

# SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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## I. INTRODUCTION

This article analyzes cases of interest to employers decided by the Illinois Supreme Court and the Illinois Appellate Courts from June 2014-June 2015 in both private and public sectors.

Within the last year, the Illinois Supreme Court was required to analyze a case, which came from the Fifth District, *Michael v. Precision Alliance Group, LLC*,<sup>1</sup> which involved a causation issue in an agricultural-based retaliatory discharge claim. The appellate court cases addressed various other issues including age discrimination, arbitration, union issues and school district cases, unemployment benefits, and negligent hiring and retention. Illinois Acts were also examined, such as the Illinois Personnel Record Review Act, the Whistleblower Act, and the Drug Free Work Place Act.

The cases discussed within this article are organized by subject, as displayed in the outline above.

## II. AGE DISCRIMINATION

### A. *Cipolla v. The Village of Oak Lawn*<sup>2</sup>

In *Cipolla*,<sup>3</sup> the Appellate Court, First District, affirmed the circuit court's ruling in favor of the employer. At age 60, Diane Cipolla ("Cipolla") was a 12-year employee of the Village of Oak Lawn ("Village").<sup>4</sup> Cipolla was the business regulation officer for the Village's finance department.<sup>5</sup> In 2008, the Village manager informed Cipolla that her job was being eliminated due to budget constraints.<sup>6</sup> Cipolla subsequently filed a claim against the Village alleging age discrimination in violation of the Illinois Human Rights Act.<sup>7</sup>

Cipolla argued that on the day before she was terminated, the Village board met in a closed executive session and her supervisor commented that Cipolla was "older," and that her position would be eliminated and her job responsibilities transferred to another Village employee who was 20 years younger.<sup>8</sup> Cipolla contended that budget constraints were only a pretext for her termination, because not long after her termination, the Village hired a

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1. 2014 IL 117376.

2. 2015 IL App (1st) 132228, ¶ 1.

3. *Id.* at ¶ 1.

4. *Id.*

5. *Id.* at ¶ 5.

6. *Id.*

7. 775 ILL. COMP. STAT. 5/1-102(A) (West 2012).

8. *Cipolla*, 2015 IL App (1st) 132228, ¶ 6.

budget director for a higher salary than she received as the business regulation officer.<sup>9</sup> The Village denied Cipolla's allegations and argued that no other similarly situated younger employees were treated differently. Furthermore, the Village never sought a replacement for her position.<sup>10</sup> The Village explained that Cipolla was terminated for budgetary reasons, given that it had a deficit of more than \$1 million and as a result, cut personnel costs.<sup>11</sup>

The jury returned a verdict in favor of the Village and denied Cipolla's motion for a new trial.<sup>12</sup> Cipolla appealed, arguing that the circuit court abused its discretion by refusing to clarify for the jury the meaning of the word "fired" and that the jury should have been given a "cat's paw" liability instruction, which places liability on an employer when a supervisory employee acts with discriminatory intent to cause a higher-up employee to take adverse action against the plaintiff.<sup>13</sup> The First District affirmed, holding the jury's question whether "fired" included laid off, terminated, or elimination of Cipolla's position was a question of fact for the jury to decide, and the court did not abuse its discretion.<sup>14</sup> The court also held that the evidence at trial did not warrant a cat's paw liability instruction and therefore, the circuit court did not abuse its discretion in that regard.<sup>15</sup> The court noted that to succeed under the cat's paw theory, a plaintiff must show the non-decision maker exercised such "singular influence" over the decision maker that the decision to terminate was the product of "blind reliance."<sup>16</sup> The court held that the Village manager had the authority to make all personnel decisions.<sup>17</sup> Department directors could make recommendations regarding hiring and firing of employees, but there was no testimony indicating that the Village manager blindly relied on the finance department director when he decided to terminate Cipolla.<sup>18</sup> In addition, for Cipolla's termination to become final, the budget amendments that proposed the elimination of the business licensing officer position had been approved by the majority of the Village board.<sup>19</sup> Thus, the Appellate Court concluded that Cipolla was not prejudiced by the circuit court's decision not to give the cat's paw liability instruction.<sup>20</sup>

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9. *Id.*

10. *Id.* at ¶ 7.

11. *Id.*

12. *Id.* at ¶ 25.

13. *Id.* at ¶¶ 28, 42, 44.

14. *Id.* at ¶ 33.

15. *Id.* at ¶ 45.

16. *Id.*

17. *Id.* at ¶ 45.

18. *Id.*

19. *Id.* at ¶ 46.

20. *Id.* at ¶ 47.

### III. RETALIATORY DISCHARGE

Retaliatory discharge is a narrow exception to the general rule that a non-contractual or at-will employee may be discharged by his or her employer at any time and for any reason.<sup>21</sup> Under the doctrine, an employer may not discharge an employee if a clear mandate of public policy is involved.<sup>22</sup> In Illinois, retaliatory discharge actions have been allowed in two settings: (1) where an employee is discharged for filing, or in anticipation of filing, a claim under the Workers' Compensation Act<sup>23</sup> or; (2) where an employee is discharged in retaliation for the reporting of illegal or improper conduct, otherwise known as "whistleblowing."<sup>24</sup> The rationale is that in these situations, an employer could effectively frustrate a significant public policy by using its power of dismissal in a coercive manner. Therefore, recognition of a cause of action for retaliatory discharge is considered necessary to vindicate the public policy underlying the employee's activity, and to deter employer conduct inconsistent with that policy.<sup>25</sup>

To sustain a cause of action for retaliatory discharge, an employee must prove: (1) the employer discharged the employee, (2) the discharge was in retaliation of the employee's activities, and (3) the discharge violates a clear mandate of public policy.<sup>26</sup>

#### A. *Michael v. Precision Alliance Group*<sup>27</sup>

In *Michael*,<sup>28</sup> the plaintiff Wayne Michael ("Michael") filed a retaliatory discharge claim against the defendant, Precision Alliance Group, LLC ("Precision"), an agricultural supply business dealing in soybean seeds. Michael alleged that he and two of his co-workers were discharged in retaliation for reporting Precision to the State of Illinois for shipping underweight product.<sup>29</sup> In the year prior to the lawsuit, Precision began experiencing a problem with underweight seed bags, which was a violation under an Illinois law that required every bag to be labeled as containing a certain weight of seeds actually weigh that amount.<sup>30</sup>

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21. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 182 (1978).

22. *Id.* at 183.

23. 820 ILL. COMP. STAT. 305/1 *et seq.* (1992).

24. Jacobson v. Knepper & Moga, P.C., 185 Ill. 2d 372, 376 (1998).

25. Fellhauer v. City of Geneva, 142 Ill. 2d 495, 505 (1991).

26. Turner v. Mem'l Medical Ctr. 233 Ill. 2d 494, 500 (2009).

27. 2014 IL 117376.

28. *Id.* at ¶¶ 1–3.

29. *Id.* at ¶ 1.

30. *Id.* at ¶ 6.

After co-worker Shawn Dudley (“Dudley”) was terminated for horseplay, Precision’s seed bag weight problems were reported to the Illinois Department of Agriculture. When Dudley’s unemployment compensation was denied, Michael and several of his co-workers assisted Dudley by providing him the lot numbers and locations of underweight bags.<sup>31</sup> Approximately a month later, Precision’s corporate office decided to eliminate 22 positions as a result of slow business.<sup>32</sup> Michael and three others, including one of the assisting co-workers, were chosen for termination.<sup>33</sup> The evidence showed that Michael was dismissed because he spent too much time standing around, needed a more diverse skill set, and did not want to perform certain tasks.<sup>34</sup> Furthermore, when he finished his tasks, he would not look for other tasks.<sup>35</sup> The management staff claimed they were unaware that Michael or his co-worker had any role in reporting the company to the Department at the time they were discharged and only learned of their involvement during discovery of the case.<sup>36</sup> The circuit court entered judgment in favor of Precision, finding that it offered a legitimate, nondiscriminatory reason for discharging Michael and his coworker, and that they had failed to prove the reason for their discharge was pretextual.<sup>37</sup>

The Appellate Court, Fifth District, reversed the decision, reasoning that the circuit court erroneously increased the plaintiff’s burden by requiring them to prove both causation and to disprove defendant’s defense of pretext.<sup>38</sup> The case was remanded for further proceedings on the issue of plaintiffs’ damages.<sup>39</sup> On appeal to the Illinois Supreme Court, Precision argued that the appellate court improperly relieved plaintiffs of the burden to establish the case.<sup>40</sup> The Illinois Supreme Court agreed.<sup>41</sup> Although the circuit court applied the wrong standard in this case, the Court nevertheless agreed with the circuit court’s conclusion that Precision presented valid and legitimate reasons for plaintiffs’ discharges, and that the plaintiffs failed to meet their burden of proving that they were discharged in retaliation for their protected activity.<sup>42</sup> The Court explained that the Fifth District improperly held that plaintiffs proved causation based on the circuit court’s finding of a “causal nexus” between plaintiffs’ discharges and their

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31. *Id.* at ¶ 9.

32. *Id.* at ¶ 17.

33. *Id.*

34. *Id.* at ¶ 18.

35. *Id.*

36. *Id.*

37. *Id.* at ¶¶ 19–22.

38. *Id.* at ¶ 26.

39. *Id.*; see also Ill. S. Ct. R. 315 (eff. July 1, 2013).

40. *Michael*, 2014 IL 117376 ¶ 33.

