if the District's initial answer to the initial complaint was untimely, the IELRB erred in finding the District lacked good cause for the late filing. Lastly, the District argued that the IELRB's order reinstating the teacher was beyond the IELRB's authority, as it would result in the teacher being granted tenure. The appellate court found merit in the District's first two arguments, rendering moot its remaining three contentions. The *Alton* Court reversed and remanded.[442]

First, the *Alton* Court addressed the number of days the District had in which to answer the amended complaint. The initial complaint was filed on August 13, 2003. The District received a copy of that complaint on August 15, 2003. Later that month, a motion to file an amended compliant was filed, which was granted later that month. An amended complaint was filed on September 4, 2003. That same day, the District filed its answer to the initial complaint. Later that month, the complainant filed a motion to deem the initial complaint's allegations as admitted, as the District's answer to the initial complaint was allegedly untimely. The District subsequently filed an answer to the amended complaint.[443]

The ALJ found the allegations contained in the initial complaint were admitted. On appeal, the District argued that the facts could not be admitted because the initial complaint was amended. The IELRB argued the amendment to the complaint had no effect on the District's default in answering the initial complaint. This issue presented a question of law, so it was reviewed *de novo*.[444]

The appellate court was not persuaded by the case law relied upon by the IELRB and complainant, who relied primarily on *Foxcroft Townhome Owner's Association v. Hoffman Rosner Corporation*,[445] for the proposition that complainant did not abandon the original complaint by amending it. The court found *Foxcroft* inapplicable to the instant case, where there had been a default judgment, rather than a trial.[446]

Both complainant and IELRB also cited *First National Bank of Mattoon v. Mattoon Federal Savings & Loan Association* to support their argument that

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442 . *Id*. at 664, 839 N.E.2d at 1131–32.

443 . *Id*. at 664–65, 839 N.E.2d at 1132.

444 . *Id*. at 665, 839 N.E.2d at 1132.

445 . Foxcroft Townhome Owner's Ass'n v. Hoffman Rosner Corp., 96 Ill. 2d 150, 449 N.E.2d 125 (1983).

446 . *See* First Nat'l Bank of Mattoon v. Mattoon Fed. Sav. & Loan Ass'n, 175 Ill. App. 3d 956, 963, 530 N.E.2d 666, 671 (4th Dist. 1988) (explaining that the *Foxcroft* rule, regarding a party's filing of an amended pleading, results in that party's waiver of objections to the trial court's ruling on the former complaint, had no bearing or application where a court had entered a default judgment against a party).

the minimal amendments contained in the amended complaint did not "substantively change the allegations in the initial complaint."[447] The court also found *First National* inapposite in the matter at bar. That case had involved a suit with two defendants, Mattoon Federal Savings and Howard Dees. The plaintiff's amendment to the initial complaint changed only the allegations directed against Mattoon. Dees, who did not face any new or different allegations in the amended complaint, failed to file an answer to both the original complaint and the amended complaint. The trial court entered a default judgment against Dees as to the original complaint. The *Alton* Court explained that if Dees had been the only defendant in *First National*, there would not have been an amended complaint. The case at bar, unlike *First National*, had only one defendant. The amended complaint did change the allegations directed against the District. It followed that those changes affected the District. The *Alton* Court found irrelevant the issue of whether those changes were substantive or minor.[448]

Lastly, the court explained that once the amended complaint was filed, the case "should have proceeded under the amended complaint, not the original complaint."[449] The court found that the District filed its answer to the amended complaint within fifteen days of being served with it. Hence, that answer was timely and the ALJ's order defaulting the District was improper. In reversing this portion of the order, the *Alton* Court did not address the remaining arguments before it.[450]

2. Arbitration

In *City of Rockford v. Unit Six of the Policemen's Benevolent and Protective Association of Illinois*,[451] the City terminated police officer Steven Johnson for calling a friend to notify and warn him that there was a warrant out for his arrest and that police officers were on their way to arrest him.[452] The Rockford Board of Fire and Police Commissioners (the Board) heard the evidence in the case with a Union representative present the entire time.[453] The Union representative argued that by his interpretation of the Collective Bargaining Agreement (CBA), Johnson was entitled to progressive and

447 . *Alton*, 362 Ill. App. 3d at 666, 839 N.E.2d at 1133.
448 . *Id.* at 666–67, 839 N.E.2d at 1133–34.
449 . *Id.* at 667, 839 N.E.2d at 1134.
450 . *Id.* at 667–68, 839 N.E.2d at 1134.
451 . City of Rockford v. Unit Six of the Policemen's Benevolent and Protective Ass'n of Ill., 362 Ill. App. 3d 556, 840 N.E.2d 1283 (2d Dist. 2005).
452 . *Id.* at 558, 840 N.E.2d at 1285–86.
453 . *Id.*

corrective punishment and that this misconduct should not rise to the level of termination. The Board implicitly rejected this argument by ruling that Johnson engaged in serious misconduct.[454]

Approximately four months after the charges were filed against Johnson, the Union filed a labor grievance alleging that this misconduct should have resulted in progressive and corrective punishment according to the CBA.[455] The grievance was denied on September 26, 2003 with the deputy chief stating that this same argument was raised at the Board hearing and was rejected. Further, the discipline of the Board had never been challenged through the grievance procedure.[456] On September 29, 2003, Johnson appealed his Board-instituted discharge to the trial court.[457]

On September 30, 2003, the Union demanded labor arbitration for the grievance. The City, on October 23, 2003, filed a declaratory judgment action for a permanent stay of arbitration on the grievance. While the declaratory judgment action remained idle, the trial court upheld the Board's findings and order terminating Johnson on administrative review. Johnson decided not to appeal the court's administrative review order.[458]

After the trial court's judgment on Johnson's appeal in administrative review became final, the City filed an amended declaratory judgment complaint asserting that *res judicata* bars the Union's labor grievance and in the alternative that section 10–2.1–17 of the Illinois Municipal Code bars arbitration.[459] After cross-motions for summary judgment, the trial court granted summary judgment in the City's favor on both grounds and the Union appealed.[460]

The court ruled that *res judicata* barred the action by examining each of the three elements of *res judicata*.[461] First, the court held and the parties did not dispute that there was a final judgment on the merits.[462] Second, the Union asserted that the identity of the causes of action was not the same. Applying the transactional test, the court determined that the facts arose from the same set of operative facts.[463] The fact that the Union filed a grievance and Johnson appealed the Board's decision has no bearing on *res judicata*. The Union

