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TABLE OF CONTENTS

I. INTRODUCTION

This article highlights the significant developments in Illinois labor and employment law during the *Survey* year.[1] Most develop-

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1. The *Survey* period covers developments in the law between July 1, 1986 and July 1, 1987. *See* the *Administrative Law* article in this *Survey* for a discussion of cases during the *Survey* year considering due process issues in connection with proceedings before the

ments occurred in case law and concerned a wide range of issues, including at-will employment,[2] retaliatory discharge,[3] employment discrimination,[4] and workers' compensation.[5]

II. Rebutting the Presumption of At-Will Employment

A. Contract Claims

In *Duldulao v. St. Mary of Nazareth Hospital*,[6] the Illinois Supreme Court held that "an employee handbook or other policy statement" can create a binding contract between employer and employee.[7] The employee in *Duldulao* alleged that her employer violated the disciplinary procedures set forth in its employee handbook when it discharged her.[8] The handbook provided that, with limited exceptions for serious misconduct, an employee having at least ninety days of service would not be fired unless she received three written admonitions within twelve months.[9] Though the employee had worked for the employer for eleven years and had not committed one of the severe offenses listed in the handbook, she

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Industrial Commission, *e.g.* Collura v. Bd. of Police Comm'rs, 113 Ill. 2d 361, 498 N.E.2d 1148 (1986) (holding that the plaintiff's due process rights to a hearing before an impartial tribunal were not impaired during a rehearing before an adjudicatory board, though one adjudicatory officer had heard improper evidence of polygraph test results); Werries v. Industrial Comm'n, 114 Ill. 2d 43, 499 N.E.2d 459 (1986) (involving questions as to the propriety of the Commission's consideration of evidence that was not presented to the arbitrator in the proceedings); Pecyna v. Industrial Comm'n, 149 Ill. App. 3d 97, 500 N.E.2d 548 (1st Dist. 1986). *See also* the *Commercial Law* article in this *Survey*.

2. *See infra* notes 6-36 and accompanying text.
3. *See infra* notes 37-80 and accompanying text.
4. *See infra* notes 109-20 and accompanying text.
5. *See infra* notes 121-79 and accompanying text.
6. 115 Ill. 2d 482, 505 N.E.2d 314 (1987).
7. *Id.* at 490-91, 505 N.E.2d at 318. In Illinois, an employment agreement for an indefinite duration entitles the employer to terminate the relationship without cause. De Fosse v. Cherry Electrical Products Corp., 156 Ill. App. 3d 1030, 1034, 510 N.E.2d 141, 144 (2d Dist. 1987). Employment for an indefinite term creates the judicial presumption that the parties have an at-will employment contract terminable at the will of either party. *Duldulao*, 115 Ill. 2d at 488-89, 505 N.E.2d at 317-18. The Illinois courts agree that the employer or employee can rebut the presumption of at-will employment by establishing the existence of contract terms to the contrary. *Id.* Illinois appellate courts, however, disagreed about whether an employee handbook unilaterally prepared by the employer could create such a binding contract. Ohlemeier v. Community Consolidated School Dist., 151 Ill. App. 3d 710, 715-16, 502 N.E.2d 1312, 1316 (5th Dist. 1987). *See infra* note 14 and accompanying text.
8. *Duldulao*, 115 Ill. 2d at 485, 505 N.E.2d at 316.
9. *Id.* at 490-91, 505 N.E.2d at 318. The list of offenses that would justify immediate dismissal of an employee included " 'Mistreatment of a patient,' 'Fighting on hospital premises,' 'Unauthorized Possession of Weapons,' and 'Reporting to work under the influence of intoxicants.' " *Id.* at 491, 505 N.E.2d at 315-16.

was fired without advance notice.[10]

The *Duldulao* court addressed three issues. First, the court considered whether an employee handbook could constitute a contract.[11] Second, it formulated a test for determining when a handbook could give rise to contractual obligations.[12] Finally, the court decided whether the employer in *Duldulao* breached the terms of its handbook.[13]

Addressing the first issue, the *Duldulao* court noted conflicting Illinois appellate court decisions regarding whether an employee handbook can create a contract.[14] The court then looked to authority in other states, observing that the minority of jurisdictions refuse to give employee handbooks contractual status under any circumstances.[15] In contrast, the majority of jurisdictions consider an employee handbook binding if certain requirements are met.[16]

10. *Id.* at 484-86, 505 N.E.2d 315-16.

11. *Id.* at 486-90, 505 N.E.2d 316-18.

12. *Id.* at 490, 505 N.E.2d at 318.

13. *Id.* at 492-93, 505 N.E.2d at 319.

14. *Id.* at 488, 505 N.E.2d at 316. The Illinois Appellate Court for the Fifth District addressed the question first in Carter v. Kaskaskia Community Action Agency, 24 Ill. App. 3d 1056, 322 N.E.2d 574 (5th Dist. 1974), and found an employee handbook binding. Later, the First District distinguished *Carter* and held that an employee handbook was not binding because the parties did not bargain for the provisions in the handbook. Sargent v. Illinois Inst. of Technology, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1st Dist. 1979). *See also* Ring v. J. T. Reynolds, 597 F. Supp. 1277 (N.D. Ill. 1984); Enis v. Continental Bank, 582 F. Supp. 876 (N.D. Ill. 1984); and Rynar v. Ciba-Geigy, 560 F. Supp. 619 (N.D. Ill. 1983). In Kaiser v. Dixon, the Third District rejected the narrow holding in *Sargent* and followed the reasoning in Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980). *Kaiser*, 127 Ill. App. 3d 251, 468 N.E.2d 822 (3d Dist. 1984). *See also* Pudil v. Smart Buy, 607 F. Supp. 440 (N.D. Ill. 1985). Finally, the First District rejected the analysis it had applied in *Sargent* when deciding *Duldulao*, 136 Ill. App. 3d 763, 483 N.E.2d 956 (1st Dist. 1985). *See also* Pundt v. Milliken Univ., 145 Ill. App. 3d 990, 496 N.E.2d 291 (4th Dist. 1986).

15. *Duldulao*, 115 Ill. 2d at 486-87, 505 N.E.2d at 316-17 (citing Uriarte v. Perez-Molina, 434 F. Supp. 76 (D.D.C. 1977); White v. Chelsea Indus., Inc., 425 So. 2d 1090 (Ala. 1983); Heideck v. Kent General Hosp., Inc., 446 A.2d 1095 (Del. 1982); Muller v. Stromberg Carlson Corp., 427 So. 2d 266 (Fla. App. 1983); Shaw v. S.S. Kresge Co., 167 Ind. App. 1, 328 N.E.2d 775 (1975); Johnson v. Nat'l Beef Packing Co., 220 Kan. 52, 551 P.2d 779 (1976); Richardson v. Charles Cole Memorial Hosp., 320 Pa. Super. 106, 466 A.2d 1084 (1983); Reynolds Mfg. Co. v. Mendoza, 644 S.W.2d 536 (Tex. Civ. App. 1982)).

16. *Duldulao*, 115 Ill. 2d at 487-88, 505 N.E.2d at 317 (citing Vinyard v. King, 728 F.2d 428 (10th Cir. 1984); Lincoln v. Sterling Drug, Inc., 622 F. Supp. 66 (D. Conn. 1985); Barger v. General Electric Co., 599 F. Supp. 1154 (W.D. Va. 1984); Smith v. Teledyne Indus., Inc., 578 F. Supp. 353 (E.D. Mich. 1984); Brooks v. Trans World Airlines, Inc., 574 F. Supp. 805 (D. Colo. 1983); Leikvold v. Valley View Community Hosp., 141 Ariz. 544, 688 P.2d 170 (1984); Pugh v. See's Candies, Inc., 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981); Salimi v. Farmers Ins. Group, 684 P.2d 264 (Colo. App. 1984); Finley v. Aetna Life & Casualty Co., 5 Conn. App. 394, 499 A.2d 64 (1985); Jackson v. Minidoka Irrigation Dist., 98 Idaho 330, 563 P.2d 54 (1977); Wyman v. Oste-

Rejecting the minority approach,[17] the court held that an employee handbook can create contractual obligations if all the traditional elements of contract formation are present.[18] The court then concluded that the *Duldulao* handbook met the contractual standards.[19] It found that the employee could reasonably interpret the mandatory discipline system as a promise;[20] that the employer's use of the handbook in its employee training program led to the employee's reasonable belief that the handbook was an offer;[21] and that the employee's continued performance established acceptance and consideration.[22] Significantly, the court noted the absence of any disclaimer that would negate the employee's belief that the

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opathic Hosp. of Maine, Inc., 493 A.2d 330 (Me. 1985); Staggs v. Blue Cross of Maryland, Inc., 61 Md. App. 381, 486 A.2d 798 (1985); Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (1980); Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983); Enyeart v. Shelter Mutual Ins. Co., 693 S.W.2d 120 (Mo. App. 1985); Morris v. Lutheran Medical Center, 215 Neb. 677, 340 N.W.2d 388 (1983); Southwest Gas Corp. v. Ahmad, 99 Nev. 594, 668 P.2d 261 (1983); Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284, 491 A.2d 1257 (1985); Forrester v. Parker, 93 N.M. 781, 606 P.2d 191 (1980); Bolling v. Clevepak Corp., 20 Ohio App. 3d 113, 484 N.E.2d 1367 (1984); Langdon v. Saga Corp., 569 P.2d 524 (Okla. Ct. App. 1976); Yartzoff v. Democrat-Herald Publishing Co., 281 Or. 651, 576 P.2d 356 (1978); Osterkamp v. Alkota Mfg., Inc., 332 N.W.2d 275 (S.D. 1983); Hamby v. Genesco, Inc., 627 S.W.2d 373 (1981); Piacitelli v. Southern Utah State College, 636 P.2d 1063 (Utah 1981); Thompson v. St. Regis Paper Co., 102 Wash. 2d 219, 685 P.2d 1081 (1984); and Mobil Coal Producing, Inc. v. Parks, 704 P.2d 702 (Wyo. 1985)).

17. *Duldulao*, 115 Ill. 2d at 489-90, 505 N.E.2d at 318 (citing Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983)).

18. *Id.* at 490, 505 N.E.2d at 318. The court described the elements as follows:

> First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. When these conditions are present, then the employee's continued work constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed.

Id.

19. *Id.* at 490-91, 505 N.E.2d at 318.

20. *Id.* at 491, 505 N.E.2d at 318. The court quoted two provisions of the handbook. *Id.* The first provision stated that "permanent employees '*are never* dismissed without prior written admonitions and/or an investigation that has been properly documented, . . . and that 'three warning notices within a twelve-month period *are required* before an employee is dismissed.' " *Id.* (emphasis in original). The second provision, quoted from the introduction of the handbook, stated that the handbook policies were " 'designed to clarify [the employee's] *rights* and duties as employees.' " *Id.* (emphasis in original).

21. *Id.* at 492, 505 N.E.2d at 319.

22. *Id.* The plaintiff was already an employee of the defendant at the time the defendant adopted the handbook. *Id.* at 485, 505 N.E.2d at 316.

commitments in the handbook were binding and enforceable.[23]

Finally, the *Duldulao* court decided that the employer had breached the terms of its employee handbook.[24] Although certain terms defining which employees were entitled to progressive discipline procedures were subject to differing interpretation,[25] the court held that the ambiguous contract language should be construed against the drafter.[26] Accordingly, the court concluded that the employer breached the terms of its handbook by discharging the employee without conforming to the progressive discipline system.[27]

The *Duldulao* decision created an exception to an employer's generally unfettered right to discharge employees-at-will.[28] Limited by its facts, the decision affects the hundreds of employers who publish employee handbooks containing disciplinary or discharge procedures. Read broadly, however, *Duldulao* has far-reaching implications to other employment decisions that may be challenged as inconsistent with handbook or policy manuals.

