

IDC Monograph

*By: Denise Baker-Seal
Brown & James P.C., Belleville*

*Julie A. Bruch
O'Halloran, Kosoff, Geitner & Cook, LLC, Northbrook*

*Kimberly A. Ross
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago*

*Geoffrey M. Waguespack
Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC, Chicago*

From Retaliatory Discharge to Retaliation by Association: The Expanding Scope of Viable Retaliation Claims against Employers

Increasingly, the easiest way an employer can lose what appears to be an otherwise defensible employment discrimination case is by engaging in retaliation against the employee who made the complaint. Those who complain of discrimination, however, are not the only ones who have standing to make a claim of retaliation. Those who assist or support an employee in making a complaint of discrimination and even (in the most recent expansion of the theory) those closely associated with that employee have standing to make a claim for retaliation against an employer. As U.S. Supreme Court Justice Samuel Alito observed in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,¹ employees' filings of retaliation claims with the EEOC have proliferated in recent years. In many of those cases, the employers ultimately prevail on the underlying discrimination claims only to lose against claims based on retaliatory acts that occurred after the employer had notice of an employee's original complaint.

Each of the most widely known federal employment statutes contains anti-retaliation provisions. The language of each provision differs,² but they all generally make it an unlawful practice for an employer to discriminate against any employee because the employee opposed any practice made an unlawful practice by the statute or because the employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the statute. Employees also can bring retaliation claims under the amended Section 1981 of the Civil Rights Act of 1866.³ Even employees⁴ who suffer retaliation for opposing the racial discrimination suffered by others have standing to assert retaliation claims under Section 1981.⁵ Similarly, the Illinois Human Rights Act⁶ (IHRA) prohibits discrimination, and the necessary elements for retaliation claims under the IHRA are the same as the federal claims.⁷ Employers in Illinois also can be liable for damages under the common law tort theory of retaliatory discharge,⁸ which itself creates an interesting

interplay with the anti-retaliation provisions found within the Illinois Whistleblowers Act.⁹ Employers must be aware that damages allowed to plaintiffs who succeed on retaliation claims can be significant and may include both compensatory damages and punitive damages, which under certain schemes are uncapped.¹⁰

Section I of this Monograph explains the basic elements of a claim for retaliation, which both federal and Illinois state courts have applied to the causes of action arising under the various statutes prohibiting retaliation. Section II explains the origins of the common law tort of retaliatory discharge, which has been created as a very narrow exception to the general rule in Illinois of employment at will. Section III discusses the interplay between the Illinois common law and the Illinois Whistleblower Act, as well as the private causes of action available under that statute. Finally, Section IV explores the expanding base for retaliation claims allowed by courts under the statutory schemes prohibiting retaliation.

I. Elements of a Retaliation Claim

Like discrimination claims, an employee can prove his retaliation claim under the direct or indirect method of proof. Under either method, the first two essential elements are the same: (1) a protected activity by the employee; and (2) a materially adverse action suffered by the employee because of her protected activity. Once a plaintiff establishes those two elements of a retaliation claim, the plaintiff must establish a causal link between them. At this point, the differences between the direct and the indirect methods of proof arise. Under the direct method, a plaintiff may present an admission by the employer that its actions were in retaliation against the plaintiff's engaging in protected activity; or a plaintiff may proceed with circumstantial evidence of retaliation. Under the indirect method, the plaintiff must show that, after engaging in the protected activity, she was treated less favorably than other similarly situated employees who did not engage in a protected activity, even though the plaintiff was performing her job satisfactorily. Next, the employer has the opportunity to establish a non-retaliatory reason for its action, and the plaintiff must establish that the reason presented was mere pretext for the employer's retaliatory motive. This Section explains these elements and the current state of the law with respect to each.

A. Employees Must Engage in a Protected Activity

Most anti-retaliation statutes contain two types of protected activity by the employee: opposition and participation. An employee who opposes any practice made unlawful by a statute satisfies the first element of a cause of action for retaliation. Typically, an employee's opposition occurs by filing a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) or the Illinois Department of Human Rights (IDHR), or by filing suit against her employer. Increasingly, the U.S. Supreme Court has taken an expansive view of what constitutes opposition to an unlawful practice. In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, the Court expanded the scope of covered employees under the opposition clause to protect an employee speaking out about discrimination not on her own initiative, but in answering questions during the employer's internal investigation.¹¹ Similarly, in *Kasten v. Saint-Gobain Performance Plastics Corp.*,¹² the Court ruled that the term "filed any complaint" in the Fair Labor Standards Act anti-retaliation provision included oral as well as written complaints.¹³ The *Kasten* majority refused to consider whether a complaint must be made to a governmental agency as opposed to a private employer.¹⁴ Although the U.S. Court of Appeals for the Seventh Circuit has not decided this issue, the U.S. Court of Appeals for the Eleventh Circuit protects complaints to private employers while the U.S. Court of Appeals for the Second Circuit has held that only the filing of formal complaints to a government authority is protected under the FLSA.¹⁵

Although employees are not required to use magic words like "sexual harassment" or "race discrimination," the employee's speech must identify a connection to a protected class or provide facts

sufficient to create that inference.¹⁶ The recipient of even an oral complaint must be “given fair notice that a grievance has been lodged and does, or should, reasonably understand the matter as part of its business concerns.”¹⁷ This situation occurs when a complaint is “sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.”¹⁸ Even if the employee is mistaken on whether the practice he opposed was in fact a violation of the statute, his opposition is protected activity.¹⁹ The employee’s opposition, however, must be based on a good-faith and reasonable belief that he is opposing unlawful conduct.²⁰

The second type of protected activity, known as the participation clause, occurs when an employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the statute at issue. The investigation, proceeding, or hearing must take place as part of a court hearing or investigation by an outside agency charged with enforcing the law, such as the EEOC.²¹ Although the circuit courts are split on this issue, the Seventh Circuit holds that an employee does not satisfy the participation clause merely by taking part in an employer’s purely internal investigation, as opposed to an investigation conducted by an outside agency charged with enforcing the law.²² Though uncommon, in certain cases, courts have found that an employee need not undertake protected activity to successfully establish a retaliation claim. Those cases typically involve an employer retaliating against an employee in anticipation of that person engaging in protected opposition to discrimination.²³ Notably, participation does not insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination.²⁴ Even though some employees believe that the best defense to an impending termination is to go on offense by filing a charge of discrimination, the Seventh Circuit regularly warns such employees that making frivolous accusations, lying to an investigator, and defaming co-workers does not protect them from valid discipline—even termination.²⁵

B. The Employer Must Have Taken a Materially Adverse Action against the Employee

After an employee establishes that he or she engaged in a protected activity, the employee must show that a materially adverse action occurred because of the participation in the protected activity. The language of most anti-retaliation statutes prohibits acts by an employer that “discriminate against” an employee who has engaged in a protected activity. Under *Burlington Northern & Santa Fe Railway v. White*,²⁶ the U.S. Supreme Court considered the reach of the phrase “discriminate against” in the anti-retaliation provision in Title VII of the Civil Rights Act of 1964, as amended.²⁷ Unlike discrimination that must be employment- or workplace-related, materially adverse actions under the anti-retaliation provision extend beyond workplace-related or employment-related acts and harm.²⁸ In *White* the Court defined a “materially adverse action” to be an act that “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”²⁹ Excluded from the definition of “materially adverse actions” are “trivial harms,” “petty slights,” “minor annoyances,” and “simple lack of good manners” that all employees likely experience.³⁰ The test is an objective one in which context matters and must be judged from the perspective of a reasonable person in the employee’s position, considering all of the circumstances. As the Court explained, “[a] schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children.”³¹ “[T]he standard is tied to the challenged retaliatory act, not the underlying conduct that forms the basis of the Title VII complaint.”³²