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454 . *Id.*
455 . *Id.* at 558, 840 N.E.2d at 1286.
456 . *Id.*
457 . *Id.*
458 . *Id.*
459 . *Id.* at 559, 840 N.E.2d at 1287.
460 . *Id.* at 560, 840 N.E.2d at 1287.
461 . *Id.* at 561, 840 N.E.2d at 1288.
462 . *Id.*
463 . *Id.*

argued that the grievance raises an additional claim regarding whether the Board has the authority to discharge Johnson or whether an arbitrator should decide. However, the court held that both procedures sought to achieve the same result– Johnson's reinstatement. Thus, there was only one group of operative facts.[464]

Third, the Union argued that it was not in privity with Johnson.[465] Defining privity as existing between two parties when they adequately represent the same legal interests, the court held that the Union has little separate beneficial interest in recovery and that the Union and Johnson have identity of interest pursuant to statute.[466] While the Union does represent all of its members, primarily in this case it was seeking a reinstatement of Johnson, who is the same party in interest.[467] In addition, the Union is considered its member's exclusive bargaining agent.[468] Finally, the CBA recognizes the Union as its sole bargaining agent. Thus, because the Union is attempting to collaterally attack the Board's and trial court's decisions in an attempt to find a favorable outcome, *res judicata* should apply to preserve the court's resources in litigating whether Johnson should have been fired.[469]

3. Bargaining Unit Clarification

In a series of three decisions, the appellate courts have determined that an employee who is a computer systems manager is usually considered a confidential employee since these employees generally have access to all of the data stored on the computer systems. Thus, these types of employees must be excluded as part of the bargaining unit because they may have access to confidential bargaining information. In addition, the courts are pretty clear that a petition for clarification of a bargaining unit when it comes to confidential employees may be brought at any time.[470]

In *Niles Township High School District 219 v. IELRB*,[471] the court determined whether the District appropriately raised a unit clarification petition in a timely manner and whether the Administrative Law Judge (ALJ)

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464 . *Id.* at 562, 840 N.E.2d at 1289.
465 . *Id.* at 563, 840 N.E.2d at 1289.
466 . *Id.* at 564, 840 N.E.2d at 1291.
467 . *Id.*
468 . *See* 5 ILL. COMP. STAT. 315/6 (2004).
469 . *Rockford*, 362 Ill. App. 3d at 566, 840 N.E.2d at 1292.
470 . *See* Niles Twp. High Sch. Dist. 219 v. IELRB, 369 Ill. App. 3d 128, 859 N.E.2d 57 (1st Dist. 2006); Cent. Mgmt. Servs. v. ILRB, 364 Ill. App. 3d 1028, 848 N.E.2d 118 (4th Dist. 2006); Support Council of Dist. 39, Wilmette Local 1274, IFT-AFT, AFL-CIO v. IELRB, 366 Ill. App. 3d 830, 852 N.E.2d 372 (1st Dist. 2006).
471 . Niles Twp. High Sch. Dist. 219 v. IELRB, 369 Ill. App. 3d 128, 859 N.E.2d 57 (1st Dist. 2006).

and Illinois Educational Labor Relations Board (IELRB) properly refused to hear evidence regarding the unit clarification petition.[472] On May 30, 2003, the District filed a clarification petition to classify three information systems (IS) employees as confidential employees within the meaning of the Illinois Educational Labor Relations Act (Act)[473] because they had unlimited access to the computer network including District bargaining positions.[474] The District argued that if these employees, who were previously a part of the clerical workers' bargaining unit, were allowed to continue as part of the collective bargaining unit, there would be an unreasonable risk that the District's collective bargaining positions would be prematurely disclosed.[475] The IS employee's new duties included monitoring employees computer use habits and disciplining them accordingly.[476]

The ALJ issued a rule to show cause order requiring the District to show why the petition was an "appropriate vehicle" and noted that unit clarification petitions are only appropriate in three narrow circumstances: "(1) there is a newly created job classification entailing job functions that are similar to those of classifications covered by the existing bargaining unit; (2) the job functions of an existing classification have been altered substantially . . . ; or (3) there has been a change in statutory or case law affecting the bargaining rights of employees."[477] The ALJ required the District to show how it fit into the above categories as it thought the clarification petition was not an appropriate vehicle. In this case, the ALJ ruled that neither of the first two exceptions applied because the job had not changed that much since being instituted in 1999. Further, the ALJ stated that there had not been significant change in statutory or case law since the District created the positions.[478]

The District responded by stating that the job classifications changed in May 2001. The ALJ, instead of focusing on whether the petition was "an appropriate vehicle," ruled, *sua sponte*, that the District's petition was untimely filed as the position had changed in May 2001 and that the petition was not filed until May 2003, some 24 months later.[479] Later the District attempted to introduce evidence that the union challenged the decision in May 2001. Ultimately, this lead to an agreement between the District and the union in December 2002, which the School Board adopted January 6, 2003. That is

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472 . *Id.* at 129, 859 N.E.2d at 59.
473 . *See* 115 ILL. COMP. STAT. 5/2(n) (2004).
474 . *Niles*, 369 Ill. App. 3d at 130–31, 859 N.E.2d at 59–60.
475 . *Id.* at 130, 859 N.E.2d at 60.
476 . *Id.* at 132, 859 N.E.2d at 62.
477 . *Id.* at 131, 859 N.E.2d at 61.
478 . *Id.* at 131, 859 N.E.2d at 61.
479 . *Id.* at 132, 859 N.E.2d at 62.

the date the District argues that the classification changed.[480]

The IELRB noted that the District had asserted new facts in response to the ALJ's recommended decision and order and that it would not consider these new facts because the District had not raised them during the investigation of the case.[481] The IELRB ultimately ruled that because the petition was not filed within a reasonable period of time after the change in the classification, the District could not now exclude the IS employees.[482] In overruling its previous decision in *Community High School District No. 218*, the IELRB held that if clarification petitions were allowed to be filed at any time, it would undermine the Act's policy of promoting stability in collective bargaining relationships. Changing statutorily created relationships in an untimely fashion would undermine this policy.[483]

The First District Appellate Court in rejecting the ALJ and IELRB's decisions noted that the District had no notice that the ALJ was considering dismissal of its petition on an untimeliness basis and the District had no opportunity to be heard or make arguments as to that issue. Consequently, this violated the District's due process rights of notice and an opportunity to be heard. The court held that the ALJ should have held an evidentiary hearing rather than issuing a rule to show cause order to the District.[484] The IELRB's refusal to consider these new facts constituted a continuation of the deprivation of the District's due process rights and could have been presented at an evidentiary hearing. Accordingly, the court reversed and remanded the case to the IELRB to consider these additional facts the District submitted.[485]

The court further held that requiring a reasonable time limit to file a clarification petition is against the legislature's intent in defining confidential employees rejecting the IELRB's declaration that it would promote stability. Further, the court held that the requirement of filing a timely petition would disrupt the orderliness of the process because allowing employees access to confidential information would give a union an unfair advantage over an employer.[486] Thus, the court found that the IELRB's decision overruling prior precedent with respect to confidential employees was arbitrary and capricious.[487]

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480 . *Id.*
481 . *Id.* at 133, 859 N.E.2d at 62.
482 . *Id.* at 133–34, 859 N.E.2d at 62–63.
483 . *Id.* at 134, 859 N.E.2d at 63.
484 . *Id.* at 136, 859 N.E.2d at 64–65.
485 . *Id.* at 137, 859 N.E.2d at 65.
486 . *Id.* at 142, 859 N.E.2d at 69–70.
487 . *Id.* at 143, 859 N.E.2d at 70.