41. *Id.*

42. *Id.* at ¶¶ 35, 36.

protected activity.<sup>43</sup> Thus, the Court further held that plaintiffs failed to prove the element of causation, and therefore, found that the circuit court further properly entered judgment in favor of Precision.<sup>44</sup> The Court concluded that the Appellate Court erred in reversing that judgment.<sup>45</sup>

B. *Flick v. Southern Illinois Healthcare, NFP*<sup>46</sup>

Causation between a plaintiff's discharge and a protected activity was also addressed by the Fifth District case *Flick*.<sup>47</sup> There, Cindy Flick ("Flick") worked for the defendant, Southern Illinois Healthcare, NFP, ("SIH") as the director of its medical laboratories.<sup>48</sup> During her employment, Flick discovered quality control failures in the chemistry department at one of the defendant's hospitals, which constituted a violation of the federal Clinical Laboratory Improvement Amendments of 1988 ("CLIA").<sup>49</sup> She reported her concerns to the medical director and the manager of the lab.<sup>50</sup> Months later, the hospital administrator told Flick that her management style was not conducive to a long-term relationship with the hospital and presented her with a severance agreement.<sup>51</sup> Days later, Flick called the compliance help line to report her concern regarding possible CLIA violations in the laboratory and then rejected the severance agreement. Flick's employment was not terminated but her responsibilities were limited and her salary was frozen. She continued her employment for approximately two more years. During that time, she was responsible for ensuring the company's smooth transition in converting to a new computer system.<sup>52</sup> The transition was problematic. The hospital administrator again approached Flick with a severance package, and despite her refusal to accept, Flick's employment was terminated.<sup>53</sup>

Flick filed a petition alleging that she was discharged in retaliation for reporting possible violations of CLIA.<sup>54</sup> She alleged that prior to the "attempt to terminate" her employment, her performance reviews were favorable and she received annual pay increases.<sup>55</sup> She testified that she believed that the only reason she was not fired after she declined the first

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43. *Id.* at ¶ 34.

44. *Id.* at ¶ 37.

45. *Id.*

46. 2014 IL App (5th) 130319.

47. *Id.* at ¶ 1.

48. *Id.* at ¶ 1.

49. *Id.* at ¶ 4; 42 U.S.C. § 263a *et seq.* (2000).

50. *Flick*, 2014 IL App (5th) 130319, ¶ 4.

51. *Id.* at ¶¶ 4–5.

52. *Id.* at ¶¶ 7–8.

53. *Id.* at ¶ 9.

54. *Id.* at ¶ 10.

55. *Id.*

severance agreement was because she had reported to the CLIA hotline.<sup>56</sup> In response, SIH filed a motion for summary judgment arguing that Flick presented no evidence of a causal connection between her actions in raising concerns about the lab's compliance with CLIA and her termination.<sup>57</sup> The court granted the motion, finding that Flick exercised a statutory right when she called the CLIA compliance hotline, but that she could not establish that her discharge was in retaliation for exercising this right just because of timing.<sup>58</sup>

On appeal, Flick argued that the court erred in finding that she did not engage in "protected activity" until she called the compliance help line to report the possible CLIA violations two days after she was presented with her first severance agreement.<sup>59</sup> According to Flick, the fact that she voiced her concerns about the lab's procedures prior to the meeting was also a protected activity.<sup>60</sup> The Appellate Court, Fifth District, agreed that voicing her concerns was protected activity, but Flick failed to prove any evidence of a causal connection.<sup>61</sup> Flick also argued that the court erred in finding that there were no genuine issues of material fact regarding causation because the two-year gap in time between her activity and termination does not automatically defeat a claim that the termination was retaliatory.<sup>62</sup>

The court held that Flick's second argument also failed, and reiterated the plaintiff's requirement to present evidence of a causal connection.<sup>63</sup> The court noted that Flick presented no evidence to support her theory that the hospital administrator was prevented from discharging her initially and needed to wage a two-year campaign of retaliatory actions to discharge her later.<sup>64</sup> Flick acknowledged that her employment with SIH was at-will and there was no evidence that SIH was required to document ongoing dissatisfaction in order to terminate her employment.<sup>65</sup> Therefore, the court concluded that it was the plaintiff's burden to provide evidence of the causal link between a retaliatory motive and her discharge, and therefore the circuit court properly granted summary judgment.<sup>66</sup>

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56. *Id.* at ¶ 14.

57. *Id.* at ¶ 16.

58. *Id.* at ¶¶ 17–18.

59. *Id.* at ¶ 22.

60. *Id.*

61. *Id.*

62. *Id.* at ¶ 23.

63. *Id.*

64. *Id.* at ¶ 36.

65. *Id.*

66. *Id.*



C. *Taylor v. Board of Education of the City of Chicago*<sup>67</sup>

In another appellate court decision, this time for the Appellate Court, First District, the court distinguished whether a retaliatory discharge claim applied to an at-will employee compared to a contractual employee in *Taylor*.<sup>68</sup> In that case, plaintiff Kenneth Taylor (“Taylor”) began his employment with the defendant, the Board of Education of the City of Chicago (“Board”), as a teacher at Robeson High School.<sup>69</sup> Shortly thereafter, he attained tenure.<sup>70</sup> After continuing his education and obtaining a master degree, the Board promoted him to serve as the assistant principal at Goodlow Magnet School (“Goodlow”), an elementary school for students from pre-kindergarten through eighth grade.<sup>71</sup> The assistant principal position was contractual with a four-year duration, after which his contract could be terminated “for cause.”<sup>72</sup> Upon accepting this position, Taylor relinquished his tenured status.<sup>73</sup>

During his employment, Taylor was informed that a special education teacher kicked a student and caused the student to fall backwards and strike his head on the floor.<sup>74</sup> Taylor was designated a “mandated reporter” of child abuse under the Abused and Neglected Child Reporting Act,<sup>75</sup> which requires all school personnel to immediately report any reasonable suspicion of child abuse to the Illinois Department of Children and Family Services (“DCFS”). Accordingly, Taylor reported the incident to the appropriate authorities.<sup>76</sup>

Taylor testified that his supervisor, the principal of Goodlow, severely reprimanded him for reporting the incident to the DCFS and the police.<sup>77</sup> The supervisor told Taylor that he mishandled the situation because the special education teacher was a trained therapist who was engaging in an effective form of “role playing” therapy with the child.<sup>78</sup> Taylor claimed that after the incident, his supervisor became hostile and uncommunicative toward him, and that the Board also began a campaign of harassing behavior against him.<sup>79</sup> Thereafter, Taylor began to receive lower performance ratings and was demoted to the position of social studies

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67. 2014 IL App (1st) 123744.

68. *Id.* at ¶ 1.

69. *Id.* at ¶¶ 1, 5.

70. *Id.*

71. *Id.* at ¶ 6.

72. *Id.*

73. *Id.*

74. *Id.* at ¶ 8.

75. *Id.* at ¶ 17; 325 ILL. COMP. STAT. 5/4 (West 2007).

76. *Taylor*, 2014 IL App (1st) 123744, ¶ 10.

77. *Id.* at ¶ 11.

78. *Id.*

79. *Id.* at ¶ 12.

teacher. He was later reassigned to supervising students who were placed on in-school suspension.<sup>80</sup> After experiencing back pain from intervening between several student fights, Taylor took two leaves of absence but upon his return, was informed that he overextended his leave.<sup>81</sup> He was reinstated by the Board but was notified that he would be released from the contract a month later.<sup>82</sup>

Taylor filed suit against the Board, seeking damages for retaliatory discharge and violation of the Illinois Whistleblower Act,<sup>83</sup> claiming that he was discharged from his employment and subjected to an ongoing campaign of retaliatory acts by the Board because he reported an act of alleged abuse.<sup>84</sup> A jury awarded Taylor over \$1,000,000 in damages, which included compensatory and emotional distress damages that arose from the discharge and the Board's retaliatory conduct.<sup>85</sup>

On appeal, the Board argued that Taylor could not maintain an action for retaliatory discharge because he was not an at-will employee. The First District agreed, noting that Taylor admitted in his testimony that he understood that he had a four-year term and that his supervisor could choose not to renew his employment at the end of that term.<sup>86</sup> Because Taylor was subject to a definite contractual term of employment and that the Board exercised its option not to renew that term, the court concluded that Taylor was not an at-will employee.<sup>87</sup> Thus, the court reversed the judgment in favor of Taylor on his retaliatory discharge claim.<sup>88</sup>

#### D. *Dale v. South Central Illinois Mass Transit District*<sup>89</sup>

In a workers' compensation related retaliatory discharge claim, the Fifth District analyzed the case *Dale*.<sup>90</sup> The plaintiff, Richard Dale ("Dale"), was employed as a bus driver for the defendant, South Central Illinois Mass Transit District ("South Central").<sup>91</sup> Dale filed a complaint against South Central alleging that he was fired in retaliation for exercising his rights under the Illinois Workers' Compensation Act.<sup>92</sup> Dale had filed a workers' compensation claim after he injured his left shoulder in a work-

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80. *Id.* at ¶¶ 14–15, 16, 22.

81. *Id.* at ¶ 26.

82. *Id.* at ¶29.

83. *Id.* at ¶ 1; 740 ILL. COMP. STAT. 174/1 *et seq.* (2009).

84. *Taylor*, 2014 IL App (1st) 123744, ¶ 1.

85. *Id.*

86. *Id.* at ¶¶ 34, 39.

87. *Id.* at ¶ 43.

88. *Id.* at ¶ 54.

89. 2014 IL App (5th) 130361.

90. *Id.* at ¶ 1.

91. *Id.*

92. *Id.*; *see also* 820 ILL. COMP. STAT. 305/1 *et seq.* (2010).

related accident and was unable to work.<sup>93</sup> Although his physician recommended surgery, he refused and alleged that South Central improperly disputed his claim.<sup>94</sup> He took a 12-week approved leave of absence under the Family Medical Leave Act,<sup>95</sup> but his employment was terminated after the 12 weeks expired, because he was medically unable to return to work.<sup>96</sup> Dale filed a complaint against South Central and alleged that South Central engaged in the illegal practice of retaliatory discharge when it terminated his employment as a bus driver as a result of his exercising his rights under the Workers' Compensation Act.<sup>97</sup> The circuit court entered an order that granted South Central's request for partial summary judgment for lost wages because his lost wages were caused by his inability to work rather than the alleged wrongful discharge.<sup>98</sup>

The circuit court also granted Dale's request for certified questions, under Supreme Court Rule 308(a), and were accepted for interlocutory appeal.<sup>99</sup> Both questions involved whether the Act's provisions barred an injured employee from recovering damages for lost wages in a retaliatory discharge lawsuit when the employee is injured in a work-related accident and is unable to work as a result.<sup>100</sup>

The court held that the employee's damages for lost wages fell within the exclusivity provisions of the Act.<sup>101</sup> The court explained that the Act's purpose is to provide a system of imposing liability on employers without fault for accidental work-related injuries and, in return, prohibiting common law suits by employees against the employer.<sup>102</sup> However, an action for retaliatory discharge is not completely barred by the exclusivity provisions of the Act.<sup>103</sup> "[A]ny diminution in a plaintiff's earnings directly related to that plaintiff's injury, but not connected to the employer's tortious discharge, is not properly included in the retaliatory discharge award."<sup>104</sup> The court concluded that, as a matter of law, the employee's lost wages were causally connected to the workplace accident, not his discharge, and the Act provides the exclusive remedy for the employee to recover the lost

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93. *Dale*, 2014 IL App (5th) 130361, ¶¶ 4–6.

