

THE IDC MONOGRAPH:

The Price of Getting Even: An Analysis of Employment-Related Retaliation Claims

Candice D. Bennett

Durga M. Bharam

Tressler, Soderstrom, Maloney & Priess, LLP, Chicago

Thomas Scott Stewart

*Hepler, Broom, MacDonald, Hebrank,
True & Noce, LLC, St. Louis*

Thomas R. Weiler

Norton, Mancini & Weiler, Chicago

Retaliation is an adverse action that an employer takes against an employee because he or she exercised a right under a certain statute, such as the Illinois Workers' Compensation Act or the Family Medical Leave Act, or complained about discrimination, harassment or some other unlawful act or practice. Retaliation claims have proven to be far more problematic and dangerous to employers than most other employment-related claims. This article analyzes the potential legal liability of employers for acts of retaliation under Illinois law, federal law and the National Labor Relations Act.

I. Retaliation Claims and the Whistleblower Act in Illinois

A. Brief History

In Illinois, the tort of retaliatory discharge has developed as an exception to the doctrine of employment at will. It was first recognized in *Kelsay v. Motorola, Inc.*, where the Illinois Supreme Court recognized a cause of action for employees who were terminated in retaliation for filing workers' compensation claims.¹ The court reasoned that the public policy underlying the Workers' Compensation Act would be seri-

ously undermined if employers were allowed "to discharge, or threaten to discharge" employees who sought relief under the Act.² Since compensatory damages under contract law were not effective to deter the employer's otherwise absolute power to terminate at-will employees, the Illinois Supreme Court provided that a retaliatory discharge claimant could seek punitive damages.³

In 1981, the Illinois Supreme Court in *Palmateer v. International Harvester Co.* extended the tort of retaliatory discharge beyond its workers' compensation origins to provide a remedy to an employee fired for reporting the criminal activity of a co-worker.⁴ In expanding the tort to include "whistleblowing" activity, the court held that "[t]he foundation of the tort of retaliatory discharge lies in the protection of public policy."⁵

The *Palmateer* court observed that the employer and employee do not "stand on equal footing."⁶ The court held that the policy driving the tort of retaliatory discharge should be to strike a proper balance "among the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."⁷

Rejecting the employer's argument that unionized employees could not pursue claims for retaliatory discharge be-

About the Authors

Candice D. Bennett concentrates her practice in labor and employment law, defending and counseling employers. She received both her B.A. in physiology and her J.D. from Southern Illinois University at Carbondale. She is licensed in Illinois and Missouri.



Thomas Scott Stewart is a partner in the *Hepler, Broom, MacDonald, Hebrank, True & Noce, LLC* firm. He concentrates his practice in labor & employment law, defending and counseling employers. Scott has litigated a wide range of employment-related matters in federal, state and municipal courts and agencies, involving discrimination, harassment, retaliatory discharge, defamation, assault and battery, infliction of emotional distress, state and federal Constitutional issues, wage and hour laws, breach of contract, temporary restraining orders/preliminary injunctions, labor arbitrations, unit clarification petitions, and more. He writes and lectures extensively on issues related to labor and employment law, as well as publishes the *Labor & Employment Bulletin*.



Durga M. Bharam is a partner in *Tressler, Soderstrom, Maloney & Priess, LLP's* Chicago office and chairs the firm's Employment Law Group. Durga concentrates her practice in commercial and employment litigation and consultation. She has been recognized as one of the top labor and employment attorneys in Illinois, most recently in the 2007 *Illinois Super Lawyers* magazine. As a frequent author and lecturer, Durga has written and lectured on a national and local basis on a variety of employment-related topics. Durga received her law degree in 1990 from Northwestern Law School where she was an editor for Northwestern's *Journal of Criminal Law and Criminology*. Durga is licensed in Illinois and is a member of the Federal Trial Bar.



Thomas R. Weiler is a partner in the Chicago office of *Norton, Mancini & Weiler*. He devotes a substantial part of his practice to municipal, civil rights and employment litigation, practicing in both state and federal court. He received his B.B.A. in 1980 from the University of Notre Dame and his J.D. in 1983 from Loyola University of Chicago School of Law. He is a member of the Defense Research Institute, Illinois Defense Counsel and Illinois State Bar Association.



The authors acknowledge the assistance of **Jack Murphy** of *Norton, Mancini & Weiler* in the preparation of this Monograph.

cause they were not “employees at-will,” the Illinois Supreme Court in *Midgett v. Sackett-Chicago, Inc.* held that union members could pursue actions independently of their collective-bargaining agreements, where they were terminated for filing workers’ compensation claims.⁸ However, since *Midgett*, the supreme court “has consistently sought to restrict the common law tort of retaliatory discharge.”⁹

At present, Illinois law generally limits retaliatory discharge claims to two settings: (1) when a plaintiff is discharged for filing, or in anticipation of filing, claims pursuant to the Workers’ Compensation Act,¹⁰ and (2) when a plaintiff is discharged in retaliation for reporting an employer’s illegal or improper conduct; *i.e.*, whistle-blowing activities.¹¹

B. Prima Facie Case – Common Law Retaliatory Discharge

In order to establish a prima facie case for common law retaliatory discharge, a plaintiff must establish: (1) that he or she was discharged; (2) in retaliation for activities; and (3) the discharge violates a clear mandate of public policy.¹²

1. Discharge

Illinois courts refuse to recognize a common law retaliation claim for any injury short of actual discharge.¹³ Significantly, there is no cause of action for “constructive discharge.” In *Zimmerman v. Buchheit of Sparta, Inc.*, the Illinois Supreme Court was asked to extend the existing law to “circumstances in which an employee suffers a loss of employment status or income or both but is not terminated from her employment altogether.” The court declined to do so.¹⁴ In *Metzger v. Deroga*, the court noted that it had “never recognized a common law tort for any injury short of actual discharge.”¹⁵

In *Hartlein v. Illinois Power Co.*, the court held that there was no discharge even though the employer told the plaintiff to start a job search and contact other employers, because under the Workers’ Compensation Act, an employer is obligated to provide vocational rehabilitation services where the employee is no longer able to do his original job.¹⁶ However, courts have recognized a cause of action for retaliatory discharge where the employee is “forced” to resign as opposed to being “constructively discharged.”¹⁷

In *Hinthorn v. Roland’s of Bloomington, Inc.*, the plaintiff was told that she should seek other employment after she sought medical attention for an on the job injury. She was told she had been “getting hurt too much – costing the company too much money.”¹⁸ The plaintiff was directed to sign a

“voluntary resignation” form.¹⁹ The Illinois Supreme Court found that it was clear that plaintiff was not being given an actual opportunity to continue her employment and therefore sustained her retaliatory discharge claim.²⁰ Noting that “the overriding purpose of the [Workers’ Compensation] Act is to protect injured employees by ensuring the availability of medical treatment,” the court held the plaintiff established a violation of public policy.²¹ Nevertheless, the court made it “abundantly clear” that it was not endorsing the concept of constructive discharge.²²

A failure to renew an employee’s written contract does not give rise to a cause of action for retaliatory discharge.²³ However, in *Motsch v. Pine Roofing Co.*, an Illinois court allowed a claim where the Workers’ Compensation Act provided for rehiring.²⁴ The court noted that the same part of the Worker’s Compensation Act that prohibits an employer from discharging an employee for asserting his rights under the Act, also prohibits an employer from refusing to rehire or recall to active service an employee for exercising his rights under the Act.²⁵ These claims have been strictly limited to failure to rehire or recall in retaliation for pursuing worker’s compensation claims.²⁶ Moreover, unless there is a reasonable expectation that the employee would be permitted to return, there is no cause of action.²⁷

2. In Retaliation for Activities

A litigant’s cause of action for retaliatory discharge hinges on evidence of a causal connection between his activities as an employee and his discharge. In *Webber v. Wight & Co.*, the appellate court held it was proper for the trial court to refuse to give jury instructions that did not include the causation element.²⁸ “Concerning the element of causation, the ultimate issue to be decided is the employer’s motive in discharging the employee.”²⁹ “The element of causation has not been met if the employer has a valid basis, which is not pretextual for discharging the employee.”³⁰ Summary judgment is proper where the plaintiff cannot show a causal connection between his or her activities and the alleged retaliation.³¹

3. Discharge Violates a Clear Mandate of Public Policy

As noted above, the courts have limited retaliatory discharge claims to two settings: those involving the pursuit of rights under the Workers’ Compensation Act and those involving whistle blowing activities.³² In only one other case

(Continued on next page)

has the Illinois Supreme Court recognized a cause of action for retaliatory discharge outside of the context of the Workers' Compensation Act or strict whistle-blowing settings. In *Wheeler v. Caterpillar Tractor Co.*, the Court allowed a claim where the plaintiff alleged he was terminated for refusing to work in the handling of radioactive material, alleging he was not properly trained in handling the material and doing so without proper training would be unsafe and in violation of federally mandated safety codes.³³ The majority found a clear violation of public policy where the plaintiff alleged that he refused to work under conditions that contravened regulations promulgated by the Nuclear Regulatory Commission published in the Federal Register. It did not matter that no complaint was made to regulatory authorities.³⁴

Justice Moran wrote a cogent dissent, stating that he could find "no justification for extending the tort of retaliatory discharge to cases where, as here, existing remedies adequately protect the employee's interest in earning a livelihood and the public's interest in safety."³⁵ Because federal regulations covered the handling of radioactive material, he did not feel the action was justified since the basis on which the court recognized the retaliatory discharge tort in *Palmateer* was "the lack of any remedy available to employees in situations where they were discharged in 'contravention of clearly mandated public policy.'"³⁶

Wheeler appears to be something of an anomaly. It was decided strictly on the basis of the allegations in the complaint. While the plaintiff did not allege he tried to contact the company or outside authorities about alleged improprieties, he did refuse to engage in activity that he believed would be unsafe and would violate federal regulations dealing with the handling of radioactive material.³⁷

Courts have consistently recognized that there is neither a precise definition of public policy nor a "precise line of demarcation dividing matters that are the subject of public policies from matters purely personal."³⁸ Since the right of workers to pursue claims under the Workers' Compensation Act without fear of retaliation is clear and has long been recognized, the following section looks primarily at those cases involving whistle-blowing activities.