Already, in *Land v. Michael Reese Hospital*,[29] the Illinois Appellate Court for the First District modestly extended *Duldulao* by enforcing a non-union employee grievance procedure described in a handbook.[30] It is likely that the *Land* decision is the first

23. *Id.* at 491, 505 N.E.2d at 319. *See infra* notes 32-36 and accompanying text.

24. *Id.*

25. *Id.* at 492-93, 505 N.E.2d at 319. The court said, "The handbook states that an employee may be terminated without notice during the '*initial* probationary period,' . . . a period which ends '[a]t the end of 90 calendar days since employment.' " *Id.* at 492, 505 N.E.2d at 319 (emphasis in original). The employee had worked for the employer for eleven years. *Id.* at 484, 505 N.E.2d at 315-16. The employer asserted, however, that the employee "reverted to probationary status" when she was transferred to a new position. *Id.* at 492, 505 N.E.2d at 319. The employer relied on an amendment to the handbook that stated "[a]ll promotions and transferred employees must successfully pass a designated probationary period." *Id.* From this language, the employer concluded that the employee was not entitled to the disciplinary procedures in the handbook because the employee had not worked in her new position for more than three months. *Id.*

26. *Id.* at 493, 505 N.E.2d at 319. The court dismissed the employer's assertion that the employee was subject to a new probationary period upon her transfer, noting that the transfer was involuntary. *Id.*

27. *Id.* at 494, 505 N.E.2d at 320.

28. *See supra* note 18 and accompanying text.

29. 153 Ill. App. 3d 465, 505 N.E.2d 1261 (1st Dist. 1987).

30. *Id.* at 466-67, 505 N.E.2d at 1262. The *Land* employer had adopted an employee manual containing an arbitration procedure for handling non-union employee grievances regarding discharge and other adverse employment actions. *Id.* at 467, 505 N.E.2d at 1262. The procedure gave employees the right to file a complaint and to have a hearing before the Vice-President of Human Resources. *Id.* In *Land*, a terminated employee initiated the grievance procedure. *Id.* The Vice-President sustained the employee's complaint and said that she should be reinstated. *Id.* The employer refused to comply with the reinstatement decision. *Id.* The court held that the employee manual in *Land* consti-

in a progression of cases that will seek to apply *Duldulao* to discipline, promotion, training, compensation, and other employment decisions.[31]

At least two courts have held that, as suggested in *Duldulao*,[32] explicit disclaimers in employee manuals can prevent the formation of contractual obligations. In *Moore v. Illinois Bell Telephone Co.*,[33] the Illinois Appellate Court for the Second District held that the employer's written incentive pay plan was not a binding contract because it contained provisions disclaiming any contractual rights.[34] Similarly, the Federal District Court in *Morgan v. Harris Trust & Savings Bank*[35] held that several disclaimers in the employer's personnel policy manual refuted an employee's claim that he could be discharged only for good cause.[36]

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tuted a binding promise under *Duldulao* and the employer's failure to comply with the decision rendered under the grievance procedure constituted a breach of contract. *Id.* at 469, 505 N.E.2d at 1263.

31. *See, e.g.*, DeFosse v. Cherry Elec. Prod. Corp., 156 Ill. App. 3d 1030, 510 N.E.2d 141 (2d Dist. 1987) (holding that the employee had a contractual right to benefits under the employer's published disability benefits plan).

32. As noted above, the Illinois Supreme Court stated in *Duldulao* that the employee handbook in that case did not contain any disclaimer or other language negating the contractual promise created by the handbook. *See supra* note 23 and accompanying text.

33. 155 Ill. App. 3d 781, 508 N.E.2d 519 (2d Dist. 1987).

34. *Id.* at 783-84, 508 N.E.2d at 520-21. The employees in *Moore* alleged that the employer breached a binding incentive pay plan by recalculating the employees' incentive pay under a revised formula. *Id.* The employer asserted that two disclaimers in the plan prevented the formation of a binding contract. *Id.* at 784, 508 N.E.2d at 520. The first disclaimer appeared on the first page of the plan and described the plan as "a statement of management's intent" that was "not a contract or an assurance of compensation." *Id.* at 783, 508 N.E.2d at 521. The second disclaimer stated:

> AT&T reserves the right to amend, change, or cancel the Incentive Plan at its discretion. It also reserves the right to reduce, modify, or withhold awards based on individual performance or management modification. The Plan is a statement of management's intent and is not a contract or assurance of compensation.

Id. The court held that these unequivocal disclaimers prevented the creation of a contract under *Duldulao* because the handbook could not reasonably be interpreted as an offer of compensation. *Id.* at 785, 508 N.E.2d at 521.

35. 44 Fair Empl. Prac. Cas. (BNA) 704. The employee's state law breach of contract claim was pendant to a race discrimination count under Title VII of the Civil Rights Act of 1974. *Id.*

36. *Id.* at 705. The employee in *Morgan* was fired for failing two polygraph examinations during a theft investigation. *Id.* at 704. The employee asserted that his termination violated the bank's disciplinary and discharge procedures. *Id.* The court rejected the employee's argument, citing three separate sections of the manual. *Id.* at 705. The first portion of the manual quoted by the court "state[d] that it is 'not intended to create any contractual or other legal rights; [the manual] is designed solely as a guide for supervisors and managers.' " *Id.* The manual also provided that "[e]mployment with the bank is at will, meaning that the employment may be terminated by the employer or employee at any time, without restriction. Nothing in this manual is intended or should be construed

The *Duldulao* decision represents a new source of employee rights arising from the employee handbooks and manuals that so many employers electively and unilaterally publish. Employees can be expected to seek the extension of *Duldulao* from the discharge area into other employment transactions, while employers and lawyers will seek to limit those claims by including express disclaimers in their employee handbooks. In the event of a lawsuit, employers will be making the same arguments they made before *Duldulao*: that employee handbooks reflect statements of employment policy and intent rather than enforceable contract provisions.

B. Retaliatory Discharge Claims

The decision in *Herbster v. North American Can Co.*,[37] holding that the termination of an in-house attorney by his corporate employer does not state a retaliatory discharge claim,[38] is representative of the Illinois appellate courts' reluctance during the *Survey* year to expand the tort.[39] The attorney in *Herbster* alleged that he

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as altering the employment at will relationship." *Id.* In a third provision, the handbook "restate[d] that '[t]he bank may terminate an employee at any time, with or without cause.' " *Id.*

37. 150 Ill. App. 3d 21, 501 N.E.2d 343 (2d Dist. 1986), *cert. denied*, 108 S. Ct. 150 (1987).

38. *Id.* at 30, 501 N.E.2d at 338. Under Illinois law, an action for retaliatory discharge has two elements. *Id.* at 23, 501 N.E.2d at 334. First, an employee must show that he was "discharged" within the meaning of the tort. *Id.* Second, the employee must establish that he was discharged in violation of "a clearly mandated public policy." *Id.* Retaliation, an exception to the employer's freedom to discharge an at-will employee for any reason, was initially recognized by the Illinois courts in Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). Since that time, the courts have worked toward defining the kinds of discharge and public policies that give rise to an action for retaliatory discharge.

39. The courts initially broadened the scope of retaliatory discharge by adopting an expansive standard for the public policy consideration that could give rise to a retaliation claim. Palmateer v. Int'l Harvester, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878-79 (1981) (describing a mandated public policy as "what is right and just and what affects the citizens of the State collectively . . . . [A] matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed."). Further expansion of the tort occurred through extension of its protection to new groups of employees. Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280, *cert. denied*, 472 U.S. 1032 (1985) (extending protection to a union employee who was fired for filing a workers' compensation claim). The trend toward expansion of retaliatory discharge came to a halt with the Illinois Supreme Court's decision in Barr v. Kelso-Burnett, 106 Ill. 2d 520, 478 N.E.2d 1354 (1985). The *Barr* holding, which emphasized that retaliatory discharge is only a limited exception to the broad freedom of an employer to discharge employees-at-will, has been cited repeatedly as a mandate against further expansion of the tort. *See, e.g.*, Morton v. Hartigan, 145 Ill. App. 3d 417, 495 N.E.2d 1159 (1st Dist. 1986) (holding that supervisors employed by a public entity cannot be sued in their private capacity for retaliation); and Zaniecki v. P.A. Bergner & Co., 143 Ill. App. 3d 668, 493 N.E.2d 419 (3d Dist. 1986) (holding that an employee who alleged he

was fired for refusing to destroy documents that his client was ordered to produce in connection with a lawsuit.[40]

The *Herbster* court indicated that the Illinois Supreme Court had cautioned against unchecked expansion of the retaliatory discharge claim.[41] With this in mind, the court decided that the special relationship between an attorney and client[42] prevented limitations on the client's right to terminate the relationship even if the reasons for doing so were inconsistent with public policy concerns.[43] Thus, the court decided that in this case, the interest in favor of the client's right to select and have complete trust in his attorney outweighed the policies in favor of ensuring integrity in the judicial process.[44]

Other cases during the *Survey* year also reflected a restrictive view of retaliatory discharge. In *Buechele v. St. Mary's Hospital Decatur*,[45] the Illinois Appellate Court for the Fourth District held that public policy is not offended when an employer terminates an employee who files slander and other tort claims against her employer.[46] In *Boyles v. Greater Peoria Mass Transit District*,[47] the

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was discharged for failing two polygraph examinations during a theft investigation conducted by his employer did not state a viable retaliation claim).

40. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 343.

41. *Id.* at 25-26, 501 N.E.2d at 345-46 (quoting Barr v. Kelso-Burnett, 106 Ill. 2d 520, 525, 478 N.E.2d 1354, 1356 (1985)).

42. *Id.* at 29-30, 501 N.E.2d at 348. The court stated that an attorney is both an employee and a professional advisor. *Id.* at 26, 501 N.E.2d at 346. Because the court viewed these two components of the attorney's role as inseparable, the court held that the attorney's rights as an employee could not be considered outside the context of his professional relationship to his client. *Id.* The court described that professional relationship as consisting of "mutual trust, exchanges of confidence, reliance on judgment, and personal [interaction]." *Id.* at 29, 501 N.E.2d at 348.

43. *Herbster*, 150 Ill. App. 3d at 30, 501 N.E.2d at 348. The court recognized that the public policies on which the plaintiff relied, including ILL. S. CT. RULES 1-102(a)(3) and 7-102(a), the rules of professional ethics (ILL. REV. STAT. ch. 110A, paras. 1-102(a)(3), 7-102(a) (1985)), and the Illinois discovery rules (ILL. REV. STAT. ch. 38, para. 31-4(a)(1985)), were sufficient to support the public policy element of the tort. *Id.* at 23-24, 501 N.E.2d at 344.

44. *Herbster*, 150 Ill. App. 3d at 24, 28-30, 501 N.E.2d at 344, 346-48.

45. 156 Ill. App. 3d 637, 509 N.E.2d 744 (4th Dist. 1987).

46. *Id.* at 643, 509 N.E.2d at 747. The *Buechele* employer had accused the employee of stealing drugs from the hospital's emergency room. *Id.* at 639, 509 N.E.2d at 745. The employee was terminated after she sued her employer for slander and intentional infliction of emotional distress in connection with the employer's subsequent investigation. *Id.* at 640, 509 N.E.2d at 745. The court stated that the "right to file a lawsuit claiming individual injury" was a personal rather than a public policy interest. *Id.* at 643, 509 N.E.2d at 747. For additional cases regarding the distinction between personal and private policies, see Mein v. Masonite Corp., 109 Ill. 2d 1, 485 N.E.2d 312 (1985); Price v. Carmack Datsun, Inc., 109 Ill. 2d 65, 485 N.E.2d 359 (1985); and Palmateer v. Int'l Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

47. 113 Ill. 2d 545, 499 N.E.2d 435 (1986).