Similarly, in *Central Management Services v. ILRB*,[488] the court held that if an employee is determined to be a confidential employee, then a clarification petition may be filed at any time even where the employee has been classified in a bargaining unit for years before the clarification petition.[489] In addition to the three circumstances when a clarification petition may be filed, which are noted above, the court added one more created under Illinois case law.[490] Namely, this occurs "when a newly created job classification has job functions similar to functions already covered in the bargaining unit."[491] The job classification in question in these two cases, consolidated for appeal, are an information systems analyst and a drug screener, positions that allegedly required access to confidential information.[492]

While the court acknowledged that the circumstances did not fit with any of the four limited circumstances which allowed a unit clarification petition, it held that where unique circumstances exist and "allegedly confidential employees were improperly included in a bargaining unit, the filing of a unit-clarification petition is appropriate."[493] The court reasoned that because access to confidential information to protect the employers and confidential employees that could find themselves torn between the loyalty to the their employer and their bargaining unit were so paramount, a unit clarification petition was an appropriate method of reclassifying the employees.[494]

In response to the Board's holding that the unit-clarification petitions are barred by equitable estoppel, the court reversed and held that there was no affirmative act by Central Management Services to make AFSCME and the employees rely on the classification. Thus, because there was no affirmative misconduct, equitable estoppel would not apply.[495] Finally, the court overturned the Board's decision that the petition was dismissed because it was untimely. The court held that because of the unique nature of confidential employees, the timeliness should not matter simply because the employee was wrongly classified in the first place.[496] The court remanded the case to the Board to determine whether these employees were considered confidential employees.[497]

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488 . Ill. Dept. of Cent. Mgmt. Servs. v. ILRB, 364 Ill. App. 3d 1028, 848 N.E.2d 118 (4th Dist. 2006).
489 . *Id.* at 1036, 848 N.E.2d at 124.
490 . *See* 80 ILL. ADM. CODE §§ 1210.170(a)(1), (a)(2), (a)(3).
491 . *Cent. Mgmt. Servs.*, 364 Ill. App. 3d at 1032, 848 N.E.2d at 121.
492 . *Id.* at 1030–31, 848 N.E.2d at 120–21.
493 . *Id.* at 1033, 848 N.E.2d at 122.
494 . *Id.* at 1033, 848 N.E.2d at 122–23.
495 . *Id.* at 1035, 848 N.E.2d at 124.
496 . *Id.* at 1036, 848 N.E.2d at 124.
497 . *Id.*

In another case regarding the status of a computer network manager, the First District Appellate Court held that he was considered a confidential employee.[498] In *District 39*, the court determined whether a newly created network manager position was considered a confidential employee. To determine the answer, the court examined other IELRB decisions regarding computer systems employees. In one factually similar situation where the position required the employee access to all passwords and to recover lost files, the Board ruled that the employee was considered a confidential employee. Thus, because the network manager in this case had broad, unfettered access to the computer systems and could retrieve lost records, he had access to those confidential files and was a confidential employee.[499]

The court rejected the notion that a school district must devise systems to prevent a network manager from access to those confidential files by requiring collective bargaining documents to be stored on a disk.[500] Also rejecting the petitioner's argument that the network administrator is like a security guard standing outside a door where a confidential meeting is taking place, the court noted that if the network manager retrieved a file, it would appear on the screen and the network manager could not be prevented from viewing it.[501]

Finally, the court looked at the three tests to determine if the network manager was a confidential employee. The first, the reasonable expectation test is applied where no collective bargaining unit is in place and it is assumed the employee will be able to access confidential records. The second, the labor-nexus test, applies where an employee, in his regular duties, assists one or more persons who formulate, determine, or effectuate labor relations policies. The third, the authorized access test applies where the employee has authorized access to information related to labor relations.[502] The court ruled that the first test did not apply since the bargaining unit was already in place. With respect to the labor-nexus test, the court ruled that the regular duties include assisting the District's top administrators who have access to confidential files. Under the third test, the job entails access to all files stored on the network. Thus, the network manager is considered a confidential employee.[503]

In *County of Cook v. ILRB*,[504] the court determined that a different

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498 . Support Council of Dist. 39, Wilmette Local 1274, IFT-AFT, AFL-CIO v. IELRB, 366 Ill. App. 3d 830, 852 N.E.2d 372 (1st Dist. 2006) (hereinafter "District 39").

499 . *Id.* at 835, 852 N.E.2d at 377.

500 . *Id.*

501 . *Id.* at 835–36, 852 N.E.2d at 378.

502 . *Id.* at 837, 852 N.E.2d at 379.

503 . *Id.* at 837–38, 852 N.E.2d at 379–80.

504 . County of Cook v. ILRB, 369 Ill. App. 3d 112, 859 N.E.2d 80 (1st Dist. 2006).

standard applies to health care providers when determining a bargaining unit in a multi-site setting because typically each provider operates independently.[505] In *County of Cook*, the Retail, Wholesale & Department Store Union Local 200 (RWDSU) sought to certify all Administrative Assistants III and IV (AAIIIs and IVs) at Provident Hospital as a bargaining unit. The American Federation of State, County & Municipal Employees (AFSCME), already representing AAIs and IIs, filed a petition to intervene and to accrete Provident AAIIIs and IVs to its bargaining unit. The Board determined that AAIIIs and IVs were an appropriate bargaining unit, not confidential employees, and ordered an election in which the employees chose RWDSU to represent them. Cook County objected to the finding arguing that it will create a fragmentation of the bargaining unit and that the AAIIIs and IVs were confidential employees. AFSCME objected to the AAIIIs and IVs classified as an appropriate bargaining unit.[506]