C. Common Law Retaliatory Discharge for Whistle-Blowing Activities

In *Palmateer*, the Illinois Supreme Court first recognized a right of action for retaliatory discharge for engaging in "whistle-blowing" activities. The court noted that there is no precise standard separating matters that are the subject of public policy from matters purely personal. It found that in

order to fall within the realm of public policy, the matter must "strike at the heart of the citizen's social rights, duties and responsibilities before the tort will be allowed."³⁹ A cause of action will be allowed "where the public policy is clear, but [will be] denied where it is equally clear that only private interests are at stake."⁴⁰

Courts will protect whistleblowers who expose "illegal or improper conduct."⁴¹ Accordingly, a plaintiff can succeed on a retaliatory discharge claim by showing that the employer's conduct was improper, yet not necessarily illegal.⁴²

To state a viable common law whistleblower claim, it is essential that during the course of his or her employment, the employee actively complained of some aspect of his or her employer's or co-worker's conduct. The complaints can be made either to an outside law enforcement or regulatory authority or to internal company management.⁴³

The whistleblower must also allege that his or her discharge violated a clear mandate of public policy. 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."⁴⁴ A person does not qualify as a whistleblower by simply reporting his own injury.⁴⁵

In a recent appellate court case out of the Second Judicial District, *Carty v. The Suter Company*, the court reversed summary judgment that had been entered in favor of the employer. The plaintiff alleged that he was fired after complaining to his employer that the employer was violating the One Day Rest in Seven Act (820 ILCS 140/1 *et. seq.* (West 2002)) and after complaining about his employer's violation of various federal laws relating to food labeling and "batch-making" in the food industry.⁴⁶

The appellate court found that the trial court had missed the issue when it held that neither the One Day Rest in Seven Act nor the Federal Food, Drug and Cosmetic Act provided for a private right of action. Rather, the court held, the plaintiff had alleged a common-law retaliatory discharge claim citing the statutes as the sources of the applicable public policy.⁴⁷ The issue for the court then, was whether the public policy enunciated in the statutes involved was violated by the plaintiff's discharge.

Noting that whether the One Day Rest in Seven Act provided a basis for a retaliatory discharge claim was a case of first impression in Illinois, the court found that public policy would be violated if the plaintiff were terminated for complaining about its violation. "[T]o disallow the plaintiff's claim based on this statute would be to relieve the defendant of its obligations under it."⁴⁸ Likewise, finding that the federal regulations cited also enunciate public policy, the court held that

the plaintiff's allegations supported a retaliatory discharge claim based on their violation as well.⁴⁹ We can expect to see many more common-law retaliatory discharge claims premised on alleged statutory violations if cases like *Carty* stand.

D. Other Issues

1. Preemption

Illinois retaliatory discharge claims have been preempted when they interfere with other more narrowly defined statutory or common law schemes. For example, in *Corluka v. Bridgford Foods of Illinois, Inc.*, the court held that the Illinois Human Rights Act preempted a common law retaliatory discharge claim.⁵⁰ In *Robinson v. Alter Barge Line, Inc.*, the court found that both a common law action for retaliatory discharge and a statutory claim under the Illinois Whistleblower Act were preempted by federal maritime law and federal statute.⁵¹ The Illinois Supreme Court has held that provisions of the Railway Labor Act preempt retaliatory discharge claims for employees covered by the Act.⁵² However, the provisions of the federal OSHA statute do not preempt a claim of retaliatory discharge under state law.⁵³

2. Tort Immunity Act

Retaliatory discharge is a common law tort and as such is subject to protections of the Tort Immunity Act.⁵⁴

E. The Illinois Whistleblower Act

The Illinois Whistleblower Act, (the Act)⁵⁵ was passed by the legislature and became effective January 1, 2004. The relatively brief text of the Act is set forth in Appendix A to this article.

1. General Provisions

The anti-retaliation provisions are set out in sections 15 and 20 of the Act. In section 15, the Act provides that 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.⁵⁶ Employers do not include individuals (unless they happen to be sole proprietors).⁵⁷ Section 20 provides that an employer may not retaliate against an employee for refusing to participate in any activity that would result in a

violation of a state or federal law.⁵⁸ The Act provides an express private right of action for violation of either of these sections and provides for the recovery of attorneys' fees and other litigation costs.⁵⁹ Punitive damages are not available.⁶⁰ The Act does not apply to disclosures that would violate the attorney client privilege.⁶¹

The legislative history on the bill is rather sparse. In the Senate, the bill passed 57-1. The bill contained one amendment deleting provisions regarding reports of governmental agencies (a minor drafting error as the term "employer" under the bill excludes governmental entities; therefore a report drafted by a governmental employee would not fall within the scope of the Act). The Senate also discussed Section 20 of the Act. Senator Roskam raised concerns that the provision may have the unintended consequence of allowing an employee to file a claim if the employer asked that employee to perform an act that would be a "technical violation" of a law, rule or regulation. Senator Garrett noted that the word "would" precludes the bringing of any technical or frivolous issue. The employee must refuse to engage in an activity that "would" result in a crime not that "may" result in a crime.

In the House, representatives expressed concern that the bill would allow bad employees a means to keep their jobs or bring frivolous claims. Nevertheless, the bill passed 87-31.

2. Case Law

Very few cases have directly addressed the Illinois Whistleblower Act. In *Smith v. Madison Mutual Insurance Co.*, the court held that the Act prevents retaliation against an employee who discloses information to the government or a law enforcement agency, but does not protect an employee who disclosed information to her own company (a significant difference from a common law action).⁶²

An important question, yet to be answered by the Illinois Supreme Court, is whether the Whistleblower Act codifies or preempts the common law retaliatory discharge cause of action for whistle-blowing activity. Because the Act is relatively new, there have not been many cases decided that have interpreted it. However, until the very recent first district decision in *Callahan v. Edgewater Care & Rehabilitation Center, Inc.*,⁶³ the few Illinois appellate court and federal district court cases discussed below that have touched on the issue have determined that the Act codifies and therefore preempts, common law actions for retaliatory discharge based upon whistle-blowing activity.

The decision in *Callahan* considered only the narrow issue of whether the enactment of the Whistleblower Act re-

(Continued on next page)

pealed by implication the common-law action for retaliatory discharge “existing in favor of an individual ***discharged*** for reporting illegal or improper activity to someone other than a government or law enforcement official.”⁶⁴ The plaintiff alleged that she was terminated from her position as a clerk in a nursing home when she reported to her superior that a resident was being kept in the nursing home against her will in violation of the Nursing Home Act (210 ILCS 45/1-101 *et seq.*). The trial court granted the defendant’s motion to dismiss on the grounds that her common-law claim had been preempted by the Whistleblower Act and failed to state a cause of action under the statute.⁶⁵ The plaintiff argued that her common-law action and the Whistleblower Act were not in such conflict that both could not exist.

After reviewing the law of retaliatory discharge in Illinois and the enactment of the Whistleblower Act, the court found that the Whistleblower Act did “not expressly abrogate any existing common-law remedy” and, therefore, the issue was whether common-law actions were preempted by implication. It noted that repeal or preemption by implication is not favored in Illinois and found that nothing in the remarks of the sponsor of the legislation suggested that the act was intended to curtail the rights of employees who report illegal activity to their employers.⁶⁶

In reversing the trial court’s dismissal of plaintiff’s claims, the court held “that the enactment of the Whistleblower Act did not, either explicitly or implicitly, preempt or repeal the common-law right of action in favor of an employee discharged in retaliation for reporting illegal activities to her superior under circumstances where her discharge violates a clearly mandated public policy.”⁶⁷ “The fact that individuals discharged in retaliation for reporting illegal activities to their superiors have no right of action under the Whistleblower Act does not compel the conclusion that they have no right of action at all.”⁶⁸

The court did leave open the possibility that a preemption argument might still be valid in the context of complaints made to a government or law enforcement agency as in *Palmateer* or for refusing to work under conditions that violate government mandated safety codes as in *Wheeler*.⁶⁹ Arguably, those types of actions were codified by the Act.

Before *Callahan*, only a few Illinois state court cases even mentioned the issue of codification of the common law.⁷⁰ In two of these cases, *Sutherland v. Norfolk Southern Ry. Co.* and *Bajalo v. Northwestern University*, the reference to the Whistleblower Act appears only in a footnote and in each case, the termination occurred prior to the effective date of the Whistleblower Act. The courts in both *Sutherland* and *Bajalo*, without analyzing the issue, summarily stated that

the common law whistleblower cause of action has been codified in the Illinois Whistleblower Act.⁷¹ The court in *Krum v. Chicago Nat’l League Ball Club* directly acknowledged that a question exists as to whether the Whistleblower Act preempts common law retaliatory discharge whistleblower claim, but was unable to address the issue in the context of the case.

The trial court in *Krum* had held that the Illinois Whistleblower Act preempted the plaintiff’s common law retaliation claim.⁷² *Krum* was an assistant athletic trainer for the Chicago Cubs. He was employed pursuant to a one-year employment contract. After he complained to management that the head trainer was not licensed under the Athletic Trainer’s Practice Act, he claimed that the Cubs refused to renew his contract.⁷³ Relying on precedent dealing with common law retaliation claims, the court held that Illinois only recognizes “failure to rehire” claims in the context of the Workers’ Compensation Act.⁷⁴ It found that the Athletic Trainer’s Practice Act did not contain language prohibiting retaliatory conduct and therefore refused to recognize his claim.⁷⁵ As a result, the court found that it did not have to reach the issue of whether the Whistleblower Act preempted *Krum*’s claim for retaliatory discharge.⁷⁶

Several United States District Court cases in Illinois have addressed the issue of codification and preemption of Illinois common law. Each has determined that the Illinois Whistleblower Act codifies (though does not necessarily preempt) common law retaliatory discharge actions based upon whistle-blowing activity.

