

BELOW THE RED LINE

HEYL...
ROYSTER

WORKERS' COMPENSATION UPDATE

"WE'VE GOT THE STATE COVERED!"

A Newsletter for Employers and Claims Professionals

January 2016

A WORD FROM THE PRACTICE GROUP CHAIR

The new year is well under way and we welcome you to the January 2016 edition of *Below the Red Line*. As in the past, we will endeavor to keep you up to date throughout this year with cutting-edge information pertaining to Workers' Compensation issues, and at the same time provide in depth analysis of important topics to the Workers' Compensation industry. In this edition we highlight Brett Siegel from our Springfield office, who provides an article on retaliatory discharge claims. The Workers' Compensation professional always needs to be aware of this potential litigation which can develop when it is necessary to terminate an employee who has filed a Worker's Compensation claim.

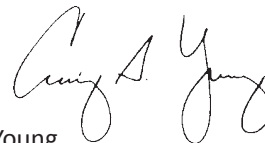
Heyl Royster has some exciting announcements to make as we head into the new year. We have named four new partners: Dana Hughes, Lynsey Welch, Brian Smith, and Barry Noeltner. We are proud of our firm's expansive practice, and you will note these four exceptional lawyers are leaders in many of our firm's specialized practice areas. We in the Workers' Compensation practice group are especially proud of Dana and Lynsey - lawyers many of you know well. Dana is located in our Peoria office and Lynsey practices out of Rockford and Chicago. Please congratulate both of them when you have a chance to do so.

It is also my pleasure to announce that as of January 1st, Toney Tomaso was appointed Chair of our firmwide Workers' Compensation practice group. Toney is well known to most of you, for his skill as a lawyer and for his devotion to client service. He will do a great job in this new role. I'm not going anywhere, as I continue to work with Toney and others in the management of our practice group, and also will continue to manage the practice out of our Peoria office. As always, Bruce Bonds (Urbana), Kevin Luther (Rockford/Chicago), and Dan Simmons (Springfield) will continue to be actively involved in the management of our Workers' Compensation practice. Brad Elward

continues in the management of our statewide Workers' Compensation appellate practice. We are also available to serve you in Missouri and Wisconsin, and in Jones Act cases venued throughout the Midwest Region.

Our team approach to practice group management and client service reflects our goal of making sure you receive exceptional legal counsel and representation for all your Workers' Compensation claims and concerns. In addition to our "We've got you covered" map, we also attach a list of the Workers' Compensation attorneys serving you from our six offices throughout the state. The contact attorneys listed on those documents are always a good resource, but please feel free to contact any of our attorneys for assistance with your claims.

We thank you for your past confidence in our firm, and we are excited about working with you in 2016 and beyond. Please never hesitate to contact any of us with your questions, concerns, and file assignment needs. Happy New Year!!



Craig S. Young
Former Chair, WC Practice Group
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NEW PRACTICE GROUP CHAIR



Toney Tomaso
Edwardsville & Urbana Offices

Toney works out of the Urbana and Edwardsville offices covering a vast majority of the state of Illinois for workers' compensation docket and trial coverage purposes. Based upon the current makeup and system put in place by the Illinois Workers' Compensation Commission, Toney has become familiar with most, if not all, of the Arbitrators and Commissioners who have been appointed by the IWCC.

Toney takes great pride in working directly with employers and their insurance carriers in order to build an important relationship and foster a team mentality and approach to defending workers' compensation claims. This includes consistent and constant communication and on-site meetings to enable and form the trust within the team which has proven to be an important formula in protecting the client's most important asset – the client's business itself.

HEYL ROYSTER NAMES NEW PARTNERS



Dana Hughes
Peoria Office

Dana started in our Rockford office and moved to the Peoria office this past year. She represents employers in workers' compensation claims. Dana frequently speaks and writes on Workers' Compensation law, including co-authoring *Southern Illinois University Law Journal's* "Survey of Illinois Law: Workers' Compensation." She is a graduate of Northern Illinois University College of Law and received her undergraduate degree at NIU. In 2015, Dana was named to the Leading Lawyers *Emerging Lawyers* list.