The court, applying a clearly erroneous standard of review, looked at the factors in Section 9(b) of the Illinois Public Labor Relations Act[507] to determine whether the Board determined the appropriate bargaining unit.[508] The factors included: the "historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours and other working conditions of the employees involved; and the desires of the employees."[509] While Cook County and AFSCME argued that there was a presumption of inappropriateness because the petitioner (RWDSU) sought only a portion of employees who perform duties in identical job classifications, the court held that a different standard applies in cases concerning health care providers.[510] Although Cook County is one employer running several different hospitals, the court must look at factors to consider to determine whether a single-facility or multiple-facility unit is appropriate for representing employees of a multi-site health care provider. The factors include: (1) whether the multiple facilities are considered a single entity for certification or accreditation; (2) whether there is centralized administration of the various facilities; (3) whether labor and personnel policies and benefits are the same amongst the facilities; (4) whether job openings are posted throughout the facilities; (5) whether

505 . *Id.* at 120, 859 N.E.2d at 87.
506 . *Id.* at 115, 859 N.E.2d at 83.
507 . 5 ILCS 315/1 *et. seq.* (2004).
508 . *County of Cook*, 369 Ill. App. 3d at 118, 859 N.E.2d at 86.
509 . *Id.* at 118, 859 N.E.2d at 86 (quoting 5 ILL. COMP. STAT. 315/9(b) (2006)).
510 . *County of Cook*, 369 Ill. App. 3d at 119, 859 N.E.2d at 86.

employees frequently transfer among the facilities; (6) whether the facilities' departments are unified or there is significant interaction among the employees; (7) whether the facilities are geographically proximate; (8) whether there is a history or pattern of combining comparable employees of the various facilities in single units.[511]

In this case, the court did not find that the Board's decision that a Provident AAIIIs and IVs bargaining unit was clearly erroneous. In analyzing the factors, the court noted that Provident is certified separately from other hospitals, it has its own chief operating officer and budget, and hires and negotiates with labor unions independently of the other hospitals. Further, there was no evidence that employees transferred or that there was significant interaction amongst the employees.[512] Thus, it was appropriate to classify Provident AAIIIs and IVs into one bargaining unit.[513]

Cook County also argued that the employees were confidential employees because they had access to management policies with regard to labor relations. The court determined that the purpose of excluding confidential employees is to keep them from having their loyalties divided between their employer and bargaining unit.[514] Adopting the authorized access test, the court determined that the employee did not have authorized access to information concerning matters specifically related to the collective bargaining process. Specifically, examining the job functions of four employees who were AAIIIs or IVs, it determined that there was no evidence that the employees could access the records. Although these employees may have assisted those who make decisions regarding collective bargaining, there was no evidence that any of the employees had access to confidential information in the regular course of their duties.[515] Because the burden of proof was on Cook County to prove these employees status as confidential employees and there was no evidence showing this, the court ruled that AAIIIs and IVs were not confidential employees and certified them as a bargaining unit.[516]

G. At-Will Employment

The First District of the Appellate Court followed precedent by affirming the trial court's dismissal of a case for breach of employment contract alleged

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511 . *Id.* at 120, 859 N.E.2d at 87.
512 . *Id.* at 121–22, 859 N.E.2d at 88.
513 . *Id.* at 122, 859 N.E.2d at 88.
514 . *Id.* at 124, 859 N.E.2d at 90.
515 . *Id.* at 125, 859 N.E.2d at 91.
516 . *Id.*

to have been created by the employee manual in *Ivory v. Specialized Assistance Services, Inc.*[517] Plaintiff had been a driver for 16 years for the company. His job was eliminated due to budgetary issues. Plaintiff alleged his termination was wrongful because the company breached its seniority and notification provisions set forth in the employee manual. The employee manual introduction contained the following provision:

> This Personnel Policies/Procedures document is an outline of the basic personnel policies, practices, and procedures in our agency. It contains general statements of agency policy and it should not be read as forming an expressed or implied contracts or promise. The agency will try to keep the document current, but there may be times when the policy will change before this material can be revised.
>
> The policies and procedures set forth in this document prescribe the terms, conditions, and standards or personnel operations for Substance Abuse Services, Inc. The content of which is neither contractually binding upon the agency nor restrictive in terms of amendment or interpretation by Substance Abuse Services, Inc. Employees are expected to acquaint themselves fully with the contents of this document in order to establish an employment relationship based on a complete understanding of Substance Abuse Services, Inc. personnel requirements, expectations, and methods of conducting personnel matters."[518]

Illinois is an employment-at-will state. This means that employees and employers are free to terminate the employment relationship at the will of either party, unless it is otherwise demonstrated that the parties intended to create a contractual relationship.[519] In order for a contractual relationship to be created by an employee manual, there must be (1) a promise clear enough that the employee reasonably believes a promise has been made, (2) an acceptance by the employee and (3) consideration.[520] Any such contractual relationship can be overcome by proper disclaimer language in the employee manual.[521] The trial court dismissed the case finding the disclaimer was clearly worded and it was unreasonable for the plaintiff to construe it as a promise or offer. The court further noted that plaintiff's reliance was even less reasonable because the language he relied upon as creating the promise was in the introduction of the employee manual which also contained the disclaimer

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517 . Ivory v. Specialized Assistance Servs., Inc., 365 Ill. App. 3d 544, 850 N.E.2d 230 (1st Dist. 2006).
518 . *Id.* at 545, 850 N.E.2d at 232.
519 . *Id.* at 546, 850 N.E.2d at 232 (citing Dudulao v. Saint Mary of Nazareth Hosp. Ctr., 115 Ill. 2d 482, 505 N.E.2d 314 (1987).
520 . *Id*. at 546, 850 N.E.2d at 232–33.
521 . *Id*. at 546, 850 N.E.2d at 233.

language.[522]

H. School Law

1. Section 24-14 of the School Code.

The appellate court scrutinized the applicability of section 24–14 of the School Code ("Code")[523] to non-tenured teachers in *Board of Education of Park Forest Heights School District No. 163, Cook County, IL v. State Teacher Certification Board.*[524]

Michael DuBose ("DuBose") was a probationary teacher who resigned just after the 2002 school year began. He claimed his resignation was due to an increase in the district's insurance premiums. However, DuBose had already accepted a teaching position in a nearby school district during the same time.