Since *White*, parties have litigated whether certain acts by an employer rise to the level of a material adverse action. A “materially adverse action” is broader than an “adverse *employment* action,” but the phrase requires that the action must be “more disruptive than a mere inconvenience or an alteration of job responsibilities.”³³ Accordingly, “not everything that makes an employee unhappy is an actionable adverse action.”³⁴ The court likely will find a materially adverse action where there is “termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular

situation.”³⁵ Loss of opportunities to work overtime can be a materially adverse action.³⁶ Yet, a transfer without any decrease in hours or pay or significant diminution in material duties is legally insufficient to support a retaliation claim.³⁷ Similarly, in the case of a change in job responsibilities, the employee “must allege more than a dislike for her new assignments or preference for her old ones for her case to go forward.”³⁸ Written warnings, standing alone, do not constitute materially adverse actions, but could be actionable when they cite “petty misdeeds that allegedly occurred months ago” coupled with other limitations, such as on the employee’s movements within the workplace.³⁹ Materially adverse actions do not encompass claims by employees that they were not being listened to, were getting a cold shoulder from management, or were labeled as “trouble makers.”⁴⁰ Increasingly, however, courts are finding that “a series of repeated minor annoyances could conceivably blossom into a materially adverse action.”⁴¹

C. There Must be a Causal Link between the Protected Activity and the Materially Adverse Action

The third element in a retaliation claim is that there is a “causal link” between the protected conduct and the materially adverse action. Causality typically is regarded as one of the highest hurdles that must be cleared by plaintiffs.⁴² To establish causation, the employee may proceed under the direct or indirect methods of proof.⁴³

Under the direct method, the employee need only provide evidence of the employer’s retaliatory animus that motivated the employer to take a materially adverse action against the employee.⁴⁴ In the rare case, the direct evidence is an admission by the employer that it took a materially adverse action against the employee because of the protected conduct.⁴⁵

More commonly, employees use one or more of three categories of circumstantial evidence to establish a “convincing mosaic” of circumstantial evidence.⁴⁶ Those three categories are (1) suspicious timing, ambiguous statements and other bits and pieces from which an inference of retaliatory intent might be drawn; (2) evidence that similarly situated employees were treated differently; and (3) evidence that the employer offered a pretextual reason for an adverse employment action.⁴⁷ Suspicious timing alone is almost never enough to create a triable issue in a retaliation claim.⁴⁸ When the adverse action happens within days of the protected act, though, courts are much more likely to find an inference of causation.⁴⁹ An exception exists for retaliation claims under the Family Medical Leave Act of 1993,⁵⁰ where an employee is terminated during leave or upon return from leave. Often, however, the reason for termination is either company-wide layoffs or the employer discovering during the employee’s absence the employee’s misdeeds or incompetence. In those circumstances, courts have found that “the timing of the discharge does not constitute relevant and probative evidence of a causal link.”⁵¹

If the employee does not have the requisite evidence to proceed under the direct method, he or she still may establish a retaliation claim under the indirect method. The indirect method requires that an employee show that after exercising rights to the protected activity the employee was treated less favorably than other similarly situated employees who did not engage in a statutorily protected action, even though the employee was performing the job in a satisfactory manner.⁵² Thus, the employee must show that at the time of the materially adverse action, the employee’s supervisors were satisfied that the employee was meeting their legitimate performance expectations.⁵³ Often, employees try to satisfy this element with their own glowing assessment of their abilities. The Seventh Circuit has rejected such evidence repeatedly, on the basis that an employee’s own self-serving appraisals are inadequate to meet the required burden of proof on this element or to rebut the employer’s complaints about the employee’s job performance.⁵⁴ Under the indirect method, an employee also must identify a similarly situated employee who did not engage in a protected activity and was treated more favorably.⁵⁵ This inquiry is meant to be “a flexible, common-sense comparison based on ‘substantial similarity’ rather than a strict ‘one-to-one mapping between employees,’ but still requires ‘enough common features between the individuals to allow [for] a meaningful comparison.’”⁵⁶

To succeed on a retaliation claim, an employee does not need to prove that retaliation was the only reason for the materially adverse act; she may establish a retaliation claim by “showing that the protected conduct was a substantial or motivating factor in the employer’s decision.”⁵⁷ “A motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the [employer’s] actions.”⁵⁸

D. The Employer Must Show a Non-retaliatory Reason for the Materially Adverse Action, and the Employee Must Show that the Employer’s Explanation is Pretext to a Retaliatory Motive

Once the employee establishes a *prima facie* case of retaliation under the direct or indirect method of proof, the employer must provide a non-retaliatory explanation for why it took the materially adverse action against the employee.⁵⁹ As long as the employer honestly believes the reasons for the adverse action, the employer has satisfied its burden.⁶⁰ In making that determination, a court does not sit as a “super-personnel department,” second-guessing an employer’s “business decision as to whether someone should be fired or disciplined because of a work-rule violation.”⁶¹

If the employer satisfies this requirement, then the burden shifts to the employee to show that the employer’s explanation is pretext for a retaliatory motive. Attorneys for the employer always will want to define pretext as “more than just faulty reasoning or mistaken judgment on the part of the employer; it is a lie, specifically a phony reason for some action.”⁶² Problems often arise when the employer gives a different reason for the adverse action during litigation than it gave the employee at the time of the adverse action. Similarly, troubles arise when an employer gives an employee glowing performance reviews leading up to a protected act and then suddenly finds fault with the employee’s performance immediately after the employee’s participation in the protected act. Under such circumstances, courts have found that an employer that advances a fishy reason takes the risk that disbelief of the reason will support an inference that the reason merely is a pretext for retaliation.⁶³

II. Origins of the Illinois Common Law Tort of Retaliatory Discharge

Generally, Illinois is an employment at-will state, with only very narrowly construed exceptions restricting an employer’s right to discharge an employee. Under Illinois common law, the exception to the at-will employment doctrine has been established through the tort of retaliatory discharge, originally stemming from the court’s protection of rights afforded to employees under public policy mandates set forth via statute. Specifically, the tort of retaliatory discharge in Illinois was established in an effort to safeguard the rights of employees under the Illinois Workers’ Compensation Act⁶⁴ (IWCA). The courts, however, have been very reluctant to expand that tort.

The IWCA makes unlawful the discharge or the threat to discharge, or the refusal to rehire or recall to active service, an employee because of the exercise of the employee’s rights or remedies granted under the IWCA.⁶⁵ Prior to 1979, violation of this prohibition was punishable by a criminal fine only. In 1979, the Illinois Supreme Court recognized for the first time a common law cause of action of retaliatory discharge arising from the termination of an employee for filing of a workers’ compensation claim.