Barry Noeltner
Edwardsville Office

Barry Noeltner's practice is focused on the defense of personal injury, construction, nursing home claims, and professional liability litigation. He was one of the original three lawyers in the firm's Edwardsville office, starting in 1985, and he returned to the Edwardsville office in 2012. Barry is a trained mediator who has been ranked an *AV Preeminent* lawyer by Martindale-Hubbell since 1995. He is a graduate of Southern Illinois University School of Law. His undergraduate degree is also from SIU.



Brian Smith
Urbana Office

Brian concentrates his practice in the areas of civil rights, employment law, education, commercial litigation, professional liability and trucking/motor carrier litigation. Brian was named to the Leading Lawyers *Emerging Lawyers* list in 2015, and named an Illinois Super Lawyer "Rising Star" from 2012-2015. He is a graduate of University of Illinois College of Law. He also received his undergraduate degree from U of I. Prior to law school, Brian worked for five years in campus ministry.



Lynsey Welch
Chicago & Rockford Offices

Lynsey dedicates a significant portion of her practice to the defense of workers' compensation cases. She has authored a variety of articles on Workers' Compensation law and Workers' Compensation appeals. She is a graduate of Northern Illinois University College of Law and she received her undergraduate degree from the University of Illinois.

RETALIATORY DISCHARGE LAWSUITS FILED BY INJURED WORKERS

By: Brett Siegel, bsiegel@heyloyroyster.com

While injured Illinois workers are entitled to compensation under the Illinois Workers' Compensation Act, employers and their insurance companies should also be aware of the exposure they may face in state court. Situations can arise where an employer desires to terminate or lay off an employee who has been injured or claims to have been injured at work. Discharging an employee after they have reported a work injury can cause the employee to file a retaliatory discharge civil lawsuit against the employer.

In *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 336 (1998), the Illinois Supreme Court held that to recover for the tort of retaliatory discharge predicated upon the filing of a workers' compensation claim, an employee must prove:

1. That he was an employee before the injury;
2. That he exercised a right granted by the Workers' Compensation Act;
3. That he was discharged; and
4. That the discharge was causally related to his filing a claim under the Workers' Compensation Act.

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Further, *Clemons* held that if an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proved is not met. *Clemons*, 184 Ill. 2d at 336. Concerning the element of causation, the ultimate issue to be decided is the employer's motive in discharging the employee. *Id.*

Importantly, *Clemons* held that in retaliatory discharge cases, an employer is not required to come forward with an explanation for an employee's discharge and that it remains the plaintiff's burden to prove the elements of the cause of action. *Id.* An employer may offer a reason, however, if it chooses. *Clemons* makes it clear that for a workers' compensation retaliatory discharge claim, the burden remains with the plaintiff and the three-tier approach used by federal courts in employment discrimination cases is not applicable.¹ Rather, causes of action for retaliatory discharge based on an employee's filing of a workers' compensation claim should be reviewed using traditional tort analysis where the burden of proof remains with the plaintiff. *Id.* *Clemons* explains that because Illinois law allows an employer to discharge an employee-at-will for any reason or no reason (with limited public policy exceptions – one being workers' compensation), the traditional tort analysis is used. *Id.*

A more recent Illinois Supreme Court case from 2014, *Michael v. Precision Alliance Group, LLC*, 2014 IL 117376, reaffirmed the burden of proof established in *Clemons*, and also expanded *Clemons* by holding that the standard of proof analysis applies to retaliatory discharge cases "in anticipation" of filing a workers' compensation case. *Michael*, 2014 IL 117376, ¶ 35. Thus, if the discharged employee did not file a formal Workers' Compensation claim and only reported an injury to his employer, the report of injury is likely enough to trigger a cause of action for retaliatory discharge. Importantly, the employer is not shielded from a retaliatory discharge lawsuit simply because the employee did not file a claim with the Illinois Workers' Compensation Commission.

