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Labor and Employment Law Notes

Recent Illinois Labor and Employment Law Legislation and Decisions

The following are a number of recent Illinois labor and employment law related legislative changes/proposed changes and case decisions that should be noted for their potential impact on the handling of labor and employment related claims/cases in Illinois.

1. Legislation

- A. **Public Act 95-25:** amends the Illinois Human Rights Act to prohibit a public employer from refusing to temporarily transfer a pregnant firefighter or peace officer at her request with the advice of her physician for the duration of her pregnancy if the transfer can be reasonably accommodated (effective January 1, 2008).
- B. **Civil Liabilities - Whistle Blower Claims:** The Whistle Blower Act is amended by, among other things, expanding the definition of an “Employer” to now include: individual, sole proprietorship, partnership, firm, corporation, association, and any other entity that has one or more employees in this state, including a political subdivision of the state; a unit of local government; a school district, a combination of school districts or governing body of a joint agreement of any type formed by two or more school districts; a community college district, State college or University, or any State Agency whose major function is providing educational services; any authority including a department, division, bureau, board, commission or any other agency of these entities; and any person acting within the scope of his authority expressed or implied on behalf of those entities in dealing with its employees. [This removes the prior exception that stated that an “employer” did not include any governmental entity.]

Additional revisions to the Whistle Blower Act:

1. 740 ILCS 174/15 is changed as follows:

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 any other proceeding, where the employee has reasonable cause to

believe that the information disclosed is a violation of a state or federal law, rule or regulation.

2. 740 ILCS 175/2 amends and changes the definition of “State” as used in the Whistleblower Act to read as follows:

“State” means the State of Illinois; any agency of state government; the system of state colleges and universities, any school district, community college district, county, municipality, municipal corporation, unit of local government and any combination of the above pursuant to an intergovernmental agreement that includes provisions for a governing body of the agency created by the agreement. [The prior version of this section included entities which may elect to adopt the provisions of this Act by ordinance or resolution, a copy of which shall be filed with the attorney general within 30 days of its adoption. The entities that may elect to adopt are now automatically included as falling under the definition of “State” rather than having to elect to adopt the provisions of this act. They are automatically included in the provisions of this act.]

3. 740 ILCS 175/3 is amended as follows to add:

Any person who knowingly takes adverse employment action against an employee for disclosing information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law, rule or regulation; knowingly retaliates against an employee who has disclosed information in a court and administrative hearing, before legislative commission and committee, or in another proceeding and disclosed information, if the employee has reasonable cause to believe that the information discloses a violation of state or federal law, rule or regulations, is liable to the state for a civil penalty if not less than \$5,500 and not more than \$11,000, plus three times the amount of damages which the state sustains because of the act of that person. A person violating this subsection (a) shall also be liable to the state for the cost of a civil action brought to recover any such penalty or damages. The word “claim” also includes a request or demand for money damages or injunctive relief on behalf of an employee who has suffered an adverse employment action taken in violation of Paragraph (8) or Paragraph (9) of subsection (a). [This broadens the liability for anybody who knowingly presents or causes to be presented, to an officer or an employee of the state or a member of the guard, a false or fraudulent claim for payment or approval.]

- C. **Other Legislation: 820 ILCS 205/7 (Child Labor) is modified as follows:** No minor under 16 years of age shall be employed, permitted or allowed to work in occupations which involve the handling or storage of human blood, human blood products, human body fluids or human body tissues. [The previous version did not include the use of the word “human” next to the word “blood.”]
- D. **820 ILCS 175/5 (Day and Temporary Labor Services Act):** “Day and temporary labor” means work performed by a day or temporary laborer for a third party client, the duration of which may be specific or undefined, pursuant to a

contract or understanding between the day and temporary labor service agency and the third party client. “Day and temporary labor” does not include labor and employment of a professional or clerical nature. [This modifies the definition of day and temporary laborer and broadens the definition of who would qualify as a day and temporary laborer.]

2. **Recent Illinois and 7th Circuit Decisions Involving Labor and Employment Law Issues**

Pantoga v. American NTN

For a *prima facie* case of wrongful termination, a terminated employee must show that the employer sought someone to perform the same work after he left. Noting that there had been a subtle evaluation in the way that courts described the “barnacle-laden” McDonald Douglas requirements for a *prima facie* case of discrimination, the 7th Circuit stated that to establish the fourth element of a *prima facie* case, a Title VII plaintiff challenging a termination had to show that his employer sought someone to perform the same work after he left. The fact that the employer needs to find another person to perform the job after the employee is gone raises the same inference of discrimination that the continuation of a search does in the hiring situation.

Callahan v. Edgewater Care and Rehabilitation Center, Inc.