Illinois Supreme Court held that a public employer can be held liable for unlawful retaliation against a union employee but limited the employee's recovery to compensatory damages.[48] Furthermore, the Illinois Appellate Court for the First District, in *McCluskey v. Clark Oil & Refining Corp.*,[49] rejected a retaliation claim by an employee fired for marrying a co-worker.[50] The court stated that the policy favoring the freedom to marry does not provide a sufficient basis for a retaliatory discharge claim.[51] Even the holding in *Hinthorn v. Roland's of Bloomington*,[52] which allowed a retaliation claim by an employee who allegedly resigned to avoid threatened termination, did not significantly enlarge the scope of retaliatory discharge.[53]

Two cases during the *Survey* year considered whether a retaliation claim can be established when an employee who is terminated for asserting that his employer violated federal law. In *Pratt v. Caterpillar Tractor Co.*,[54] the Illinois Appellate Court for the Third District held that the public policies reflected in federal trade laws[55] could not support a retaliation claim because those policies were not policies of the State of Illinois.[56]

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48. *Id.* at 555-56, 499 N.E.2d at 439.

49. 147 Ill. App. 3d 822, 498 N.E.2d 559 (1st Dist. 1986).

50. *Id.*

51. *Id.* at 825-26, 498 N.E.2d at 561-62. The court stated that "not every classification which relates in any way to the incidents of marriage necessarily involves the intensely personal decisions which the court has found to be fundamental, and reasonable regulations that do not significantly interfere with decisions to enter the marital relationship may legitimately be imposed." *Id.* at 826, 498 N.E.2d at 561.

52. 151 Ill. App. 3d 1006, 503 N.E.2d 1128 (4th Dist. 1987).

53. *Id.* at 1009, 503 N.E.2d at 1130. The *Hinthorn* court overruled Scheller v. Health Care Service Corp., 138 Ill. App. 3d 219, 485 N.E.2d 26 (4th Dist. 1985). *Id.* The *Scheller* court had stated that constructive discharge could not form the basis for a retaliation claim. *Scheller*, 138 Ill. App. 3d 219, 225, 485 N.E.2d 26, 30. The *Hinthorn* court noted that the constructive discharge in *Scheller* was based on harassment, while the *Hinthorn* plaintiff alleged that she was threatened with termination. *Hinthorn*, 151 Ill. App. 3d at 1008, 503 N.E.2d at 1130. The *Hinthorn* court held that the *Scheller* language "was overly broad if it prevented the discharge element of the tort from arising under circumstances where an employee is forced to resign under express or implied threat of discharge." *Id.* at 1009, 503 N.E.2d at 1130.

54. 149 Ill. App. 3d 588, 500 N.E.2d 1001 (3d Dist. 1986).

55. *Id.* at 589, 500 N.E.2d at 1002 (relying on the Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78dd-1 *et seq.* (1982) and the Export Administration Act of 1969, 50 U.S.C. App. § 2401 *et seq.* (1982)). These Acts "reflect Congress' attempt to regulate the conduct of international corporations doing business with foreign countries." *Id.* at 591, 500 N.E.2d at 1003.

56. *Pratt*, 149 Ill. App. 3d at 590-91, 500 N.E.2d at 1003. The court distinguished the plaintiff's claim from earlier cases that recognized federal policies as policies of Illinois. *Id.* *See* Price v. Carmack Datsun, Inc., 109 Ill. 2d 65, 485 N.E.2d 359 (1985); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985). The basis for

In *Johnson v. World Color Press, Inc.*,[57] however, the Illinois Appellate Court for the Fifth District took a broader view. The employee in *Johnson* said he was fired for opposing accounting policies he believed might violate federal securities laws.[58] The court said these laws reflected a national policy and, of its own accord, established that this national policy was closely paralleled in Illinois law.[59] Accordingly, the court permitted the employee's claim.[60]

III. PREEMPTION

A. Preemption of Retaliatory Discharge Claims

In *Gonzalez v. Prestress Engineering Corp.*,[61] the Illinois Supreme Court reaffirmed that a union employee can file a retaliation claim without exhausting grievance procedures provided for discharged employees.[62] With two justices dissenting, the court also held that

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the *Pratt* court's differentiation was that the statutes cited by the *Pratt* employee did not involve nation-wide policies that "impact on the health and safety of Illinois." *Pratt*, 149 Ill. App. 3d at 591, 500 N.E.2d at 1003.

57. 147 Ill. App. 3d 746, 498 N.E.2d 575 (5th Dist. 1986).

58. *Id.* at 749-50, 498 N.E.2d at 576-77. The employee believed his employer might be violating the Securities Act of 1933, 15 U.S.C. § 77 (a) *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. § 78 (a) *et seq. Johnson*, 147 Ill. App. 3d at 749, 498 N.E.2d at 576-77. Considering the sufficiency of the employee's complaint, the court noted that there is inconsistent authority regarding whether an employee claiming retaliatory discharge must allege both that his employer violated the law and that the employee notified outside officials of the employer's activity. *Id.* at 751-53, 498 N.E.2d at 578. *See* Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1986); Palmateer v. Int'l Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Petrik v. Monarch Printing Corp., 143 Ill. App. 3d 1, 501 N.E.2d 1312 (1st Dist. 1986); Zoniecki v. P.A. Bergner & Co., 143 Ill. App. 3d 668, 493 N.E.2d 419 (3d Dist. 1986). The *Johnson* court held that allegations that the employee suspected illegal activity and reported his suspicions to his supervisors were sufficient. *Johnson*, 147 Ill. App. 3d at 751, 498 N.E.2d at 578-79.

59. *Johnson*, 147 Ill. App. 3d at 749, 498 N.E.2d at 577 (citing the Illinois Securities Law of 1953, ILL. REV. STAT. ch. 121 1/2, para. 137.1 *et seq.* (1985)).

60. *Id.* at 755, 498 N.E.2d at 580.

61. 115 Ill. 2d 1, 503 N.E.2d 308 (1986).

62. *Id.* at 13, 503 N.E.2d at 313. As discussed above, the tort of retaliatory discharge was first recognized as a protection for at-will employees in Kelsay v. Motorola. *See supra* note 38 and accompanying text. In Midgett v. Sackett-Chicago, Inc., the Illinois Supreme Court extended the tort to union employees. Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 150, 473 N.E.2d 1280, 1284, *cert. denied*, 472 U.S. 1032 (1985). The *Midgett* court held that a union employee can bring a claim for retaliatory discharge without exhausting grievance procedures, even when those procedures are designed to resolve disputes under a collective bargaining agreement's just cause provision. *Id.* at 152, 473 N.E.2d at 1285. Neither party in *Midgett* raised the issue of federal preemption, and the court did not address it. *Id.* at 145-46, 473 N.E.2d at 1281. *But see* Sagen v. Jewel Cos., 148 Ill. App. 3d 447, 450, 499 N.E.2d 662, 664 (2d Dist. 1986) (holding that preemption is a jurisdictional question and may be raised sua sponte).

the retaliation claim of a union employee terminated for exercising his rights under the Workers' Compensation Act was not preempted by section 301 of the Labor Management Relations Act (the "LMRA")[63] even if the employee's collective bargaining agreement contained a just cause provision and arbitration procedure.[64]

The *Gonzalez* court purported to apply the preemption analysis set forth in *Allis-Chalmers Corp. v. Lueck*,[65] in which the United States Supreme Court held that a state tort claim is preempted if its resolution is "inextricably intertwined with consideration of the terms of the labor contract."[66] In *Gonzalez*, however, the Illinois Supreme Court held that the tort of retaliatory discharge exists independently of the labor agreement and therefore is not preempted.[67]

The appellate courts typically did not find state claims preempted by federal labor law.[68] Complicating the issue, however, is

63. 29 U.S.C. § 185 (1982).

64. *Gonzalez*, 115 Ill. 2d at 14, 503 N.E.2d at 312. The employee in *Gonzalez* alleged that he was terminated for filing a workers' compensation claim against his employer. *Id.* at 5, 503 N.E.2d at 310. He did not file a grievance for violation of the just cause provision in his collective bargaining agreement. *Id.*

65. *Id.* at 6-9, 503 N.E.2d at 310-11 (citing Allis Chalmers v. Lueck, 471 U.S. 202 (1985)). In *Lueck*, the plaintiff was a union employee who filed a state law claim for "bad faith handling" of his request for benefits under an insurance policy established by his collective bargaining agreement. *Lueck*, 471 U.S. at 206. The *Lueck* court held that the plaintiff's tort claim was preempted by section 301 of the LMRA because it was "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Id.* at 220. The court's holding was based on established federal labor policy that a uniform body of federal labor law be maintained and that labor disputes be resolved by arbitration. *Id.* at 219-21. The *Lueck* court specifically cautioned against reading the holding as requiring preemption of "every state-law suit asserting a right that relates in some way to a provision in a collective bargaining agreement." *Id.* at 220. The Supreme Court, however, suggested that it might preempt under federal law a state law claim for wrongful or retaliatory discharge. *Id.* at 219.

66. *Lueck*, 471 U.S. at 213.

67. *Gonzalez*, 115 Ill. 2d at 11-13, 503 N.E.2d at 312. The *Gonzalez* court's characterization of retaliation claims based on discharge of an employee for exercising rights under the Workers' Compensation Act was based on the holding in Midgett v. Sackett-Chicago, 105 Ill. 2d 143, 473 N.E.2d 1280. The *Midgett* court had emphasized the strength of the Illinois public policy favoring the exercise of rights under the Workers' Compensation Act. *Midgett*, 105 Ill. 2d at 150-51, 473 N.E.2d at 1284. That court then described the tort of retaliatory discharge as "firmly rooted in [this] clearly mandated public policy." *Gonzalez*, 115 Ill. 2d at 9, 503 N.E.2d at 312.

68. *See, e.g.*, Richardson v. Illinois Bell Tel. Co., 156 Ill. App. 3d 1006, 510 N.E.2d 134 (2d Dist. 1987) (holding that the retaliation claim of an employee who invoked grievance procedures before filing his claim was not preempted; and further indicating that the claim could later be preempted by section 301 if the defendant established a legitimate basis for discharging the employee, suggesting that resolution of the pre-emption issue depends on the merits of each individual case); Byrd v. Aetna Casualty, 152 Ill. App. 3d

the Seventh Circuit's en banc decision in *Lingle v. Norge Division of Magic Chef*.[69] The *Lingle* court held, in contrast to *Gonzalez*, that retaliatory discharge cases are preempted under section 301 of the LMRA[70] if the plaintiff is a union employee subject to a collective bargaining agreement containing cause and grievance arbitration provisions.[71]

First, the *Lingle* court held that the case was removed properly.[72] Because the employee's claim could have been pleaded as a claim under the collective bargaining agreement, the court held that the claim could have been brought in federal court under section 301.[73] Accordingly, the court concluded that removal of the federal claim was not error.[74]

The *Lingle* court then considered whether the employee's claim was federally preempted.[75] Relying on *Lueck*, the court held that the outcome of retaliation cases necessarily requires interpretation of the contractual just cause provision.[76] Policy considerations clearly influenced the court's result on this issue.[77] The Court of Appeals held that, unless preempted, state law wrongful discharge claims will undermine the well-centered federal labor policies which the *Lueck* court also found compelling: the policies favoring a uniform body of federal labor law, and the resolution of employment disputes through private arbitration rather than court

292, 504 N.E.2d 216 (2d Dist. 1987) (holding that a plaintiff who allegedly invoked grievance procedures under a collective bargaining agreement was not re-litigating, was entitled to bring a retaliation claim, and was not subject to pre-emption); Beckman v. Freeman United Coal Mining Co., 151 Ill. App. 3d 47, 502 N.E.2d 64 (4th Dist. 1986) (holding that the retaliation claim of an employee was not barred by res judicata though the employee had arbitrated the issue of whether he had violated his employer's absenteeism provision); and Ryherd v. General Cable Co., 151 Ill. App. 3d 1, 504 N.E.2d 745 (4th Dist. 1986) (holding that the retaliation claim of a union employee was preempted because he had raised the claim during grievance procedures and lost).