The Regional Superintendent conducted an evidentiary hearing and found that Dubose had violated the Code Section 24–14, prohibiting teachers from resigning during the school year to take teaching jobs elsewhere.[525] Pursuant to this section, the Regional Superintendent suspended DuBose's teaching certificate for one year.[526]

DuBose filed an appeal with the State Teacher Certification Board ("Certification Board"), which found that Code Section 24–14 applied only to tenured teachers and reversed the Superintendent's suspension of DuBose. The Illinois State Board of Education ("Board of Education") filed a complaint for administrative review of the Certification Board's decision in the circuit court. DuBose filed for dismissal challenging the Board of Education's standing. The circuit court subsequently reversed the Certification Board's determination, reinstating DuBose's one-year suspension Code Section 24–14.[527]

On appeal, DuBose first challenged the Board of Education's standing to file a complaint for administrative review. The court found that the Board of Education was an original party to the administrative hearing conducted by the

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522 . *Id.*

523 . 105 ILL. COMP. STAT. ANN. 5/24–14 (West 2002).

524 . Bd. of Educ. of Park Forest Heights Sch. Dist. No. 163, Cook County Ill. v. State Teacher Certification Bd., 363 Ill. App. 3d 433, 842 N.E.2d 1230 (1st Dist. 2006), *appeal denied* 219 Ill. 2d 561, 852 N.E. 238 (2006).

525 . 105 ILL. COMP. STAT. ANN. 5/24–14 (West 2002).

526 . *Park Forest Heights*, 363 Ill. App. 3d at 436, 852 N.E.2d at 1233.

527 . *Id.* at 437, 852 N.E.2d at 1233.

Regional Superintendent. The court further noted the administrative decision affected the Board of Education's rights, privileges, and duties, as required for standing under the Administrative Review Law.[528]

DuBose next argued the Certification Board erred by denying him a *de novo* hearing pursuant to subsection 21–23(c) of the Code.[529] The court argued that DuBose could not assert or prove prejudice, since the Certification Board gave DuBose a favorable ruling. Generally, "a party cannot complain of error that does not prejudicially affect it."[530]

Despite the lack of prejudice, the court further noted that even if DuBose had shown prejudice, the Certification Board was not required to conduct a *de novo* hearing. The court found Code Section 21–23 (c) applied to *de novo* hearings after a teaching certificate had been revoked. The court did not find this Code Section extended to hearings where a teaching certificate had been suspended.[531]

DuBose further argued that the Certification Board's adoption of the Illinois Administrative Code[532] supported his contention that a *de novo* hearing was required. The court noted that the Administrative Code regulations applied only to "'administrative hearing' rather than 'appeals' from the Certification Board from suspension of a teaching certificate."[533]

DuBose also challenged the Certification Board's procedures, alleging they were not adopted in accordance with the Illinois Administrative Procedure Act.[534] Again, the court noted that without a showing of prejudice, DuBose could not show the Certification Board erred.[535]

Next, DuBose argued that the circuit court's determination should be reversed and remanded due to the Certification Board's failure to make factual findings. Synthesizing Section 10–50(a) of the Administrative Procedure Act with Section 477.100 of the Administrative Code, the court concluded that the rules required the Regional Superintendent, who conducted the hearing, not the Certification Board, which reviewed the appeal, to include factual findings in its decision.[536] Additionally, the court found that the Regional Superintendent had provided factual findings and they were sufficient to

528 . 735 ILL. COMP. STAT. ANN. 5/3–101– 5/3–113 (West 2002).
529 . 105 ILL. COMP. STAT. ANN. 5/21–23(c) (West 2002).
530 . *Park Forest Heights*, 363 Ill. App. 3d at 438, 842 N.E.2d at 1234.
531 . *Id.* at 1235–36 (discussing 105 ILL. COMP. STAT. ANN. 5/21–23(a)).
532 . 23 ILL. ADM. CODE §§ 475.10 – 475.100 (eff. June 30, 2005).
533 . *Park Forest Heights*, 363 Ill. App. 3d at 440–41, 842 N.E.2d at 1236.
534 . 5 ILL. COMP. STAT. ANN. 100/5–5 (West 2002).
535 . *Park Forest Heights*, 363 Ill. App. 3d at 441, 842 N.E.2d at 1236.
536 . 23 ILL. ADM. CODE § 475.100 (eff. June 30, 2005).

permit judicial review.[537]

Next the court addressed one of the key issues in the cases: whether Section 24–14 applied to both tenured and non-tenured teachers. The Regional Superintendent had determined it did. The Certification Board disagreed. The appellate court emphasized the second sentence of the Code Section 24–14, reading" "*no teacher* may resign during the school term, without the concurrence of the board, in order to accept another teaching assignment."[538] The court found this sentence to be unambiguous in applying to all teachers, regardless of tenure status. The court also looked to the legislative history of Code Section 24–14, which supported this reading of the section.[539] The legislative history demonstrates that Section 24–14 was enacted out of concern for a school's inability to replace a teacher who had resigned during the school year. Keeping this concern in mind, the court could think of no reason why the legislature would make a distinction between tenured and non–tenured teachers.[540]

2. Irremediable Conduct.

A teacher may be dismissed for cause. Two kinds of misconduct may constitute cause. One is irremediable misconduct, that is conduct which "causes damage to the students, the faculty, or the school itself that could not have been corrected" had the teacher been given a warning.[541] The other is remediable conduct, which is misconduct by a teacher in the ordinary course of duties that if called to his or her attention can be remedied.[542]

In *Ahmad v. Board of Education of City of the Chicago*, the court determined whether the teacher's actions were remediable or irremediable. The plaintiff was a tenured teacher at the time of the action. She had been reassigned to the Board's Office of Schools and Regions after she had been removed from the classroom for disciplinary reasons unrelated to the current action.[543] Plaintiff also had a side business selling office supplies. To support this business venture, plaintiff applied for membership in the National Association for the Exchange of Industrial Resources (NAEIR), a nonprofit organization that provided low cost office supplies to other nonprofits or to schools. NAEIR rejected plaintiff's initial application because she did not have

537 . *Park Forest Heights*, 363 Ill. App. 3d at 442, 842 N.E.2d at 1237.
538 . 105 ILL. COMP. STAT. ANN. 5/24–14 (West 2002) (emphasis added).
539 . *Park Forest Heights*, 363 Ill. App. 3d at 443–45, 842 N.E.2d at 1238–39.
540 . *Id.* at 446, 842 N.E.2d at 1240.
541 . Ahmad v. Bd. of Educ. of Chicago, 365 Ill. App. 3d 155, 163, 847 N.E.2d 810, 817 (1st Dist. 2006).
542 . *Id.* at 163, 845 N.E.2d at 817.
543 . *Id.* at 157, 847 N.E.2d at 813.

a valid school address or name of a school. Plaintiff then filled out a new application stating that she was applying on behalf of the Board's Office of Schools and Regions with the approval of plaintiff's supervisor.[544] In various documents and order forms, NAEIR stated that the supplies were to be used only for nonprofit ventures, were not to be resold, and were for organizations only.[545] Plaintiff eventually ordered more than $30,000 worth of office supplies from NAEIR. Eventually, the Board, after receiving numerous invoices from NAEIR, questioned plaintiff about the organization. The plaintiff stated that it was personal business and no business of the Board.[546]