In *Kelsay v. Motorola, Inc.*,⁶⁶ the plaintiff alleged that her employer terminated her in retaliation for her filing of a workers’ compensation claim.⁶⁷ Recognizing that the only repercussion for an employer that violates the prohibition against discharging an employee for filing a workers’ compensation claim is a criminal fine, the supreme court found that such a small fine was insufficient to effect the public policy underlying the IWCA.⁶⁸ The issue before the supreme court, therefore, was whether Illinois should recognize a cause of action for retaliatory discharge.⁶⁹

The court reasoned that some employers would risk the threat of criminal sanctions to escape responsibility under the IWCA. Further, the court explained that the fact that the IWCA is a penal statute does not bar a civil remedy, and that a violation of its terms may result in civil liability, as the statute was enacted for the benefit of a particular class of individuals.⁷⁰

The supreme court was not convinced that an employer's otherwise absolute power to terminate an employee at will in Illinois prevails when that power is used to prevent an employee from exercising statutory rights under the IWCA.⁷¹ Allowing an employer to intimidate employees into choosing their jobs over their rights under the IWCA, the court found, is contrary to public policy under the IWCA. Even in the absence of an explicit proscription against retaliatory discharge, the court refused to believe that the legislature intended such a result.⁷² Accordingly, the supreme court held that a common law claim for retaliatory discharge exists in Illinois for those employees discharged in retaliation for filing a workers' compensation claim.⁷³

Illinois courts generally have refused to expand liability for retaliation under the common law beyond the tort of retaliatory discharge.⁷⁴ Specifically, the supreme court has rejected retaliatory demotion, retaliatory discrimination,⁷⁵ and a retaliatory discharge "process"⁷⁶ as viable theories of tort liability, and has recognized that the common law tort of constructive discharge has not been recognized in Illinois.⁷⁷ Likewise, the Illinois appellate court has rejected the claim that "a threat to discharge or discipline short of discharge" states a valid cause of action.⁷⁸

Underlying the court's decision in *Kelsay* was a concern with safeguarding against violations of clearly mandated public policy. After *Kelsay*, the case law quickly developed under that principle, so that the law in Illinois currently is that, under the employee-at-will doctrine, an employer may terminate an employee for any reason or for no reason, except when the termination violates a clearly mandated public policy.⁷⁹ This principle has given rise to the concept of the "citizen crime-fighter," discussed in detail, below, in Section III.

III. Retaliation for Reporting Illegal or Improper Conduct: The Interplay between the Concept of the Common Law Citizen Crime-Fighter and the Illinois Whistleblower Act

Employees in Illinois have available to them two principal methods for seeking damages against employers who retaliate against them for engaging in certain protected activities with regard to reporting illegal or improper conduct. This Section will discuss the actions of the employee that are protected and the type of employer conduct prohibited under varying scenarios.

As discussed above in Section II, since at least 1979, Illinois courts have recognized a common law claim for retaliatory discharge for employees who engage in certain protected activity. In 2003, the Illinois legislature enacted the Illinois Whistleblower Act,⁸⁰ which provides additional protections for employees against retaliatory conduct by employers, including conduct short of or less than termination.

A. The Concept of the Citizen Crime-Fighter

The purpose of a common-law retaliatory discharge claim is to prevent an employer from discharging an employee in contravention of public policy. Public policy concerns what is right and just and "what affects the citizens of the state collectively."⁸¹ Thus, a cause of action for common-law retaliatory discharge "is allowed where the public policy is clear, but is denied where it is equally clear that only private interests are at stake."⁸²

Subsequent to the *Kelsay*⁸³ decision and its narrowly crafted protection of the public policy underlying an employee's right to file a workers' compensation claim, the Illinois Supreme Court in *Palmateer v. International Harvester Co.*⁸⁴ expanded the tort of retaliatory discharge to protect an employee's reporting of illegal or improper conduct. Currently, Illinois courts only recognize causes of action for common law retaliatory discharge in the two limited contexts established in *Kelsay* and *Palmateer*.⁸⁵

In order to maintain a claim for retaliatory discharge, an employee must prove the following: (1) the employment was terminated by the employer, (2) the discharge was in retaliation for action of the employee, and (3) the discharge violates a clear mandate of public policy.⁸⁶ As a general rule, the ascertainment of public policy, the determination of whether the policy is undermined by an employee's discharge, and whether a discharge violated a clear mandate of public policy are generally questions of law for the courts.⁸⁷

Even though courts seemingly have kept the bases for retaliatory discharge claims narrowly construed to filing of workers' compensation claims and the reporting of illegal or improper conduct, the latter basis actually enjoys a somewhat broad interpretation in the case law. This result is possibly due to the fairly vague concept of a "clearly mandated public policy." In defining "clearly mandated public policy," the *Palmateer* court stated:

There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions.⁸⁸

For instance, abiding by criminal laws is a clearly mandated public policy.⁸⁹ Policies that affect the health and/or safety of the general public are likely to constitute clearly mandated public policies sufficient to support a retaliatory discharge claim.⁹⁰ Courts also examine whether the conduct at issue affects society as a whole or merely constitutes an individual grievance. For example, a former employee of a company does not state a claim for retaliatory discharge based on his dismissal over complaints raised about ethical concerns, accounting practices, or intentional contractual breaches, or other business improprieties not rising to the level of crimes.⁹¹

In *Palmateer*, the concept of the "citizen crime-fighter" was developed as a basis for a retaliatory discharge claim.⁹² Since then, numerous cases involving those issues have been decided in the Illinois appellate courts. Each of those cases was deemed to have involved situations where the "citizen crime-fighter" was acting to protect the interests of others. As can be seen, the activity in question has quite a large range, from actual criminal activity, to public safety, to individual safety: *Mackie v. Vaughan Chapter-Paralyzed Veterans of America, Inc.*⁹³ involved a report of alleged theft of the employer's mailing list that was then used in a private business to solicit business from customers on that list; *King v. Senior Services Associates, Inc.*⁹⁴ involved a report of abuse of an elderly person; *Vorpagel v. Maxell Corporation of America*,⁹⁵ involved a report of a supervisor's sexual relationship with a minor; *Stebbins v. University of Chicago*⁹⁶ involved a report of exposure of human test subjects to radiation levels in contravention to federal statutes and regulations, as well as the employer's refusal to report those levels as legally required; *Petrik v. Monarch Printing Corp.*⁹⁷ involved a report of a discrepancy in an employer's financial records due to criminal conduct; *Russ v. Pension Consultants Co.*⁹⁸ involved a refusal to file false tax returns; *Wheeler v. Caterpillar Tractor Co.*⁹⁹ involved a refusal to work under unsafe conditions; *Howard v. Zack Co.*¹⁰⁰ involved concerns with the public policy of maintaining proper document control pursuant to the Code of Federal Regulations, in order to facilitate verification that nuclear power plants have been safely constructed; and *Paskarnis v. Darien-Woodridge Fire Protection District*¹⁰¹ involved the public policy of proper training of part-time firefighters.

An employee need only have a good-faith belief that the employer was violating the law or some clearly mandated public policy; the employee need not conclusively show that the law was broken or that the regulations in question were violated.¹⁰² Further, although citizen crime-fighter cases usually involve an employee terminated for "whistleblowing" or telling of a coworker's commission of an alleged crime, the crime does not have to be work-related for the employee to be protected from retaliatory discharge.¹⁰³ Moreover, under common law, it is not necessary for the employee to have reported the conduct to an outside governmental entity or law enforcement agency.¹⁰⁴ Internal reports are sufficient.

Importantly, Illinois courts consistently have limited claims for common law retaliation to retaliatory discharge only. Claims for retaliatory conduct short of discharge are not protected under Illinois common law.

Even the failure to renew an expired employment agreement will not form the basis of a retaliatory discharge case.¹⁰⁵ This limitation is unlike most statutes enacted to protect the rights of employees (such as the Illinois Human Rights Act or the Illinois Wage Payment and Collection Act¹⁰⁶), which typically also incorporate anti-retaliation clauses that include retaliatory conduct short of termination, such as demotions, pay cuts or harassment.

In 2004, however, when the Illinois legislature enacted the Illinois Whistleblower Act (IWBA), claims for retaliatory conduct short of termination became viable, albeit limited to the underlying language of the IWBA and what it was intended to protect.

B. Illinois Whistleblower Act

The IWBA is comprised of several substantive sections delineating several different forms of prohibited conduct. Interestingly, the concept of termination or discharge is not specifically mentioned in the IWBA, but is presumably included within the definition of “retaliation” under Section 15 of the IWBA. This omission does, however, lead to some discussion about the concept of preemption of common law retaliatory discharge claims by the IWBA, which will be discussed briefly below.