Illinois jury instructions on the plaintiff's burden of proof

IPI 250.02 states that the plaintiff has the burden of proving each of the following propositions in a retaliatory discharge claim:

- First, that the plaintiff was an employee of the defendant;
- Second, that the plaintiff was [discharged][fired] from [his][her] employment with the defendant;
- Third, that the plaintiff was [discharged][fired] because [set forth in simple form without undue emphasis

or repetition the plaintiff's claimed reason(s) for the discharge];

Fourth, that the plaintiff sustained damages as a result of [his][her] [discharge] or [firing];

Fifth, that the reason(s) stated in paragraph three above [was][were] a proximate cause of [his][her] [discharge] [firing] and resulting damages.

When the employer should offer a reason for discharge

In explaining that an employer may offer a reason for discharging the plaintiff, the Court in *Michael* held that an employer's valid reason "does not automatically defeat a retaliatory discharge claim." *Id.* ¶ 36. Offering a valid reason, however, gives the trier of fact the opportunity to consider the reason offered by the employer, and if they believe the reason, then the plaintiff has failed to meet his burden of proving causation. *Id.* If the reason offered by the employer is not believed, the plaintiff still must prove his discharge was caused by the anticipation of the filing of a workers' compensation claim.

In *Clemons*, the employer offered a reason for firing the employee which turned out to also be an illegal reason. The employee alleged that he was fired in retaliation of reporting a work injury. The employer asserted at trial that it fired the employee because of a dispute over payment of vacation days. As it turned out, the employer had violated the Illinois Wage payment statute. Nevertheless, *Clemons* held that whether the employer provided a legal or illegal reason for firing the plaintiff was not relevant to his wrongful discharge lawsuit for filing a workers' compensation claim. The Court held:

The alleged illegality of defendant's explanation for plaintiff's discharge is not relevant here and does not preclude the employer from offering that reason as a defense to plaintiff's action. The burden remains on the plaintiff to establish the elements of his cause of action, which here involved the discrete claim that the defendant wrongfully discharged plaintiff in retaliation for seeking recovery under the Workers' Compensation Act.

Clemons, 184 Ill. 2d at 336-337.

¹ In Title VII claims brought in federal court, once a plaintiff establishes a prima facie case against the defendant, the defendant has the burden of rebutting the prima facie case with evidence of a legitimate, nonretaliatory reason for discharging the plaintiff. If the defendant meets this burden, the plaintiff must then prove that the nonretaliatory reason asserted by the employer is pretextual. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973).

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Ultimately, while the employer was allowed to assert an illegal reason for discharging the plaintiff, the plaintiff was later allowed to amend his Complaint to include a count related to the illegal reason for the discharge. Thus, if the reason for terminating the employee is illegal, any legal repercussions will not fall under a cause of action for a workers' compensation retaliatory discharge if that illegal reason was not related to the work injury.

In *Michael*, the plaintiff argued that even if the defendant had a legitimate reason for discharging the plaintiff, the defendant could still remain liable because there can be more than one proximate cause in an action for retaliatory discharge. The Court disagreed and held that Illinois law "clearly provides that if the trier of fact finds the employer's proffered reasons for the employee's discharge to be valid and nonpretextual, the employee has failed to show causation, one of the necessary elements of a retaliatory discharge claim." *Michael*, 2014 IL 117376, ¶ 38. Therefore, employers will typically want to assert a reason for discharging an employee, assuming they have a legitimate reason unrelated to the reported injury. If the trier of fact believes the reason offered by the employer is legitimate, the plaintiff's claim for wrongful discharge fails.

Considerations to be made before discharging an employee

Employers should keep in mind the following when they contemplate discharging an employee who has reported a work injury or is pursuing medical treatment or other benefits under the Illinois Workers' Compensation Act:

1. Even though at-will employees can be terminated without cause, they cannot be terminated for a reason that violates public policy. Terminating an employee because he has exercised his rights under the Illinois Workers' Compensation Act is a violation of public policy.
2. While employers are not required to do so, they may assert a valid reason for discharging the employee in defense of a retaliatory discharge lawsuit. When considering discharging an employee who has reported a work injury, it is important to document the valid reason for discharge. Likewise, employers should document any negative or problematic issues that may arise over the course of an individual's employment, not just at termination.
3. Understand that the employer's motive in discharging the employee is the ultimate issue concerning causation. Before discharging an employee after a

reported work injury, fully evaluate the motivation for the discharge, as it will be heavily scrutinized by a jury.