94. *Id.* at ¶ 4.

95. *Id.* at ¶ 5; *see also* 29 U.S.C. § 2601 *et seq.* (2006).

96. *Dale*, 2014 IL App (5th) 130361, ¶ 5.

97. *Id.* at ¶ 7.

98. *Id.* at ¶ 8.

99. *Id.* at ¶ 9.

100. *Id.* at ¶ 12.

101. *Id.*

102. *Id.* at ¶ 28.

103. *Id.* at ¶ 33.

104. *Id.* (citing *Kritzen v. Flender Corp.*, 226 Ill. App. 3d 541, 559, 589 N.E.2d 909, 922 (2d Dist. 1992)).

wages.<sup>105</sup> Accordingly, the matter was remanded back to the circuit court for further proceedings regarding lost wages.<sup>106</sup>

#### IV. ARBITRATION

##### A. *Fuqua v. SVOX AG*<sup>107</sup>

To be enforceable, an arbitration agreement, like any contract, must be valid and conscionable.<sup>108</sup> In *Fuqua*, Kurt Fuqua (“Fuqua”) was employed by the defendant, SVOX USA (“SVOX”), a technology services company that researched and developed text-to-speech technology.<sup>109</sup> Fuqua was employed as the vice president of professional services due to his reputation for creating numerous inventions in the field of computational linguistics.<sup>110</sup> When Fuqua was offered an employment position with SVOX, he was asked to sign an employment agreement, which contained an arbitration clause, stating in part “[a]ny dispute or controversy arising under or in connection with this Agreement or any other dispute concerning [Fuqua’s] employment with [SVOX USA] shall be settled exclusively by arbitration, conducted before a single, mutually agreed upon arbitrator.”<sup>111</sup>

Fuqua and SVOX negotiated, and the Agreement was eventually executed.<sup>112</sup> After only 8 months of employment at SVOX, Fuqua was given a 90-day notice that his employment was being terminated.<sup>113</sup> Fuqua subsequently filed a demand for arbitration with the American Arbitration Association (“AAA”), alleging breach of contract and unauthorized withholding of wages.<sup>114</sup>

After many court filings by both parties in both state and federal court, the circuit court granted SVOX’s motion to stay litigation and compel arbitration; Fuqua appealed, arguing that the circuit court erred, because the arbitration clause in the agreement was unconscionable and unenforceable.<sup>115</sup> Fuqua first argued that the arbitration clause was procedurally and substantively unconscionable, because it would be extremely expensive for him to pursue arbitration by requiring him to advance at least \$23,619.25 to arbitrate.<sup>116</sup> Fuqua further claimed that after

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105. *Id.* at ¶ 34.

106. *Id.* at ¶ 37.

107. 2014 IL App (1st) 131429.

108. *Id.* at ¶¶ 35–36.

109. *Id.* at ¶ 3.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at ¶ 4.

114. *Id.*

115. *Id.* at ¶ 30.

116. *Id.*

he was terminated, he was not employable in his field due to the non-compete clause in the employment agreement, and thus, he was unable to afford the costs of arbitration.<sup>117</sup> Additionally, Fuqua stated that the application of the AAA's commercial rules to the arbitration rendered the arbitration clause unconscionable.<sup>118</sup> Fuqua claimed that he originally filed a request for arbitration under the employment rules, which would allocate fees and costs differently than the commercial rules, which the arbitrator had decided applied in his arbitration.<sup>119</sup> Fuqua contended that commercial rules were designed for arbitration disputes between businesses and not for claims arising out of employment agreements.<sup>120</sup>

In response, SVOX argued that the arbitration clause in the agreement was valid and enforceable under the Uniform Arbitration Act and the Federal Arbitration Act.<sup>121</sup> SVOX contended that the arbitration clause language was clear and that all of Fuqua's claims in this case relate to this employment and circumstances of his termination, which fall directly under the arbitration clause.<sup>122</sup> In addition, the arbitration clause met all the requirements of a valid and enforceable contract under Illinois law because it was negotiated between the parties and there was an offer and acceptance as evidence by the signed agreement.<sup>123</sup> Furthermore, there was no evidence of any unequal bargaining power between the parties.<sup>124</sup>

Lastly, SVOX defendants asserted that the arbitrator's application of the commercial rules did not render the arbitration clause unconscionable because he made that determination after carefully considering the entire employment agreement and the AAA Rules.<sup>125</sup> Likewise, the arbitration was not substantively unconscionable because the terms of the arbitration clause were not unfair because the arbitrator gave Fuqua multiple opportunities to present evidence of financial hardship, which he failed to prove.<sup>126</sup>

The appellate court held that SVOX defendants had the more reasonable argument and interpretation of the applicable legal principals and concluded that the arbitration clause was not procedurally or substantially unconscionable.<sup>127</sup> The court found that the agreement was clear and easy to understand.<sup>128</sup> Although the arbitration provision failed to

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117. *Id.*

118. *Id.* at ¶ 31.

119. *Id.*

120. *Id.*

121. *Id.* at ¶ 32; *see also* 9 U.S.C. § 2 (2008).

122. *Fuqua*, 2014 IL App (1st) 131429, ¶ 32.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at ¶ 34.

127. *Id.* at ¶ 38.

128. *Id.*

instruct whether the employment rules or commercial rules were applicable, it stated that the AAA rules would determine which rules would apply.<sup>129</sup> Furthermore, Fuqua negotiated with SVOX regarding the terms of the arbitration clause and was an active participant in the negotiations and the terms of the contract.<sup>130</sup> The court found no fault in the arbitrator's ruling, noting that he gave Fuqua an opportunity to present evidence to support his argument of undue financial hardship.<sup>131</sup> Therefore, the circuit court's judgment was affirmed and the matter was remanded with direction to compel arbitration.<sup>132</sup>

B. *City of Des Plaines v. Metropolitan Alliance of Police Chapter No. 240*<sup>133</sup>

Illinois law also provides that an arbitration award must not threaten public policy.<sup>134</sup> In *City of Des Plaines*,<sup>135</sup> the plaintiff, the City of Des Plaines ("City"), sought to terminate police officer John Bueno ("Bueno") after concluding that Bueno used unnecessary and excessive force against arrestees, which was in violation of the General Orders of the Des Plaines Police Department ("Department"). The defendant, the Union, the Metropolitan Alliance of Police, Chapter No. 240 ("Union"), represented Bueno.<sup>136</sup>

The parties submitted the grievance to arbitration and after a three-day hearing, the arbitrator concluded that Bueno violated the General Orders and ordered Bueno to be reinstated without back pay or benefits.<sup>137</sup> The arbitrator determined that termination was not appropriate, because the City delayed the investigation of the alleged incident and the Department condoned his conduct. Instead of reinstating Bueno, the City filed a motion to vacate the arbitration award and argued that the award violated public policy. The circuit court agreed and also denied the Union's motion to remand to the arbitrator to determine Bueno's likelihood of engaging in the same misconduct following reinstatement.<sup>138</sup>

On appeal, the Union argued that the award did not violate public policy, because there was no well-defined public policy that mandated

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129. *Id.*

130. *Id.*

131. *Id.* at ¶ 34.

132. *Id.* at ¶ 42.

133. 2015 IL App (1st) 140957.

134. *See, e.g., Am. Fed'n of State, Cnty. & Mun. Emps. AFL-CIO v. Dep't of Cent. Mgmt. Servs.* (AFSCME I), 173 Ill. 2d 299, 304, 671 N.E.2d 668, 672 (1996).

135. 2015 IL App (1st) 140957, ¶ 1.

136. *Id.*

137. *Id.* at ¶ 6.

138. *Id.* at ¶¶ 2, 15.

termination of a police officer that was engaged in unnecessary use of force, failure to report, or untruthfulness.<sup>139</sup> The Union maintained that public policy supports the award, because the Department condoned the conduct, the City delayed its investigation of the incidents, and the City destroyed relevant video evidence that resulted in prejudice to Bueno's defense.<sup>140</sup>

The First District observed that public policy analysis involves two steps: (1) whether a well-defined and dominant public policy can be identified, and, if so, then (2) whether the arbitrator's award as reflected in his interpretation of the agreement violated public policy.<sup>141</sup> Here, the parties offered conflicting descriptions of the public policies at stake.<sup>142</sup> The court held that the Union's position improperly conflates the two-prong test into a single inquiry—the issue is not whether the public policy requires that an employee be terminated, but rather requires the identification of a public policy.<sup>143</sup> The court determined that the arbitration award implicated a well-defined and dominant public policy, namely, the public policy against police officers unnecessarily using force against prisoners and being dishonest about that use of force during a subsequent investigation.<sup>144</sup> In analyzing the second prong, the First District held that the arbitrator did not consider whether Bueno was likely to engage in similar misconduct following reinstatement.<sup>145</sup> Therefore, the court reversed and remanded the case to the arbitrator to clarify the award because it could not fully assess the public policy implications.<sup>146</sup>

## V. LABOR

### A. *Board of Trustees of the University of Illinois v. Illinois Educational Labor Relations Board*<sup>147</sup>

In *Board of Trustees of the University of Illinois*,<sup>148</sup> the issue was whether a high school teacher, who also acted as the collective-bargaining representative for university employees, could be certified as an exclusive collective-bargaining representative for both entities. The Uni Faculty Organization, the Illinois Education Association, and the National

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139. *Id.* at ¶ 17.

140. *Id.*

141. *Id.* at ¶ 20; *AFSCME I*, 173 Ill. 2d at 307, 671 N.E.2d at 673.

142. *City of Des Plaines*, 2015 IL App (1st) 140957, ¶ 22.

143. *Id.* at ¶ 23.