69. 823 F.2d 1031 (7th Cir. 1987), *cert. granted*, 108 S. Ct. 226 (1987).

70. 29 U.S.C. § 185.

71. *Lingle*, 823 F.2d at 1046.

72. *Id.* at 1038.

73. *Id.* at 1040-42.

74. *Id.* at 1042. The *Lingle* court recognized that retaliatory discharge is considered an independent tort in Illinois. *Id.* at 1038-39. The court also recognized that the plaintiff's claim involved Workers' Compensation benefits and that 28 U.S.C. § 1445(c) prevents removal of any Workers' Compensation claims. *Id.* at 1039. The court held, however, that federal courts must examine the jurisdiction of each claim de novo. *Id.* Therefore, the state's characterization of the claim, whether as a tort claim or an action under the Workers' Compensation Act, did not establish the federal court's jurisdictional question. *Id.*

75. *Id.* at 1042.

76. *Id.* at 1046.

77. *Id.* at 1046-47.

actions.[78]

The United States Supreme Court has granted the employer's petition for certiorari in *Lingle*.[79] Until the Supreme Court rules, the preemption issue in Illinois will remain confused, the very situation the preemption doctrine is intended to avoid. Plaintiffs in retaliation cases will try to avoid federal court when, under *Lingle*, their claims will be preempted. It is unlikely, however, that they will be able to defeat a removal petition. The real confusion will exist for litigants now in state court who either did not try or had unsuccessfully attempted to remove before *Lingle* was decided. The lower state courts are likely to follow *Gonzalez* rather than *Lingle* even over defendants' arguments that federal decisional law should control the interpretation of section 301. The Illinois Appellate Court for the First District, however, has held that state courts should follow *Lingle*.[80]

B. Preemption of Other Claims

In *Sagen v. Jewel Co.*,[81] the Illinois Appellate Court for the Second District held that section 301 preempted a union employee's claim for tortious interference with employment relations.[82] The *Sagen* court held that preemption is a jurisdictional issue that may be raised for the first time on appeal.[83] Because the employee's claim required her to establish a breach of the collective bargaining agreement, the court held that the claim was preempted under section 301.[84]

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78. *Id.* *See supra* note 65 and accompanying text.

79. The federal courts of appeals are divided on the preemption issue. *Compare* Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2d Cir. 1987); Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120 (3d Cir. 1986); Peabody Galion v. A.V. Dollar, 666 F.2d 1309 (10th Cir. 1981) *with* Lingle v. Norge Div. of Magic Chef, 823 F.2d 1031 (7th Cir. 1987) *and* Johnson v. Hussman Corp., 805 F.2d 795 (8th Cir. 1986).

80. Netzel v. United Parcel Serv., 165 Ill. App. 3d 685, 520 N.E.2d 665 (1st Dist. 1987).

81. 148 Ill. App. 3d 447, 499 N.E.2d 662 (2d Dist. 1986).

82. *Id.* at 452-53, 499 N.E.2d at 665-66. The *Sagen* employee alleged that her employer enforced new company policies against her in an arbitrary and discriminatory manner. *Id.* at 449, 499 N.E.2d at 663. Though the employee was covered by a collective bargaining agreement, she did not pursue her complaint through the contract's grievance procedures. *Id.*

83. *Id.* at 450, 499 N.E.2d at 664.

84. *Id.* at 452, 499 N.E.2d at 665. The court reasoned that:

> [T]he very nature of the tort itself connotes employee-employer labor relations which are governed by a collective-bargaining agreement. Moreover, these claims appear to be those that traditionally should be resolved through arbitration. Maintenance of such a tort action requires plaintiff to show that the labor

In *Krasinski v. United Parcel Service, Inc.*,[85] the Illinois Appellate Court for the Third District decided that not every state claim with an arguable nexus to a collective bargaining agreement warrants preemption.[86] The plaintiff in *Krasinski* was a union employee terminated after his employer accused him of stealing company property.[87] He sued his employer for malicious defamation,[88] alleging that the employer published the defamatory theft accusations against the employee in a letter to the employee's union.[89] The court recognized that the employer sent the allegedly defamatory letter to the union because it was contractually obligated to notify the union of employee terminations.[90] The court held, however, that a cause of action for malicious defamation exists independently of the collective bargaining agreement and was not preempted.[91]

In *Missouri Portland Cement Co. v. United Cement*,[92] the Illinois Appellate Court for the Fifth District held that the defendant employees' tort and contract counterclaims[93] were preempted under the LMRA and the NLRA.[94] The employees described their contract as an employment agreement rather than a collective bargaining agreement.[95] The *Missouri Portland* court, however,

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agreement was breached; such a determination should be governed by Federal labor laws.

Id.

85. 155 Ill. App. 3d 831, 508 N.E.2d 1105 (3d Dist. 1987).

86. *Id.* at 840, 508 N.E.2d at 1110.

87. *Id.* at 833-34, 508 N.E.2d at 1106.

88. *Id.* at 832, 508 N.E.2d at 1106. The employee also filed a wrongful discharge claim which was later dismissed. *Id.*

89. *Id.* at 833-34, 508 N.E.2d at 1106. The letter set forth the theft allegations. *Id.* at 833, 508 N.E.2d at 1106.

90. *Id.* at 833-34, 508 N.E.2d at 1106.

91. *Id.* (citing Allis-Chalmers v. Lueck, 471 U.S. 202 (1985) and Gonzalez v. Prestress Engineering, 115 Ill. 2d 1, 6-8, 503 N.E.2d 308, 310-11 (1986)). The *Krasinski* court stated that the right to be free from malicious defamation is like the "right to invoke the Workers' Compensation Act without [punishment]" and is "firmly rooted in public policy." *Id.* at 840, 508 N.E.2d at 1110.

92. 153 Ill. App. 3d 1046, 506 N.E.2d 620 (5th Dist. 1987).

93. *Id.* at 1047-48, 506 N.E.2d at 622. The employer in *Missouri Portland* initiated the litigation by filing suit against unions and several union officers for the destruction of the employer's property during a strike. *Id.* at 1047, 506 N.E.2d at 622. The employees counterclaimed, alleging that the plaintiffs discriminated against striking members of the union by refusing to re-hire those employees. *Id.* The employees also asserted that plaintiff and others conspired to deprive the employees of their contract rights. *Id.* at 1047-48, 506 N.E.2d at 622.

94. *Id.* at 1050, 506 N.E.2d at 623 (citing the Labor Management Relations Act, 29 U.S.C. § 185 (1982); the National Labor Relations Act, 29 U.S.C. §§ 157, 158 (1982)).

95. *Id.* at 1048, 506 N.E.2d at 622.

recognized that the contract was a section 301 agreement[96] and held that the employees' claims were preempted.[97]

The state courts also dealt with preemption by the Employee Retirement Income Security Act ("ERISA")[98] in a few cases during the *Survey* year. In *U.S. Steel-South Works v. Industrial Commission*,[99] the Illinois Appellate Court for the First District held that section 4(i) of the Workers' Compensation Act (the "Act")[100] was not preempted by ERISA.[101] The court reasoned that because the state statutory provision only permitted an optional method for employers to provide death benefits, the state law did not intrude sufficiently into the employer's benefit programs to merit ERISA preemption.[102]

In *Golden Bear Family Restaurants v. Murray*,[103] the court held that an employer's vacation pay plan was not an employee benefit plan under ERISA[104] and was, therefore, subject to state regulation.[105] The employees in *Golden Bear* based their claim for vacation pay on an administrative interpretation of the Illinois Wage Payment and Collection Act (the "Wage Act").[106] That interpretation provided that vacation is earned pro rata and is not subject to forfeiture.[107] The appellate court, once concluding that ERISA did

96. *Id.* at 1049, 506 N.E.2d at 623.

97. *Id.* at 1050, 506 N.E.2d at 623 (applying Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)). *See supra* note 65.

98. 29 U.S.C. §§ 1002(1), 1003(b))(3), 1144(a), 1114(b)(2)(A)(b)(4) (1982).

99. 147 Ill. App. 3d 402, 499 N.E.2d 60 (1st Dist. 1986).

100. Workers' Compensation Act, ILL. REV. STAT. ch. 48, para. 138.4(i) (1985). Section 4(i) provides that "[i]f an employer elects to obtain a life insurance policy on his employees, he may also elect to apply such benefits in satisfaction of all or a portion of the death benefits payable under the Act, in which case, the employer's compensation premium will be reduced accordingly." *Id.* The plaintiff in *U.S. Steel* was the widow of one of the employer's former employees. *U.S. Steel*, 147 Ill. App. 3d at 404, 499 N.E.2d at 62. She was designated as the beneficiary of a life insurance policy the employer was obligated to provide to employees under the terms of a collective bargaining agreement. *Id.* The plaintiff asserted that the life insurance proceeds should not be set off against the death benefits owed by the employer because the employer had not made a proper election under section 4(i). *Id.* The court agreed. *Id.* at 405, 499 N.E.2d at 63.

101. *U.S. Steel*, 147 Ill. App. 3d at 409-10, 499 N.E.2d at 65-66. The plaintiff raised the issue of preemption for the first time on appeal, and the court could, therefore, have waived the issue. *Id.* at 406, 499 N.E.2d at 63-64. The court elected to address the issue because of its significance. *Id.* at 407, 499 N.E.2d at 64.

102. *Id.*

103. 144 Ill. App. 3d 616, 494 N.E.2d 581 (1st Dist. 1986).

104. ERISA, 29 U.S.C. § 1001 *et seq.* (1982).

105. *Golden Bear*, 144 Ill. App. 3d at 628, 494 N.E.2d at 588. The employer's plan was not set up as a trust, funded by a trust, or based on any writing that would establish the plan under ERISA. *Id.* at 622, 494 N.E.2d at 586.

106. *Id.* at 625-26, 494 N.E.2d at 588.

107. *Id.* (citing the Illinois Wage Payment and Collection Act, ILL. REV. STAT. ch.

not preempt the state statute, sustained this administrative construction of the Wage Act.[108]

IV. EMPLOYMENT DISCRIMINATION[109]

The Illinois Appellate Court for the Second District in *Pickering v. Human Rights Commission*[110] held that the one hundred and eighty-day time limit for filing a charge under the Human Rights Act[111] is a jurisdictional requirement.[112] The court rejected the employee's argument that the filing period should be considered a statute of limitations subject to tolling and equitable estoppel.[113]

48, para. 39m-5 (1985)). The employer in *Golden Bear* had refused to award two former employees any pay under the company vacation plan. *Id.* at 618, 494 N.E.2d at 582-83. The plan provided that " '[e]arned vacation is the amount of vacation to which an eligible employee becomes entitled to take in a calendar year if the employee is actively on the payroll working a regular schedule . . . on the Wednesday proceeding (sic) January 1.' " *Id.* at 618, 494 N.E.2d at 583. The employees were fired after working approximately ten months of the year. *Id.* They alleged that they were entitled to vacation pay under the terms of the Wage Act, which provides that vacation pay is earned on a pro rata basis. *Id.* at 619, 494 N.E.2d at 583.

108. *Id.* at 628, 494 N.E.2d at 589.

109. For cases during the *Survey* year involving racial discrimination, see Pioneer Life Ins. Co. v. Woodward, 152 Ill. App. 3d 236, 504 N.E.2d 230 (2d Dist. 1987) (holding that the Human Rights Commission's inference that a black employee was fired because of racial animus was against the manifest weight of the evidence); Loyola v. Human Rights Comm'n, 149 Ill. App. 3d 8, 500 N.E.2d 639 (1st Dist. 1986) (terminated employee established discrimination on the basis of dissimilar treatment of similarly situated employees); and Dept. of Corrections v. Adams, 146 Ill. App. 3d 173, 496 N.E.2d 1138 (1st Dist. 1986) (black job applicant with equal qualifications established prima facie case of discrimination by showing he was given inferior information to prepare for final and decisive interview).