The Board then learned that plaintiff had falsified her status as an agent of the Office of Schools and Regions and began hearings to determine whether to terminate her. Plaintiff's defense was that she had not understood from the forms that NAEIR excluded individuals from the program and also that she thought that the prohibition on the form requiring the goods only to be used for nonprofit organizations was merely a suggestion.[547] The hearing officer dismissed plaintiff stating that Ahmad's conduct was irremediable applying a two part test the Illinois Supreme Court set forth in *Gilliland v. Board of Education of Pleasant View Consolidated School District No. 622*.[548]

To prove that the conduct is irremediable the Board must prove by a preponderance of the evidence that (1) the teacher's conduct caused significant damage to the school; and (2) the teacher would not have corrected his or her conduct if he or she had been issued a written warning.[549] Applying this two part test, the hearing officer ruled that the conduct could have resulted in NAEIR losing its tax exempt status and threatening the school's future membership in the organization causing significant damage to the school. Second, the teacher's conduct was continual and not remediable. The Board, in adopting the hearing officer's recommendations terminated Ahmad.[550]

The court, in reviewing the Board's decision, rejected the Board's decision to cast the decision as between remediable and irremediable conduct, but instead looked to the Illinois School Code (Code) amended after the Illinois Supreme Court's decision in *Gilliland*.[551] The Code provides that a teacher's conduct may be considered irremediable if it is considered cruel, immoral,

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544 . *Id.* at 158, 847 N.E.2d at 814.
545 . *Id.* at 159, 847 N.E.2d at 814.
546 . *Id.* at 160, 847 N.E.2d at 815.
547 . *Id.*
548 . *Id.* at 161, 847 N.E.2d at 816; *see* Gilliland v. Bd. of Educ. of Pleasant View Consol. Sch. Dist. No. 622, 67 Ill. 2d 143, 365 N.E.2d 322 (1977).
549 . *Ahmad*, 365 Ill. App. 3d at 161, 847 N.E.2d at 816.
550 . *Id.* at 161–62, 847 N.E.2d at 816.
551 . *Id.* at 164, 847 N.E.2d at 818; *see* 105 ILL. COMP. STAT. 5/34–85 (2004).

negligent, or criminal.[552] The court, citing its previous decision in *Younge v. Board of Education of the City of Chicago*,[553] held that *Gilliland* is inapplicable in cases where the conduct warrants an immoral classification. In this case, the court held that plaintiff's conduct was not only immoral, "but perhaps even criminal, *i.e.* theft by deception."[554] The court then detailed plaintiff's actions to deceive her employer and NAEIR in order to obtain merchandise to sell for her own business venture. Thus, because the court found that plaintiff's conduct was immoral, it was by necessity irremediable and subjected plaintiff to termination.[555]

I. Termination of Tenured Teacher

Like the cases in Section III.A.1 of this article, failing to name the correct party is fatal to a case. In *Jones v. Cahokia Unit School District No. 187*,[556] the appellate court reviewed *de novo* the Illinois State Board of Education's ("State Board") affirmation of Cahokia Unit School District No. 187's ("School District") decision to terminate a tenured teacher, Carlton Jones ("Jones") for cause.

There is no dispute that Jones failed to name or serve the State Board when he filed a complaint for administrative review.[557] Jones argues he was not required to name the State Board.[558] Section 3–107(a) of the Administrative Review Law[559] provides in part:

> [I]n any action to review any final decision of an administrative agency, the administrative agency and all persons, other than the plaintiff, who were parties of record to the proceedings before the administrative agency shall be made defendants. [560]

This section required Jones to name and serve the State Board, since it is this

552 . *Ahmad*, 365 Ill. App. 3d at 164, 847 N.E.2d at 818.
553 . Younge v. Bd. of Educ. of Chicago, 338 Ill. App. 3d 522, 788 N.E.2d 1153 (1st Dist. 2003).
554 . *Ahmad*, 365 Ill. App. 3d at 165, 847 N.E.2d at 819.
555 . *Id.* at 166–67, 847 N.E.2d at 820.
556 . Jones v. Cahokia Unit Sch. Dist. No. 187, 363 Ill. App. 3d 939, 845 N.E.2d 866 (5th Dist. 2006).
557 . *Id.* at 942, 845 N.E.2d at 868.
558 . *Id.*
559 . 735 ILL. COMP. STAT. ANN. 5/3–101 et seq. (West 2004).
560 . *Jones*, 363 Ill. App. 3d at 942, 845 N.E.2d at 868; 735 ILL. COMP. STAT. ANN. 5/107(a) (West 2004).

decision that is being reviewed by the appellate court.[561]

The appellate court also rejected Jones' argument that he should be allowed to amend his complaint to add the State Board and its hearing officer pursuant to Section 3–107(a) which provided in part:

> If, during the course of a review action, the court determines that a party of record to the administrative proceedings was not made a defendant as required . . ., and only if that party was not named by the administrative agency in its final order as a party of record, then the court shall grant the plaintiff 21 days from the dates of the determination in which to name and serve the unnamed party as a defendant.[562]

This section does not allow the addition of the administrative agency which rendered the final order, but rather the additional of a party of record.[563] The appellate court affirmed the circuit court's decision to dismiss Jones' complaint for administrative review.[564]

J. Breach of Employment Contract

1. Oral Employment Agreement

In *Robinson v. BDO Seidman, LLP*,[565] the appellate court examined the enforceability of an oral contract and an alleged breach thereof.

BDO Seidman, LLP ("BDO") contacted plaintiff, Douglas Robinson ("Robinson"), about a job opportunity to run a newly created department. BDO told Robinson, if Robinson accepted the position as head of a new department, "he would be employed as long as it takes to successfully build the department, and then as long as plaintiff desired."[566] Robinson resigned his current job to go and work for BDO, despite a minimum pay cut. After two months of employment, BDO terminated Robinson. Robinson filed suit against BDO alleging breach of contract and promissory estoppel. The trial court granted with prejudice BDO's section 2–615 motion to dismiss and Robinson appealed.[567] The appellate court would affirm the dismissal.