The first case to address the issue was *Jones v. Dew*.⁷⁷ The plaintiff in *Jones* brought her action *pro se* and the court decided the issue on a motion to dismiss. Velma Jones alleged that she was discharged for, among other things, making formal complaints to her employer, Habilitative Systems, Inc., on behalf of herself and on behalf of her patients, regarding the infestation of rats in the workplace. Judge Moran reviewed the precedent on the issue of retaliatory discharge, noting that Illinois courts generally allow such actions to proceed in only two situations: those based upon the assertion of worker’s compensation rights and where the discharge arises out of whistle-blowing activities.⁷⁸ Relying upon the footnote comment in *Sutherland* and the legislative history of the Act, Judge Moran found that the Act was the “codification of the common law tort of retaliatory discharge based upon whistle-blowing activities.”⁷⁹ The court in *Callahan* was critical of decision in *Jones* because it did not analyze the issue of when a statute preempts or repeals a common-law remedy.⁸⁰

In *Sprinkle v. Lowe’s Home Center’s Inc.*, the court held that the Illinois Whistleblower Act was the codification of

Illinois common law.⁸¹ The plaintiff alleged that he was discharged because he refused to engage in a practice called “Bogus Sales” at the direction of a manager.⁸² However, the court in *Sprinkle* apparently did not consider or did not construe the Illinois Whistleblower Act as preempting Illinois common law. After noting that the Whistleblower Act codified Illinois common law, the *Sprinkle* court went on to state that an employer must actually discharge the employee in order for the employee to state a claim under the Act.⁸³

The Act itself, however, is silent on the issue of discharge. Section 30 of the Act allows an employee to bring a civil action against an employer for violation of either Sections 15 or 20 of the Act. Section 15 of the Act provides only that an employer may not “retaliate” against an employee for disclosing information to a government or law enforcement agency.⁸⁴ Likewise, Section 20 provides only that “an employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of State or Federal law, rule or regulation.”⁸⁵ Notably, no case has yet addressed whether an employee who has suffered retaliation short of discharge, can state a claim under the Whistleblower Act. The plain reading of the Act, however, would seem to allow an employee to bring an action for any type of retaliation, not just discharge.

The next case to address the issue was *Robinson v. Alter Barge Line, Inc.*⁸⁶ In *Robinson*, a sailor brought an action in state court against his employer alleging retaliatory discharge under Illinois common law and for violation of the Illinois Whistleblower Act.⁸⁷ The case, originally filed in state court, was removed to federal court on the basis of diversity jurisdiction. The defendant in *Robinson* argued that both the Illinois common law and the Whistleblower Act conflicted with the narrower scope of retaliatory discharge claims allowed under general maritime law codified in 46 U.S.C. §2114.⁸⁸ Relying upon *Jones*, *Sprinkle* and *Sutherland*, the court in *Robinson* found the Whistleblower Act to be a codification of the Illinois common law whistleblower retaliatory discharge claim.⁸⁹ However, the court went on to hold that because the federal retaliatory discharge statute was narrower than the Illinois Whistleblower Act, the Illinois Whistleblower Act was preempted by the federal statute.⁹⁰ Again, however, the court in *Robinson* apparently did not equate codification with preemption because the court went on to consider whether the plaintiff could still state an Illinois common law claim for retaliatory discharge.⁹¹ Ultimately, the court held that any Illinois common law retaliatory discharge claim would also be preempted by general maritime retaliatory discharge law.⁹² In fact, in a footnote, the court stated:

As Illinois case law shows (as discussed *infra*), the Illinois statutory cause of action does not obviate the need for common law recourse when the employee is discharged in retaliation for reporting the suspected violation *internally*.⁹³

In *Bell v. LaSalle Bank*, the court held that plaintiffs who claimed that they were retaliated against for filing charges of racial discrimination with the EEOC could not maintain a cause of action under the Whistleblower Act, as it was preempted by the Illinois Human Rights Act.⁹⁴ The court based its decision on the Illinois Supreme Court’s ruling in *Maksimovic v. Tsogalis*,⁹⁵ which held that a claim will be preempted by the IHRA unless the plaintiff can allege the claim “without reference to legal duties created by the [IHRA].”⁹⁶

The last case to discuss the interplay between common law retaliatory discharge for whistle-blowing activity and the Illinois Whistleblower Act before *Callahan* was *Riedlinger v. Hudson Respiratory Care, Inc.*⁹⁷ (As with *Jones*, the court in *Callahan* was critical of *Riedlinger* because of its lack of analysis. 2007 WL 1932736 at *2) In *Riedlinger*, the plaintiff alleged that he was terminated for telling senior management that he believed the employer’s facility would be shut down by the FDA because of the presence of high levels of toxic mold in the employer’s production and warehousing areas that remained even after abatement efforts.⁹⁸ Importantly, the plaintiff did not allege that he ever contacted the FDA or any other governmental agency regarding the alleged mold problem.⁹⁹ The court summarized the Illinois law for common law retaliatory discharge claims, noting again that Illinois only recognizes such claims arising out of worker’s compensation claims or whistle-blowing activities.¹⁰⁰ Addressing the Illinois Whistleblower Act, the court noted that those courts that have dealt with the statute have determined that the Whistleblower Act has codified the common law tort of retaliatory discharge in Illinois.¹⁰¹ Agreeing with the prior courts’ analyses, the *Riedlinger* court held:

Taking the persuasive reasoning of the *Smith* and *Jones* courts into account, and following the clear legislative history of the Whistleblower Act, this court therefore interprets Illinois law to provide that an employee has a cause of action for retaliatory discharge in Illinois only if he or she has revealed information he or she reasonably believes discloses a violation of a law or regulation to some government or law enforcement agency. Where an employee has revealed this information only to his or her employer,

(Continued on next page)

there is no cause of action in Illinois for retaliatory discharge.¹⁰²

Because the undisputed facts demonstrated that the plaintiff never complained to a government or law enforcement agency, summary judgment in favor of the employer was granted.¹⁰³

While the issue of preemption was not specifically addressed, the court's opinion implies that Illinois common law retaliatory discharge claims or whistle-blowing activities is supplanted and preempted by the Whistleblower Act. The only claim brought by the plaintiff in *Riedlinger* was a common law retaliatory discharge claim.¹⁰⁴ He did not assert a claim under the Whistleblower Act. If the court in *Riedlinger* did not consider Illinois common law preempted by the Whistleblower Act, then it should have allowed the claim to go forward. Prior Illinois law did not necessarily require that the wrongdoing be reported to law enforcement or government agencies.¹⁰⁵ If the rationale in *Callahan* stands, *Riedlinger* would no longer be good law.

There are significant differences between the law for common law retaliatory discharge claims and the language in the Whistleblower Act. As it now stands, *Callahan* allows both common-law and Whistleblower Act claims. Therefore which cause of action to pursue becomes important.

On the one hand, the Act does not on its face limit claims only to employees who have been discharged. It also allows recovery for retaliation for refusal to participate in activity that would violate a law, rule or regulation, where Illinois common law is limited in that area. It also allows for the recovery of attorneys fees. On the other hand, the Act is more restrictive in that it requires that wrongdoing be reported to a government or law enforcement agency. It does not allow for the recovery of punitive damages where the common law does. It also does not allow suit to be brought against governmental entities. The common law is not so limited. We expect that it will take some time before the courts sort out all of these issues.

II. Retaliation Claims Under Federal Law

A. Federal Statutory Claims

There are several federal employment-related statutes that prohibit retaliation, including Title VII of the Civil Rights Act of 1964 (Title VII), the Fair Labor Standards Act of 1938 (FLSA), the Equal Protection Act (EPA), the Americans with

Disabilities Act of 1990 (ADA), the False Claims Act (FCA), the Family and Medical Leave Act of 1993 (FMLA), and the Age Discrimination in Employment Act of 1967 (ADEA). Generally, these federal statutes make it unlawful for an employer to take an adverse action against an employee for engaging in certain listed, protected activities. For example, Title VII, which prohibits discrimination based upon race, color, sex, religion or national origin, has an anti-retaliation provision that forbids an employer from "discriminating against" an employee or job applicant because that individual "opposed any practice" made unlawful by Title VII or "made a charge, testified, assisted, or participated in" a Title VII proceeding or investigation.¹⁰⁶

The EPA, which mandates equal pay for equal work, also bars retaliation against persons for filing a charge or participating in a proceeding but has no express protection for opposing an unlawful practice under the EPA.¹⁰⁷

The FLSA establishes minimum wage, overtime pay, and other standards affecting both private and public workers. The FLSA makes it unlawful for an employer to discharge or discriminate against an employee because the employee has filed a complaint, instituted a proceeding, testified in a proceeding, or has served or is serving on an industry committee.¹⁰⁸

The ADA is an act established to be a clear and comprehensive prohibition of discrimination on the basis of disability.¹⁰⁹ Section 503(b) of the ADA makes it unlawful to "coerce, intimidate, threaten, or interfere" with any individual based on the exercise of rights under the ADA or based on an individual having "aided or encouraged any other individual" in exercising any rights under the ADA.¹¹⁰

The FCA imposes civil liability for submitting false claims to the federal government.¹¹¹ The Act also contains a provision prohibiting discrimination or retaliation against FCA "whistle-blowers."¹¹² Specifically, the FCA protects whistleblowers from adverse action taken by both public and private individuals, as well as public and private companies.¹¹³ The FCA provides in part:

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole.¹¹⁴

The FMLA is a federal statute that protects and grants eligible employees unpaid leave for a variety of reasons.¹¹⁵ Such reasons may include the birth and care of a newborn child of the employee, the placement with an employee of a son or daughter for adoption, to care for a spouse, child, or parent with a serious health condition, or to take medical leave when the employee is unable to work due to a serious health condition. Section 105 of the FMLA lists acts that are prohibited by the FMLA and is consistent with the other federal acts' anti-retaliation provisions in that it also makes it unlawful for an employer to "discharge or in any other manner discriminate against any individual for opposing" a protected activity.¹¹⁶ It is also unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right under the Act.¹¹⁷

Likewise, the ADEA, a federal statute that protects individuals from age discrimination by employers, contains an anti-retaliation provision.¹¹⁸ Section 623(d) of the ADEA not only makes it unlawful for an employer to retaliate, but it also prohibits employment agencies and labor organizations from discharging or discriminating against an employee or applicant 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" of a protected activity.¹¹⁹