For a case involving age discrimination, see Anderson v. Pistner, 148 Ill. App. 3d 616, 499 N.E.2d 566 (1st Dist. 1986) (holding that the plaintiff's complaint, which consistently referred to the employer's differential treatment of older employees, was a claim for age discrimination rather than for tortious interference with contract relations and prospective business advantage; therefore, the claim was barred by the exclusive remedy provision of the Illinois Human Rights Act).

For cases involving discrimination on the basis of handicap, see Kenall Mfg. Co. v. Human Rights Comm'n, 152 Ill. App. 3d 695, 504 N.E.2d 805 (1st Dist. 1987) (plaintiff was wrongfully terminated for a handicap because the condition was unrelated to the plaintiff's ability to perform his duties); Caterpillar, Inc. v. Human Rights Comm'n, 154 Ill. App. 3d 424, 506 N.E.2d 1029 (3d Dist. 1987) (holding that the plaintiff's handicap prevented her from performing the essential functions of her position; therefore, termination of the plaintiff was proper).

110. 146 Ill. App. 3d 340, 496 N.E.2d 746 (2d Dist. 1986).

111. ILL. REV. STAT. ch. 68, para. 7-102 (A)(1) (1985).

112. *Pickering*, 146 Ill. App. 3d at 347, 496 N.E.2d at 751.

113. *Id.* at 343, 496 N.E.2d at 749. The employee in *Pickering* was a sixty-year-old man with an eye condition that required surgery. *Id.* at 342, 496 N.E.2d at 747-48. He asserted that he was fired because of his age and handicap. *Id.* The employee contacted an attorney shortly after he was discharged, but the attorney attempted to settle the employee's dispute and did not file a charge against the employer under the Human Rights

The court reasoned that the charge filing provision, unlike other time periods in the Human Rights Act, was not statutorily described as "non-jurisdictional."[114]

In *Hardee's Food Systems, Inc. v. Human Rights Commission*,[115] the Illinois Appellate Court for the Fifth District held that a 1986 amendment to the Human Rights Act,[116] which provided for direct appellate court review of Human Rights Commission decisions, should be given retroactive effect.[117] Though the amendment did not expressly provide for retroactivity,[118] the court said that it should be given such effect unless a party's vested rights would be impaired.[119] The court, deciding that the *Hardee's* employer's due process rights were not violated because the employer had ample time to pursue an appeal of the Human Rights Commission's decision under the retroactively applied amendment, dismissed the employer's petition.[120]

V. WORKERS' COMPENSATION

A. Eligible Employees

In a case of first impression, the Illinois Appellate Court for the Fifth District in *Patton v. Industrial Commission*[121] analyzed the jurisdictional reach of the Illinois Workers' Compensation Act (the

Act until after the one hundred eighty-day period had expired. *Id.* at 342-43, 496 N.E.2d at 747-48.

114. *Id.* at 347, 496 N.E.2d at 751.

115. 155 Ill. App. 3d 173, 507 N.E.2d 1300 (5th Dist. 1987).

116. ILL. REV. STAT. ch. 68, para. 8-111(A)(3) (1985) (amended by Public Act 84-717, effective Jan. 1, 1986).

117. *Hardee's*, 155 Ill. App. 3d at 177, 507 N.E.2d at 1304. In a hearing before the Commission that concluded fifteen days prior to the passage of the amendment, the employer in *Hardee's* was found to have violated the Act. *Id.* at 175-76, 507 N.E.2d at 1302. The employer appealed the Commission's decision in the circuit court in accordance with the procedures in the pre-amendment Act. *Id.* at 176, 507 N.E.2d at 1303. When the plaintiff filed a motion to dismiss the defendant's appeal for lack of subject matter jurisdiction based on the amended Act, the defendant moved to transfer the appeal to the appellate court. *Id.* at 176, 507 N.E.2d at 1303. The circuit court granted this motion, but the *Hardee*'s court held that the transfer was invalid for lack of subject matter jurisdiction. *Id.* at 179, 507 N.E.2d at 1305.

118. *Id.* at 176, 507 N.E.2d at 1303.

119. *Id.* at 177, 507 N.E.2d at 1303. The court said that retroactivity was appropriate because the amendment was procedural in nature and did not contain a savings clause. *Id.* at 177-78, 507 N.E.2d at 1303.

120. *Id.* at 177-78, 507 N.E.2d at 1303-04. The employer asserted that his right to due process was violated because his right to appeal accrued before the effective date of the amendment. *Id.* at 177, 507 N.E.2d at 1303. Retroactive application of the amendment left the employer with nineteen days of a thirty-five-day appeal framework to file an appeal in appellate court. *Id.*

121. 147 Ill. App. 3d 738, 498 N.E.2d 539 (5th Dist. 1986).

"Act").[122] The claimant, an over-the-road, non-resident truck driver, asserted that his substantial mileage in Illinois was sufficient to establish jurisdiction over his workers' compensation claim.[123] The employer disagreed, asserting that the claimant spent less than half of his work time in Illinois.[124] Given these facts, the court held that the claimant's employment was not "principally localized" in Illinois.[125] The court dismissed the claim for lack of jurisdiction.[126]

The Illinois courts also continued to decide case-by-case whether a claimant is an "employee" eligible for benefits under the Act.[127] In *Lister v. Industrial Commission*,[128] the Illinois Appellate Court

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122. *Id.* at 741, 498 N.E.2d at 541. The Act covers:

> [P]ersons whose employment is outside the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made . . . .

ILL. REV. STAT. ch. 48, para. 138.1(b)(2) (1985). The claimant asserted that his employment was " 'principally localized' " in Illinois. *Patton*, 147 Ill. App. 3d at 740, 498 N.E.2d at 540.

123. *Patton*, 147 Ill. App. 3d at 740, 498 N.E.2d at 540-41. The claimant was employed by a Michigan corporation with its principal facility in Missouri. *Id.* at 739, 498 N.E.2d at 540. The claimant relied on the fact that he logged more miles in Illinois than in any other state. *Id.* at 740, 498 N.E.2d at 540.

124. *Id.* Though the claimant spent more work time in Illinois than in any other state, he spent only 48.7% of his total work time in Illinois. *Id.*

125. *Id.* at 745, 498 N.E.2d at 544. The court said the statutory language could support either party's construction of "principally localized." *Id.* at 741-43, 498 N.E.2d at 542-43 (citing ILL. REV. STAT. ch. 48, para. 138.1(b)(2) (1985)). When construing the term, the court relied on the definition of "principally localized" in a Model Act similar to the Illinois statute. *Id.* at 743, 498 N.E.2d at 543. The Model Act defined "principally localized" as where the employer maintains a regular place of business, or (if the first definition was not applicable) where the employee was domiciled and spent a substantial portion of his work time. *Id.*

126. *Id.* at 746, 498 N.E.2d at 544.

127. ILL. REV. STAT. ch. 48, para. 138.1 (1985). The definition of "employees" in the Illinois Workers' Compensation Act includes "every person in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside the State of Illinois." ILL. REV. STAT. ch. 48, para. 138.1(b)(2) (1985). For cases regarding loaned employees, see Trenholm v. Cooper, Inc., 152 Ill. App. 3d 6, 503 N.E.2d 1067 (5th Dist. 1986) (claimant who alleged that the defendant had no authority to hire or fire the claimant, that there was no contract of hire between the claimant and defendant, and that the claimant was actually an employee of a contractor working in the defendant's plant, stated a claim for benefits despite the defendant's allegations that the claimant was a loaned employee); Board v. Indus. Comm'n, 148 Ill. App. 3d 15, 499 N.E.2d 90 (3d Dist. 1986) (claimant who was not subject to direction or control of the defendant when performing his employment duties was not a loaned employee and was eligible for workers' compensation benefits).

128. 149 Ill. App. 3d 286, 500 N.E.2d 134 (3d Dist. 1986).

for the Third District held that an aluminum siding applicator was the respondent's employee and, therefore, was entitled to benefits under the Act.[129] The respondent asserted that the claimant was a subcontractor, relying on a form the claimant had signed.[130] The court held that the subcontractor form, though relevant, was not dispositive and applied the traditional right-to-control test.[131] The court found that the respondent exercised a "significant degree of control over the means by which the claimant accomplished his work."[132]

In *Reynolds v. Industrial Commission*,[133] the Illinois Appellate Court for the Fifth District held that the Industrial Commission properly decided that the claimant was a seasonal employee and was therefore ineligible for benefits under the Act.[134] The claimant, a plumber and pipefitter, relied on evidence showing the number of hours he had worked for the respondent to establish his permanent employee status.[135] The court, however, found more convincing the evidence that the respondent hired plumbers for only part of its operating year.[136]

B. Injury in the Course of Employment

The Illinois Supreme Court decided two cases during the *Survey* year concerning the types of injury compensable under the Act.[137]

129. *Id.* at 292, 500 N.E.2d at 138.

130. *Id.* at 288, 500 N.E.2d at 135. The subcontractor's form "stated that the siding applicator was to furnish his own tools, equipment, and workmen's compensation and general liability insurance." *Id.* The respondent claimed that the form established that the claimant was an independent contractor rather than an employee. *Id.* at 287, 500 N.E.2d at 135.

131. *Id.* at 290, 500 N.E.2d at 136.

132. *Id.* at 292, 500 N.E.2d at 136. The court cited evidence that the respondent often inspected the claimant's work, helped the claimant if the claimant was behind schedule, told the claimant where to work on several occasions, loaned the claimant a truck for work, and considered the claimant a "full time" worker. *Id. Compare* Lowe v. Industrial Commission, 154 Ill. App. 3d 958, 507 N.E.2d 881 (4th Dist. 1987) (holding that a claimant who was paid on a piecework basis but used his own tools and truck, hired his own crew, and paid his crew, was an independent contractor).

133. 151 Ill. App. 3d 695, 502 N.E.2d 1178 (5th Dist. 1986).

134. *Id.* at 700, 502 N.E.2d at 1181.

135. *Id.*

136. *Id.* The respondent operated all year but hired plumbers for two hundred or less days per year. *Id.*

137. An injury is compensable under the Act only if it "arises out of" and "in the course of" employment. ILL. REV. STAT. ch. 48, para. 138.2 (1985). For appellate court decisions considering these standards, see Lemons v. Indus. Comm'n, 155 Ill. App. 3d 125, 507 N.E.2d 884 (3d Dist. 1987) (plaintiff established injury but her seven-month delay in seeking medical assistance precluded a finding that her injury arose when she fell while working for her employer); Luckenbill v. Indus. Comm'n, 155 Ill. App. 3d 106, 507

In *Peoria County Belwood Nursing Home v. Industrial Commission*,[138] the Illinois Supreme Court held that an injury caused by work-related repetitive trauma was compensable.[139] The employee's duties included the operation of two large washing machines in the employer's laundry room.[140] She suffered a wrist injury through her long-term operation of this equipment.[141] The employer asserted that the employee's injury, which could not be traced to a specific incident, date, or place of occurrence, was not compensable because the injury was not accidental and because the claim was barred by the three-year statute of limitations.[142] Construing the Act liberally, the court rejected the employer's contentions.[143] The court reasoned that requiring an employee to suffer "complete collapse" from repetitive trauma merely so that the injury could be traced to a specific incident would be contrary to the purposes of the Act.[144] Additionally, the court held that the statute of limitations for repetitive trauma injury claims begins to run on the date the injury manifests itself.[145]

In *Orsini v. Industrial Commission*,[146] the Illinois Supreme Court

N.E.2d 1185 (4th Dist. 1987) (employee established injury in course of employment by producing medical evidence of injury attributable to back pain first experienced while lifting parts at work); Law Offices of William Schooley v. Indus. Comm'n, 151 Ill. App. 3d 1069, 503 N.E.2d 1186 (5th Dist. 1987) (employee who was required to manage his employer's softball team, and to play if other players were absent, suffered compensable injury during a company softball game); Northern Illinois Gas Co. v. Indus. Comm'n, 148 Ill. App. 3d 48, 498 N.E.2d 327 (2d Dist. 1986) (a gap in time between the employee's first heart attack caused by work activity and his fatal heart attack did not preclude a finding of causation between the employee's work and his death); Board of Ed. v. Indus. Comm'n, 146 Ill. App. 3d 937, 497 N.E.2d 447 (1st Dist. 1986) (death of school custodian with health problems, which occurred shortly after the decedent moved a three hundred fifty-pound desk, arose out of the decedent's employment); Oscar Mayer Foods Corp. v. Indus. Comm'n, 146 Ill. App. 3d 315, 496 N.E.2d 515 (4th Dist. 1986) (an employee hit by a car as she walked to the company parking lot to get her own car was injured on the employer's premises and in the course of her employment).