4. Punitive damages can be awarded in a retaliatory discharge claim. "Punitive damages may be awarded where retaliatory discharge has been committed with fraud, actual malice, deliberate violence or oppression, or when the defendant has acted willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others."

Holland v. Schwan's Home Service, Inc., 2013 IL App (5th) 110560, ¶ 228.

If you have any questions about retaliatory discharge liability related to a work injury, please feel free to contact any of our workers' compensation attorneys across the state.



Brett Siegel

Springfield Office

Brett represents clients in tort litigation and defends employers in workers' compensation cases. Brett regularly handles depositions of expert witnesses and treating physicians in both civil and workers' compensation matters. Brett has taken several cases to trial and has argued multiple cases on appeal before the Workers' Compensation Commission.

COMMISSION NEWS: NEW ARBITRATORS

Governor Bruce Rauner has appointed Paul Cellini as an arbitrator for the Illinois Workers' Compensation Commission. Cellini, formerly a staff attorney with the Commission, brings 20 years of experience in workers' compensation law in both the public and private sectors. He is a graduate of the University of Illinois and The John Marshall Law School.

Also appointed as an arbitrator was Gary Gale. Gale is the former Executive Director of the Illinois Workers' Compensation Commission and brings nearly 35 years of experience in workers' comp law to the position. He is a graduate of the University of Missouri and the Chicago Kent College of Law.

ILLINOIS WORKERS' COMPENSATION RATES

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TTD, DEATH, PERM. TOTAL & AMP. RATES

ACCIDENT DATE	MAX. RATE TTD, DEATH, PERM. TOTAL, AMP.	MIN. RATE DEATH, PERM. TOTAL, AMP.
7/15/10 to 7/14/11.....	1243.00.....	466.13.....
7/15/11 to 7/14/12.....	1261.41.....	473.03.....
1/15/12 to 7/14/12.....	1288.96.....	483.36.....
7/15/12 to 1/14/13.....	1295.47.....	485.80.....
1/15/13 to 7/14/13.....	1320.03.....	495.01.....
7/15/13 to 1/14/14.....	1331.20.....	499.20.....
1/15/14 to 7/14/14.....	1336.91.....	501.34.....
7/15/14 to 1/14/15.....	1341.07.....	502.90.....
1/15/15 to 7/14/15.....	1361.79.....	510.67.....
7/15/15 to 1/14/16.....	1379.73.....	517.40.....
1/15/16 to 7/14/16.....	1398.23.....	524.34.....

MINIMUM TTD & PPD RATES

# of dependents, including spouse	7/15/07- 7/14/08	7/15/08- 7/14/09	7/15/09- 7/14/10	7/15/10- 7/14/16
0.....	200.00.....	206.67.....	213.33.....	220.00.....
1.....	230.00.....	237.67.....	245.33.....	253.00.....
2.....	260.00.....	268.67.....	277.33.....	286.00.....
3.....	290.00.....	299.67.....	309.33.....	319.00.....
4+.....	300.00.....	310.00.....	320.00.....	330.00.....

MAXIMUM PERMANENT PARTIAL DISABILITY RATES

ACCIDENT DATE	MAXIMUM RATE
7/1/08 to 6/30/10.....	664.72.....
7/1/10 to 6/30/11.....	669.64.....
7/1/11 to 6/30/12.....	695.78.....
7/1/12 to 6/30/13.....	712.55.....
7/1/13 to 6/30/14.....	721.66.....
7/1/14 to 6/30/15.....	735.37.....
7/1/15 to 6/30/16.....	769.28.....

MAXIMUM 8(D)(1) WAGE DIFFERENTIAL RATE

ACCIDENT DATE	MAXIMUM RATE
1/15/13 to 7/14/13.....	990.02.....
7/15/13 to 1/14/14.....	998.40.....
1/15/14 to 7/14/14.....	1002.68.....
7/15/14 to 1/14/15.....	1005.80.....
1/15/15 to 7/14/15.....	1021.34.....
7/15/15 to 1/14/16.....	1034.80.....
1/15/16 to 7/14/16.....	1048.67.....