On appeal, plaintiff argued his termination constituted breaches of two

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561 . *Jones*, 363 Ill. App. 3d at 942, 845 N.E.2d at 868.
562 . *Id.* at 942–43, 845 N.E.2d at 868; 735 ILL. COMP. STAT. ANN. 5/3–107(a) (West 2004).
563 . *Jones*, 363 Ill. App. 3d at 942–43, 845 N.E.2d at 868.
564 . *Id.* at 944, 845 N.E.2d at 869.
565 . Robinson v. BDO Seidman, LLP, 367 Ill. App. 3d 366, 854 N.E.2d 767 (1st Dist. 2006).
566 . *Id*. at 367, 854 N.E.2d at 769.
567 . 735 ILL. COMP. STAT. ANN. 5/2–615 (West 2004).

terms of the oral employment contract. First, BDO terminated Robinson's employment before the new department was successfully established, and, second, BDO did not employ plaintiff as long as he desired. Before addressing either of these two main allegations, the appellate court determined the oral contract between BDO and Robinson was supported by sufficient consideration. That is, Robinson opted not to take (or, more accurately *stay at*) a more lucrative job in exchange for the employer's promise of permanent employment.[568]

Next, the *Robinson* court addressed the allegation BDO breached the oral agreement by failing to employ plaintiff as long as it took to build a successful new department. The court explained that the general rule is that an employment agreement that does not specify a clear and definite duration can be terminated at will without liability for breach of contract. In examining the opinions of prior courts, the *Robinson* court noted language that a contract would "last through 1991" was sufficiently clear and definite. However, representations that the employee "would be groomed to be the company president" were not.[569]

In examining the facts relating to the instant case, the appellate court observed no specific duration was established for Robinson's employment. The court noted BDO's comments during the interview process that Robinson would be employed until the department was successfully established were nothing more than general and generic expressions of goodwill and hope. That is, any promises made to Robinson regarding the length of his employment were very vague, not nearly clear or definite enough to overcome the presumption that Robinson's employment was at will.[570]

The court next addressed plaintiff's argument that BDO failed to comply with its promise to employ him "as long as plaintiff desired." The *Robinson* Court found this promise to be equally unclear and indefinite. Further, the statute of frauds bars such promises,[571] providing, in part: "[n]o action shall be brought . . . upon any agreement that is not to be performed within the space of one year form the making thereof unless . . . in writing. . . ." The court likened the instant case to *McInerney v. Charter Golf, Inc.*,[572] where an employee was promised lifetime employment. The *McInerney* court found an employment-for-life contract violated the statute of frauds. Although the

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568 . *Robinson*, 367 Ill. App. 3d at 368, 854 N.E.2d at 770.

569 . *Id.* at 368–69, 854 N.E.2d at 770–71 (citing, among other cases, Johnson v. George J. Ball, Inc., 248 Ill. App. 3d 859, 617 N.E.2d 1355 (2d Dist. 1993); Kercher v. Forms Corp. of Am., Inc., 258 Ill. App. 3d 743, 630 N.E.2d 978 (1st Dist. 1994)).

570 . *Id.* at 369–70, 854 N.E.2d at 771.

571 . *See* 740 ILL. COM. STAT. ANN. 80/1 (West 2004).

572 . McInerney v. Charter Golf, Inc., 176 Ill. 2d 482, 680 N.E.2d 1347 (1997).

employee certainly could, in theory, die within one year of the contract's formation, such an interpretation of the one year rule would "eviscerate the policy underlying the statute of frauds." [573]

In the case before it, the *Robinson* court found the statute of frauds barred an oral contract purported to exist as long as the employee desired, even if, in theory, that could mean a year or less of employment. A promise such as BDO's must be in writing.[574]

Plaintiff argued alternatively that even if the statute of frauds applies, it is inapplicable, as he partially performed under the oral contract. The appellate court found this argument unpersuasive. Quoting *McInerney*, the court observed: "[a] party's partial performance generally does not bar application of the statute of frauds, unless it would otherwise be impossible or impractical to place the parties in status quo or restore or compensate the performing party for the value of his performance."[575] Robinson had been compensated for the work he performed for BDO. Consequently, the statute of frauds still applies.

Lastly, plaintiff argued the trial court erred in dismissing his allegations of promissory estoppel. Such a cause of action requires allegations that: (1) defendant made an unambiguous promise to plaintiff; (2) plaintiff relied on this promise; (3) plaintiff's reliance was expected and foreseeable by defendant; and (4) plaintiff relied on the promise to his detriment. The court found plaintiff had failed to sufficiently allege that the promises made by BDO were unambiguous offers of permanent employment. Additionally, in Illinois, promissory estoppel does not bar the application of the statute of frauds, except where the performing party would be without a remedy and the promising party would be unjustly enriched. Such was not the case with Robinson, as he was fully compensated for his services.[576]

2. Reduction of Pay

The appellate court scrutinized the calculation of a teacher's temporary total disability ("TTD") benefits in a breach of contract action filed against the school district in *Boelkes v. Harlem Consolidated School District No. 122*.[577] The plaintiff, Lisa Boelkes ("Boelkes"), was hired to work 181 days in the 2002–2003 academic year for Harlem Consolidated School District No. 122 ("District"). Boelkes' salary was to be $47,811.40, which she opted to receive

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573 . *Id.* at 490–91, 680 N.E.2d at 1352.

574 . *Robinson*, 367 Ill. App. 3d at 370–71, 854 N.E.2d at 772.

575 . *Id*. at 371–72, 854 N.E.2d at 773 (quoting *McInerney*, 176 Ill. 2d at 491, 680 N.E.2d at 1352).

576 . *Id*. at 372, 854 N.E.2d at 774.

577 . Boelkes v. Harlem Consol. Sch. Dist. No. 122, 363 Ill. App. 3d 551, 842 N.E.2d 790 (2d Dist. 2006).

in 26 installments, equaling $1,838.90 per paycheck.

Just four days into the school year, Boelkes was injured on the job and missed 74 days of work. Boelkes sought compensation under the Illinois Workers' Compensation Act ("Act").[578] The District and Boelkes settled the workers' compensation claim. Pursuant to the workers' compensation agreement, Boelkes received TTD benefits based on an average weekly wage of $919.45. The agreement did not indicate how this average weekly rate was calculated, but the appellate court deduced this was the result of her base pay being divided by 52 weeks.[579]

The dispute resulting in the instant lawsuit arose after Boelkes returned to work in December 2002. Upon her return to work, Boelkes began receiving weekly paychecks in the amount of $1,511.59, over $300.00 less than her weekly paychecks *pre*-injury. To arrive at the *post*-injury weekly paycheck amount, the District divided plaintiff's base salary by 181 (the number of school days plaintiff had been hired to work), yielding in a *per diem* wage of $264.16. At the time Boekles returned to work in December, there were only 103 days left in the academic year. Of the original 26 pay periods in the year, 18 remained at this time. Multiplying $264.16 time 103, the District calculated Boelkes total salary for the remaining 103 workdays to be $27,208.48. Since plaintiff had opted for payment using the 26 pay periods method, the District divided $27,208.48 by 18 to calculate plaintiff's weekly salary for the remaining 18 pay periods. This was how the District calculated Boelkes' remaining paychecks. Boelkes did not like the math and brought suit against the District.[580]