B. Prima Facie Case of Retaliation Under Federal Law

In order to prove a claim of retaliation, the plaintiff may either present direct evidence without resorting to inferences from circumstantial evidence, or use an indirect, burden-shifting method.¹²⁰ The direct method requires the plaintiff to show that: (1) he engaged in statutorily protected activity; (2) he suffered an adverse employment action taken by the employer; and (3) a causal connection between the two.¹²¹ If plaintiff's evidence is uncontradicted, then he is entitled to summary judgment. If the evidence is contradicted, then the case will be tried unless the employer comes forward with un rebutted evidence that he would have taken the same adverse action even if he had no retaliatory motive. If the employer can show a non-retaliatory reason for the action, then the employer is entitled to summary judgment.¹²²

The indirect, burden-shifting method is an adaptation of the United States Supreme Court's test found in *McDonnell Douglas Corp. v. Green*.¹²³ The *McDonnell-Douglas* test is designed simply to give a plaintiff a "boost" when an employee has no direct, or actual evidence of the retaliation or discrimination, but instead only has some suspicious circumstances. To prove retaliation under the indirect method, the

plaintiff must establish a *prima facie* case of retaliation by showing that: (1) she engaged in a statutorily protected activity; (2) she met the employer's legitimate expectations; (3) she suffered an adverse employment action; and (4) she was treated less favorably than similarly situated employees who did not engage in statutorily protected activity.¹²⁴ Under the indirect method, once a "plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to present evidence of a non-discriminatory reason for its employment action."¹²⁵ If the employer meets its burden, the burden shifts back to the plaintiff to demonstrate that the employer's reason is "pretextual" (*i.e.*, that the actual reason was discriminatory).¹²⁶

In *Humphries v. CBOCS West, Inc.*, the court stated that if a claimant elects to proceed under the indirect method to make out *prima facie* case of retaliation, then as part of the fourth prong, she must show that after opposing the employer's discriminatory practice only she, and not any similarly situated employee who did not complain of discrimination, was subjected to a materially adverse action even though she was performing her job in a satisfactory manner.¹²⁷ Anything short of such a showing will result in the court concluding that the plaintiff failed to make out his *prima facie* case of retaliation under the indirect method.¹²⁸

1. Protected Activity

As set forth above, an employer cannot discharge or discriminate against an employee, current or former, or a job applicant, either because of the employee's or applicant's participation in, or opposition to, a certain protected activity.¹²⁹ It is essential that the employee have a reasonable and good faith belief that the conduct complained of or practice opposed violates the law. It is not necessary, however, that the conduct or practice opposed actually violates Title VII or some other statute. Therefore, even if the employee does not succeed on a discrimination claim, he or she may still have a viable retaliation claim.¹³⁰

The courts have made a notable distinction between the act of "opposing" an employment practice and the act of "participating" in an investigation, proceeding or hearing. Generally, employee participation is afforded more protection than employee opposition, as not all forms of opposition are protected. In *Mozee v. Jeffboat, Inc.*, the Seventh Circuit held that that an opposition action that unreasonably disrupts a work environment may fall outside of Title VII's protection.¹³¹ Likewise, no protection is afforded where the employee opposes a co-worker's action, rather than an employer's employment practice.¹³² In *Twisdale v. Snow*, an employee ini-

(Continued on next page)

tially supported his employer in an investigation opposing another employee, but later claimed that his superiors retaliated against him for opposing the other employee.¹³³ The court found that there is no retaliation protection for someone who participated in an investigation in favor of the employer.¹³⁴ Rather, the purpose of Title VII's anti-retaliation provision is to protect those individuals who assert claims and those who assist them.¹³⁵

2. Adverse Action

The Seventh Circuit has defined adverse action as not only action that involves discharge, demotion, lack of promotion, and harassment, but also loss of a more distinguished title, loss of benefits, or diminished job responsibilities.¹³⁶

a. *Burlington Northern v. White*

Recently, the United States Supreme Court ruled, in *Burlington Northern & Santa Fe Railroad Co. v. White*, that an employee who has not suffered a tangible adverse action (*i.e.*, one that causes economic loss) might nevertheless sue as long as there was a "materially adverse" employment action.¹³⁷ Prior to the Supreme Court ruling in *Burlington Northern*, the circuit courts were split over the scope of Title VII anti-retaliation provision, particularly what kind of harm must be demonstrated for a Title VII retaliation claim. The Supreme Court held that "[a] plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it may have persuaded a reasonable worker from making or supporting a charge of discrimination."¹³⁸

b. Material Adversity

The EEOC had proposed a standard under which an employee need only demonstrate an "adverse treatment that is reasonably likely to deter the charging party or others from engaging in the protected activity."¹³⁹ The *Burlington* Court rejected the EEOC's standard. The Court agreed with the Seventh Circuit that the conduct needs to be "material" in order for it to be considered an adverse action for purposes of retaliation.¹⁴⁰ Without the requirement of material adversity, the Court feared that employees could recover from "trivial harms," "petty slights," and "minor annoyances."¹⁴¹ The Court explained that minor annoyances are often triggered by personality differences, and are something that all employees experience.¹⁴²

In *Herron v. DaimlerChrysler Corp.*, the Seventh Cir-

cuit held that minor annoyances in the workplace, such as a two-month delay in paying an employee for overtime, transferring an employee to various departments and shifts, and refusing to pay an employee for a two-day absence after a verbal confrontation with a supervisor, do not constitute an adverse employment action for purposes of discrimination or retaliation.¹⁴³ Even if these minor annoyances are collective, they are still not sufficient to constitute a claim of retaliation.¹⁴⁴ In order to demonstrate an adverse employment action, "an employee must be able to show a quantitative or qualitative change in the terms or conditions of employment."¹⁴⁵ The *Herron* court stated that these minor annoyances, even when viewed collectively, do not alter the terms or conditions of the plaintiff's employment.¹⁴⁶

c. Objective Standard

The *Burlington* Court also emphasized the need for an objective standard so as to be "judicially administrable." Such a standard "avoids uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings."¹⁴⁷ However, the Supreme Court also said:

[T]he significance of any given act of retaliation will often demand upon the particular circumstances. Context matters. The real social impact of workplace behavior often depends upon a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by simple recitation of the words used or the physical acts performed.¹⁴⁸

For example, a schedule change may have little impact to most workers, but may be significant to a young mother with school age children.¹⁴⁹

d. Retaliation Need Not Be "Employment-Related"

According to the United States Supreme Court, the type of discrimination prohibited by Title VII's anti-retaliation provision is not solely confined to employment-related discrimination.¹⁵⁰ Rather, employers can also retaliate in ways not concerning employment.¹⁵¹

The Seventh Circuit similarly has recognized that the retaliation need not always be employment-related, but it must involve a "real harm."¹⁵² In *Flannery v. Recording Industry Ass'n of America*, the employer denied consulting work that it had promised to an employee as part of a severance package.¹⁵³ The Seventh Circuit stated that although the denial was

not strictly employment-related, if the denial was indeed in retaliation for a protected activity, then it is actionable.¹⁵⁴

3. Casual Connection

a. Decision-Maker's Lack of Knowledge Determinative

Obviously, a relevant factor in a retaliation claim is the decision-maker's knowledge of the employee's complaint or protected activity at the time of the employer's decision to take an adverse action against the employee.¹⁵⁵ In *Treadwell v. Office of Ill. Secretary of State*, an employee filed an action against his employer alleging that it violated Title VII of the Civil Rights Act of 1964 by retaliating against him for filing complaints of discrimination and harassment, among others.¹⁵⁶ The decision maker was aware that the employee filed an internal complaint about his previous supervisor, but was not aware of a separate charge filed with the EEOC about the same supervisor that contained similar allegations.¹⁵⁷ The court concluded that the employee had not established his *prima facie* case of retaliation, and stated that a decision-maker's lack of knowledge that an employee had filed EEOC charges is determinative of a retaliation claim.¹⁵⁸

b. Temporal Proximity Between Protected Activity and Adverse Action

The Seventh Circuit has stated, "close temporal proximity provides evidence of causation and may permit a plaintiff to survive summary judgment provided that there is other evidence that supports the inference of a causal link."¹⁵⁹ The court has discussed, in various cases, the relevance of the amount of time that passes between a protected activity and an adverse employment action for purposes of a retaliation claim.¹⁶⁰ Generally, it regards a four-month period between the protected activity and the adverse action as too long to establish a causal connection between a protected activity and an adverse action.¹⁶¹ However, it has considered a three-month time span between the protected activity and an adverse employment action to be sufficient to support an inference of retaliation.¹⁶²

In *Contreras v. Suncoast Corp.*, although the employee's discharge was only one month after filing an EEOC complaint, the Seventh Circuit stated that temporal proximity is not enough to support a retaliation claim.¹⁶³ As a matter of fact, the Seventh Circuit has even stated that a time frame as short as one week between the protected activity and discharge will be insufficient if there is no additional evidence to sup-

port a causal link. Suspicious timing alone is usually insufficient.¹⁶⁴ Ultimately, each case is unique and much of the courts' decisions will be based on the individual fact scenarios rather than any hard and fast rules on time periods.