144. *Id.* at ¶ 24.

145. *Id.* at ¶ 25.

146. *Id.* at ¶ 39.

147. 2015 IL App (4th) 140557.

148. *Id.* at ¶ 1–3.

Education Association (collectively the “Union”) filed a majority-interest petition to represent “all full-time and regularly employed part-time teaching associates at “UniHigh,” the public laboratory high school and educational unit of the University of Illinois (“University”).<sup>149</sup> UniHigh accepted students who were considered exceptionally intelligent.<sup>150</sup> The University objected to the Union’s petition and argued that the proposed bargaining unit was inappropriately narrow because the UniHigh teaching associates were a small subset of the University’s non-tenured faculty members and the petition did not seek to include all non-tenured faculty members.<sup>151</sup>

A hearing was held before the Illinois Education Labor Relations Board’s (“Board”) Administrative Law Judge (“ALJ”) on the Union’s petition.<sup>152</sup> The ALJ issued her recommended decision and order by finding the proposed unit was appropriate and recommended the Board certify the Union as the exclusive bargaining representative for UniHigh.<sup>153</sup> The Union then filed a second petition to represent all full-time and non-tenure track faculty with respect to educational employees at the University.<sup>154</sup> During the hearing on the Union’s second petition, the Board certified the Union as the exclusive collective-bargaining representative, and excluded UniHigh teachers from the bargaining unit.<sup>155</sup> The University filed a petition for direct administrative review of the Board’s decision.<sup>156</sup>

On appeal, the University argued that the Board erred in finding that clear and convincing evidence that was presented to demonstrate the proposed bargaining unit of UniHigh teachers would: (1) be appropriate under section 7 of the Education Labor Act, (2) be appropriate given the special circumstances and compelling justifications involved, and (3) not cause undue fragmentation or a proliferation of bargaining units.<sup>157</sup> The Fourth District affirmed the Board’s judgment.<sup>158</sup> The appellate court held that UniHigh teachers shared the same skills and functions and reported to their department’s head at UniHigh and not to anyone at the University.<sup>159</sup> Furthermore, UniHigh was a separate and distinct entity where UniHigh teachers had unique conditions of employment and performed distinctly different job duties from those of the University’s other non-tenure teaching

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149. *Id.* at ¶ 5.

150. These students were often young because they had skipped grades and were permitted to take college courses at the University in addition to their high school studies.

151. *Bd. of Trs. of the Univ. of Ill.*, 2015 IL App (4th) 140557, ¶ 6.

152. *Id.* at ¶ 9.

153. *Id.* at ¶ 20.

154. *Id.* at ¶ 22.

155. *Id.* at ¶ 27.

156. *Id.* at ¶ 28.

157. *Id.* at ¶ 33.

158. *Id.* at ¶ 64.

159. *Id.* at ¶ 43.



faculty.<sup>160</sup> The court noted the fact that the UniHigh interests were distinct from those of other University faculty members supports the compelling need for their own separate bargaining unit to represent their separate and unique interests.<sup>161</sup> Finally, the court held that because UniHigh operated as its own entity separate from the University's other operations, the certification of the UniHigh teachers into their own bargaining unit would not likely cause such labor instability as to disrupt the rest of the University's other services in the event of a dispute.<sup>162</sup> Therefore, the court concluded that the Board's decision that clear and convincing evidence was presented to support recognition of the non-presumptive bargaining unit of the UniHigh teachers was not clearly erroneous.<sup>163</sup>

*B. American Federation of State, County and Municipal Employees, Council 31 v. Illinois Labor Relations Board*<sup>164</sup>

In another recent case, *American Federation of State, County and Municipal Employees, Council 31 v. Illinois Labor Relations Board (AFSCME II)*,<sup>165</sup> the court was required to determine whether an employee was properly excluded from a collective-bargaining unit. In that case, the petitioner, the American Federation of State, County and Municipal Employees, Council 31 ("Union"), represented a State of Illinois employee who worked as an Information Systems Analyst II.<sup>166</sup> The Illinois Labor Relations Board sought to exclude the position from Union membership, because it was a "confidential employee" position within the meaning of section 3(c) of the Illinois Public Labor Relations Act ("Act").<sup>167</sup> The Board found that the Information Systems Analyst II position qualified the employee as a "confidential" employee under the Act, and the Union appealed.<sup>168</sup>

In analyzing the issue, the Appellate Court, First District, first noted that the Act's purpose in excluding confidential employees from any bargaining unit is to prevent employees from having their loyalties divided between their employer, who expects confidentiality in labor relations matters, and the union, which may seek the disclosure of management's

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160. *Id.* at ¶ 48.

161. *Id.*

162. *Id.* at ¶ 59.

163. *Id.* at ¶ 60.

164. 2014 IL App (1st) 132455.

165. *Id.* at ¶ 1.

166. *Id.*

167. *Id.*; 5 ILL. COMP. STAT. 315/3(c) (West 2012).

168. *AFSCME II*, 2014 IL App (1st) 132455, ¶ 3.

labor relations material to gain an advantage in the bargaining process.<sup>169</sup> The court also recognized the two tests specifically designated in the statutory definition to determine whether a position is a “confidential” employee position: (1) the labor-nexus test<sup>170</sup> and (2) the authorized access test, which an employee is considered confidential if he or she has authorized access to information concerning matters specifically related to the collective-bargaining process between labor and management.<sup>171</sup> The court ultimately held that the employee was not a confidential employee within the meaning of section 3(c) of the Act, reasoning that the employee did not have authorized access in the regular course of her job duties or that any other duties qualified her as a “confidential employee.”<sup>172</sup> Accordingly, the decision was reversed.<sup>173</sup>

*C. American Federation of State, County, and Municipal Employees, Council 31 v. The State of Illinois*<sup>174</sup>

*American Federation of State, County, and Municipal Employees, Council 31 v. The State of Illinois (AFSCME III)*,<sup>175</sup> was a case of first impression that involved a dispute over the section 6.1 of Illinois Public Labor Relations Act.<sup>176</sup> Section 6.1 allows the Governor the authority to “designate” up to 3,580 state employment positions.<sup>177</sup> Under the authority of the statute, the Governor can file petitions, which identifies positions occupied by the individual objectors for exclusion from their collective bargaining units.<sup>178</sup> Pursuant to section 6.1(b)(2), the Governor is permitted to designate the positions, and the Illinois Relations Board (“Board”) may approve the designation based solely on the position’s title.<sup>179</sup> After the Act was passed, the petitioner, the Department of Central Management Services (“CMS”), on behalf of the Governor, filed petitions with the Board seeking to exclude certain public employment positions from collective bargaining units.<sup>180</sup> AFSCME, on behalf of individuals, contested their removal from

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169. *Id.* at ¶ 32 (citing *Chief Judge of the Circuit Court of Cook Cnty. v. Am. Fed. of State, Cnty. & Mun. Emps., Council 31* (Chief Judge II), 153 Ill. 2d 508, 523, 607 N.E.2d 182, 189 (1992)).

170. *Id.* at ¶ 33 (Under the lexus-nexus test, which was not at issue in this case, an employee is confidential if he or she assists in a confidential capacity in the regular course of his or her duties a person or persons who formulate, determine or effectuate labor relations policies.).

171. *AFSCME II*, 2014 IL App (1st) 132455, ¶33 (citing *Chief Judge II*, 153 Ill.2d at 523, 607 N.E.2d at 189).

172. *Id.* at ¶¶ 38, 40, 60.

173. *Id.* at ¶ 61.

174. 2015 IL App (1st) 133454.

175. *Id.*

176. *Id.* at ¶ 4; 5 ILL. COMP. STAT. 315/1 *et seq.* (2013).

177. *AFSCME III*, 2015 IL App (1st) 133454, ¶ 1.

178. *Id.* at ¶ 2.

179. *Id.* at ¶ 15.

180. *Id.* at ¶ 15.

their respective collective bargaining units and filed objections to the petitions. The Board approved the Governor's decision to deny the individual's collective bargaining rights, relying on the title of the positions—namely, “senior public service administrator,” to determine the Governor's action was appropriate.<sup>181</sup>

On appeal, AFSCME argued that section 6.1 was unconstitutional, because it deprived the designated employees of their procedural due process rights and therefore denied them the opportunity to object to the designations.<sup>182</sup> However, the court held AFSCME failed to demonstrate that procedural due process concerns rendered that statute unconstitutional, reasoning that the time requirements of 10 days to file an objection could be met and without any other evidence that the time requirement prevented an employee from meaningfully challenging the Governor's action.<sup>183</sup> AFSCME's argument that the delegation was improper, because the Governor was given legislative authority to determine classifications of employees under the Act without sufficient guiding principles, also failed.<sup>184</sup> The court explained that the Governor was not given a “blank check” because he was limited to expressly stated positions, which was subject to review by the Board.<sup>185</sup> Finally, the court rejected the equal protection argument, explaining that there is no dispute that the State's interest in governmental efficiency is legitimate and that the statute's means of achieving that interest are rational and reasonable.<sup>186</sup> The statute did not aim to strip particular people of their collective bargaining rights, but instead focused on those persons' employment positions.<sup>187</sup> While section 6.1 permits certain employees to be treated differently, it was not in an unconstitutional manner, because there is no constitutional right to public sector collective bargaining.<sup>188</sup> Therefore, the Board's decision was affirmed.<sup>189</sup>

*D. Department of Central Management Services v. Illinois Labor Relations Board*<sup>190</sup>

The Governor's designation power under section 6.1 of the Illinois Public Labor Relations Act (“Act”)<sup>191</sup> was also challenged in the Fourth

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181. *Id.* at ¶ 15

182. *Id.* at ¶ 7.

183. *Id.* at ¶ 14.

184. *Id.* at ¶¶ 22–24.

185. *Id.* at ¶ 24.

186. *Id.* at ¶ 32

187. *Id.* at ¶ 33.

188. *Id.* at ¶ 33.

189. *Id.* at ¶ 48.

190. 2015 IL App (4th) 131022.