138. 115 Ill. 2d 524, 505 N.E.2d 1026 (1987).

139. *Id.* at 530, 505 N.E.2d at 1028.

140. *Id.* at 527, 505 N.E.2d at 1027.

141. *Id.*

142. *Id.* at 527-28, 505 N.E.2d at 1027 (citing ILL. REV. STAT. ch. 48, para. 138.6(d) (1985)).

143. *Id.* at 529-30, 505 N.E.2d at 1028.

144. *Id.* at 529, 505 N.E.2d at 1028. The court stated that the purpose of the Act is "to provide financial protection for injured workers regardless of a showing of negligence or contributory negligence, while precluding the employee from common law tort remedies." *Id.* The court believed that the purpose of the Act would best be served by compensating employees for repetitive trauma injury if the employee established that the injury was "caused by the performance of the claimant's job and has developed gradually over a period of time." *Id.*

145. *Id.* at 530-31, 505 N.E.2d at 1028-29.

146. 117 Ill. 2d 38, 509 N.E.2d 1005 (1987).

denied benefits to an auto mechanic who was injured while repairing his own car during work hours.[147] The court conceded that the employee was injured while performing his usual activities with his employer's approval.[148] The court stressed, however, that the employee's work duties did not extend to repair of his own car. Thus, the court concluded that the employee's injury did not arise out of his employment.[149]

C. *Death Benefits*

In *Stewart v. Industrial Commission*,[150] the Illinois Supreme Court decided whether a widow's death benefits should continue when she was the deceased's second wife, had no responsibility for the decedent's minor children, and remarried.[151] The claimant argued that the Illinois Supreme Court's interpretation of section 7(a) of the Act[152] required that she be awarded lifetime benefits despite her remarriage because the decedent's minor children still were entitled to benefits.[153] Although admitting a "latent ambiguity" in the language of the statute,[154] the court distinguished the authority relied on by the claimant and held that the claimant was

147. *Id.* at 42-43, 509 N.E.2d at 1009.

148. *Id.* at 42-43, 509 N.E.2d at 1008-09. Throughout the six year term of the employee's tenure, the employer allowed the employee to work on his own car during slow periods of his shift. *Id.* at 42, 509 N.E.2d at 1007. The employee used the employer's tools for the repair. *Id.*

149. *Id.* at 47, 509 N.E.2d at 1009. The *Orsini* court stated that "an injury 'arising out of' one's employment may be defined as one which has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury." *Id.* In contrast, injury from non-employment risks are "personal to the employee" and do not arise out of employment. *Id.* The employee's injury, which arose from a hazard the employee would have been exposed to regardless of his employment, was personal. *Id.* at 49, 509 N.E.2d at 1010.

150. 115 Ill. 2d 337, 504 N.E.2d 84 (1987).

151. *Id.* at 338-39, 504 N.E.2d at 85.

152. ILL. REV. STAT. ch. 48, para. 138.7(a) (1985). Section 7(a) provides that:

> In the event of the remarriage of a widow or widower, where the decedent did not leave surviving any child or children who, at the time of such remarriage, are entitled to compensation benefits under this Act, the surviving spouse shall be paid a lump sum equal to 2 years compensation benefits and all further rights of such widow or widower shall be extinguished.

Id.

153. *Stewart*, 115 Ill. 2d at 339-40, 504 N.E.2d at 85-86 (citing Interlake, Inc. v. Indus. Comm'n., 95 Ill. 2d 181, 447 N.E.2d 339 (1983)). In *Interlake*, the Illinois Supreme Court held that a remarried widow is entitled to lifetime benefits under the Act if any of the decedent's children are still entitled to benefits at the time of the widow's remarriage. *Interlake*, 92 Ill. 2d at 191, 447 N.E.2d at 344-45.

154. *Stewart*, 115 Ill. 2d at 340, 504 N.E.2d at 86 (citing ILL. REV. STAT. ch. 48, para. 138.7(1)(1985)). The court said that "the very fact that the remarriage provision is stated in the negative in itself creates an ambiguity. The provision . . . only states what is

eligible only for a lump sum settlement upon her remarriage.[155]

The court faced a slightly different question in *G.W. Kennedy Construction Co. v. Industrial Commission*.[156] There, the Illinois Appellate Court for the Second District considered whether an ex-spouse whose divorce decree was vacated after her ex-husband's death was a widow entitled to death benefits.[157] The claimant in *G.W. Kennedy* asserted that the order vacating her divorce decree legally restored her to the status of the decedent's wife.[158] The court agreed, stressing that "the marital rights, obligations, and status of the parties are revived and restored" when a divorce decree is vacated.[159] Consequently, the claimant was eligible to receive section 7(a) benefits as the decedent's widow.[160]

D. Exclusivity of Remedy

In *Ocasek v. Krass*,[161] the Illinois Appellate Court for the First District continued to construe narrowly the exceptions to the exclusivity of the workers' compensation remedy.[162] The *Ocasek* claimant's decedent was killed in an airplane accident while on a business trip.[163] The decedent's employer was piloting the plane at the time of the crash.[164] The claimant invoked the dual capacity

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to occur if the decedent did *not* leave children who are eligible for benefits at the time of the surviving spouse's remarriage." *Id.* (emphasis in original).

155. *Id.* at 342, 504 N.E.2d at 86-87. The court distinguished the facts of *Interlake*, noting that the *Interlake* claimant was the natural mother of the surviving children. *Id.* at 340, 504 N.E.2d at 85. Because the *Stewart* court viewed the purpose of the Act as remedial legislation designed to provide financial support to "families whose principal wage earner dies leaving a financially dependent spouse, especially when the surviving spouse is left with minor children," the court held that application of the *Interlake* rationale to the *Stewart* facts would lead to an "anomalous" and "absurd" result. *Id.* at 340-41, 504 N.E.2d at 85-86. In separate dissenting opinions, Justices Ward and Goldenhersh asserted that the interpretation of section 7(a) set forth in *Interlake* clearly controlled this case. *Id.* at 343-47, 504 N.E.2d at 87-89 (relying on *Interlake*, 95 Ill. 2d 181, 447 N.E.2d 339 (1983) (Ward, J. and Goldenhersh, J., dissenting)).

156. 152 Ill. App. 3d 114, 503 N.E.2d 1169 (2d Dist. 1987).

157. *Id.* at 121, 503 N.E.2d at 1174.

158. *Id.* at 116-17, 503 N.E.2d at 1171.

159. *Id.* at 120, 503 N.E.2d at 1173. The court characterized contrary authority as reflecting a minority view. *Id. See* Deremiah v. Powers-Thompson Construction Co., 125 Ind. App. 662, 129 N.E.2d 425 (1955).

160. *Kennedy Const. Co.*, 152 Ill. App. 3d at 122, 503 N.E.2d at 1174.

161. 153 Ill. App. 3d 215, 505 N.E.2d 1258 (1st Dist. 1987).

162. *Id.* at 217-18, 505 N.E.2d at 1259-60. The terms of the Workers' Compensation Act provide that a plaintiff who makes a claim under the Act is limited to the recovery provided by the Act. ILL. REV. STAT. ch. 48, para. 138.5(a) (1985).

163. *Ocasek*, 153 Ill. App. 3d at 216, 505 N.E.2d at 1258-59.

164. *Id.*

doctrine,[165] asserting that the employer assumed distinct duties to exercise due care both as an employer and as a pilot.[166] The court rejected the claimant's position, saying it was a minority position based on outdated law.[167]

E. Computation of Awards

In *Hardin Sign Co. v. Industrial Commission*,[168] the Illinois Appellate Court for the First District held that the thirty month period for filing a second petition for recomputation of benefits[169] commenced on the date the Industrial Commission decided the first recomputation petition.[170] The employer argued that the employee's second section 19(h) petition was not timely because it was filed more than thirty months after the original award to the employee.[171] The court said that the Workers' Compensation Act is

165. *Id.* at 218-19, 505 N.E.2d at 1260. One of the few exceptions to the exclusivity of the workers' compensation remedy is the dual capacity doctrine. *Ocasek*, 153 Ill. App. 3d at 217, 505 N.E.2d at 1259. The dual capacity doctrine permits additional recovery when the employer violated a second and distinct duty owed to the injured employee and violation of that additional duty was a cause of the employee's injury. *Id.* A dual relationship consists of two elements. *Id.* First, the claimant must show that the employer stood in a relationship with the employee that "generate[d] obligations unrelated to those flowing from the first, that of employer." Smith v. Metropolitan Sanitary District, 77 Ill. 2d 313, 319, 396 N.E.2d 524, 527 (1979). Second, the claimant must demonstrate that the employer acted as a "distinct separate legal persona." Sharp v. Gallagher, 95 Ill. 2d 322, 328, 447 N.E.2d 786, 788 (1983).

166. *Ocasek*, 153 Ill. App. 3d at 218, 505 N.E.2d at 1260 (relying on Rosales v. Verston Allsteel Press Co., 41 Ill. App. 3d 787, 354 N.E.2d at 553 (1976)). Under the test cited by the claimant, a role that "creates legal obligations on the part of the employer to the public in general and not just to its employees" establishes a second capacity under the dual capacity doctrine. *Id.*

167. *Id.* at 218-19, 505 N.E.2d at 1260. The court noted that the holding cited by the plaintiff was based on California authority that was subsequently overruled through legislative action. *Id.* at 218-19, 505 N.E.2d at 1260. *See* Siva v. General Tire & Rubber Co., 146 Cal. App. 3d 152, 194 Cal. Rptr. 51 (4th Dist. 1983); Moreno v. Leslie's Pool Mart, 110 Cal. App. 3d 179, 167 Cal. Rptr. 747 (2d Dist. 1980); Douglas v. E. & J. Gallo Winery, 69 Cal. App. 3d 103, 137 Cal. Rptr. 797 (5th Dist. 1977).

168. 154 Ill. App. 3d 386, 506 N.E.2d 1066 (1st Dist. 1986).

169. ILL. REV. STAT. ch. 48, para. 138.19(h) (1985). Section 19(h) provides that claimants who are awarded benefits for injuries suffered in accidents that occur after July 1, 1955 "may at any time within 30 months after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished, or ended." *Id.*

170. *Hardin*, 154 Ill. App. 3d at 390, 506 N.E.2d at 1069. The court further held that the Industrial Commission's original determination that the claimant's condition had not changed materially was supportable by the conflicting medical testimony. *Id.* The court therefore set aside the award of additional compensation to the claimant. *Id.* For an additional case regarding a change in medical condition, see Ruff v. Industrial Comm'n, 149 Ill. App. 3d 73, 500 N.E.2d 553 (1st Dist. 1986).