The Whistleblower Act did not preempt an action by a worker discharged in retaliation for reporting illegal activity to a supervisor. The enactment of the Whistleblower Act did not, either explicitly or implicitly, preempt or repeal the common-law right of an action in favor of an employee discharged in retaliation for reporting illegal activities to her superior under circumstances where her discharge violated a clearly mandated public policy. In so holding, the Appellate Court found that nothing in the language of the statute’s legislative history suggested that the legislature intended to preempt the common-law rights of an individual discharged for reporting illegal activities to her supervisors.

Chubb Insurance Group v. Carrizales

In a suit to recover monies that the plaintiff-insurance company paid to a defendant arising from an auto accident that took place while the defendant was driving the employer’s automobile, the granting of defendant’s motion to dismiss is reversed where: 1) without the employer’s consent or without an order of court protecting the employer, the release signed by defendant in exchange for monetary settlement from the other party to the accident is not valid against the employer; and 2) if the employer was required to provide notice of its interest to the tortfeasor, at a minimum, the defendant had such constructive notice prior to the execution of the release.

Roadway Express, Inc. v. U.S. Department of Labor, Administrative Review Board

In an action filed with the Occupational Safety and Health Administration alleging that the plaintiff was terminated in retaliation for supporting a co-worker in a grievance hearing under the Surface Transportation Assistance Act, the ALJ did not err in imposing on the employer a sanction that the employer could not present evidence as to their explanation for the plaintiff's termination that it had learned from undisclosed information that the plaintiff had falsified information on his application. The sanction was based on the employer's failure to abide by discovery orders directing that the employer reveal the identity of the informant. The ALJ erred, though, in applying the sanction in the remedy phase of the hearing by ordering the plaintiff's reinstatement since the employer was still entitled to show that reinstatement was impossible given the alleged public-safety concerns contained in plaintiff's prior driving record.

Gallagher v. Lenart

The Appellate Court correctly held that general release language contained in a worker's compensation settlement agreement and a resignation agreement, executed simultaneously with it, was insufficient to constitute waiver by the employer of its subrogation rights to the proceeds of the injured employee's settlement with a third-party tortfeasor. Further, the employer's right of subrogation is so intransigent to the system of compensation for injured employees that settlement agreements must contain specific language in order to constitute waiver.

Squibb v. Memorial Medical Center

The District Court did not err in granting defendant-employer's motion for summary judgment in an ADA action alleging that the defendant terminated the plaintiff-registered nurse on the basis of her back condition, which permanently restricted her from lifting patients and limited her to lifting objects weighing no more than 10 lbs. Records showed that the defendant terminated the plaintiff after the plaintiff had refused to return from leave when offered a case manager position, and plaintiff otherwise failed to show that her back condition qualified for protection under the ADA by preventing her from obtaining employment in either class of nursing jobs or in a broad range of jobs in various classes.

Hossack v. Floor Covering Associates of Joliet, Inc.

A female employee was having an extramarital affair with a co-worker. When the employee's husband found out about the affair, he repeatedly called and threatened the co-worker. The female employee told her managers about the situation and indicated that her husband no longer wanted her to work for the employer and be in contact with the co-worker. The employer believed that the employee intended to resign. After discussing several options, including transferring the co-worker to another location, the employer accepted her resignation. The employee and her husband later reconciled and she called her employer to explain that her husband no longer objected to her working for the employer or with her co-worker. The employer explained that it had accepted a

resignation because of her husband's threatening behavior and decided not to transfer her co-worker because he was its best sales person. The employer further explained that it would not give her another job because of the potential disruption it could cause to the work place. The employee sued, alleging sex discrimination. The 7th Circuit held that the employee had not stated a claim for sexual harassment because she was terminated due to her employer's fear that the husband's threats might cause work place disruption. Further, the fact that the male employee involved in the affair was not fired was adequately explained by the fact that he was the top sales person and was therefore more valuable to the employer.

Coolidge v. Consolidated City of Indianapolis

An incident in which an employee of a county crime laboratory, while reviewing unmarked videotapes to determine their contents, viewed pornography portraying necrophilia and other violent and disturbing images, did not create a hostile work environment under Title VII, even when considered in light of the prior sexual harassment that had been the subject of a prior action by the employee. The encounter was brief and not particularly severe, given that laboratory employees frequently worked with corpses. Furthermore, the worker who allegedly left the videotapes in the workplace, and was the subject of the prior suit, had been retired from the laboratory for nearly a year when the employee discovered the videotapes.

Stevenson v. Hyre Electric Company

A genuine issue of material fact existed regarding whether the employee's unusual behavior provided her employer with constructive notice of her need for FMLA leave, precluding summary judgment in the employee's action against the employer alleging a violation of FMLA. The unusual behavior began after a stray dog climbed through a window and entered the workplace. The behavior consisted of lengthy encounters of yelling and swearing at her supervisors, agitation, and calling the police because her belongings were moved to another desk.