District.<sup>192</sup> In addition, section 11(e) of the Act was analyzed in *Department of Central Management Services*.<sup>193</sup> In that case, the petitioners, the Department of Central Management Services (“CMS”) along with the Illinois Commerce Commission, Illinois Workers’ Compensation Commission, and Pollution Control Board, sought review of a decision by the Illinois Labor Relations Board (“Board”), which found that the positions designated by the Governor for exclusion of collective bargaining did not qualify for designation under section 6.1(a).<sup>194</sup> CMS filed gubernatorial designation of exclusion petition pursuant to section 6.1 of the Act to exclude nine director positions in the Illinois Commerce Commission, two public service administrator option 8L positions in the Illinois Workers’ Compensation Commission, and two scientist positions in the Pollution Control Board.<sup>195</sup> AFSCME filed objections to the designations in each case, asserting that the positions did not qualify for designation under section 6.1 because the respective entities were not directly responsible to the Governor.<sup>196</sup> The Illinois Labor Relations Board (“Board”) consolidated the cases and the Board accepted the Administrative Law Judge’s (“ALJ”) recommended decision to dismiss the petitions.<sup>197</sup> On a direct administrative review pursuant to Supreme Court Rule 335, the Appellate Court, Fourth District, affirmed the Board’s decision, concluding that under the plain language of the statute, section 6.1 of the Act is not applicable to the three entities at issue and they do not directly report to the Governor. Therefore, the Governor cannot invoke section 6.1 to designate positions in those agencies for exclusion from collective bargaining and self-representation<sup>198</sup>

*E. Community Unit School District No. 5 v. Illinois Educational Labor Relations Board (McLean and Woodford Counties)*<sup>199</sup>

An unfair labor practice charge was addressed in the Fourth District case *McLean and Woodford Counties*.<sup>200</sup> The Illinois Educational Labor Relations Board (“Board”) found the petitioner, Community Unit School District No. 5 in McLean and Woodford Counties (“District”) engaged in unfair labor practices against the respondent, the American Federation of

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191. 5 ILL. COMP. STAT. 315/6.1 (2012).

192. *Dep’t of Cent. Mgmt. Servs.*, 2015 IL App (4th) 131022 ¶ 1.

193. *Id.* at ¶ 1; 5 ILL. COMP. STAT. 315/1(e) (2012).

194. *Dep’t of Cent. Mgmt. Servs.*, 2015 IL App (4th) 131022, ¶ 1.

195. *Id.* at ¶¶ 4, 6, 8.

196. *Id.*

197. *Id.* at ¶ 10.

198. *Id.* at ¶ 24.

199. 2014 IL App (4th) 130294.

200. *Id.* at ¶ 1.

State, County and Municipal Employees, Council 31 (AFSCME) with respect to student transportation services.<sup>201</sup> Specifically, AFSCME alleged the District violated various sections of the Illinois Educational Labor Relations Act<sup>202</sup> (“Act”) by contracting school bus services in retaliation against the bus drivers and bus monitors for choosing AFSCME as their representative and failing to bargain in good faith.<sup>203</sup> Despite the District’s argument that it subcontracted transportation services due to significant cost savings, the circuit court granted a preliminary injunction and decided that the Board raised a fair question of an unfair labor practice by the District.<sup>204</sup> The court denied the District’s motion to stay the order granting the injunction.<sup>205</sup>

On appeal, the Appellate Court, Fourth District, affirmed and found that the circuit court did not abuse its discretion in granting the petition for a preliminary injunction.<sup>206</sup> The court noted that the Administrative Law Judge (“ALJ”) conducted hearings and issued her recommended decision, where she found the bus drivers and bus monitors to be engaged in protected union activity when they chose AFSCME as their exclusive bargaining representative.<sup>207</sup> The ALJ found the District acted with anti-union animus when it subcontracted the transportation services and discharged members of AFSCME’s bargaining unit.<sup>208</sup>

On direct administrative review of the Board’s order, the District argued that the Board’s findings were erroneous.<sup>209</sup> The Fourth District reversed, holding that evidence did not support the Board’s conclusion of anti-union animus on behalf of the District.<sup>210</sup> The court noted that the ALJ relied on the District’s decision to subcontract a portion of its transportation services and then solicit bids for those services occurring within months of AFSCME being certified as an exclusive representative of the bus drivers and monitors.<sup>211</sup> However, the evidence showed that the District administrators responded to a growing problem—transportation—by meeting with the union and reassigning staff and mechanics to driving duty and entering into emergency subcontracting for transportation services.<sup>212</sup> In fact, the transportation department’s problems were established in 2003

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201. *Id.*

202. *Id.* at ¶ 4; 115 ILL. COMP. STAT. 5/14(a)(1), (a)(3), (a)(5) (2010).

203. *McLean and Woodford Counties*, 2014 IL App (4th) 130294, ¶ 1.

204. *Id.* at ¶¶ 7, 9, 35.

205. *Id.*

206. *Id.* at ¶ 9.

207. *Id.* at ¶¶ 10, 34.

208. *Id.* at ¶ 34.

209. *Id.* at ¶ 2.

210. *Id.* at ¶¶ 2, 63.

211. *Id.* at ¶ 62.

212. *Id.* at ¶ 63.

and had grown significantly worse over the years.<sup>213</sup> The court reasoned that even if a *prima facie* case could be established based on the employee's engagement in a protected activity, the District had a legitimate business reason for the adverse business action not only because of the cost savings, but also because the District had experienced an excessive amount of absences in the transportation department along with other issues that caused District administrators and staff to spend time responding to complaints regarding operational issues.<sup>214</sup> The court concluded, "[A]n employer's ability to outsource, or threaten outsourcing, is part of the bargaining process and an important weapon in negotiations."<sup>215</sup> Furthermore, the District bargained in good faith, and therefore failed to rise to the level of an unfair labor practice.<sup>216</sup>

## VI. SCHOOLS

In Illinois, a tenured teacher can only be dismissed "for cause" from his or her employment in an action initiated by the school district.<sup>217</sup>

### A. *Kinsella v. Board of Education of the City of Chicago*<sup>218</sup>

Misconduct by tenured teachers was addressed in two First District cases: *Kinsella*,<sup>219</sup> and *Kimble v. Illinois State Board of Education*.<sup>220</sup> In *Kinsella*, the defendant Board of Education for the City of Chicago ("Board") terminated the plaintiff-petitioner Kathleen Kinsella's ("Kinsella") employment as a tenured teacher for violation of Board's Drug and Alcohol Free Workplace Policy when she was found to have been under the influence of alcohol at work based on her blood-alcohol level of 0.053.<sup>221</sup> The hearing officer found that there was insufficient evidence to prove that Kinsella was under the influence of alcohol during a hearing and recommended her reinstatement.<sup>222</sup> However, the Board terminated Kinsella, finding she was under the influence of alcohol in violation of Board policies. Kinsella filed an appeal to the First District for administrative review pursuant to 34-85(a)(8) of the Illinois School

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213. *Id.* at ¶ 65.

214. *Id.* at ¶¶ 66–67.

215. *Id.* at ¶ 73.

216. *Id.* at ¶ 85.

217. See 105 ILL. COMP. STAT. 5/24-12(d) (2012); see also 23 ILL. ADMIN. CODE 51 (2012).

218. 2015 IL App (1st) 132694.

219. See *id.* at ¶ 1.

220. 2014 IL App (1st) 123436.

221. 2015 IL App (1st) 132694, ¶ 1.

222. *Id.*

Code.<sup>223</sup> Kinsella explained during her testimony that the night before the incident, that she went to dinner at a restaurant and had three sangrias and returned to work the next morning without eating anything.<sup>224</sup>

On appeal, Kinsella argued that the Board was required to prove by a preponderance of evidence that she was under the influence of alcohol and that she cannot be presumed to be impaired solely because of her Breathalyzer test result.<sup>225</sup> The court agreed, reasoning that while the odor of alcohol provides a basis for requiring an employee to submit to testing, the rules clearly state that an additional factor must exist before disciplinary action is warranted—namely, the employee must be under the influence of drugs or alcohol.<sup>226</sup> The court noted that the Board’s manual defined under the influence as “any mental, emotional, sensory or physical impairment due to the use of drugs or alcohol.” The court agreed with the hearing officer, who found that there was no evidence that Kinsella exhibited any mental, emotional, sensory or physical impairment caused by alcohol on the day in question.<sup>227</sup> The court concluded that the Board’s finding was not based on any evidence of impairment, but instead was solely based on Kinsella’s Breathalyzer test result.<sup>228</sup> Therefore, the Board’s decision that Kinsella was “under the influence” and that her conduct was cause for dismissal was arbitrary and the decision was reversed.<sup>229</sup>

#### B. *Kimble*<sup>230</sup>

In *Kimble*, plaintiff Sharon Kimble (“Kimble”) was a tenured teacher with 20 years of service to Parkside Academy when her employment was terminated by the defendant, the Board of Education of the City of Chicago (“Board”), after allegations that she pushed and choked a 10-year old student.<sup>231</sup> The incident was reported to the Department of Children and Family Services (“DCFS”), which determined that the allegations of abuse were unfounded. However, the Board approved the dismissal charges against Kimble based on hearing officer’s recommendation and the Chicago Public Schools’ employee discipline and due process policy, which prohibited the use of corporal punishment.<sup>232</sup> Kimble filed a complaint for administrative review in the circuit court of Cook County, claiming that the

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223. *Id.*; 105 ILL. COMP. STAT. 5/34-85(a)(8) (2012).

224. *Kinsella*, 2015 IL App (1st) 132694.

225. *Id.* at ¶ 14.

226. *Id.* at ¶ 27.

227. *Id.*

228. *Id.* at ¶ 32.

229. *Id.* at ¶¶ 32, 34.

230. 2014 IL App (1st) 123436.

231. *Id.* at ¶ 1.