C. Individual Liability

The question of whether an individual, such as the decision-maker, can be held personally liable for retaliation depends upon the jurisdiction. In *EEOC v. AIC Security Investigations*, the Seventh Circuit decided the issue of individual liability under the ADA.¹⁶⁵ The court held that the ADA's definition of "employer," which includes an employer's agents is "simply a statutory expression of traditional *respondeat superior* liability and imposes no individual liability on agents."¹⁶⁶ The court also recognized that its holding would also apply to actions under Title VII and the ADEA as those statutes have the same definition of employer.¹⁶⁷ However, the Seventh Circuit has also recognized that an individual can be held liable under Section 1983 of the Civil Rights Act if he "caused or participated in the alleged constitutional deprivation"¹⁶⁸ and also under the FMLA.¹⁶⁹

III. Retaliation Claims Under the National Labor Relations Act

A. Brief History and Background

The National Labor Relations Act (NLRA) was one of the first statutes to codify an anti-retaliation provision protecting employees for exercising their rights under the law. The NLRA prohibits both employers and unions from retaliating against employees for pursuing their rights to: organize, form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.¹⁷⁰ These rights include, no less importantly, the right to *refrain* from any or all of these activities.¹⁷¹

The NLRA was enacted in 1935¹⁷² in an effort to stabilize a shaky economy caused by deteriorating labor relations.¹⁷³ The National Labor Relations Board (the Board) administers, interprets and enforces the NLRA.¹⁷⁴ Subject to certain exceptions, the Board enjoys exclusive jurisdiction over proceedings involving activities that are either protected or prohibited by the NLRA.¹⁷⁵ One of the Board's principal func-

(Continued on next page)

tions is to prevent and remedy “unfair labor practices” by either employers or unions or both. The NLRA’s unfair labor practice provisions place certain restrictions on unions and employers in their relations with employees, as well as with each other.¹⁷⁶ Unlawful employer conduct, for example, includes: threatening employees with loss of jobs or benefits if they join or vote for a union or engage in concerted activity; threatening to close if employees select a union to represent them; questioning employees about their union sympathies or activities under circumstances that tend to interfere with, restrain or coerce employees in the exercise of their rights under the NLRA; promising benefits to employees to discourage their union support; and transferring, laying off, terminating or assigning employees more difficult work tasks because they engaged in union or protected concerted activity.¹⁷⁷

Unlawful union conduct, on the other hand, includes: threatening employees that they will lose their jobs unless they support the union’s activities; refusing to process a grievance because an employee has criticized union officers; firing employees who have validly resigned from the union for engaging in protected activity following their resignation; seeking the discharge of an employee for not complying with a union shop agreement, when the employee has paid or offered to pay a lawful initiation fee and periodic dues; and refusing referral or giving preference in a hiring hall on the basis of race or union activities.¹⁷⁸

B. Retaliation by Employers

The starting point in any retaliation analysis under the NLRA is that an employer may discharge an employee “for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated.”¹⁷⁹ Section 8(a) prohibits employers from retaliating against employees with regard to union membership (e.g., either encouraging or discouraging it);¹⁸⁰ from retaliating against employees for filing charges or giving testimony against the employer;¹⁸¹ and even for retaliating against “concerted activity” by non-union employees.¹⁸² Violations of sections 8(a)(2)-(5) are considered “derivative violations” of Section 8(a)(1) of the Act.¹⁸³

C. Section 8(a)(1): Retaliation for Employee’s Concerted Activities for Mutual Aid or Protection

Workers have the right to engage in “concerted activities” for their “mutual aid or protection,” regardless of whether non-union activity is involved or whether collective bargaining is contemplated. In determining whether a particular activity is for the “mutual aid or protection” of workers, the

Board will look to the demands involved in the activity. Protected demands include those concerning wages, hours, other working conditions, and job-related grievances. In *NLRB v. Washington Aluminum Co.*, a leading “mutual aid or protection” case, the Supreme Court ruled that a strike over a lack of heat in a plant was a dispute over the conditions of employment within the meaning of the statute and, therefore, activity for workers’ “mutual aid or protection.”¹⁸⁴ Employers also have violated Section 8(a)(1) by discharging employees for: protesting working conditions; organizing other employees to complain to the health department about working conditions; and protesting layoffs, speed-ups or safety conditions. In determining whether an activity is protected, it is irrelevant whether the complaint is reasonable or whether the employee used good judgment in protesting the employment condition or the employer’s action.¹⁸⁵

An employee’s otherwise legitimate protest, however, can lose its protection if done in an unlawful or otherwise illegitimate manner. Violence, strikes in violation of no-strike clauses, or intermittent or selective strikes are not protected by the NLRA. For example, employees cannot stay at work and refuse to obey work commands or rules. Nor can they protest or file grievances in bad faith or to harass the employer.¹⁸⁶

The definition of “concerted activity” has been riding a slippery slope. “Concerted activities” have included: one employee contacting at least one other employee concerning a protected demand;¹⁸⁷ one employee seeking to have a group of employees act;¹⁸⁸ and even one employee simply acting on behalf of other employees (regardless of whether the majority of those employees support his efforts).¹⁸⁹ Inevitably, even e-mail communications have been subjected to the “concerted activities” analysis. In *Caterpillar, Inc.*, the CEO sent an e-mail notice to all employees, advising them of a change in the company’s vacation policy. An employee responded by including all the original recipients. He disputed the CEO’s assertions and called them false. The Board found that this was protected activity because he was trying to clarify confusion over the company’s proposal and to organize other employees in opposition to it.¹⁹⁰ Ultimately, the definition of “concerted activity” has become so broad that it includes even one employee, acting on his own, to invoke a right that he merely believes is provided under the applicable collective bargaining agreement.¹⁹¹

D. Section 8(a)(3) Retaliation: Discipline and Discharge to Discourage Union Membership

Section 8(a)(3) prohibits an employer from discriminating against a worker “in regard to hire or tenure of employ-

ment or any term or condition of employment to encourage or discourage membership in any labor organization.”¹⁹² “Any term or condition of employment” includes disciplinary actions by employers, discharge, demotion, shift changes, and assignments of less favorable work tasks or positions.

The General Counsel, who is responsible for prosecuting complaints before the Board, initially bears the burden of establishing a prima facie case of discrimination by showing the following: (1) the employee engaged in a protected activity; (2) the decision maker knew it; and (3) the employer acted because of an anti-union animus.¹⁹³ There must be a preponderance of the evidence that the employee’s protected conduct was a motivating factor (in whole or in part) for the employer’s adverse employment action.¹⁹⁴ If this burden is met, the employer then must either rebut that evidence or prove, pursuant to the affirmative defense set forth in *Wright Line*,¹⁹⁵ that the employer would have taken the action even in the absence of the protected activities.¹⁹⁶ It is not sufficient for the employer simply to show a legitimate basis for the action in question – the employer must “persuade” by a preponderance of the evidence that it would have taken the same action in the absence of protected conduct.¹⁹⁷ The prima facie case and the *Wright Line* affirmative defense are linked: the weaker the prima facie case, the easier it is for the employer to establish that the adverse action would have been taken regardless of the employee’s protected activity.¹⁹⁸

1. Recent Developments with Section 8(a)(3) Violations

a. Inconsistent Enforcement of Lawful Employment Rules

In *Cellco Partnership*, the Board found that the employer violated Section 8(a)(3) by issuing written warnings to an employee for soliciting fellow employees during work time to sign union authorization cards.¹⁹⁹ The union began a campaign to organize the employer’s customer service representatives. At all times during this campaign, the employer maintained a written policy prohibiting solicitation during the working time of either the employee making the solicitation or the employee who is being solicited. Such rules are presumptively lawful.²⁰⁰ Here, however, the employer permitted a variety of nonunion solicitations during working time (such as selling items such as candy, meals and Girl Scout cookies) and sought to enforce its rule only against the employee’s union solicitation. The presumption of lawfulness, therefore, was effectively rebutted and the employer’s discipline of the employee for union solicitation on work time violated Section 8(a)(3), based on

its unlawful and disparately applied rule.

b. Egregious Employee Conduct May Strip Concerted Activities of Protected Status

Employee conduct may also be relevant to the analysis. In *Cellco Partnership*, after the union filed an unfair labor practice charge concerning the warnings, the employer withdrew them and issued a revised written warning based on the employee’s inappropriate and insubordinate remarks about a supervisor, as well as his use of offensive language in discussing the union with a co-worker. The Board found that this revised warning, although triggered in part by the employee’s continued solicitation on behalf of the union, was based on his egregious conduct while soliciting employees and, therefore, did not violate the NLRA.²⁰¹ Employees are permitted some leeway for impulsive behavior when engaging in concerted activity; but this leeway is balanced against an employer’s right to maintain order and respect in the workplace. Generally, the Board looks at four factors in determining whether certain behaviors lose the protection of the NLRA: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the outburst was, in any way, provoked by an employer’s unfair labor practice.²⁰²

c. NLRB-Brokered Stipulated Election Agreements Do Not Mean What They Say

In *Austal USA, L.L.C.*, the Board found that the employer violated Section 8(a)(3) for discharging an employee who refused to support the employer’s position on unionization.²⁰³ During the union’s organizational campaign, an employer representative told an employee team leader that: “as a member of management, ***[he] had to promote a non-union view.” After the employee responded that he wanted to be “left neutral,” the employer representative advised him that he could not remain neutral and he would have to make a “critical career decision.” The employer, relying on the Stipulated Election Agreement between it and the union – which excluded team leaders and supervisors as defined in the NLRA from the bargaining unit – subsequently terminated him for failing to uphold company policy. The Board found that, while the express terms of the agreement did exclude team leaders from the unit, it did not stipulate that team leaders were supervisors under the NLRA. The employer’s “calculated decision,” therefore, that team leaders *were* supervisors, was an “error in assessment” that did not excuse the employer’s unlawful

(Continued on next page)

conduct. Opting for a function-over-form analysis, the Board found that the team leader was not a supervisor under the Act.²⁰⁴

d. Interfering With Employment Opportunities

Interfering with other employment opportunities may also be in violation of the NLRA. After the employer fired the team leader in *Austal USA, L.L.C.*, a foreman with an electrical contractor that performed work at Austal USA's facility asked the employee if he was interested in a job. The foreman checked with Austal USA and the following day, told the employee that he could not hire the employee because he was barred from Austal USA's property. The Board found that Austal USA interfered with the employee's employment opportunity because of his failure to support its opposition to the Union and it therefore violated Section 8(a)(3) of the NLRA.

2. Recent Developments with Section 8(a)(4) Violations

Section 8(a)(4) makes it an unfair labor practice to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Section 8. This section has been broadly interpreted to protect employees during the investigative stage of a charge, as well as in connection with filing a formal charge or giving formal testimony.²⁰⁵

a. Second-Guessing Personnel Decisions

In *Management Consulting, Inc.*, the Board found that the employer violated Section 8(a)(4) for giving an employee a poor evaluation because she gave testimony to the Board.²⁰⁶ Over the course of her employment, the employee had received the highest ratings in all categories on her performance evaluations. During an investigation of her employer by the Board, she provided an affidavit to the Board after she was served with a subpoena requiring her to do so. The employer gave her a poor rating on her evaluation, just one month later, and failed to provide the Board with what it deemed to be sufficient evidence to support the employer's conclusion that her performance had in fact deteriorated. The Board, finding no credible lawful reason to explain why the employer gave her the poor evaluation, inferred that the reason was an unlawful one.