Brandt Construction Company v. Ludwig

The failure of cities to give a construction contractor notice of the increased prevailing wage rate for its employees on public works projects relieved the contractor of the obligation to pay penalties or liquidated damages under the Prevailing Wage Act. It would be wholly inequitable to punish the contractor for failing to pay a wage rate for which it received no notice. However, the city's failure to provide notice did not relieve the contractor of its obligation to pay back wages resulting from the increased wage. The statutory requirement that the cities provide notice to the contractor of the revised rate did not place a condition precedent upon the contractor's duty to pay the revised rate.

Spiegla v. Hull

The United States Supreme Court let stand a 7th Circuit decision that a prison guard who reported a possible breach of prison security to the assistant prison superintendent, as part of her official responsibilities as a guard to keep the prison secured, did not engage in “citizen” speech and, thus, her comments were not protected from retaliation under the First Amendment. That the guard’s statement highlighted potential misconduct by prison officers, who may have been smuggling contraband into the prison, did not change the fact that she was speaking pursuant to her official responsibilities, not as a citizen, the Court of Appeal reasoned.

Bannon v. The University of Chicago

The District Court did not error in granting defendant/employer’s motion for summary judgment in the Title VII action alleging that the plaintiff’s supervisor rendered plaintiff’s work environment hostile where the supervisor repeated epithets based on the plaintiff’s national origin. While the supervisor’s use of said epithets could be viewed as being objectively hostile, the plaintiff failed to show that she subjectively viewed her workplace to be hostile where: (1) the plaintiff failed to report her supervisor’s conduct over a five-year period; and (2) the plaintiff socialized with her supervisor on several occasions, one consisted of a week-long vacation with the supervisor and their spouses.

The County of DuPage v. Illinois Labor Relations Board

In an action seeking administrative review of the certification of respondent Metropolitan Alliance of Police, DuPage County Sheriff’s Police Chapter No. 126 (MAP), as the exclusive bargaining representative of certain sheriff’s deputies employed by the petitioners, the Labor Relation Board’s certification orders vacated and remanded the MAP’s petition, as it was processed by the Board pursuant to invalid regulations and in contradiction of the requirement of Section 9 of the Illinois Public Labor Relations Act.

White v. The Worker’s Compensation Commission

In a worker’s compensation claim arising from repetitive trauma injuries, reversal of an order to pay temporary and permanent total disability benefits is affirmed where the plaintiff failed to give his employer timely notice of his accidental injuries.

West Cab Company, Inc. v. The Industrial Commission

In the matter of a taxi driver who was shot and killed while on duty, finding that his death arose out of and in the course of his employment with all three plaintiff-respondents, and awarding of benefits to the claimants was reversed, where the claimants’ decedent was not an employee.

Brown v. Illinois Department of Natural Resources

In a suit against a government agency alleging violation of Title VII and retaliation, summary judgment for the defendant was affirmed where: (1) based on the Supreme Court's decision in Ledbetter v. Goodyear Tire and Rubber Company, several of plaintiff's claims are time barred; (2) plaintiff did not establish a *prima facie* case of discrimination since he did not present any evidence of similarly situated employees of a different race who were promoted, but not better qualified than plaintiff; and (3) plaintiff failed to offer any direct evidence that the agency retaliated against him for filing a discrimination complaint.

Wade v. Soo Line R.R. Corporation

In a personal injury suit against an employer, dismissal of the complaint was affirmed where the District Court did not abuse its discretion since the evidence of bad faith and plaintiff's attorneys withholding of documents was manifest. Sanctions against the attorney were affirmed but remanded for recalculation.

Brotherhood of Locomotive Engineers and Train Men v. Union Pacific Railroad Company

In a suit to enforce an arbitration award in favor of a union against a railroad, dismissal of the suit was reversed and remanded with instructions to enforce the award where the award was not ambiguous.

White v. The Department of Employment Security

The denial of unemployment benefits was affirmed over claims that: (1) the plaintiff did not voluntarily leave employment; (2) the hearing referee improperly allowed plaintiff's employer to participate in the hearing; and (3) the Board improperly declined to consider telephone records that were not presented to the hearing referee.

Weyerhaeuser Company v. US Railroad Retirement Board

The determination of the Railroad Retirement Board that four employees were entitled to retroactive Railroad Retirement Act service credit beyond the four years automatically allowed by statute was reversed because the Board, on reconsideration, did not consider the only possible exception to the statutory limit as to employer fraud. The determination is affirmed in all other respects where the decision was supported by substantial evidence.

Blont v. Stroud

In an action alleging claims under the common law tort of retaliatory discharge and under Section 1981 of the Civil Rights Act of 1991, a finding in favor of the plaintiff was reversed where the Illinois Circuit Courts lack the subject matter jurisdiction to entertain any civil rights claims, including those in which the defendant is a private entity.