232. *Id.*

Board's decision was contrary to law and against the manifest weight of the evidence.<sup>233</sup> The appeal focused on the fact that Kimble was the only person who witnessed the alleged event and the only person to testify at the hearing.<sup>234</sup>

The circuit court reversed in part and remanded for further findings of fact, holding that the hearing contained inadmissible hearsay and that the factual basis of the hearing officer's recommendation was not apparent from the record.<sup>235</sup> The circuit court affirmed on further administrative review after the hearing officer issued a clarification and the Board issued a supplemental order.<sup>236</sup> On appeal, Kimble argued that she was denied her right to due process because the admission of the child's hearsay testimony violated her right to confront her accuser as well as denied her right to notice of the specific charges against her.<sup>237</sup> The court agreed and emphasized the inappropriateness of the decision given the fact that the tenured teacher's termination after 20 years of service was based almost entirely on hearsay statements of one student who was not present at the hearing.<sup>238</sup> Furthermore, there were no eyewitnesses to the alleged incident and the teacher denied the conduct. Therefore, the court concluded that the termination of a tenured teacher's employment without giving her the opportunity to cross-examine the accuser violated due process and the Board's decision was reversed.<sup>239</sup>

## VII. UNEMPLOYMENT BENEFITS

The Illinois Unemployment Insurance Act<sup>240</sup> ("Act") affords economic relief to employees who, through no fault of his or her own, become involuntarily unemployed.<sup>241</sup> However, a former employee may not receive benefits under the Act if his or her discharge was for misconduct. Misconduct has been defined as when: (i) the employer has a reasonable work policy or rule that (ii) the employee deliberately and willfully violates, and (iii) the violation either harms the employer or was repeated by the employee despite a warning.<sup>242</sup> In 2014, two First District

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233. *Id.* at ¶ 59.

234. *Id.*

235. *Id.* at ¶ 3.

236. *Id.*

237. *Id.* at ¶ 76.

238. *Id.* at ¶ 84.

239. *Id.* at ¶¶ 84, 88.

240. 820 ILL. COMP. STAT. 405/602 (2012).

241. *AFM Messenger Serv., Inc. v. Dep't of Emp't Sec.*, 198 Ill. 2d 380, 396, 763 N.E.2d 272, 282 (2001).

242. *Woods v. Ill. Dep't of Emp't Sec.*, 2012 IL App (1st) 101639, ¶ 19.



decisions analyzed whether employees were discharged for misconduct, and came to opposing conclusions.

A. *Baker v. Department of Employment Security*<sup>243</sup>

Unemployment benefits were properly denied in *Baker*.<sup>244</sup> In that case, plaintiff Ronald Baker was employed as an electrician for the Chicago Park District (“Park District”) for 14 years before he was discharged for violating the Park District’s code of conduct for violence in the workplace.<sup>245</sup> Baker was reported after he had an argument with his co-workers and supervisors. Baker allegedly said he might “go Arizona” on his supervisors.<sup>246</sup> The supervisors took the reference to the Arizona killings<sup>247</sup> as a threat, filed a police report, and terminated Baker’s employment. As a result of his termination, Baker applied for unemployment insurance benefits but was denied due to the fact that he was discharged for misconduct.<sup>248</sup> Baker appealed for reconsideration of his claim and a referee investigated. Baker’s supervisor told the referee that he felt threatened after Baker’s comments.<sup>249</sup> After questioning the human resources manager and his supervisor, the referee concluded that he was discharged due to misconduct as defined in the Unemployment Insurance Act<sup>250</sup> and was subject to disqualification of benefits under that section.<sup>251</sup> Baker then appealed to the Board of Review (“Board”), which affirmed the referee’s decision and found that the further investigating of evidence was unnecessary.<sup>252</sup>

The circuit court affirmed the decision and Baker appealed.<sup>253</sup> In an appeal from an administrative review proceeding, the court reviewed the decision of the Board rather than that of the circuit court. The First District first noted that an employee willfully violates a rule or policy when he is aware of and consciously disregards that rule. Baker argued that his remark was not threatening, he did not appear angry, and he did not raise his voice when he made the remark.<sup>254</sup> The court recognized that the Park District’s

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243. 2014 IL App (1st) 123669.

244. *Id.* at ¶ 1.

245. *Id.* at ¶ 2.

246. *Id.* at ¶ 10.

247. The plaintiff’s alleged “Arizona” comment referred to a shooting incident in Arizona that occurred less than two weeks earlier, on January 8, 2011, when United States Congresswoman Gabrielle Giffords and 18 others were shot, and six people died from gunshot wounds.

248. *Baker*, 2014 IL App (1st) 123669, ¶ 3.

249. *Id.* at ¶ 6.

250. *Id.* at ¶ 11; 820 ILL. COMP. STAT. 405/602(A) (2010).

251. *Baker*, 2014 IL App (1st) 123669, ¶ 11.

252. *Id.* at ¶ 12.

253. *Id.* at ¶ 14.

254. *Id.* at ¶¶ 16–20.

policy forbade any comment creating a reasonable fear of injury to another person.<sup>255</sup> Baker's remark referred to a violent fatal shooting incident that occurred just weeks earlier and was directed individually to each of the co-workers in Baker's presence. Furthermore, the referee concluded that Baker's supervisor interpreted the remark as intent by Baker to cause great bodily harm. Therefore, the Board's conclusion that the facts constituted misconduct was not clearly erroneous.<sup>256</sup>

*B. Universal Security Corporation v. Department of Employment Security*<sup>257</sup>

The court found that unemployment benefits were wrongly denied in *Universal Security Corporation*.<sup>258</sup> In that case, defendant Darvin Hooker ("Hooker") was employed by Universal Security Corporation ("Universal") as an unarmed night security guard at O'Hare International Airport.<sup>259</sup> After only three months of employment, Hooker was caught sleeping while on duty by his supervisor. After his termination, Hooker sought unemployment insurance benefits but was denied under the Illinois Unemployment Insurance Act ("Act")<sup>260</sup> because he had deliberately and willfully violated Universal's policy, which prohibited sleeping on the job. Hooker appealed and a referee investigated. During the investigation, Hooker explained that he had temporarily dozed off on duty because he was tired from working two jobs. In fact, on the night of the incident, he had reported to work a few hours after a 10-hour shift at his other job. In determining whether Hooker engaged in a deliberate and willful violation under the Act, the referees concluded that Hooker did not deliberately and willfully fall asleep and therefore did not commit "misconduct." Therefore, Hooker was permitted to claim unemployment insurance benefits. Universal appealed the referee's decision to the Board of Review of the Department. However, the Board agreed with the referee and explained "falling asleep on the job is willful only if an individual purposely takes a nap."<sup>261</sup> The fact that Hooker dozed off in an open area where all could observe him showed a lack of intent. Universal appealed yet again to the First District after the circuit court affirmed the Board's decision.<sup>262</sup>

The First District Appellate Court agreed that to be considered "deliberate and willful," the Act requires the conduct be intentional. In

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255. *Id.* at ¶ 21.

256. *Id.*

257. 2015 IL App (1st) 133886.

258. *Id.* at ¶ 2.

259. *Id.* at ¶ 1.

260. *Id.*; 820 ILL. COMP. STAT. 405/602(A) (2012).

261. *Universal Sec. Corp.*, 2015 IL App (1st) 133886, ¶ 6.

262. *Id.*

examining the legislative intent of the Act, the court noted that definition of misconduct expressly rejected the argument that carelessness or negligence alone should be equated with willful and deliberate misconduct.<sup>263</sup> The court held that the circumstances did not show that Hooker intended to fall asleep at work given the fact that he was asleep for only a short interval and in an upright sitting position in public view.<sup>264</sup> Thus, Hooker was eligible for unemployment benefits and the Board's decision was not clearly erroneous, despite the fact that Universal had every reason to fire him for sleeping on the job.<sup>265</sup>

C. *McCleary v. Wells Fargo Securities*<sup>266</sup>

Written bonus plans as they applied to unemployment benefits were examined in *McCleary*.<sup>267</sup> Plaintiff, Thomas McCleary ("McCleary"), was the director of sales for the defendant, Wells Fargo Securities, L.L.C. ("Wells Fargo").<sup>268</sup> As part of his compensation, he was eligible to participate in the "Wells Fargo Securities Group Bonus Plan ("Plan"). The Plan specified that former employees who worked at least three months during the bonus period, met their performance objectives, and were discharged for non-performance reasons, would generally be eligible for pro-rated bonuses. After his job was eliminated, McCleary wanted to continue to participate in the Plan.<sup>269</sup> However, a bonus pool was created to pay performance bonuses for the current calendar year, and McCleary was not awarded a performance bonus under the Plan.<sup>270</sup> McCleary requested an internal company review of Wells Fargo's decision, but was informed that although he was eligible, Wells Fargo retained "absolute discretion" to determine a bonus award based on a number of factors and ultimately determined that he would not receive a bonus payment.<sup>271</sup> However, Wells Fargo failed to identify any factors that influenced its decision.<sup>272</sup> McCleary filed a complaint and alleged that the Plan was legally enforceable and the failure to include him in the bonus pool and pay him a prorated bonus for his performance year was a breach of the parties' agreement.<sup>273</sup> The circuit court granted Wells Fargo's motion to dismiss,

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263. *Id.* at ¶ 16.

264. *Id.* at ¶ 20.

265. *Id.*

266. 2015 IL App (1st) 141287.

267. *Id.* at ¶ 1.

268. *Id.* at ¶ 4.

269. *Id.*

270. *Id.* at ¶ 8.

271. *Id.* at ¶ 9.

272. *Id.*

273. *Id.* at ¶ 10.

finding that the language in the Plan gave Wells Fargo the “absolute discretion to determine whether a bonus should be awarded and, if so, the amount, ultimately undermines the claim here in all counts.”<sup>274</sup> On appeal, the First District reversed, concluding that McCleary sufficiently pled claims to support a violation of the Illinois Wage Payment and Collection Act.<sup>275</sup> The circuit court erred when it dismissed McCleary’s amended complaint in its entirety based on its finding that Wells Fargo’s “absolute discretion” under the Plan undermined McCleary’s claims.<sup>276</sup> However, McCleary sufficiently pled that Wells Fargo abused its discretion by amending the Plan in order to disqualify McCleary’s participation in the bonus pool and be awarded a prorated bonus. Thus, the judgment was reversed and remanded.<sup>277</sup>

### VIII. PENSION AND OTHER FRINGE BENEFITS

#### A. *Vaughn v. City of Carbondale*<sup>278</sup>

At issue in *Vaughn*,<sup>279</sup> was the termination of a police officer’s employer-provided health insurance coverage in accordance with section 10 of the Public Safety Employee Benefits Act (“Act”).<sup>280</sup> While on duty, Officer Jeffrey Vaughn (“Vaughn”) was stopped by a motorist who was asking for directions when he received a request from dispatch to respond over the radio.<sup>281</sup> As he reached inside the squad car for the radio, he struck the top of his head on the doorframe, causing him immediate pain to his head and sharp pain in his arm.<sup>282</sup> He sought medical attention after his shift, and the physician recommended that he remain off duty.<sup>283</sup> Vaughn initially received line-of-duty disability pension benefits pursuant to section 3-114.1 of the Illinois Pension Code,<sup>284</sup> but the Carbondale Police Pension Board (“Board”) eventually terminated the payments after concluding that Vaughn was not injured as a result of his employment.<sup>285</sup>

Vaughn filed a complaint for administrative review in the circuit court. The court affirmed the Board’s decision to terminate Vaughn’s

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274. *Id.* at ¶ 13.