Section 10 of the IWBA prohibits an employer from making, adopting or enforcing any rule, regulation or policy that prevents an employee from disclosing information to a government or law enforcement agency “if the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.”¹⁰⁷

Section 15, entitled “Retaliation for certain disclosures prohibited,” states:

(a) An employer may not retaliate against an employee who discloses information in a court, an administrative hearing, or before a legislative commission or committee, or in any other proceeding, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.

(b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation.¹⁰⁸

Section 20 of the IWBA prohibits an employer from retaliating against an employee for refusing to participate in an activity that would result in a violation of a state or federal law, rule, or regulation.¹⁰⁹

Section 20.1 is a sort of catch-all provision that prohibits “any other act or omission not otherwise specifically set forth” in the Act, if the act or omission would be materially adverse to a reasonable employee and is because of the employee’s disclosing or attempting to disclose public corruption or wrongdoing.¹¹⁰ Thus, Section 20.1 is somewhat vague as to “other” acts or omissions, but is rather specific with respect to the conduct in which the employee must engage (that is, the disclosure or attempt to disclose public corruption or wrongdoing). There have been no court decisions interpreting or applying this section of the IWBA.

Section 20.2 prohibits an employer from threatening any employee with any act or omission if that act or omission would constitute retaliation against the employee under the IWBA.¹¹¹ No cases have addressed this section. Presumably, Section 20.2 would apply to a situation where, for instance, an employer threatened to terminate an employee if the employee moves forward to report an illegal act to a governmental agency, because that type of reporting is protected under Section 15.

One key difference to note immediately between the IWBA and common law retaliatory discharge is the fact that under the IWBA, the conduct of the employer that the employee is reporting must be a violation of a law, rule, or ordinance (or reasonably believed to be). On the other hand, the conduct being reported in a retaliatory discharge case can be criminal, but it also can constitute a mere violation of public policy.

The available damages under the IWBA pose some interesting questions, especially in light of an absence of any cases that have considered issues of damages under the statute. Section 30 of the IWBA states:

[I]f an employer takes any action against an employee in violation of Section 15 or 20, the employee may bring a civil action against the employer for all relief necessary to make the employee whole, including but not limited to the following, as appropriate: (1) reinstatement with the same seniority status that the employee would have had, but for the violation; (2) back pay, with interest; and (3) compensation for any damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney's fees.¹¹²

The IWBA is entirely silent on the right of an employee to bring a claim or seek damages under Sections 10, 20.1, or 20.2, and the silence on the issue suggests that no claim can be brought under these sections. It should be noted that the manner in which the IWBA is written is such that Sections 20.1 and 20.2 are not subsections of Section 20 and instead are stand-alone concepts. Contrast the organization of those sections with Section 15, which contains subsections (a) and (b). This structure suggests a conscious effort on the part of the legislature to exclude Sections 20.1 and 20.2 from forming the basis of a civil action.

Another interesting question that arises with the IWBA, particularly because of the potential confusion arising out of the eligible bases for a civil action, is what damages exist with certain violations under the IWBA that constitute technical violations but which do not seemingly result in quantifiable injury. This question has not yet been addressed by any court. Generally, conduct such as terminations, demotions, and missed promotions cause calculable damages such as lost wages and benefits, which would be covered under Section 30 (back pay and other compensation).¹¹³ But, how would one quantify damages to an employee who is given a less desirable office or work space, or is verbally harassed, in retaliation for his refusal to engage in illegal conduct, as prohibited by Section 20? Or, assuming damages could be awarded under Section 20.2, what are the damages if an employer merely threatens a discharge, yet does not actually go through with it?

Seemingly, nothing under Section 30 would allow the award of any damages other than attorney's fees for such a technical violation where monetary damages do not result. It remains unclear whether the phrase "compensation for any damages sustained as a result of the violation" might possibly include emotional damages. If the answer is no, it would then appear that plaintiff's attorneys are the only ones who could benefit from violations that do not result in economic damage to an employee. One must question whether a court would even allow a claim to proceed under the IWBA where it did not result in quantifiable damages for the underlying conduct, given that the only remedies would be for attorney's fees, which are not incurred unless or until the underlying violation occurred. In other words, it would be nonsensical to allow a lawsuit to proceed where the only remedy is attorney's fees.

Perhaps the most troubling question that arises under the IWBA is whether the employee must specifically report the allegedly illegal conduct to governmental agencies or entities to be afforded protection under the IWBA, or whether an internal report of the illegal conduct is enough. There is a litany of cases to which employers should cite that have involved reports of violations of the law by the employers: *Zuccolo v. Hannah Marine Corp.*¹¹⁴ (report of employer's violations of maritime regulations); *Averett v. Chicago Patrolmen's Federal Credit Union*¹¹⁵ (report of senior management's attempts to "sidestep" National Credit Union Administration rules and regulations on external auditing firms); and *Woodley v. RGB Group, Inc.*¹¹⁶ (refusal to participate in employer's violation of federal regulations).

As recognized by the appellate court in the case of *Callahan v. Edgewater Care & Rehabilitation Center, Inc.*,¹¹⁷ the legislative history of the IWBA suggests that it was intended to protect only individuals who reported violations of the law to the authorities.¹¹⁸ For instance, consider the statements of the Illinois House sponsor of the bill, John Fritchey:

What this does is prohibit an employer from taking any actions to prevent an employee from disclosing information to the government * * *.

* * *

What we're saying is, you can't terminate them solely for going, in good faith, to the authorities to let the authorities know that there's been a violation of law occurring.¹¹⁹

Therefore, it can be argued that the legislative intent for the IWBA is very narrow and that claims are limited to situations involving an employee's report to a government or law enforcement agency of an employer's violation of a state or federal law, rule, or regulation. Claims under Section 15 clearly require the retaliation to be based on external reporting in order to be actionable. Less clear is whether an external report is also required even when the conduct being alleged is a refusal to participate in an activity that would result in a violation of a state or federal law, rule, or regulation as set forth in Section 20. The same uncertainty exists for claims under Sections 20.1 and 20.2, assuming such claims would be allowed to be filed in the first place, given the limitations of Section 30.

Employees will cite to the fact that only Sections 10 and 15 of the IWBA mention reporting to a government or law enforcement agency violation of a state or federal law, rule, or regulation. They will then argue that the remainder of the sections of the IWBA does not require a report to an outside governmental entity of the criminal activity for a claim to arise. Employers can argue that such an interpretation of the IWBA would be contrary to *Callahan*, which recognized that "individuals discharged in retaliation for reporting illegal activities to their superiors have no right of action under the Whistleblower Act."¹²⁰ Notably, the court in *Callahan* specifically cited to Section 20 of the IWBA during its discussion in its opinion.¹²¹ Thus, the *Callahan* court had the opportunity to specify that only certain sections of the IWBA require reporting to an outside agency (such as Section 15), while other sections can give rise to a claim even when the reporting is only internal, but it chose not to. Therefore, employers can argue that the court intended to interpret the IWBA as requiring an external report.¹²²

The main focus of the argument with regard to whether a cause of action under the IWBA can exist absent a report to a governmental entity is on Section 20, which prohibits retaliation for an employee refusing to participate in an activity that would amount to a violation of the law. The issue of whether a cause of action under Section 20 of the IWBA can exist absent a report to a governmental entity was discussed indirectly in the case of *Sardiga v. Northern Trust Co.*¹²³