In *Five Star Manufacturing, Inc.*, the Board found that the employer violated Section 8(a)(4) by discriminating

against an employee, apparently on numerous occasions, because he was first named in a charge, then an amended charge, and then gave testimony to the Board in the form of an affidavit.²⁰⁷ The Board ruled that the employer unlawfully punished him by: (1) moving him to a different job position (which the Board concluded was more difficult) at a different location; (2) prohibiting him from completing his regular work shift after returning from his unemployment hearing; (3) issuing "disparate" rules, requirements and procedures about how he was to receive his paycheck; (4) issuing "disparate" rules, requirements and procedures for disciplining him; and ultimately (5) suspending him and issuing him a notice of possible discharge, issuing a further notice of suspension and possible discharge, then issuing a preliminary notice of suspension and possible discharge, and finally discharging him.

b. Supervising Employees

Although the NLRA offers no protection to supervisory employees who are disciplined or discriminated against because of their support of a union, it does protect them from discrimination based on giving testimony before the Board.²⁰⁸ In *Oil City Brass Works v. NLRB*, the appellate court held that, among the rights protected from management interference, is the right to have the privileges secured by the NLRA vindicated through the administrative procedures of the Board, and that "any discrimination against supervisory personnel because of testimony before the Board directly infringes the right of rank-and-file employees to a congressionally provided, effective administrative process, in violation of section 8(a)(1)."²⁰⁹

Conclusion

Employer liability for retaliation continues to expand in all three of the major areas of employment law: federal, state and labor relations. *Burlington Northern's* ambiguous standard of what kind of employment action will be considered to be retaliatory has resulted in an increased number of federal retaliation claims, as well as the number of claims surviving summary judgment motions. The Illinois Whistleblower Act now offers employees several new theories of recovery not previously available under the state common law retaliatory discharge claim. Even the National Labor Relations Act has been stretched in recent years to address employees blogging on the Internet about their employers. Expect plaintiff's lawyers to bring a wider variety of even more employment-related cases, which will in turn, force employers to spend even more money on legal fees and defensive management practices.

Appendix A

Illinois Whistleblower Act, 740 ILCS 174/1 *et seq.*
(Effective January 1, 2004)

174/1. Short title

§ 1. Short title.

This Act may be cited as the Whistleblower Act.

174/5. Definitions

§ 5. Definitions.

As used in this Act:

“Employer” means: an individual, sole proprietorship, partnership, firm, corporation, association, and any other entity that has one or more employees in this State, except that “employer” does not include any governmental entity.

“Employee” means any individual who is employed on a full-time, part-time, or contractual basis by an employer.

174/10. Certain policies prohibited

§ 10. Certain policies prohibited.

An employer may not make, adopt, or enforce any rule, regulation, or policy preventing 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.

174/15. Retaliation for certain disclosures prohibited

§ 15. Retaliation for certain disclosures prohibited.

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.

174/20. Retaliation for certain refusals prohibited

§ 20. Retaliation for certain refusals prohibited.

An employer may not retaliate 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.

174/25. Civil penalty

§ 25. Civil penalty.

Violation of this Act is a Class A misdemeanor.

174/30. Damages

§ 30. Damages.

If 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.

174/35. Exception

§ 35. Exception.

This Act does not apply to disclosures that would constitute a violation of the attorney-client privilege.

Endnotes

¹ *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 182, 384 N.E.2d 353, 357 (1978).

² *Kelsay*, 74 Ill. 2d at 182.

³ *Id.* at 186-187.

⁴ *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 133, 421 N.E.2d 876, 880 (1981).

⁵ *Palmateer*, 85 Ill. 2d at 133.

⁶ *Id.* at 129.

⁷ *Id.*

⁸ *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 150, 473 N.E.2d 1280, 1284 (1984).

⁹ *Metzger v. DeRosa*, 209 Ill. 2d 30, 44, 805 N.E.2d 1165, 1173 (2004); *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 45, 645 N.E.2d 877, 884 (1994) (court noted the “guarded development” and “narrow construction” of the tort).

¹⁰ (820 ILCS 305/1 *et seq.*).

¹¹ *Jacobson v. Knepper & Moga, P.C.*, 185 Ill. 2d 372, 376, 706 N.E.2d 491, 493 (1998); *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill. App. 3d 620, 626 (1st Dist. 2005); *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1024 (1st Dist. 2006).

¹² *Jacobson*, 185 Ill. 2d at 376; *Webber*, 368 Ill. App. 3d at 1021; *see also, Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 35, 645 N.E.2d 877, 880 (1994).

¹³ *Bajalo v. Northwestern University*, 369 Ill. App. 3d 576, 582, 860 N.E.2d 556, 561 (1st Dist. 2006).

¹⁴ *Zimmerman*, 164 Ill. 2d at 37-38. *See, Bajalo*, 369 Ill. App. 3d at 582-583 (cases cited therein).

¹⁵ *Id.* at 45 (citing *Zimmerman*)(emphasis in the original).

¹⁶ *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 164-165, 601 N.E.2d 720, 731 (1992).

¹⁷ *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 519 N.E.2d 909 (1988); *see also, Zimmerman*, 164 Ill. 2d at 41 (noting that Illinois courts have disapproved the imposition of liability where the employee is not actually discharged or forced to resign).

¹⁸ *Hinthorn*, 119 Ill. 2d at 528.

¹⁹ *Id.* at 528-529.

²⁰ *Id.* at 531.

²¹ *Id.* at 534.

²² *Id.* at 531.

²³ *Bajalo v. Northwestern University*, 369 Ill. App. 3d 576, 584, 860 N.E.2d 556, 563 (1st Dist. 2006); *Krum v. Chicago National League Ball Club*, 365 Ill. App. 3d 785, 788 (1st Dist. 2006).

²⁴ *Motsch v. Pine Roofing Co.*, 178 Ill. App. 3d 169, 175, 533 N.E.2d 1, 5 (1st Dist. 1989).

²⁵ *Motsch*, 178 Ill. App. 3d at 175.

²⁶ *Krum*, 365 Ill. App. 3d at 789.

²⁷ *Klinker v. County of DuPage*, 331 Ill. App. 3d 48, 51, 770 N.E.2d 734, 736 (2nd Dist. 2002).

²⁸ *Webber v. Wight & Co.*, 368 Ill. App. 3d 1007, 1021, 858 N.E.2d 579, 592 (1st Dist. 2006).

²⁹ *Hartlein*, 151 Ill. 2d at 163.

³⁰ *Id.* at 160.

³¹ *Layne v. Builders Plumbing Supply Co.*, 210 Ill. App. 3d 966, 975, 569 N.E.2d 1104, 1110 (2nd Dist. 1991).

³² In an attempt to restrict the tort of retaliatory discharge, Illinois courts have refused to find the existence of a clearly mandated public policy in myriad settings. *See e.g., Price v. Carmack Datsun, Inc.*, 109 Ill. 2d 65, 485 N.E.2d 359 (1985) (clearly mandated public policy nonexistent when employee discharged after filing a claim under an employer-provided health insurance plan); *Dykstra v. Crestwood Bank*, 117 Ill. App. 3d 821, 454 N.E.2d 51 (1st Dist. 1983) and *Mein v. Masonite Corp.*, 109 Ill. 2d 1, 485 N.E.2d 312 (1985) (clearly mandated public policy nonexistent when employee discharged due to age); *Lambert v. City of Lake Forest*, 186 Ill. App. 3d 937, 542 N.E.2d 1216 (2nd Dist. 1989) (an employee fired for refusing to lie to an investigator and an attorney in an entirely internal city investigation); *Abrams v. Echlin Corp.*, 174 Ill. App. 3d 434, 528 N.E.2d 429 (1st Dist. 1988) (clearly mandated public policy nonexistent when employee discharged for filing suit to collect monies due pursuant to employment agreement); *Buechele v. St. Mary's Hospital Decatur*, 156 Ill. App. 3d 637, 509 N.E.2d 744 (4th Dist. 1987) (clearly mandated public policy nonexistent when employee discharged for filing libel and slander suit against employer); *Hugo v. Tomaszewski*, 155 Ill. App. 3d 906, 508 N.E.2d 1139 (5th Dist. 1987) (clearly mandated public policy nonexistent when employee discharged due to employer's breach of duty of good faith and fair dealing); *McCluskey v. Clark Oil & Refining Corp.*, 147 Ill. App. 3d 822, 498 N.E.2d 559 (1st Dist. 1986) (court rejected retaliatory discharge claim that plaintiff was discharged solely because she married a coworker, finding that the law on marriage did not provide a basis for a public policy exception to the at-will rule); *Cipov v. International Harvester Co.*, 134 Ill. App. 3d 522, 481 N.E.2d 22 (1st Dist. 1985) (a complaint alleging that an at-will employee was terminated for failure to take a polygraph examination); and *Thomas v. Zamberletti*, 134 Ill. App. 3d 387, 480 N.E.2d 869, (4th Dist. 1985) (plaintiff who was discharged after he was injured in an auto accident and failed to report to work on time did not state a retaliatory discharge claim as the discharge did not violate a public policy in favor of providing medical care to injured persons).

³³ *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 505, 511, 485 N.E.2d 372 (1985).

³⁴ *Wheeler*, 108 Ill. 2d at 509-510.

³⁵ *Id.* at 512.

³⁶ *Id.* at 517 (citing *Palmateer*, n.4, *supra*, 85 Ill. 2d 124 at 134).

³⁷ Note that the refusal to engage in activity that would violate a state or federal law, rule or regulation, is now covered by the Illinois Whistleblower Act, 740 ILCS 174/1 *et seq.*, *supra*.

³⁸ *Stebbins v. Univ. of Chicago*, 312 Ill. App. 3d 360, 365, 726 N.E.2d 1136, 1140 (1st Dist. 2000), *citing, Palmateer*, n. 4, *supra*, 85 Ill. 2d at 130. *See also, Carty v. Suter Co.*, 371 Ill. App. 3d 784, 863 N.E.2d 771, 774 (2nd Dist. 2007); *Anderson v. Village of Oswego*, 109 F.Supp.2d 930, 932 (N.D. Ill. 2000).