275. *Id.* at ¶ 29. 820 ILL. COMP. STAT. 115/1 *et seq.* (2012).

276. *McCleary*, 2015 IL App (1st) 141287, ¶ 30.

277. *Id.*

278. 2015 IL App (5th) 140122.

279. *Id.* at ¶ 1.

280. *Id.* at ¶ 2; 820 ILL. COMP. STAT. 320/10 (2012).

281. *Vaughn*, 2015 IL App (5th) 140122, ¶ 2.

282. *Id.*

283. *Id.*

284. *Id.* at ¶ 3; 40 ILCS 5/3-114.1 (2006).

285. *Vaughn*, 2015 IL App (5th) 140122, ¶ 4.

disability pension payments.<sup>286</sup> Vaughn appealed the decision, arguing that the City should be required to permanently provide health insurance pursuant to the Act because there was no statutory basis to terminate the provided insurance coverage once awarded.<sup>287</sup> In response, the City argued that Vaughn was not entitled to lifetime health insurance coverage under the Act because his work-related injury was not incurred as a result of his response to fresh pursuit or his response to what he reasonably believed was an emergency.<sup>288</sup>

The Fifth District observed that pursuant to section 10 of the Act, a full-time law enforcement officer and their family are eligible to receive health insurance benefits if two conditions are satisfied: (1) the officer must have suffered a catastrophic injury in the line of duty, and (2) the injury must have occurred as the result of the officer's response to fresh pursuit or the officer's response to what is reasonably believed to be an emergency, an unlawful act perpetrated by another, or during the investigation of a criminal act.<sup>289</sup> The Fifth District reversed the circuit court's decision, concluding that the evidence supported the finding that the plaintiff was injured during the course of his employment and was therefore eligible for a line-of-duty pension.<sup>290</sup> The court reasoned that Vaughn's work-related injury occurred as a result of his response to what he reasonably believed was an emergency. Specifically, the court recognized that although there was no evidence presented that the dispatch call resulted in an emergency situation, it was an officer's duty to respond to dispatch calls in a timely manner and to be prepared for any eventuality.<sup>291</sup> An officer cannot know the nature of the call until he responds.<sup>292</sup> The evidence established that Vaughn was engaged in the act of responding to what he believed was a potential emergency that could have been involved in imminent danger to a person or property and therefore required an urgent response.<sup>293</sup> Thus, the court reversed and remanded the judgment.<sup>294</sup>

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286. *Id.* at ¶ 5.

287. *Id.* at ¶ 7.

288. *Id.*

289. *Id.* at ¶ 18; 820 ILL. COMP. STAT. 320/10(a) (2012).

290. *Vaughn*, 2015 IL App (5th) 140122, ¶¶ 19, 20.

291. *Id.* at ¶ 19.

292. *Id.*

293. *Id.*

294. *Id.* at ¶ 20.

B. *Majid v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*<sup>295</sup>

*Majid* is another interesting case involving a police officer's disability benefits.<sup>296</sup> The plaintiff, Nail Majid, served as a Chicago police officer from 1999 until he was injured in 2003.<sup>297</sup> He was awarded a line-of-duty disability benefit and subsequently relocated to Ohio.<sup>298</sup> While in Ohio, he was indicted and charged with two felony offenses: two counts of impersonating an agent of the Drug Enforcement Agency<sup>299</sup> and one count of possession of an unregistered firearm.<sup>300</sup> Majid pled guilty to possession of an unregistered firearm pursuant to a plea agreement and he was sentenced to three years' probation.<sup>301</sup> The Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago ("Board") suspended Majid's disability benefits pending a hearing upon learning of the felony conviction.<sup>302</sup> Majid argued before the Board that he was convicted of a felony under the federal classification, and therefore the possession of an unregistered weapon charge should not be considered a felony for purposes of section 5-227.<sup>303</sup> Furthermore, Majid argued that section 5-227 was ambiguous.<sup>304</sup> The Board found that it was undisputed that Majid had been convicted of a felony while receiving disability benefits and issued a written order denying Majid's application for reinstatement.<sup>305</sup> Majid appealed and the circuit court affirmed the Board's decision.<sup>306</sup> On further appeal to the First District, Majid argued that the Board ignored the legislative intent that the felony conviction must have a nexus with his service as a police office before disability benefits could be terminated.<sup>307</sup> The court disagreed, reasoning that the Majid's interpretation of section 5-227 conflicted with previous court opinions.<sup>308</sup> Majid further argued that the hearing at which his disability benefit was

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295. 2015 IL App (1st) 132182.

296. *Id.* at ¶ 1.

297. *Id.* at ¶ 2.

298. *Id.*

299. *Id.*; 18 U.S.C. § 912 (2006).

300. *Majid*, 2015 IL App (1st) 132182, ¶ 2; 26 U.S.C. § 5861(d) (2012).

301. *Majid*, 2015 IL App (1st) 132182, ¶ 2.

302. *Id.* ¶ 3; see 40 ILL. COMP. STAT. 5/5-227 (2010) (providing for the termination of disability benefits to a police officer who commits any felony while receiving disability benefits).

303. *Majid*, 2015 IL App (1st) 132182, ¶ 3.

304. *Id.*

305. *Id.* at ¶¶ 6–7.

306. *Id.* at ¶ 7.

307. *Id.* at ¶ 11.

308. *Id.* at ¶ 18; see *Cullen v. Retirement Board of the Policeman's Annuity & Benefit Fund*, 271 Ill. App. 3d 1105, 1108-09, 649 N.E.2d 454, 456-57. (1st Dist. 1995) (holding that section 5-277 provides that no benefits shall be paid to any person who is convicted of any felony while in receipt of disability benefits).

terminated violated his right to procedural due process under the Illinois Constitution and the United States Constitution because he did not have the opportunity to argue that his felony conviction was not related to his service as a police officer and because his wife was not called as a witness.<sup>309</sup> The court disagreed, holding that the nexus issue was previously addressed and that his own testimony established the basis for the forfeiture of his disability benefit.<sup>310</sup> Therefore, the decision of the Board and the circuit court's holding were affirmed, and the termination of Majid's disability benefits was proper.<sup>311</sup>

## IX. MISCELLANEOUS EMPLOYMENT-RELATED CASES

### A. Negligent Hiring and Retention

The Second District affirmed summary judgment in favor of the Boy Scouts of America ("BSA") in *Doe v. Boy Scouts of America*,<sup>312</sup> a case involving the sexual assault of a minor boy scout by a former employee of a local scouting council. The plaintiff, Jane Doe ("Doe"), the mother of John Doe ("John"), filed a complaint alleging that BSA was negligent in screening, hiring and retaining a man who sexually assaulted her son after the employment with BSA had been terminated. Doe alleged that BSA should have known that the perpetrator posed a threat of sexual abuse to children and that BSA failed to conduct background checks on new or existing scout leaders, employees or volunteers.<sup>313</sup> BSA moved for summary judgment, denying that it had any duty to protect John when the sexual assaults occurred, because the perpetrator was no longer employed by the BSA.<sup>314</sup> In response, Doe argued that a duty of care arose, because BSA voluntarily undertook to protect scouts from dangerous individuals such as pedophiles.<sup>315</sup>

The circuit court determined there was no material fact question on negligence and that BSA was entitled to judgment as a matter of law. The court held that the perpetrator was no longer employed by BSA when the incident occurred and that BSA adequately executed all voluntary protective measures that they undertook.<sup>316</sup> Doe appealed, but the Second District affirmed the decision, finding that it was not reasonably foreseeable

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309. *Majid*, 2015 IL App (1st) 132182, ¶¶ 30, 37.

310. *Id.* at ¶¶ 36–37.

311. *Id.* at ¶¶ 60–61.

312. 2014 IL App (2d) 130121, ¶ 1.

313. *Id.* at ¶ 7.

314. *Id.* at ¶ 27.

315. *Id.* at ¶ 28.

316. *Id.* at ¶ 29.

that the perpetrator would sexually molest young boys.<sup>317</sup> Moreover, there was no evidence that BSA intended to continue to protect John after perpetrator was terminated, and, therefore, did not voluntarily undertake the duty to protect young from sexual predators as alleged by Doe.<sup>318</sup>

#### B. Illinois Personnel Record Review Act

*Harrison v. Deere & Co.*<sup>319</sup> was one of three lawsuits filed by plaintiff Andre Harrison (“Harrison”) in response to the termination of his employment by the defendant, Deere & Company (“Deere”). In this case, Harrison claimed violations by Deere under the Illinois Personnel Record Review Act (“Act”)<sup>320</sup> when Deere assembled an investigative record of his associations, communications and non-employment activities and failed to provide him a copy of the report, which supported his discharge within the appropriate time period.<sup>321</sup> The investigation was initiated due to allegations that Harrison had engaged in sexual misconduct with subordinate employees.<sup>322</sup> Harrison was fired a month later for violation of company policy, which prohibited managers from engaging in sexual relationships with subordinate employees.<sup>323</sup> Harrison subsequently requested a copy of his personnel file and the corresponding investigative report, which disclosed the facts of the investigation.<sup>324</sup> However, Harrison received the personnel file without the investigative report. Thereafter, he filed a complaint seeking enforcement of section 2 of the Act with the Department of Labor.<sup>325</sup> Harrison finally received the investigative records after a request by his attorney.<sup>326</sup> In his complaint, Harrison alleged that these activities were racially motivated, constituted an invasion of his privacy and resulted in his wrongful termination.<sup>327</sup>

The circuit court held in favor of Deere and Harrison appealed, arguing that Deere did not submit the appropriate personnel documents with the seven-day time frame required by section 2 of the Act, and, should, therefore, be subject to the penalty imposed by the statute which provides for \$200 plus costs, reasonable attorney’s fees and actual damages.<sup>328</sup> In determining whether Deere’s violation was willful, the court concluded that

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317. *Id.* at ¶ 44.