In *Sardiga*, the plaintiff claimed that he was fired as a result of his repeated complaints and questions to supervisors (that is, an internal complaint) that expressed his belief that his employer was engaged in deceptive illegal practices. He alleged common law retaliatory discharge and a violation of Section 20 of the IWBA for refusing to participate in the activity. The trial court granted summary judgment for the employer on the IWBA count, finding that the plaintiff did not actually refuse to participate in illegal activity because he was never asked to participate in the first place. The appellate court upheld the decision, finding that merely complaining about an activity—as opposed to actually refusing to participate in it—is not sufficient to entitle a plaintiff to relief under the Act.¹²⁴

While reaching that conclusion, the *Sardiga* court analyzed the interplay between common law retaliatory discharge and the IWBA. The court stated: "The [Whistleblower] Act protects employees who call attention in one of two specific ways to illegal activities carried out by their employer. It protects employees who either contact a government agency to report the activity or refuse to participate in that activity."¹²⁵ Employees will read (and likely take out of context) this statement as establishing that reporting illegal activity to a governmental agency is not required under Section 20 of the IWBA, because the statement was a disjunctive proposition (that is, either report externally or refuse to participate). Employers must then point out that, following the statement quoted above, the *Sardiga* court then stated:

An employee who does not perform either of the specifically enumerated actions under the [IWBA] cannot qualify for its protections. We fail to see how the plain meaning of the [IWBA] creates a

loophole when the [IWBA] does not purport to cover the situation described in the instant case. When an employee complains to a supervisor, as opposed to a government agency, and is terminated as a result, a common law claim of retaliatory discharge arises, with which the [IWBA] does not interfere. *Callahan v. Edgewater Care & Rehabilitation Center, Inc.*, 374 Ill.App.3d 630, 635 (2007).¹²⁶

This quotation illustrates that the *Sardiga* court was aware of the current state of the law as expressed in *Callahan*, which recognized that individuals discharged in retaliation for reporting illegal activities to their superiors have no right of action under the IWBA.

As noted above, the court in *Callahan* explicitly recognized the provisions of Section 20 when it made its ruling. At no point in *Callahan* did the court qualify or limit this ruling to apply to Section 15 of the IWBA only; rather, the ruling arguably applied to the entire act. Likewise, the court in *Sardiga* did not limit or qualify its reiteration of the statement from *Callahan* to apply to Section 15 only. Indeed, the very fact it made the statement suggests that it agreed with the *Callahan* court that, to state a claim under any section of the IWBA, a plaintiff necessarily must have made a report to a governmental or a law enforcement entity. Thus, although the situation in *Sardiga* turned on the issue of refusing to participate versus merely complaining of the improper activity, the court opted to explain that an employee's right of action for internal complaints is found under common law, not under the IWBA. Although these statements might be *dicta*, they were expressed nonetheless. Indeed, nothing in the *Sardiga* decision indicates that the issue of the internal versus external reporting requirement was even raised.

Thus, employers are left to argue that to allow a claim to proceed under Section 20 without requiring a report to a governmental or a law enforcement agency would carve out an exception to the IWBA that was not intended by the legislature and that there is no basis for expanding the purview of Section 20 to cover such claims. The legislative intent and the case law interpreting the Illinois Whistleblower Act as a whole arguably demonstrate the narrow application of Section 20, and the requirement that a plaintiff report the illegal activity to a governmental or a law enforcement agency. The validity of the argument is untested, but it is certainly worthwhile. Given that attorney's fees are available under the IWBA but not under common law, and given the frequency with which attorney's fees are significantly higher than damages for the underlying proscribed activity, employers should do everything possible under the law to seek dismissal of claims under the IWBA.

In addition, even when employers are stuck defending against claims under the IWBA, they often find themselves also defending the same claim under common law. In these cases, employers should consider arguing that the enactment of the IWBA preempts causes of action for common law retaliatory discharge in situations where the employee made an external complaint to an outside governmental or law enforcement agency. Although the *Callahan* case held that the IWBA did not preempt a cause of action for retaliatory discharge where the plaintiff's claim was based on reports made to the employer internally, rather than to a governmental or a law enforcement agency, the court did not decide whether claims based on external reports to a governmental or a law enforcement agency were preempted by the IWBA.¹²⁷ The court did acknowledge that it could reasonably be argued that the IWBA codified claims by employees discharged for reporting illegal activities to a governmental or a law enforcement agency, without actually making that holding.¹²⁸

IV. The Expanding Base of Retaliation Claims: Retaliation by Association

Retaliation claims under Title IV, ADA, ADEA, other federal statutes containing anti-retaliation provisions, and potentially the Illinois Human Rights Act and the IWBA have been expanded by the theory of retaliation by association. This theory was examined in the United States Supreme Court case of *Thompson v. North American Stainless, LP*.¹²⁹ In *Thompson*, the plaintiff, Eric Thompson, brought a retaliation suit against his former employer, North American Stainless, LP (NAS), alleging that he was terminated three weeks after NAS learned that his fiancée, who was also an employee of NAS, had filed an EEOC charge alleging sex

discrimination. The Supreme Court found that NAS's firing of the plaintiff was a violation of Title VII's antiretaliation provision. The Court held that the antiretaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."¹³⁰ Because "a reasonable worker might be dissuaded from engaging in protected activity if she knew her fiancé would be fired," the Court held that the employer's action of firing plaintiff was unlawful.¹³¹

In *Thompson*, the Court declined to identify clearly a class of relationships that will be recognized as third-party retaliation under Title VII's antiretaliation provision. The Court did state that terminating a close family member of an employee who files a discrimination complaint normally will violate the antiretaliation provision. The Court, however, refused to declare with certainty that such a situation will always amount to retaliation. A terminated employee has standing under Title VII to bring suit as long as the employee "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis of his complaint."¹³² The plaintiff in *Thompson* satisfied the "zone of interests" standing test, as he was more than just an accidental victim of the employer's actions, because it appeared that the employer terminated the plaintiff in order to punish his fiancée for filing a sexual harassment charge against the employer.¹³³

The ruling in *Thompson* has been expanded by lower federal courts to provide standing for retaliation suits against employers in additional circumstances. In *McGhee v. Healthcare Services Group, Inc.*, the plaintiff was terminated by his employer, Healthcare Services Group, Inc., after his wife filed a discrimination charge against her employer, Sovereign Healthcare of Bonifay.¹³⁴ Healthcare Services Group was a subcontractor of Sovereign Healthcare of Bonifay, and the plaintiff reported to work each day at the Sovereign Healthcare facility.¹³⁵ The court held that the plaintiff had standing to bring a retaliation suit against his wife's employer because "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her husband would be fired by his employer."¹³⁶ In that case, the employers had a close relationship as contractor and subcontractor, and the plaintiff established facts demonstrating that Sovereign Healthcare used its relationship with the plaintiff's employer to retaliate against the plaintiff's wife for filing an EEOC charge. This relationship between employers opens the door to allow closely related employees of subcontractors and contractors to bring retaliation claims when one employee files a charge of discrimination against his respective employer.