- ³⁹ *Palmateer*, 85 Ill. 2d at 130.
- ⁴⁰ *Id.* at 131.
- ⁴¹ *Stebbins*, 312 Ill. App. 3d at 370 (italics in original), citing *Howard v. Zack Co.*, 264 Ill. App. 3d 1012, 637 N.E.2d 1183 (1st Dist.1994).
- ⁴² *Stebbins*, 312 Ill. App. 3d at 369 (“it is not necessarily a requirement of a valid retaliatory discharge claim that the conduct the employee reports or refuses to engage in be illegal”); *Mackie v. Vaughan Chapter-Paralyzed Veterans of America, Inc.*, 354 Ill. App. 3d 731, 736, 820 N.E.2d 1042, 1046 (2004). Some cases have held that the Illinois Whistleblower Act (740 ILCS 174/1 *et seq.*), which went into effect January 1, 2004, has codified and, therefore, preempted Illinois common law retaliatory discharge claims based on whistle-blowing activities. See, e.g., *Jones v. Dew*, 2006 WL 3718053 (N.D. Ill. Dec. 13, 2006). These are addressed in the next section.
- ⁴³ *Sutherland*, 356 Ill. App. 3d at 626-27.
- ⁴⁴ *Palmateer*, 85 Ill. 2d at 130. Notably, attorneys cannot maintain an action for retaliatory discharge as the supreme court has found that the ethical rules of an attorney provide adequate safeguards to the public policy implicated. *Jacobson v. Knepper & Moga, P.C.*, 185 Ill. 2d 372, 706 N.E.2d 491 (1998).
- ⁴⁵ *Sutherland*, 356 Ill. App. 3d at 621-627. The court found that plaintiff alleged he was fired to prevent him from presenting damages in his FELA/FBIA action and so that his employer could avoid compliance with its reporting requirements. He did *not* allege that he was discharged in retaliation for reporting any alleged wrongdoing or dangerous or unsafe condition.
- ⁴⁶ *Carty v. The Suter Company*, 371 Ill. App. 3d 784, 863 N.E.2d 771 (2nd Dist. 2007).
- ⁴⁷ *Carty*, 371 Ill. App. 3d at 787.
- ⁴⁸ *Id.* at 788.
- ⁴⁹ *Id.* at 789.
- ⁵⁰ *Corluka v. Bridgford Foods of Illinois, Inc.*, 284 Ill. App. 3d 190, 194, 671 N.E.2d 814, 817 (1st Dist. 1996).
- ⁵¹ *Robinson v. Alter Barge Line, Inc.*, 482 F.Supp.2d 1032 (N.D.Ill. 2007).
- ⁵² 45 U.S.C. §§ 151- 164 (1982); *Koehler v. Illinois Central Gulf Railroad Co.*, 109 Ill. 2d 473, 480, 488 N.E.2d 542, 546 (1985).
- ⁵³ *Gomez v. Finishing Company, Inc.*, 369 Ill. App. 3d 711, 718, 861 N.E.2d 189, 197 (1st Dist. 2006).
- ⁵⁴ See generally, *Cross v. City of Chicago*, 352 Ill. App. 3d 1, 815 N.E.2d 956 (1st Dist. 2004); See also, *Boyles v. Greater Peoria Mass Transit District*, 113 Ill. 2d 545, 499 N.E.2d 435 (1986) (Tort Immunity Act precluded recovery of punitive damages in plaintiff’s retaliatory discharge claim); *Hillmann v. City of Chicago*, 2005 WL 1766367 (N.D.Ill. July 20, 2005).
- ⁵⁵ 740 ILCS 174/1 *et. sec.*
- ⁵⁶ 740 ILCS 174/15 (2007).
- ⁵⁷ *Averett v. Chicago Patrolmen’s Federal Credit Union*, 2007 WL 952034, *5 (N.D.Ill. March 27, 2007).
- ⁵⁸ 740 ILCS 174/20 (2007).
- ⁵⁹ *Id.*
- ⁶⁰ *Averett*, 2007 WL 952034 at *4.
- ⁶¹ 740 ILCS 174/35 (2007).
- ⁶² *Smith v. Madison Mutual Insurance Co.*, 2005 WL 1460301 (June 21, 2005).
- ⁶³ *Callahan v. Edgewater Care & Rehabilitation Center, Inc.*, 2007 WL 1932736 (1st District, July 3, 2007)
- ⁶⁴ *Callahan*, 2007 WL 1932736 at * 1.
- ⁶⁵ *Id.*
- ⁶⁶ *Id.* at * 3.
- ⁶⁷ *Id.* at * 4.
- ⁶⁸ *Id.* at * 3.
- ⁶⁹ *Id.*
- ⁷⁰ *Sutherland v. Norfolk Southern Ry. Co.*, 356 Ill. App. 3d 620, 826 N.E.2d 1021 (1st Dist. 2005); *Bajalo v. Northwestern University*, 369 Ill. App. 3d 576, 860 N.E.2d 556 (1st Dist. 2006); *Krum v. Chicago Nat’l League Ball Club*, 365 Ill. App. 3d 785, 851 N.E.2d 621 (1st Dist. 2006).
- ⁷¹ *Sutherland*, 356 Ill. App. 3d at 624; *Bajalo*, 369 Ill. App. 3d at 581.
- ⁷² *Krum*, 365 Ill. App. 3d at 788.
- ⁷³ *Id.* at 787.
- ⁷⁴ *Id.* at 789.
- ⁷⁵ *Id.* at 790.
- ⁷⁶ *Id.*
- ⁷⁷ *Jones v. Dew*, 2006 WL 3718053 (N.D.Ill. December 13, 2006).
- ⁷⁸ *Jones*, 2006 WL 3718053 at *3.
- ⁷⁹ *Id.*
- ⁸⁰ *Callahan*, 2007 WL 1932736 at *2.
- ⁸¹ *Sprinkle v. Lowe’s Home Center’s Inc.*, 2006 WL 2038580, *5 (S.D.Ill. July 19, 2006).
- ⁸² *Sprinkle*, 2006 WL 2038580 at *4.
- ⁸³ *Id.* at *5.
- ⁸⁴ 740 ILCS 174/15.
- ⁸⁵ *Id.* at 174/20.
- ⁸⁶ *Robinson v. Alter Barge Line, Inc.*, 482 F. Supp. 2d 1032, 2007 WL 809647 (S.D.Ill. 2007).
- ⁸⁷ *Robinson*, at 482 F.Supp.2d 1034.
- ⁸⁸ *Id.* at 1037.
- ⁸⁹ *Id.* at 1038-1039.
- ⁹⁰ *Id.* at 1039.
- ⁹¹ *Id.* at 1040.
- ⁹² *Id.* at 1044.

(Continued on next page)

- ⁹³ *Id.*, fn. 9 (emphasis in the original).
- ⁹⁴ *Bell v. LaSalle Bank*, 2005 WL 43178 (N.D.Ill. Jan. 11, 2005).
- ⁹⁵ *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 687 N.E.2d 21, 23 (1997).
- ⁹⁶ *Bell*, 2005 WL 43178 at *2.
- ⁹⁷ *Riedlinger v. Hudson Respiratory Care, Inc.*, 478 F.Supp. 2d 1051 (N.D.Ill. 2007). In *Woodley v. RGB Group, Inc.*, 2006 WL 1697049 (N.D.Ill. June 13, 2006), the court was presented with a summary judgment motion which sought dismissal of both a common law retaliatory discharge claim and one based on the Whistleblower Act. However, the issue of preemption or codification was never mentioned in the opinion, nor apparently addressed by the parties. Finding there were material questions of fact, the court allowed *both* claims to proceed.
- ⁹⁸ *Riedlinger*, 478 F.Supp.2d at 1052.
- ⁹⁹ *Id.*
- ¹⁰⁰ *Id.* at 1054.
- ¹⁰¹ *Id.*
- ¹⁰² *Id.* at 1055.
- ¹⁰³ *Id.* at 1056.
- ¹⁰⁴ *Id.* at 1053.
- ¹⁰⁵ See *Stebbins*, 312 Ill. App. 3d. at 370 (finding that the “fact that *Stebbins* did not succeed in making a report to the NIH before he was discharged does not undermine his claim.”)
- ¹⁰⁶ 42 U.S.C. § 2000e-3(a).
- ¹⁰⁷ 29 U.S.C. § 215(a)(3).
- ¹⁰⁸ 42 U.S.C.A. § 215(a)(3).
- ¹⁰⁹ See 42 U.S.C.A. § 12203.
- ¹¹⁰ 42 U.S.C.A. § 12203.
- ¹¹¹ See 31 U.S.C. § 3729 *et seq.*
- ¹¹² J. Greg Coulter & Michael J. Lehet, *Jurisdiction, Everything You Wanted to Know About Employment Law (Besides Sex, Race and Age), but were Afraid to Ask: Damages and Evidentiary Standards in the “Other” Federal Discrimination Laws* (2007).
- ¹¹³ See S. Rep. No. 99-345 at 21-22 (1986).
- ¹¹⁴ 31 U.S.C. § 3720(h).
- ¹¹⁵ 29 U.S.C.A. § 2615.
- ¹¹⁶ *Id.*
- ¹¹⁷ *Id.*
- ¹¹⁸ 29 U.S.C.A. § 623(d).
- ¹¹⁹ *Id.*
- ¹²⁰ *Moser v. Ind. Dept. of Corr.*, 406 F.3d 895, 903 (7th Cir. 2005).
- ¹²¹ *Sitar v. Indiana Dep’t of Transp.*, 344 F.3d 720, 728 (7th Cir. 2003).
- ¹²² *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 644 (7th Cir. 2002).
- ¹²³ *McDonnell Douglas Corp. v. Green.*, 411 U.S. 792 (1973); *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005).
- ¹²⁴ *Tomanovich v. City of Indianapolis*, 457 F.3d 656 (7th Cir. 2006).
- ¹²⁵ *Tomanovich*, 457 F.3d at 656 (citing *Adusumilli v. City of Chicago*, 164 F.3d 353, 362 (7th Cir. 1998)).
- ¹²⁶ *Id.* (citing *Moser v. Ind. Dept. of Corr.*, 406 F.3d 895, 904 (7th Cir. 2005)).
- ¹²⁷ *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 404 (7th Cir. 2007); See also *Sylvester v. SOS Children’s Villages Ill., Inc.*, 453 F.3d 900, 902 (7th Cir. 2006).
- ¹²⁸ *Brewer v. Bd. of Trs.*, 479 F.3d 908 (7th Cir. 2007).
- ¹²⁹ See 42 U.S.C. §2000e-3(a).
- ¹³⁰ *Alexander v. Gerhardt Enterprises, Inc.*, 40 F.3d 187, 195 (7th Cir. 1994); EEOC New Compliance Manual, Section 8-II B 3b (actions based on belief that, given all of the surrounding circumstances, is not reasonable and in good faith will not be protected).
- ¹³¹ *Moze v. Jeffboat, Inc.*, 746 F. 2d 365, 374 (7th Cir. 1984).
- ¹³² *Twisdale v. Snow*, 325 F.3d 950, 951-52 (7th Cir. 2003).
- ¹³³ *Twisdale*, 325 F.3d at 951-52.
- ¹³⁴ *Id.*
- ¹³⁵ *Id.* at 952; See 42 U.S.C. § 2000e-3.
- ¹³⁶ See *Whittaker v. Northern Ill. Univ.*, 424 F.3d 640 (7th Cir. 2005); *Tart v. Ill. Power Co.*, 366 F.3d 461 (7th Cir. 2004).
- ¹³⁷ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2415 (2006).
- ¹³⁸ *Burlington*, 126 S.Ct. at 2415 (internal quotations omitted); see also *Washington v. Ill. Dep’t of Revenue*, 420 F.3d 658 (7th Cir. 2005).
- ¹³⁹ *Burlington*, 126 S.Ct. at 2411.
- ¹⁴⁰ *Id.* at 2409.
- ¹⁴¹ *Id.* at 2415.
- ¹⁴² *Id.*
- ¹⁴³ *Herron v. DaimlerChrysler Corp.*, 388 F.3d 293, 302 (7th Cir. 2004).
- ¹⁴⁴ *Herron*, 388 F.3d at 302.
- ¹⁴⁵ *Id.* (citing *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 532 (7th Cir. 2003)).
- ¹⁴⁶ *Herron*, 388 F.3d at 302.
- ¹⁴⁷ *Burlington*, 126 S.Ct. at 2415.
- ¹⁴⁸ *Id.*
- ¹⁴⁹ *Id.*
- ¹⁵⁰ *Id.* at 2405-06; See 42 U.S.C. § 2000e-3(a).
- ¹⁵¹ *Burlington*, 126 S.Ct. at 2405-06.
- ¹⁵² See *Johnson v. Cambridge Indus.*, 325 F.3d 892, 902 (7th Cir. 2003).