318. *Id.* at ¶¶ 54–55.

319. 2014 IL App (3d) 130497, ¶ 1.

320. *Id.* at ¶ 4; 820 ILCS 40/2, 9 (2008).

321. *Harrison*, 2014 IL App (3d) 130497, ¶ 4.

322. *Id.* at ¶ 7.

323. *Id.*

324. *Id.* at ¶ 8.

325. *Id.* at ¶ 11.

326. *Id.*

327. *Id.* at ¶ 4.

328. *Id.* at ¶¶ 5, 21; 820 ILL. COMP. STAT. 40/12(d)(2) (2012).



Harrison was not eligible for attorneys' fees, because the court did not compel Deere to comply with the statutory requirements to produce the report for inspection and Deere complied without any need for Harrison to hire counsel.<sup>329</sup> However, the court found that Deere was subject to a petty offense for violating a provision of the Act by providing Harrison with the complete set of records in 25 working days rather than the statutorily required seven days.<sup>330</sup> Harrison's invasion of privacy and wrongful termination arguments also failed because they were barred by *res judicata*.<sup>331</sup> Therefore, the circuit court's decision was affirmed.<sup>332</sup>

### C. Whistleblower Act

In *Larsen v. Provena Hospitals*,<sup>333</sup> the Fourth District analyzed the Illinois Whistleblower Act<sup>334</sup> as applied to a physician's employment. In that case, the defendant, Provena Hospitals ("Provena") declined to renew the medical staff membership and clinical privileges of plaintiff, Dr. L. Royce Larsen ("Larsen") after his 31 years of service.<sup>335</sup> Larsen filed a complaint alleging that Provena retaliated against him because he had made reports to government agencies that revealed Provena's violations of various state and federal laws.<sup>336</sup> Larsen sought damages as a result of Provena's alleged willful and wanton misconduct in harming his medical practice and professional reputation.<sup>337</sup> Provena filed a motion to dismiss Larsen's complaint on the basis that Larsen did not sufficiently plead willful and wanton conduct under section 10.2 of the Hospital Act.<sup>338</sup> Furthermore, Larsen was not a protected employee under the Whistleblower Act because Larsen failed to allege that Provena received state funding.<sup>339</sup>

The circuit court partially granted Provena's motion to dismiss, finding that harm to a physician's medical practice and professional reputation was not the type of harm required to state a claim for willful and wanton misconduct under the Hospital Act.<sup>340</sup> Yet, the court denied Provena's motion to dismiss Larsen's retaliation claim, finding in part that the Whistleblower Act applied due to Provena's state funding in the form of

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329. *Harrison*, 2014 IL App (3d) 130497, ¶ 24.

330. *Id.* at ¶ 25.

331. *Id.* at ¶ 55; *see Harrison v. Addington*, 2011 IL App (3d) 100810.

332. *Id.* at ¶ 59.

333. 2015 IL App (4th) 140255.

334. *Id.* at ¶ 1; 740 ILL. COMP. STAT. 174/1 to 40 (West 2010).

335. *Larsen*, 2015 IL App (4th) 140255, ¶¶ 1, 8.

336. *Id.* at ¶ 9.

337. *Id.* at ¶ 1.

338. *Id.* at ¶ 10.

339. *Id.*

340. *Id.* at ¶ 3.

Medicaid payments.<sup>341</sup> On interlocutory appeal,<sup>342</sup> the court was presented with four certified questions, which addressed whether Larsen's status as an employee was protected under the Whistleblower Act.<sup>343</sup> The court noted that section 5 of the Whistleblower Act defined an employee as an individual who is "employed on a full-time, part-time, or contractual basis by an employer and includes, but is not limited to, a licensed physician who practices his or her profession in whole or in part, at a hospital, nursing home, clinic or any medical facility that is a health care facility funded, in whole or in part, by the State."<sup>344</sup> The court determined that the answer to the question depended on the interpretation of the last phrase the definition—whether a health care facility was funded, in whole or in part, by the State.<sup>345</sup> Provena argued that Medicaid benefits were not state funds as contemplated by section 30 of the Whistleblower Act.<sup>346</sup> The court disagreed with Provena's argument but nevertheless determined that a Medicaid payment is not funding as contemplated by section 5 of the Whistleblower Act.<sup>347</sup> The court answered the first question in the affirmative and the remaining three in the negative, and the case was remanded.<sup>348</sup>

#### D. Drug Free Workplace Policy

The First District analyzed an interesting issue relating to the relatively new statute known as the Drug Free Workplace Act.<sup>349</sup> In *Walker*, Cook County deputy sheriff Mister Walker ("Walker") was selected randomly by a computer for a drug test.<sup>350</sup> Walker's sample testified positive for oxazepam,<sup>351</sup> which is a controlled substance under schedule IV of the Illinois Controlled Substances Act.<sup>352</sup> An investigation followed and a complaint was filed.<sup>353</sup> At the hearing before the Cook County Sheriff's Merit Board ("Merit Board"), an investigator testified that although the prescription bottle was dated from 1995, Walker had told her

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341. *Id.*

342. *Id.* at ¶ 4; Ill. Sup. Ct. R. 308(b) (eff. Feb. 26, 2010).

343. *Larsen*, 2015 IL App (4th) 140255, ¶¶ 4, 54.

344. *Id.* at ¶55; 740 ILL. COMP. STAT. 174/5 (2010).

345. *Larsen*, 2015 IL App (4th) 140255, ¶ 55.

346. *Id.* at ¶ 58.

347. *Id.* at ¶¶ 58, 61–62.

348. *Id.* at ¶¶ 64–65.

349. *Walker v. Dart*, 2015 IL App (1st) 140087.

350. *Id.* at ¶¶ 2, 4.

351. See WEBMD OXAZEPAM, <http://www.webmd.com/drugs/2/drug-8347/oxazepam-oral/details> (defining Oxazepam as a medication used to treat anxiety as well as symptoms associated with acute alcohol withdrawal) (last visited Oct. 13, 2015).

352. *Id.* at ¶4; 720 ILL. COMP. STAT. 570.210(c)(18) (2010).

353. *Walker*, 2015 IL App (1st) 140087, ¶ 4.

that a now-deceased doctor prescribed the medication.<sup>354</sup> The investigator concluded that the 1995 prescription was not a valid prescription at the time of testing and Walker was therefore in violation of the drug policy.<sup>355</sup>

At trial, Walker testified that before he was employed by the sheriff for 32 years, he had served in the Vietnam War and suffered from medical conditions stemming from exposure to Agent Orange<sup>356</sup> and has taken prescription medications at various times to help him sleep and for anxiety as needed.<sup>357</sup> Despite Walker's justification, the Merit Board issued a decision, which resulted in Walker's termination due to the violation of the drug policy.<sup>358</sup> Walker filed a complaint for administrative review in the circuit court, but the court affirmed the Merit Board's decision.<sup>359</sup>

Walker appealed and argued that the Merit Board's decision was erroneous because the drug policy did not state that employees were prohibited from taking validly obtained prescription drugs after a certain period of time elapsed since the prescription was filled.<sup>360</sup> On the other hand, the defendants, the Merit Board and Cook County Sheriff Thomas Dart, contended that the drug policy can be violated in three ways: (1) the presence of drugs or controlled substances in the employee's system; (2) the use of non-prescribed controlled substances; and (3) the abuse of legally prescribed drugs or controlled substances.<sup>361</sup> The court reversed the decision, holding that the Merit Board's conclusion was not supported by an appropriate statute, ordinance or rule.<sup>362</sup> The defendants cited to section 312(a) of the Illinois Controlled Substances Act, which the court determined, was directed only at pharmacists.<sup>363</sup> Furthermore, the court held that there was no medical testimony to establish that taking medication from an older prescription bottle was not within the limits of "a medically valid prescription" or that Walker's conduct was an abuse of prescription medication.<sup>364</sup> Therefore, the court concluded that the evidence used to support the unwritten drug policy was based on speculation and was therefore against the manifest weight of evidence.<sup>365</sup>

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354. *Id.* at ¶ 6.

355. *Id.* at ¶ 7.

356. *Id.* at ¶¶ 14-15; *see* U.S. Dep't of Vet. Aff., Public Health: Agent Orange, <http://www.publichealth.va.gov/exposures/agentorange/> (defining Agent Orange as a herbicide used by the U.S. military as part of its herbicidal warfare program).

357. *Walker*, 2015 IL App (1st) 140087, ¶ 15.

358. *Id.* at ¶ 30.

359. *Id.* at ¶ 31.

360. *Id.* at ¶ 32.

361. *Id.* at ¶ 45.

362. *Id.* at ¶ 47.

363. *Id.* at ¶ 48.

364. *Id.* at ¶ 50.

365. *Id.* at ¶ 59.

## X. CONCLUSION

The courts provided some well-reasoned decisions during this period of time.

In a case of first impression, Section 6.1 of the Illinois Public Labor Relations Act was in dispute in an action filed by AFSCME challenging removal of certain positions from the collective bargaining unit as unconstitutional. The court upheld that classifications based on certain positions did not violate procedural due process under the constitution.

It continues to be difficult to obtain a decision denying unemployment benefits based on the willful and deliberate language in the definition of misconduct in the Illinois Unemployment Insurance Act. Violence or threats of violence seem to be treated differently in that the first occurrence of a violation of a workplace violence policy is usually enough to be considered misconduct. It does not have to be repeated after a warning, and is almost always determined to be willful and deliberate. Most other misconduct will take repeated violations of rule or policy or some proven harm, which is often hard to quantify.

Employers in Illinois who wish to retain discretion regarding to whom to award bonuses, should carefully review their written bonus plans before implementation. If an employee is able to sufficiently plead their claims that the employer abused its discretion in amending a bonus plan to disqualify an employee's participation, the employee may succeed in obtaining payment under the bonus plan.