The retaliation by association theory has also been expanded to cover job applicants as well. Children of an employee who filed a discrimination charge against her employer had standing to file a retaliation claim when they were not hired by their mother's employer. In *EEOC v. Wal-Mart Associates, Inc.*,¹³⁷ the EEOC brought retaliation claims against Wal-Mart on behalf of Ramona, Robin, and John Bradford.¹³⁸ John and Robin applied for employment with Wal-Mart within six months of the filing of a sexual harassment charge by their mother, Ramona. Wal-Mart claimed that it did not hire John or Robin because the store was under a hiring freeze, Robin's availability was limited, and John was at high risk for workplace theft.¹³⁹ The court determined that Robin and John had standing to file retaliation claims, because they fell within the "zone of interests" of parties intended to be protected by Title VII as employees who "might be dissuaded from engaging in protective activity" if they knew that their children would not be hired by their employer as a result.¹⁴⁰ The court also stated that it was possible that Wal-Mart's refusal to hire John and Robin was intended to punish Ramona for filing a sexual harassment charge against Wal-Mart.¹⁴¹

One recent case, however, highlights the potential limit of *Thompson*. In *Jarvis v. Bank of America Corp.*,¹⁴² the plaintiff brought a retaliation claim based on his association with another employee who had filed a racial discrimination claim against the employer. The court granted summary judgment in favor of the employer on the retaliation claim, because the plaintiff did not provide sufficient evidence of a relationship with the complaining employee. The only evidence of the plaintiff's relationship with the complaining employee was that they went on one business trip together. After the trip, the plaintiff received a warning from their employer for failing to obtain approval from department heads for expenses incurred and activities conducted while on the trip.¹⁴³ The relationship between the two parties was not sufficient enough to constitute a third-party reprisal, and further, the employer's warning did not discipline the plaintiff in any manner or lead to his termination.¹⁴⁴ The court refused to apply *Thompson*, as the plaintiff did not have a close relationship

with the complaining employee and did not attempt to aid or assist the complaining employee with his racial discrimination claim.

As demonstrated by *Thompson* and its progeny, Title VII's antiretaliation provision has been interpreted to not only protect third-party employees who have close relationships with employees filing discrimination claims, but also to cover third-party applicants and employees of subcontractors or related companies. In this legal environment of an ever-expanding class of retaliation plaintiffs, employers should closely examine the relationships of any employees who file discrimination charges prior to terminating, disciplining, or refusing to hire other employees.

Conclusion

Although Illinois remains an employment-at-will state, courts have recognized many forms of retaliation that restrict the otherwise unconditional right of an employer to hire or fire an employee. Although the Illinois courts have refused to expand the common law beyond the tort of retaliatory discharge, both federal and state courts are stretching the bounds of what constitutes retaliation under those statutes that contain anti-retaliation provisions. Therefore, employers must be sure that they have clear, justifiable reasons for the employment decisions they make, so that those decisions will withstand harsh scrutiny when defending against an otherwise meritless discrimination case.

(Endnotes)

¹ *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 855 (2009).

² The language of the relevant statutes are set forth as follows:

Title VII:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [an employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [an employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3(a).

The Age Discrimination in Employment Act (ADEA):

It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA].”

29 U.S.C. § 623(d).

Americans with Disabilities Act of 1990 (ADA):

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [the ADA].

42 U.S.C. § 12203(a).

The Family Medical Leave Act:

It shall be unlawful for any person to discharge or in any other manner discriminate against any individual because such individual –

(1) has filed any charge, or has instituted or caused to be instituted any proceeding under or related to [the FMLA];

(2) has given, or is about to give, any information in connection with any inquiry or proceeding related to any right provided under [the FMLA]; or

(3) has testified, or is about to testify, in any inquiry or proceeding relating to any right provided under [the FMLA].

29 U.S.C. § 2615(b).

The Fair Labor Standards Act:

[I]t shall be unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [the FLSA], or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

29 U.S.C. § 215(a)(3).

OSHA contains a retaliation provision providing that:

[N]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to [OSHA] or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by [OSHA].

29 U.S.C. § 660(c)(1).

The National Labor Relations Act (NLRA) makes it an unfair labor practice for an employer to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under [the NLRA].” 29 U.S.C. § 158(a)(4).

³ 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071; see also *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 397 (7th Cir. 2007).

⁴ Employees of governmental entities are protected from retaliation in violation of their First Amendment rights. The contours of First Amendment retaliation claims, however, are beyond the scope of this Monograph.

⁵ *Humphries*, 474 F.3d at 403.

⁶ Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.*

⁷ See *Hoffelt v. Ill. Dep’t of Human Rights*, 367 Ill. App. 3d 628 (1st Dist. 2006).

⁸ See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978).

⁹ 740 ILCS 174/1, *et seq.*

¹⁰ Seventh Circuit pattern jury instruction 3.10 sets forth the types of compensatory damages that can be awarded in retaliation claims. In addition to lost wages and benefits that would be calculated by the court, such damages include the physical and mental/emotional pain and suffering and disability/loss of a normal life that the employee has experienced and is reasonably certain to experience in the future. The jury instruction also permits the employee to seek the reasonable value of medical care that the employee reasonably needed and actually received, as well as the present value of the care that he is reasonably certain to need and receive in the future. In certain cases, the employee may seek punitive damages

against her employer as well. Recovery for punitive damages, however, could be capped, as it is under Title VII, based on the number of individuals employed by the employer, 42 U.S.C. § 1981A(b), or uncapped, as it is under a Section 1981 claim. Although compensatory damages are not available generally under the ADEA, 29 U.S.C. §§ 621-634, they are permitted in ADEA retaliation claims. *PfeiferMoskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283-84 (7th Cir. 1993). On the other hand, compensatory and punitive damages are not available for retaliation claims under the ADA, 42 U.S.C. §§ 12101-12213. *Kramer v. Banc of Am. Sec.*, 355 F.3d 961, 965 (7th Cir. 2004). In ADA cases, the employee is limited to seeking equitable relief, including back pay. *Kramer*, 355 F.3d. at 964.

Under the Illinois Human Rights Act, available damages include actual damages and back pay, plus interest, from the date of the violation. 775 ILCS 5/8A-104. Punitive damages are not available under the act. Punitive damages, however, are available for the tort of retaliatory discharge, and are not capped under Illinois common law. A plaintiff is also entitled to compensatory damages under that theory. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 189 (1979).

¹¹ *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 850-53 (2009).

¹² *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011).

¹³ *Kasten*, 131 S. Ct. at 1329.

¹⁴ *Id.* at 1336.

¹⁵ Compare *EEOC v. White & Son Enters.*, 881 F.2d 1006, 1011 (11th Cir. 1989), with *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993), abrogated on other grounds by *Kasten v. Saint-Gobain Performance Plastics*, 131 S. Ct. 1325 (2011).

¹⁶ *Tomanovich v. City of Indianapolis*, 457 F.3d 656, 663 (7th Cir. 2006) (Ind.); *Miller v. Am. Family Mut. Ins. Co.*, 203 F.3d 997 (7th Cir. 2000) (Wis.).

¹⁷ *Kasten*, 131 S. Ct. at 1334.

¹⁸ *Id.* at 1335.

¹⁹ *O'Leary v. Accretive Health, Inc.*, 657 F.3d 625, 631 (7th Cir. 2011).

²⁰ *O'Leary*, 657 F.3d at 631.

²¹ *Sawyer v. Nicholson*, No. 06-CV-5907, 2010 U.S. Dist. LEXIS 115969, 2010 WL 4510954, *32-*33 (N.D. Ill. Nov. 1, 2010).

²² *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 746-47 (7th Cir. 2010).

²³ See, e.g., *Beckel v. Wal-Mart Assocs.*, 301 F.3d 621, 624 (7th Cir. 2002) (noting that “a threat [of firing an employee if she filed suit on her sexual harassment claim] would be a form of anticipatory retaliation, actionable as retaliation under Title VII”).

²⁴ *Hatmaker*, 619 F.3d at 745.

²⁵ *Id.* at 745-46.

²⁶ *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006).

²⁷ 28 U.S.C. § 2000e, *et seq.*

²⁸ *Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2414.

²⁹ *Id.* at 2415.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Nagle v. Vill. of Calumet Park*, 554 F.3d 1106, 1120 (7th Cir. 2009); see also *Benuzzi v. Bd. of Educ. of the City of Chi.*, 647 F.3d 652, 665 (7th Cir. 2011).

³⁴ *Smart v. Ball St. Univ.*, 89 F.3d 437, 441 (7th Cir. 1996).