SCHEDULED LOSSES (100%)

Effective 2/1/06 (and 7/20/05 to 11/15/05)	Effective 2/1/06 (and 7/20/05 to 11/15/05)
Person as a whole.....500 wks	Leg.....215 wks
Arm.....253 wks	Amp at hip joint.....296 wks
Amp at shoulder joint.....323 wks	Amp above knee.....242 wks
Amp above elbow.....270 wks	Foot.....167 wks
Hand.....205 wks	Great toe.....38 wks
Repetitive carpal tunnel claims.....190 wks	Other toes.....13 wks
Benefits are capped at 15% loss of use of each affected hand absent clear and convincing evidence of greater disability, in which case benefits cannot exceed 30% loss of use of each affected hand.	Hearing
Thumb.....76 wks	Both ears.....215 wks
Index.....43 wks	One ear.....54 wks
Middle.....38 wks	Eye
Ring.....27 wks	Enucleated.....173 wks
Little.....22 wks	One eye.....162 wks
	Disfigurement.....162 wks

Death benefits are paid for 25 years or \$500,000 whichever is greater.

As of 2/1/06, burial expenses are \$8,000.

The current state mileage rate is 54¢ per mile.

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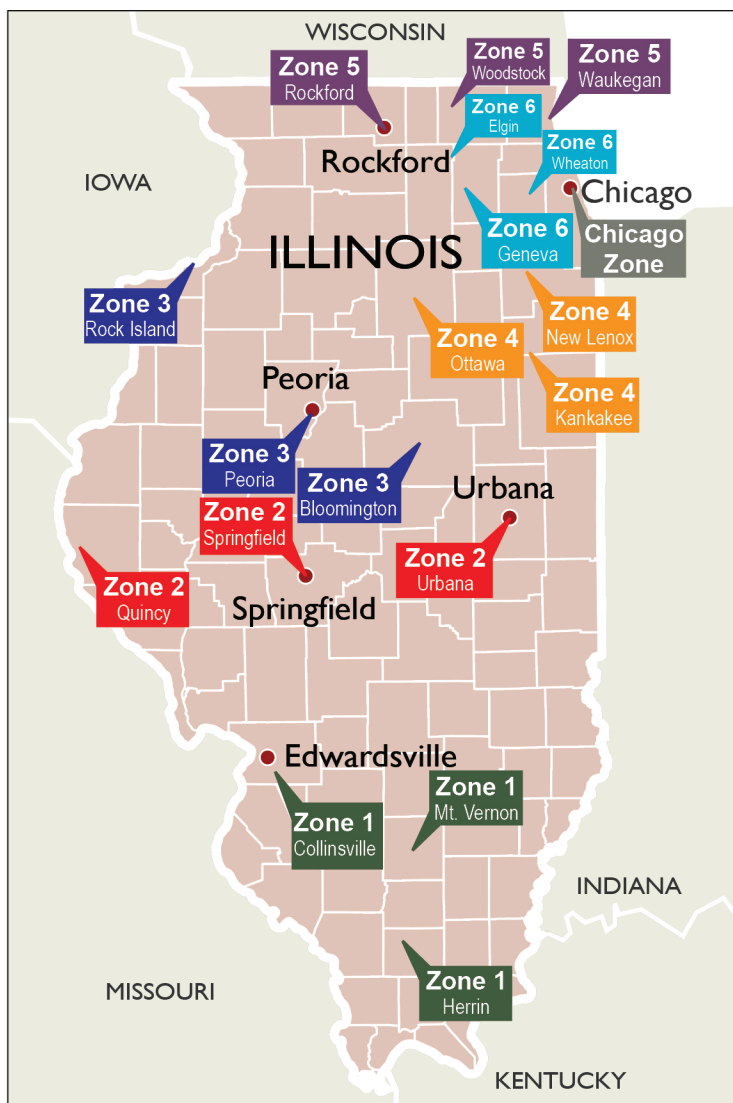
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Workers' Compensation

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