171. *Hardin*, 154 Ill. App. 3d at 388, 506 N.E.2d at 1068-69.

remedial legislation and, therefore, should be construed liberally and in a manner entitling the employee's second section 19(h) petition.[172]

In *Killian v. Industrial Commission*,[173] the Illinois Appellate Court for the First District denied an employer credit under section 8(e)(17),[174] a benefit recomputation provision, for previous payments made to the claimant for a back injury.[175] The claimant in *Killian* was hospitalized three separate times for work-related injuries to his lower back.[176] The employer sought reduction of the claimant's awards for the second and third injuries by the amounts he paid the claimant for the first accident.[177] The *Killian* court held that under section 8(e)(17), an employer can receive credit for previously paid benefits only when an employee has reinjured a body part listed in section 8(e).[178] Because the back is not listed in section 8(e), the court denied the employer's request for credit.[179]

VI. UNEMPLOYMENT COMPENSATION

A. Eligibility

In *Ferretti v. Department of Labor*,[180] the only Illinois Supreme Court decision during the *Survey* year concerning eligibility under the Unemployment Insurance Act,[181] the court held that the claim-

172. *Id.* at 389-90, 506 N.E.2d at 1069.

173. 148 Ill. App. 3d 975, 500 N.E.2d 450 (1st Dist. 1986).

174. Workers' Compensation Act, ILL. REV. STAT. ch. 48, para. 138.8(e)(17) (1985). That section states:

> In computing the compensation to be paid to any employee who, before the accident for which he claims compensation, had before that time sustained an injury resulting in the loss by amputation or partial loss by amputation of any member, including hand, arm, thumb or fingers, leg, foot or any toes, such loss or partial loss of any such member shall be deducted from any award made for the subsequent injury.

Id.

175. *Killian*, 148 Ill. App. 3d at 979, 500 N.E.2d at 453.

176. *Id.* at 976, 500 N.E.2d at 451.

177. *Id.*

178. *Id.* at 978-79, 500 N.E.2d at 452-53. Section 8(e) lists the thumb, each finger, each toe, distal phalanx, hand, arm, foot, leg, eye, ear, and testicle. ILL. REV. STAT. ch. 48, para. 138.8(e) (1985). The court inferred that section 8(e)(17) credits apply to reinjury of parts listed in section 8(e) because the reductions are only appropriate where the claimant has reinjured a body part previously amputated or partially amputed and all body parts listed in section 8(e) are severable. *See Killian*, 148 Ill. App. 3d at 978-79, 500 N.E.2d at 453.

179. *Killian*, 148 Ill. App. 3d at 978-79, 500 N.E.2d at 452-53.

180. 115 Ill. 2d 347, 506 N.E.2d 560 (1987).

181. Unemployment Insurance Act, ILL. REV. STAT. ch. 48, paras. 300 *et seq.* (1985).

ant produced sufficient evidence that he was actively seeking work within the meaning of the Act.[182] The claimant in *Ferretti* allegedly was fired for poor job performance.[183] He applied for benefits under the Unemployment Insurance Act, but his claim was denied by a hearing referee on the grounds that he was not actively seeking work.[184] To establish his eligibility for benefits, the claimant produced detailed documentation of advertisements he answered and phone calls he made while looking for work.[185] Some of the claimant's job search records, however, were prepared from memory after he filed his unemployment benefits claim.[186] The Illinois Supreme Court nonetheless held that the claimant's documentation was sufficient to support a finding that he conducted a reasonable, sufficient job search.[187]

In *Eddings v. Illinois Department of Labor*,[188] the Illinois Appellate Court for the First District held that two former teachers who did not seek work as substitute teachers were eligible for unemployment insurance benefits.[189] The court emphasized that claimants under the Unemployment Insurance Act cannot reject suitable work without good cause,[190] but good cause is determined case-by-case.[191] The court reviewed compelling evidence that sub-

182. *Ferretti*, 115 Ill. 2d at 354, 506 N.E.2d at 562-63. The Unemployment Insurance Act provides that an individual may receive benefits if "[h]e is able to work, and is available for work; provided that during the period in question he was actively seeking work." ILL. REV. STAT. ch. 48, para. 420(C) (1985).

183. *Ferretti*, 115 Ill. 2d at 349-50, 506 N.E.2d at 560.

184. *Id.* at 350, 506 N.E.2d at 560-61. The claimant's claim was originally denied on the grounds that the claimant was terminated for misconduct, but that determination was reversed on remand. *Id.* at 350-51, 506 N.E.2d at 561-62.

185. *Ferretti*, 115 Ill. 2d at 351, 506 N.E.2d at 561. This documentation described forty-eight job contacts within a twenty-four-week period. *Id.* at 354, 506 N.E.2d at 562. The claimant attributed the low number of contacts to the limited demand for painters during winter months. *Id.*

186. *Id.* at 351-52, 506 N.E.2d at 561.

187. *Id.* at 354, 506 N.E.2d at 563.

188. 146 Ill. App. 3d 62, 496 N.E.2d 1167 (1st Dist. 1986).

189. *Id.* at 67, 496 N.E.2d at 1170. The claimants in this consolidated action were terminated from their full-time teaching positions. *Id.* at 64, 496 N.E.2d at 1168. One claimant attempted substitute teaching for a brief period but abandoned it after deciding to change his profession. *Id.* The other claimant never sought substitute work and concentrated her job search exclusively on full-time teaching opportunities though she had extensive secretarial skills. *Id.* at 65, 496 N.E.2d at 1168-69.

190. ILL. REV. STAT. ch. 48, para. 433 (1985), which provides that "an individual shall be ineligible for benefits if he has failed, without good cause, either to apply for available, suitable work when so directed by the employment office or the Director."

191. *Eddings*, 146 Ill. App. 3d at 66-67, 496 N.E.2d at 1170. The court stated that good cause "may be found in the claimant's personal circumstances or his unsuitability for the particular job and should be judged by the reasonableness of the claimant's actions in light of the circumstances which exist in his particular case." *Id.*

stitute teachers comprise a large worker pool that exceeds demand, work on a day-to-day basis, and suffer a forty percent reduction in salary.[192] Accordingly, the court found it reasonable for the claimants not to seek substitute teaching positions.[193]

B. Computation of Benefits

In *Northern Trust Co. v. Bernardi*,[194] the Illinois Supreme Court considered the manner in which the Director of Labor computed an employer's unpaid insurance contributions under the Act.[195] The Director increased the *Northern Trust* employer's contribution rate over a four-year period by subtracting unpaid, overdue contribution amounts from a factor in the equation used to determine those rates.[196] Under the Director's method, the employer's contribution rate was recomputed each time the Director determined a deficiency in the employer's contributions that was not satisfied within thirty days.[197] The court held that the Director's method was improper because the statute allows the employer twenty-five months to cure original deficiencies before any benefit-wage ratio recomputation is applied.[198] Therefore, the court held that the Act "does not allow revision of past years' rates based upon an employer's failure to pay deficiencies of an earlier year created by a retroactive rate revision."[199]

The Illinois appellate courts also considered questions concerning the recoupment of benefits paid under the Act. In *Vaught v. Department of Labor*,[200] the Illinois Appellate Court for the First

192. *Id.* at 67, 496 N.E.2d at 1170.

193. *Id.*

194. 115 Ill. 2d 354, 504 N.E.2d 89 (1987).

195. *Id.* at 357, 504 N.E.2d at 90. The court applied section 1503 (A) of the Unemployment Insurance Act, ILL. REV. STAT. ch. 48, para. 573(A) (1981). *Northern Trust*, 115 Ill. 2d at 357-58, 504 N.E.2d at 90. The court stated that section 1503(A), which defines the benefit-wage ratio used in calculating interest due on unpaid employment insurance, provides that:

> [T]he ratio is arrived at by dividing the employer's "benefit wages" (a figure related, though not equal, to unemployment-compensation claims charged against the employer's account) by the total "wages . . . on which contributions were paid."

Id. at 358, 504 N.E.2d at 90.

196. *Northern Trust*, 115 Ill. 2d at 359-62, 504 N.E.2d at 91-93. The employer's deficiency arose when the Director corrected the employer's 1978 contribution rate and the employer failed to contribute the additional amount due under the corrected rate within thirty days. *Id.* at 359, 504 N.E.2d at 91.

197. *Id.* at 361-62, 504 N.E.2d at 91-92.

198. *Id.* at 363, 504 N.E.2d at 93.

199. *Id.* at 365-66, 504 N.E.2d at 94.

200. 152 Ill. App. 3d 340, 504 N.E.2d 250 (2d Dist. 1987).

District held that social security benefits paid to a claimant who still sought a place in the work force cannot be recouped by the state if the claimant is otherwise eligible for unemployment insurance benefits.[201] The Illinois Appellate Court for the First District also rejected the state's recoupment claim in *Weingart v. Department of Labor*,[202] construing the Act as establishing a one-year statutory limitation period for the state's determination that benefits were paid to an ineligible claimant and finding that the state failed to act within that period.[203]

VII. THE PUBLIC SECTOR

A. Illinois Public Labor Relations Act (The "IPLRA")

Rejecting the most comprehensive challenge yet advanced against the IPLRA, the Illinois Supreme Court in *County of Kane v. Carlson*[204] held that the IPLRA was constitutional[205] and that its application to judicial employees does not violate the separation of powers doctrine.[206] In *Carlson*, the court consolidated two actions.[207] One action involved the employer's challenge to a union's request for a representation election among the "nonsupervisory employees" in the Kane County circuit clerk's office.[208] The other case dealt with unfair labor practice charges against a judge.[209]

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201. *Id.* at 346, 504 N.E.2d at 254. The court stated that section 611 (A)(2) of the Act, which describes "disqualifying income" subject to offsetting, does not include social security benefits. *Id.* at 345, 504 N.E.2d at 253 (citing ILL. REV. STAT. ch. 48, para. 441 (A)(2) (1985)).

202. 147 Ill. App. 3d 1076, 498 N.E.2d 762 (1st Dist. 1986).

203. *Id.* at 1080, 498 N.E.2d at 765. The court stated that section 900D of the Act authorizes the State's recoupment of benefits paid to ineligible claimants, but the court also recognized that a precondition to such a recoupment was a redetermination of the claimant's eligibility pursuant to the terms and limitations of section 900A of the Act. *Id.* (citing ILL. REV. STAT. ch. 48, paras. 490A-490D (1985)).

204. 116 Ill. 2d 186, 507 N.E.2d 482 (1987).

205. *Id.* at 211, 507 N.E.2d at 491.

206. *Id.* at 209, 507 N.E.2d at 491. The plaintiffs asserted that "application of the IPLRA to judicial employees would violate the separation of powers principle and would trench on the general administrative and supervisory authority vested by the Constitution in the judicial branch." *Id.* at 201, 507 N.E.2d at 487.

207. *Id.* at 194, 507 N.E.2d 484.

208. *Id.* The union asserted that it had demonstrated sufficient interest among the deputy circuit clerks and requested a representation election. *Id.* The plaintiff county sought an injunction to prevent the election on the grounds that "the deputy circuit clerks were not employees under the Act, that the Act was unconstitutional on its face and as applied to the county, and that the county was the sole employer of the deputy clerks." *Id.*

209. *Id.* at 195, 507 N.E.2d at 484. A judge was charged with refusing to sign a collective bargaining agreement and with interfering with a probation officer's rights under the IPLRA. *Id.* at 195-96, 507 N.E.2d at 484. The judge sought a writ of manda-

The plaintiffs argued that the IPLRA was unconstitutional because it denied equal protection,[210] was not passed by a sufficient vote,[211] violated the state constitution's "single-subject requirement,"[212] and was amended improperly under the governor's amendatory veto power.[213] The court held that each of these arguments failed to rebut the presumption that the IPLRA was constitutional.[214]

The *Carlson* court also held that the judicial branch fell within the scope of the IPLRA and that both judges and circuit clerks constitute employers within the meaning of the IPLRA.[215] The court indicated that the judiciary's administrative and supervisory powers did not require exclusive control over "every detail affecting personnel."[216] In any event, the court concluded that the statute's effect on these powers was collateral and nondestructive and, therefore, was not prohibited by the Illinois Constitution.[217]

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mus or a prohibition against any further action on the unfair labor practice charges. *Id.* at 195, 507 N.E.2d at 484.