³⁵ *Hilt-Dyson v. City of Chi.*, 282 F.3d 456, 465-66 (7th Cir. 2002) (citing *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir. 1999)).

³⁶ *Lewis v. City of Chicago*, 496 F.3d 645, 654 (7th Cir. 2007).

³⁷ *Atanus v. Perry*, 520 F.3d 662, 677 (7th Cir. 2008).

³⁸ *Vance v. Ball St. Univ.*, 646 F.3d 461, 474 (7th Cir. 2011), cert. granted, 133 S. Ct. 23 (2012).

³⁹ *Benuzzi v. Bd. of Educ. of the City of Chi.*, 647 F.3d 652, 665 (7th Cir. 2011).

⁴⁰ *Brown v. Advocate S. Suburban Hosp.*, 700 F.3d 1101, 1107 (7th Cir. 2012).

⁴¹ *Pesek v. Caterpillar Inc.*, No. 10 C 3546, 2012 U.S. Dist. LEXIS 104881, at *15-16, 2012 WL 3069773, at *5 (N.D. Ill. July 27, 2012).

⁴² *Benuzzi*, 657 F.3d at 665.

⁴³ See *Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004).

⁴⁴ *Smith v. Bray*, 681 F.3d 888, 901 (7th Cir. 2012).

⁴⁵ *Jajeh v. County of Cook*, 678 F.3d 560, 570 (7th Cir. 2012).

⁴⁶ *Jajeh*, 678 F.3d at 570.

⁴⁷ *Id.*

⁴⁸ *Milligan v. Bd. of Trs. of S. Ill. Univ.*, 686 F.3d 378, 389-90 (7th Cir. 2012).

⁴⁹ *Benuzzi v. Bd. of Educ. of the City of Chi.*, 647 F.3d 652, 665-66 (7th Cir. 2011).

⁵⁰ Family Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654).

⁵¹ *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 633-34 (7th Cir. 2009); *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 806 (7th Cir. 2001).

⁵² *Argyropoulos v. City of Alton*, 539 F.3d 724, 733 (7th Cir. 2008); *Hull v. Stoughton Trailers, LLC*, 445 F.3d 949, 951 (7th Cir. 2006).

⁵³ *Argyropoulos*, 539 F.3d. at 735.

⁵⁴ *Hall v. Forest River, Inc.*, 536 F.3d 615, 620 (7th Cir. 2008) (Ind.).

⁵⁵ *Hall*, 536 F.3d. at 620.

- ⁵⁶ *Argyropoulos*, 539 F.3d. at 735 (alteration in original) (quoting *Humphries v. CBOS W., Inc.*, 474 F.3d 387, 405 (7th Cir. 2007)).
- ⁵⁷ *Goelzer v. Sheboygan County*, 604 F.3d 987, 995 (7th Cir. 2010) (Wis.).
- ⁵⁸ *Culver v. Gorman & Co.*, 416 F.3d 540, 545 (7th Cir. 2005) (Wis.) (citing *Spiegla v. Hull*, 371 F.3d 928, 942 (7th Cir. 2004)).
- ⁵⁹ *Argyropoulos*, 539 F.3d. at 736.
- ⁶⁰ *Silverman v. Bd. of Educ.*, 637 F.3d 729, 744 (7th Cir. 2011).
- ⁶¹ *Ballance v. City of Springfield*, 424 F.3d 614, 621 (7th Cir. 2005).
- ⁶² *Jajeh v. County of Cook*, 678 F.3d 560, 572 (7th Cir. 2012).
- ⁶³ *Loudermilk v. Best Pallet Co., LLC*, 636 F.3d 312, 315 (7th Cir. 2011); *Goelzer v. Sheboygan County*, 604 F.3d 987, 996 (7th Cir. 2010) (Wis.).
- ⁶⁴ Workers' Compensation Act, 820 ILCS 305/1, *et seq.*
- ⁶⁵ *Id.* § 305/4.
- ⁶⁶ *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978).
- ⁶⁷ *Kelsay*, 74 Ill. 2d at 178.
- ⁶⁸ *Id.* at 185. By providing for efficient remedies for and protections of employees, the IWCA promotes the state's general welfare, and has been found to be of sound public policy. The IWCA is a trade-off between employers and employees to afford protection to employees by providing prompt and equitable compensation for their injuries, while insulating employers from the prospect of high recovery for injured workers awarded by sympathetic juries. *Id.* at 180-81.
- ⁶⁹ *Id.* at 179.
- ⁷⁰ *Id.*
- ⁷¹ *Id.* at 181.
- ⁷² *Id.* at 182.
- ⁷³ *Id.* at 181.
- ⁷⁴ See *Barr v. Kelso-Burnett*, 106 Ill. 2d 520, 525 (1985) (stating that the court does not strongly support the expansion of the tort of retaliatory discharge).
- ⁷⁵ *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 39, 44 (1994).
- ⁷⁶ *Hartlein v. Ill. Power Co.*, 151 Ill. 2d 142, 161 (1992).
- ⁷⁷ *Zimmerman*, 164 Ill. 2d at 36 (citing *Scheller v. Health Care Serv. Corp.*, 138 Ill. App. 3d 219 (4th Dist. 1985)). Constructive discharge, however, is a viable theory with which to establish discrimination under the various anti-discrimination statutes. See, *e.g.*, *Steele v. Ill. Human Rights Comm'n*, 160 Ill. App. 3d 577 (3d Dist. 1987).
- ⁷⁸ *Melton v. Cent. Ill. Pub. Serv. Co.*, 220 Ill. App. 3d 1052, 1056 (4th Dist. 1991).
- ⁷⁹ *Barr*, 106 Ill. 2d at 525.

⁸⁰ 740 ILCS 174/1, *et seq.*

⁸¹ *Palmateer v. Int’l Harvester Co.*, 85 Ill. 2d 124, 130 (1981).

⁸² *Palmateer*, 85 Ill. 2d at 131.

⁸³ *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1979); see also Section II, *supra*.

⁸⁴ *Palmateer v. Int’l Harvester Co.*, 85 Ill. 2d 124 (1981).

⁸⁵ *Barr*, 106 Ill. 2d at 525; *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29 (1994).

⁸⁶ *Barr*, 106 Ill. 2d at 529.

⁸⁷ *Turner v. Mem’l Med. Ctr.*, 233 Ill. 2d 494, 501-02 (2009).

⁸⁸ *Palmateer*, 85 Ill. 2d at 130.

⁸⁹ *Russ v. Pension Consultants Co.*, 182 Ill. App. 3d 769 (1st Dist. 1989).

⁹⁰ *Leweling v. Schnadig Corp.*, 276 Ill. App. 3d 890 (1st Dist. 1995).

⁹¹ *Nappi v. Meridian Leasing Corp.*, 859 F. Supp. 1177, 1180 (N.D. Ill. 1994).

⁹² *Palmateer*, 85 Ill. 2d at 132-33.

⁹³ *Mackie v. Vaughan Chapter-Paralyzed Veterans of Am., Inc.*, 354 Ill. App. 3d 731 (1st Dist. 2004).

⁹⁴ *King v. Senior Servs. Assocs., Inc.*, 341 Ill. App. 3d 264 (2d Dist. 2003).

⁹⁵ *Vorpapel v. Maxell Corp. of Am.*, 333 Ill. App. 3d 51 (2d Dist. 2002).

⁹⁶ *Stebbins v. Univ. of Chi.*, 312 Ill. App. 3d 360 (1st Dist. 2000).

⁹⁷ *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502 (1st Dist. 1982).

⁹⁸ *Russ v. Pension Consultants Co.*, 182 Ill. App. 3d 769, 777 (1st Dist. 1989).