Boelkes' complaint consisted of two counts, one alleging breach of contract and the second, which is not part of the appeal, alleges a violation of section 4(h) of the Illinois Workers' Compensation Act ("Act").[581] Boelkes alleges the District breached its agreement with her by unilaterally reducing her rate of pay. Defendants filed a section 2–619[582] motion to dismiss, arguing the breach of contract claim was barred by the Act's exclusivity provisions.[583] The District further contended Boelkes had failed to present a factual basis for her claim. The District argued the Boelkes' employment contract contemplated that her pay would be based on a *per diem* rate. Boelkes opposed the motion to dismiss, claiming, among other things, the District was estopped from using

578 . 820 ILL. COMP. STAT. ANN. 305.1 et seq. (West 2002).
579 . *Boelkes*, 363 Ill. App. 3d at 552–53, 842 N.E.2d at 793.
580 . *Id*. at 553, 842 N.E.2d at 793–94.
581 . 820 ILL. COMP. STAT. ANN. 305/4(h) (West 2002).
582 . 735 ILL. COMP. STAT. ANN. 5/2–619 (West 2004).
583 . 820 ILL. COMP. STAT. ANN. 305/5(a). 11 (West 2002).

a *per diem* rate to calculate her salary. The trial court granted the District's motion to dismiss the breach of contract claim with prejudice. Plaintiff appealed.[584]

Boelkes set forth several different arguments on appeal. First, the appellate court addressed plaintiff's attack of the District's method of calculating her wages post-injury. Plaintiff argued that the District's method of calculation was inconsistent with how it calculated her TTD benefits in her workers' compensation proceeding. Her TTD benefits were calculated using the average weekly wage of her base salary, not a *per diem* rate. The method used during the workers' compensation proceeding, plaintiff argued, should bind the District in calculating her post-injury wage. Hence, plaintiff argued, the District was now collaterally, judicially, and equitably estopped from using a *per diem* calculation rate.[585]

The *Boelkes* Court first addressed plaintiff's argument that the doctrine of collateral estoppel precluded a *per diem* calculation of her post-injury salary. The court observed that collateral estoppel only applies where the party invoking it has established: (1) the issues in the prior suit are identical to those in the new suit; (2) there was a final judgment on the merits of the prior suit; (3) the party against whom estoppel is asserted was a party to the prior action; and (4) the factual issue against which the doctrine is interposed has actually been litigated and determined in the prior suit.[586]

The court reviewed some of the history and purposes of the Act, noting the Act required plaintiff's TTD benefits to be calculated using her average weekly wage.[587] As the *Boelkes* Court observed, the Act in no way governs how employees are paid under their employment contracts. That is, the court found irrelevant the fact that the TTD benefits were calculated using a weekly wage. This would have no bearing on establishing plaintiff's salary under her employment contract.

Plaintiff argued that because she opted for compensation in 26 biweekly installments, her employment contract never contemplated a *per diem* rate of pay. The court disagreed. The contract gave the employee the choice of being paid in 22 or 26 installments. This regulated only the frequency of paychecks, not the employee's total salary. Significantly, plaintiff's employment contract expressly provided "the length of the contract was 181 *days*."[588] The court further noted that the collective bargaining agreement, though clearly not

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584 . *Boelkes*, 363 Ill. App. 3d at 553, 842 N.E.2d at 793–94.

585 . *Id*. at 553–54, 842 N.E.2d at 794.

586 . *Id*. at 554, 842 N.E.2d at 795.

587 . *See* 820 ILL. COMP. STAT. ANN. 305/8(b), 10 (West 2002) (mandating the compensation rate for TTD benefits as 2/3 of the employee's average weekly wage.).

588 . 363 Ill. App. 3d at 555–56, 842 N.E.2d at 795–96 (emphasis in original).

determinative, "buttressed" the proposition that District teachers are paid on a *per diem* basis.[589]

Regarding the doctrine of collateral estoppel, the court concluded the workers' compensation proceeding was not identical to the breach of contract suit. The former addressed the establishment of plaintiff's average weekly wage for purposes of calculating her TTD benefits. The latter addressed the appropriate calculation of plaintiff's post-injury pay. Hence, the court found doctrine of collateral estoppel did not apply to the case at bar.

The *Boelkes* Court found equally inapplicable the doctrine of judicial estoppel, which was designed to prevent a party from asserting inconsistent positions in separate proceedings to receive a favorable judgment in each. For this doctrine to apply: (1) the party has to take two different positions; (2) the positions were taken in separate proceedings; (3) the party must have intended the trier of fact to accept the truth of the facts alleged in the proceedings; (4) the party must have succeeded in asserting the first position and received some benefit from it; and (5) the two positions must be inconsistent.[590]

The court did not find inconsistent the District's positions in the two proceedings. As noted earlier in the opinion, the court found the weekly wage calculations from the workers' compensation proceeding mandated by statute. This was not, as such, a position the District had chosen to take.

Lastly, the plaintiff also argued equitable estoppel should preclude calculation of a *per diem* rate of pay. Again, the court disagreed. This doctrine applies where: (1) the other party misrepresented or concealed material facts; (2) the other party knew the representations were untrue at the time they made them; (3) the party claiming the estoppel did know the representations were untrue at the time they were made; (4) the other party intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith and to a detriment; and (6) the party claiming estoppel would be prejudiced by reliance on the representations if the other party is permitted to deny the truth thereof.[591]

The court found Boelkes failed to establish the first element of equitable estoppel, as there were no facts to support any allegation the District misrepresented or concealed any material facts. Having failed to establish the first element, the court found no reason to continue the analysis and affirmed the lower court's dismissal of plaintiff's breach of contract claim.

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589 . *Id*. at 556, 842 N.E.2d at 796.
590 . *Id*. at 557, 842 N.E.2d at 796–97.
591 . *Id*. at 557, 842 N.E.2d at 797.

IV. CONCLUSION

Joint employment issues appear to be more and more of an issue for employers using vendors to provide needed personnel on a temporary basis. Many employers do not realize they may be found to be a joint employer should that individual file a charge of discrimination. The appellate court again refuses to expand retaliatory discharge by distinguishing between a failure to renew a contract and discharge. The courts also still indicate at-will employment status will be preserved, if an employer uses a proper disclaimer in its employee policy manual so as not to create a contractual relationship.

We look forward to examining the next group of case decisions for additional guidance from the courts.