Heckler v. DK Funding, LLC

The evidence suggesting a company-wide practice of editing timesheets and not paying employees for all hours worked was sufficient to conditionally certify a collective action under the Fair Labor Standards Act on behalf of all of the employer's hourly workers, not simply mortgage closers such as the plaintiff.

United Mine Workers v. Brushy Creek Coal Co.

In a suit by mine workers in their union under the Taft-Hartley Act and ERISA the 7th Circuit decided that an employer could terminate the lifetime health benefits granted in a collective bargaining agreement following the agreement's expiration. A collective bargaining agreement entitling employees who retired during its term to health benefits "for life" and requiring the parties to jointly agree to modification of benefit levels after its expiration permitted the employer, after the plan expired, to terminate the lifetime benefits of employees who retired while the agreement was in effect. The health plan expressly permitted the employer to terminate it or alter its terms at any time, subject to the collective bargaining agreement. The agreement in turn required any conflict between the general description in the agreement and the health plan to be resolved in favor of the plan.

Vose v. Kliment

In a suit alleging that defendants violated plaintiff's constitutional right to free speech by dismissing him from a police department after he reported on officer wrongdoing, the 7th Circuit reversed the denial of summary judgment for defendants on grounds of qualified immunity where the plaintiff's speech was made pursuant to his official responsibilities and thus, was not constitutionally protected.

Wisconsin Central Ltd. v. Shannon

The claims, raised under the Illinois Minimum Wage Law and being investigated by the Illinois Department of Labor (DOL), constituted "minor disputes" within the meaning of the Railway Labor Act. Any calculation of overtime would require interpretation and application of collective bargaining agreements, negotiated by four unions representing communications and signal employees, conductors, locomotive engineers, and maintenance-of-way employees, to determine both "hours worked" and "regular rates of pay" components of the applicable formula under DOL regulations. The court did not reach the railroad's alternative argument that the claims were preempted because Congress intended to occupy the entire field with respect to the work hours of railroad employees, although it noted there was little support for that broad argument aside from one 6th Circuit case.

Webster v. A.T. Kearney, Inc.

In a suit alleging breach of an employment agreement, dismissal of a motion to vacate an arbitration award is affirmed where the motion was untimely, since the statute of limitations contained in the Federal Arbitration Act began to run when the award was

placed in the mail, and the motion was not served upon the defendants within the limitations period.

Central Ill. Carpenters Health & Welfare Trust Fund v. S & S Fashion Floors, Inc.

On a matter of first impression, a president of an employer was an Employee Retirement Income Security Act fiduciary over all unpaid contributions to union and employee benefit funds that were actually withheld from employee wages by the employer. Such funds, according to the court, constituted plan assets. Even though plan documents made it clear that the president was not an official, appointed fiduciary, the court found the president to be a "functional fiduciary." The president exercised control over the amount deducted, having made the decision to stop paying the funds, and the decision to liquidate and pay other creditors and herself before the dispute with the funds had been resolved.

Williams v. Aetna Life Ins. Co.

In a suit over the denial of long term disability benefits, summary judgment for defendants is affirmed where: 1) the plan administrator did not act arbitrarily or capriciously in denying benefits based on a lack of evidence about the functional impact of plaintiff's illness; 2) the plaintiff received a full and fair review; and 3) the plan administrator properly reviewed the physicians' findings.

Wade v. City of North Chicago Police Pension Bd.

The Illinois Supreme Court held that the Pension Code merely requires a municipal police pension board, as a condition to awarding a disability pension to a police officer, to obtain certificates, from three doctors selected by the board, addressing the issue of disability. It does not require that all three board-selected doctors find the officer is disabled. Interpreting the Pension Code as requiring unanimity of the board-appointed doctors, as some intermediate appellate panels had done, leads to an absurd result, in which the board is powerless to override the opinion of a doctor who does not find a disability, so that the board's hearing on an application for a disability pension is a meaningless exercise. (This decision may not yet be released for publication.)

Smith v. Louis Joliet Shoppingtown

Trial court did not have authority, without permission from injured employee's workers' compensation carrier, to reduce amount of its lien to an amount that was less than plaintiff's settlement with owner of premises at which she fell. Carrier is entitled to full amount of settlement minus attorney's fees and costs.

Equal Employment Opportunity Comm'n v. V&J Foods, Inc., No. 07-1009

In a suit alleging sexual harassment and retaliation, summary judgment for defendant is reversed and remanded where: 1) the defendant's procedure for complaining about harassment failed to take the capabilities of its primarily teenage employees into account; 2) the judge erroneously attempted to resolve issues of material fact at the summary judgment stage; and 3) the plaintiff's mother acted as her agent when complaining about the harassment, thus the retaliation against the mother's complaint was in reality a retaliation against the plaintiff.