⁹⁹ *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 510 (1985).

¹⁰⁰ *Howard v. Zack Co.*, 264 Ill. App. 3d 1012 (1st Dist. 1994).

¹⁰¹ *Paskarnis v. Darien-Woodridge Fire Prot. Dist.*, 251 Ill. App. 3d 585 (2d Dist. 1993).

¹⁰² *Stebbins v. Univ. of Chi.*, 312 Ill. App. 3d 360, 371 (1st Dist. 2000).

¹⁰³ *Mackie v. Vaughan Chapter-Paralyzed Veterans of Am., Inc.*, 354 Ill. App. 3d 731, 734 (1st Dist. 2004).

¹⁰⁴ *Michael v. Precision Alliance Group, LLC*, 2011 IL App (5th) 100089, ¶¶ 20, 24.

¹⁰⁵ *Krum v. Chi. Nat’l League Ball Club, Inc.*, 365 Ill. App. 3d 785 (1st Dist. 2006).

¹⁰⁶ 820 ILCS 115/1, *et seq.*

¹⁰⁷ 740 ILCS 174/10.

¹⁰⁸ *Id.* § 174/15.

¹⁰⁹ *Id.* § 174/20.

¹¹⁰ *Id.* § 174/20.1.

¹¹¹ *Id.* § 174/20.2.

¹¹² 740 ILCS 174/30.

¹¹³ In the case of *Dobyne v. Rimland Services NPF*, Cook County Case No. 11L-7340, which was tried in November 2012, the jury awarded the plaintiff \$22,982 on his IWBA claim for retaliatory discharge, where he alleged that he was unlawfully terminated due to his complaint against his employer to the Office of the Inspector General for the Illinois Department of Human Services.

¹¹⁴ *Zuccolo v. Hannah Marine Corp.*, 387 Ill. App. 3d 561 (1st Dist. 2008).

¹¹⁵ *Averett v. Chi. Patrolmen's Fed. Credit Union*, No. 06 C 4606, 2007 WL 952034 (N.D. Ill. Mar. 27, 2007).

¹¹⁶ *Woodley v. RGB Group, Inc.*, No. 05 C 0548, 2006 WL 1697049 (N.D. Ill. June 13, 2006).

¹¹⁷ *Callahan v. Edgewater Care & Rehab. Ctr., Inc.*, 374 Ill. App. 3d 630 (1st Dist. 2007).

¹¹⁸ *Callahan*, 374 Ill. App. 3d at 634.

¹¹⁹ IL H.R. Tran. 2003, Reg. Sess. No. 63 (statement of Rep. John Fritchey).

¹²⁰ *Callahan*, 374 Ill. App. 3d at 635.

¹²¹ *Id.* at 633.

¹²² See *Stiles v. Int'l Bioresources, LLC*, No. 09-cv-4000, 2010 WL 2740312, at *6 (N.D. Ill. July 12, 2010) (noting that, “[b]ecause Stiles did not report illegal activity to government officials, the [Illinois Whistleblower Act] does not come into play”). Interpreting Illinois law, federal courts held that plaintiffs who made internal complaints to their employers only and not to any governmental or law enforcement agency fell outside the protections of the Illinois Whistleblower Act. See *Riedlinger v. Hudson Respiratory Care, Inc.*, 478 F. Supp. 2d 1051, 1054 (N.D. Ill. 2007); *Jones v. Dew*, No. 06 C 3577, 2006 WL 3718053, at *4 (N.D. Ill. Dec. 13, 2006); and *Smith v. Madison Mut. Ins. Co.*, No. 05 CV 00142DRH, 2005 WL 1460301, at *1 (S.D. Ill. June 21, 2005).

¹²³ *Sardiga v. N. Trust Co.*, 409 Ill. App. 3d 56 (1st Dist. 2011).

¹²⁴ *Sardiga*, 409 Ill. App. 3d at 64.

¹²⁵ *Id.* at 62.

¹²⁶ *Id.*

¹²⁷ *Callahan*, 374 Ill. App. 3d at 635.

¹²⁸ *Id.* at 634.

¹²⁹ *Thompson v. N. Am. Stainless, LP*, 131 S. Ct. 863 (2011).

¹³⁰ *Thompson*, 131 S. Ct. at 868 (quoting *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405 (2006)).

¹³¹ *Id.*

¹³² *Id.* at 870 (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990)).

¹³³ *Id.*

¹³⁴ *McGhee v. Healthcare Servs. Group, Inc.*, No. 5:10cv279/RS-EMT, 2011 WL 818662 (N.D. Fla. Mar. 2, 2011).

¹³⁵ *McGhee*, 2011 WL 818662, at *3.

¹³⁶ *Id.*

¹³⁷ *EEOC v. Wal-Mart Assocs., Inc.*, No. 07-CV-0300 JAP/LFG, 2011 WL 8076831 (D.N.M. Oct. 26, 2011).

¹³⁸ *Wal-Mart Assocs.*, 2011 WL 8076831, at *2.

¹³⁹ *Id.* at *3-*4.

¹⁴⁰ *Id.* at *7.

¹⁴¹ *Id.* at *8.

¹⁴² *Jarvis v. Bank of Am. Corp.*, No. 1:10CV896, 2012 WL 6568791 (M.D.N.C. Dec. 17, 2012).

¹⁴³ *Jarvis*, 2012 WL 6568791, at *1.

¹⁴⁴ *Id.* at *7.

About the Authors

Denise Baker-Seal joined *Brown & James, P.C.*, in 2000 and practices in the firm's Belleville, Illinois, office. Her practice has focused on employment cases, as well as catastrophic injury cases. She frequently represents employers and other businesses, including product manufacturers, truck lines, and property owners. A life-long resident of central Illinois, Ms. Baker-Seal also participates as an arbitrator in the St. Clair County (IL) and Madison County (IL) mandatory arbitration programs. She serves on the firm's employee/personnel committee and is also the co-founder of the Fifth Friday Initiative to increase retention and promotion of women in the firm. Prior to entering private practice, Ms. Baker-Seal served as the Judicial Law Clerk to the Honorable Lewis M. Blanton, U.S. Magistrate Judge for the U.S. District Court for the Eastern District of Missouri.

Julie A. Bruch is a partner with *O'Halloran, Kosoff, Geitner & Cook, LLC*. Her practice concentrates on the defense of governmental entities in civil rights and employment discrimination claims.

Kimberly A. Ross is a partner with the Chicago law firm of *Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC*. She received her J.D. from DePaul University College of Law and her B.A. from the University of Michigan. Her practice areas include employment law and general tort litigation. Ms. Ross was a past Editor in Chief of the *IDC Quarterly*. In addition to the IDC, she is a member of the Defense Research Institute, the Decalogue Society of Lawyers and the Women's Bar Association.

Geoffrey M. Waguespack is the Committee Chairperson of the IDC's Employment Law Committee, and is an associate with the law firm of *Cremer, Spina, Shaughnessy, Jansen & Siegert, LLC*, in Chicago, where his practice centers on the defense of employment discrimination and construction cases as well as general litigation in the Federal and State court systems. Prior to entering private practice, Mr. Waguespack served as the judicial law clerk to the Honorable Morton Denlow, Presiding Magistrate Judge for the United States District Court, Northern District of Illinois, and as a research staff attorney for the Appellate Court of Illinois, Second District. He earned his BA from the College of William & Mary in Virginia and his JD from Loyola University Chicago School of Law, where he was a member of a moot court team and served as the Executive Editor of Publications for the *Loyola University Chicago Law Journal*.

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Illinois Association of Defense Trial Counsel, PO Box 588, Rochester, IL 62563-0588, 217-498-2649, 800-232-0169, idc@iadtc.org