¹⁵³ *Flannery v. Recording Indus. Ass'n of Am.*, 354 F.3d 632 (7th Cir. 2004).

¹⁵⁴ *Flannery*, 354 F.3d at 643.

¹⁵⁵ See *Treadwell v. Office of Ill. Sec'y of State*, 455 F.3d 778 (7th Cir. 2006).

¹⁵⁶ *Treadwell*, 455 F.3d at 779–80; See also 42 U.S.C. § 2000e-3(a).

¹⁵⁷ *Treadwell*, 455 F.3d at 780.

¹⁵⁸ *Id.* at 782.

¹⁵⁹ *Lang v. Ill. Dep't of Children*, 361 F.3d 416, 419 (7th Cir. 2004).

¹⁶⁰ *Lang*, 361 F.3d at 419; *Johnson v. West*, 218 F.3d 725 (7th Cir. 2000).

¹⁶¹ See *Tomanovic*, 457 F.3d at 667 (Seventh Circuit held employee's discharge four months after filing an EEOC complaint was insufficient to show causal connection between protected activity and adverse action.); *Longstreet v. Ill. Dep't of Corr.*, 276 F.3d 379, 384 (7th Cir. 2002) (holding that even if plaintiff had shown an adverse action, four-month proximity was insufficient to establish a causal connection); *Lewis v. Holsum of Fort Wayne, Inc.*, 278 F.3d 706, 711 (7th Cir. 2002) (Seventh Circuit stated four month time span between when plaintiff engaged in protected activity to discharge is too long to support inference of retaliation.).

¹⁶² See *Sitar*, *supra*, n 121.

¹⁶³ *Contreras v. Suncoast Corp.*, 237 F.3d 756 (7th Cir. 2001); See also *Stone v. City of Indianapolis Pub. Utils. Div.*, 281 F.3d 640 (7th Cir. 2002).

¹⁶⁴ *Culver v. Gorman & Co.*, 416 F.3d 540 (7th Cir. 2005).

¹⁶⁵ *EEOC v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1279–82 (7th Cir. 1995).

¹⁶⁶ *AIC Security*, 55 F.3d at 1281.

¹⁶⁷ *Id.* at 1279-80.

¹⁶⁸ *Hall-Bey v. Hanks*, 93 Fed. Appx. 977, 981 (7th Cir. 2004).

¹⁶⁹ *Horowitz v. Bd. Of Educ. Of Avoca School Dist. No. 37*, 260 F.3d 602 (7th Cir. 2001).

¹⁷⁰ “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.” 29 U.S.C. 157.

¹⁷¹ *Id.*

¹⁷² The Wagner Act of 1935, National Labor Relations Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169) (1982). The Act was substantially amended in 1947 by the Taft-Hartley Act of 1947, Labor Management Relations Act (LMRA), and again in 1959 and 1974.

¹⁷³ See 29 U.S.C. § 151.

¹⁷⁴ The jurisdiction of the NLRB extends to all enterprises whose operations affect commerce. See 29 U.S.C. 152(6) & (7), which respectively define the terms “commerce” and “affecting commerce.”

¹⁷⁵ See, e.g., *San Diego Building Trades Council, Millmen's Union Local 2020 v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959).

¹⁷⁶ 29 U.S.C. §158 (a) & (b).

¹⁷⁷ 29 U.S.C. §158(a).

¹⁷⁸ 29 U.S.C. §158(b).

¹⁷⁹ *N.L.R.B. v. Condenser Corp. of America*, 128 F.2d 67, 75 (3d Cir. 1942).

¹⁸⁰ 29 U.S.C. §158(a)(3).

¹⁸¹ 29 U.S.C. §158(a)(4).

¹⁸² 29 U.S.C. §158(a)(1).

¹⁸³ Section 8(a)(1) forbids an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. §158(a)(1).

¹⁸⁴ *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

¹⁸⁵ *NLRB v. Jasper Seating Co.*, 857 F.2d 419, 129 L.R.R.M. (BNA) 2337 (7th Cir. 1988), enforcing 285 N.L.R.B. 550 (1987).

¹⁸⁶ See *Ad Art, Inc.*, 238 N.L.R.B. 1124, 99 L.R.R.M. (BNA) 1626 (1978).

¹⁸⁷ *Martin Marietta Corp.*, 293 N.L.R.B. 719, 131 L.R.R.M. (BNA) 1714 (1989).

¹⁸⁸ *T & W Fashions, Inc.*, 291 N.L.R.B. 137, 131 L.R.R.M. (BNA) 1293 (1988).

¹⁸⁹ *Jasper Seating*, 857 F.2d 419.

¹⁹⁰ *Caterpillar, Inc.* 321 N.L.R.B. 1178, 153 L.R.R.M. (BNA) 1049 (1996).

¹⁹¹ See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984) (finding that a truck driver who refused to drive an unsafe truck arguably invoked a right under the collective bargaining agreement and therefore engaged in concerted activity).

¹⁹² 29 U.S.C. §158(a)(3).

¹⁹³ *Sears, Roebuck & Co. v. Nat'l Labor Relations Board*, 349 F.3d 493, 503 (7th Cir. 2003).

¹⁹⁴ *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1980 WL 12312 (1980).

¹⁹⁵ *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1980 WL 12312 (1980), approved by *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983).

¹⁹⁶ *Sears, Roebuck & Co.*, 349 F.3d at 503.

¹⁹⁷ *NLRB v. Transportation Mgmt.*, 462 U.S. 393, 935 (1983) (rejecting employer's claim that its burden is met by demonstration of a legitimate basis for the discharge); *Carpenter Technology Corp.*, 346 NLRB No. 73, slip op. at 8 (2006) (The issue is, thus, not simply whether the employer could have disciplined the employee, but whether it would have done so, regardless of his union activities). *N.L.R.B. v. Weldun International*, 321 NLRB 733 (1996) (“The

(Continued on next page)

employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must ‘persuade’ that the action would have taken place absent protected conduct by a preponderance of the evidence”) (internal quotation omitted), *enfd. in relevant part*, 165 F.3d 28 (6th Cir. 1998).

¹⁹⁸ *Sears, Roebuck & Co.*, 349 F.3d at 503.

¹⁹⁹ *Cellco Partnership*, 349 NLRB no.62, slip op. (March 28, 2007).

²⁰⁰ *Our Way, Inc.*, 268 NLRB 394, 394 (1983).

²⁰¹ *Cellco Partnership*, 349 NLRB no. 62 slip op. at 3.

²⁰² *Id.* (internal citations omitted).

²⁰³ *Austal USA, L.L.C.*, 349 NLRB No. 51, slip op. (March 21, 2007).

²⁰⁴ The employees’ duties, with respect to the assignment and direction of employees, did not demonstrate an exercise of independent judgment, but rather involved the routine decisions typical of a “leadman” position that does not constitute a statutory supervisor.

²⁰⁵ *See, N.L.R.B. v. Scrivener*, 405 U.S. 117 (1972) (employer’s discharge of employees in retaliation for their having met with and given evidence to a Board field examiner who was investigating unfair labor practice charges held to violate section 8(a)(4)). *See also, M & S Steel Vo. v. N.L.R.B.*, 353 F.2d 80 (5th Cir 1965) (court sustained Board’s finding that employer violated section 8(a)(4) by discharging employee because he gave statement to field examiner); *N.L.R.B. v. Dal-Tex Optical Co.*, 310 F.2d 58, 60-61 (5th Cir. 1962) (court sustained Board in affording protection to employee who appeared but did not testify at a Board hearing).

²⁰⁶ *Management Consulting, Inc.*, 349 NLRB No. 27, slip op. (January 31, 2007).

²⁰⁷ *Five Star Manufacturing, Inc.*, 348 NLRB No. 94, slip op. (December 26, 2006).

²⁰⁸ *N.L.R.B. v. Southland Paint Co.*, 394 F.2d 717, 720 (5th Cir. 1968).

²⁰⁹ *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966).