210. *Id.* at 211, 507 N.E.2d at 491. The plaintiffs argued that the specific exclusion of educational employees and non-state peace officers from the scope of the IPLRA violated equal protection. *Id.* The court, noting that amendments to the IPLRA removed the exclusionary provisions, chose to consider the validity of the current Act and considered the argument moot. *Id.* at 212, 507 N.E.2d at 491-92.

211. *Id.* at 212, 507 N.E.2d at 492. The plaintiffs read the IPLRA sections empowering employers to perform in the negotiation process as a measure restricting home rule and, therefore, requiring a three-fifths majority vote of each house to pass. *Id.* The court held that home rule was not restricted because the State did not renounce control over the negotiations. *Id.* at 213, 507 N.E.2d at 492.

212. *Id.* at 213-14, 507 N.E.2d at 493. The state constitution provides that "[b]ills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject." ILL. CONST. art. IV, § 8(d). The court, stating that "[t]he term 'subject' is comprehensive in its scope and may be as broad as the legislature chooses, so long as the matters included have a natural or logical connection," held that the IPLRA dealt with topics sufficiently related and, therefore, did not violate the state constitution. *Carlson*, 116 Ill. 2d at 213-14, 507 N.E.2d at 493.

213. *Carlson*, 116 Ill. 2d at 215, 507 N.E.2d at 493. The court held that the governor's proposals, consisting of recommendations that the legislators delete educational employees from the IPLRA, create a "bistate development agency" to deal with jurisdictional problems, make an anti-injunction act applicable to the IPLRA, and add two directors, did not alter the basic purpose of the IPLRA, and did not constitute improper use of the amendatory veto power. *Id.* at 215-16, 507 N.E.2d at 493-94.

214. *Id.* at 216, 507 N.E.2d at 494.

215. *Id.* at 201-02, 507 N.E.2d at 487-88. In one case, the court held that the circuit clerk was the employer of deputy clerks. *Id.* at 200, 507 N.E.2d at 487. In the other action, the court determined that judges were the employers of probation officers. *Id.* at 201, 507 N.E.2d at 487. *See also* Rockford v. Illinois State Labor Relations Bd., 158 Ill. App. 3d 166, 512 N.E.2d 100 (2d Dist. 1987) (city and library were joint employers of library employees when the city controlled the library's financing and the library, therefore, could not engage in meaningful collective bargaining without the city).

216. *Id.* at 208, 507 N.E.2d at 490.

217. *Id.* at 209, 507 N.E.2d at 490-91. The court specifically declined to consider

In *Decatur v. Illinois State Labor Relations Board*,[218] the Illinois Appellate Court for the Fourth District held that section 7 of the IPLRA,[219] which requires good faith negotiation over employment conditions unless those conditions are otherwise established by law, did not require arbitration of disciplinary matters controlled by the terms of the Illinois Municipal Code (the "IMC").[220] The city, a home rule unit, refused to negotiate with the union on the grounds that employee discipline procedures were established by operation of law under civil service provisions in the IMC.[221]

The union responded that the city's argument, if successful, would enable the city to use its home rule status to enact ordinances governing employment conditions, thereby insulating those conditions from the section 7 duty to negotiate.[222] The court determined that ordinances enacted by a home rule unit are not laws within the meaning of section 7 and cannot prevent negotiation.[223] In contrast, the court emphasized that state law, such as the IMC, can remove certain employment subjects from the statutory duty to

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"whether the Act violates principles of judicial immunity, and whether the Act is unconstitutional for permitting strikes by employees of the judicial branch, and, if a strike is enjoined, for committing to appointees of the executive branch the power to accept or reject an arbitral decision affecting judicial personnel." *Id.*

218. 149 Ill. App. 3d 319, 500 N.E.2d 573 (4th Dist. 1986).

219. The IPLRA provides that:

> The duty 'to bargain collectively' shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty to bargain collectively and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

ILL. REV. STAT. ch. 48, para. 1607 (1985).

220. *Decatur*, 149 Ill. App. 3d at 320, 500 N.E.2d at 574 (citing ILL. REV. STAT. ch. 24, paras. 10-1-1 *et seq.* (1985)).

221. *Id.* at 320-21, 500 N.E.2d at 574-75. The city, viewing the civil service provisions of the IMC as law, argued that the limitations on the duty to negotiate in section 7 applied and should be given their plain meaning. *Id.* at 321, 500 N.E.2d at 574-75. The union argued that the limitations in section 7 should not apply because the IPLRA was remedial legislation and the limitations should, therefore, be construed narrowly. *Id.* at 322, 500 N.E.2d at 575. Under the union's interpretation of section 7, the city's failure to bargain was an unfair labor practice. *Id.* at 320, 500 N.E.2d at 574.

222. *Id.* at 322, 500 N.E.2d at 575. The court noted that the city could accomplish this by enacting ordinances to withdraw itself from the scope of laws such as the IMC, establishing its own provisions through ordinance, and asserting that these ordinances were also "laws" that suspended the duty to negotiate in section 7 of the IPLRA. *Id.* at 326, 500 N.E.2d at 575-78.

223. *Id.* at 323, 500 N.E.2d at 575-76. This determination, which the court considered crucial to its holding, was based on article VII, section 6 of the Illinois Constitution, ILL. CONST. art. VII, § 6 (1970). *Id.* at 323, 326, 500 N.E.2d at 576, 578.

bargain.[224] Therefore, the court held that the city's refusal to negotiate employee discipline procedures was not an unfair labor practice.[225]

In *Laborer's International Union v. Illinois State Labor Relations Board*,[226] a case of first impression, the Illinois Appellate Court for the Fifth District held that the IPLRA permits appellate review of decisions by the Illinois State Labor Relations Board (the "ISLRB") on representation matters.[227] The respondent, who sought to block review of an ISLRB order dismissing the union's representation petition,[228] asserted that judicial review was improper because the IPLRA, like the NLRA, provides for review only of unfair labor practices.[229] The court disagreed, stating that the General Assembly specifically declined to follow the NLRA provisions restricting review of representation claims.[230] The court held that all types of claims under the IPLRA are subject to judicial review.[231]

B. School Code

In *Board of Education of the City of Chicago v. State Board of*

224. *Id.* at 326, 500 N.E.2d at 578. The court analogized the IPLRA exemption of matters in the Municipal Code from the duty to bargain to the IELRA exemption of the statutory rights of tenured teachers from the duty to bargain. *Id.* at 325, 500 N.E.2d at 577.

225. *Id.* at 321-22, 500 N.E.2d at 575.

226. 154 Ill. App. 3d 1045, 507 N.E.2d 1200 (5th Dist. 1987).

227. *Id.* at 1047, 1053-54, 507 N.E.2d at 1202, 1206.

228. *Id.* at 1047, 507 N.E.2d at 1202. The ISLRB had dismissed the union's representation petition for lack of jurisdiction over the controversy. *Id.* The ISLRB's decision was based on a determination that the city the petitioner sought to organize did not have twenty-five "public employees" within the meaning of section 3(m) of the IPLRA and, therefore, fell outside the jurisdictional scope of the IPLRA. *Id.* at 1058, 507 N.E.2d at 1208 (citing ILL. REV. STAT. ch. 48, paras. 1063(m) and 1620 (b) (1984)). Section 3(m) provides that "any individual employed by a public employer" is a public employee within the meaning of the Act "unless the context otherwise requires," and it specifically excludes supervisors unless otherwise provided. ILL. REV. STAT. ch. 48, para. 1063(m) (1984 Supp.). The court held that the Board's interpretation of section 3(m), which excluded such employees as managers, executives, and short-term help, was proper. *Laborer's International*, 154 Ill. App. 3d at 1059, 507 N.E.2d at 1208.

229. *Laborer's International*, 154 Ill. App. 3d at 1049, 507 N.E.2d at 1203.

230. *Id.* at 1050-52, 507 N.E.2d at 1204-5.

231. *Id.* at 1053-54, 507 N.E.2d at 1206. Section 11(e) of the IPLRA provides:

> A charging party or any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may apply for and obtain judicial review of an order of the Board entered under this Act, in accordance with the provisions of the Administrative Review Law, as now or hereafter amended, except that such judicial review shall be afforded directly in the appellate court for the district in which the aggrieved party resides or transacts business. . . .

ILL. REV. STAT. ch. 48, para. 1611(e) (1985).

Education,[232] the Illinois Supreme Court held that the preponderance of the evidence standard is the standard of proof in a terminated teacher's administrative discharge hearing.[233] The teacher was discharged pursuant to section 34-85 of the School Code on charges of "irremediable conduct"[234] that was criminal in nature.[235] The hearing officer in the case had required "clear and convincing evidence" to sustain the discharge.[236]

The court applied a balancing test to determine the proper evidentiary standard[237] and weighed the plaintiff's economic and professional interest in continuing to teach[238] against the government's interest against employing undesirable teachers.[239] Under this approach, the court found the teacher's interests were protected suffi-

232. 113 Ill. 2d 173, 497 N.E.2d 984 (1987).

233. *Id.* at 194, 497 N.E.2d at 993.

234. *Id.* at 177-78, 497 N.E.2d at 987-88. Section 34-85 of the School Code governs the procedure for terminating a teacher for "cause." *Id.* at 184, 497 N.E.2d 991. *See also* Fadler v. State Bd. of Educ., 153 Ill. App. 3d 1024, 506 N.E.2d 640 (5th Dist. 1987) (rights of teacher fired without prior notice for fondling students were not violated because the teacher's conduct was properly found irremediable on the grounds that it was immoral and irreparably harmed the school); Swayne v. Bd. of Educ., 144 Ill. App. 3d 217, 494 N.E.2d 906 (3d Dist. 1986) (teacher who locked six-year-old with a history of unruly behavior in a closet for the majority of a school day and spanked the child in front of his peers did not commit irremediable conduct because she promised not to repeat such disciplinary measures); Combs v. Bd. of Educ., 147 Ill. App. 3d 1092, 1103, 498 N.E.2d 806, 813 (2d Dist. 1986) (evidence supported finding that teacher who demonstrated "a blatant pattern of deficiency in maintaining discipline in the classroom committed irremediable conduct); McBroom v. Bd. of Educ., 144 Ill. App. 3d 463, 494 N.E.2d 1191 (2d Dist. 1986) (teacher who found and attempted to cash a student's social security check committed irremediable conduct).

235. *City of Chicago*, 113 Ill. 2d at 177, 497 N.E.2d at 985 (citing ILL. REV. STAT. ch. 122, para. 34-85 (1981)). The plaintiff, a tenured teacher, was suspended originally due to accusations that he solicited a student to kill three school administrators. *Id.* at 177-78, 497 N.E.2d at 985. These charges were later amended to include another murder solicitation charge and a charge that the teacher witnessed a cocaine sale and failed to report it to the police. *Id.* at 179, 497 N.E.2d at 985-86. The court held that the amendment of the charges did not violate section 34-85 of the School Code, but further held that the amended charge should not have been heard by the same hearing officer who heard the original charges. *Id.* at 184, 497 N.E.2d at 988.

236. *Id.* at 183, 497 N.E.2d at 987-88.

237. *Id.* at 190-91, 497 N.E.2d at 991-93. The court used the test set forth by the United States Supreme Court in Sanotsky v. Kramer, 455 U.S. 745 (1982). *City of Chicago*, 113 Ill. 2d at 191-92, 497 N.E.2d at 991. This test balances "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." *Id.* at 191, 497 N.E.2d at 991.

238. *City of Chicago*, 113 Ill. 2d at 192, 497 N.E.2d at 993. The court noted that monetary interests are protected adequately by the preponderance of evidence standard and that the proceeding in question would not result in permanently barring the plaintiff from teaching. *Id.* at 192, 497 N.E.2d at 992.

239. *Id.* at 194, 497 N.E.2d at 993.

ciently from arbitrary action by imposing the preponderance of the evidence burden on the employer.[240]

In *Board of Education v. Illinois State Board of Education*,[241] the Illinois Appellate Court for the First District held that the employer's dismissal of a tenured teacher for excessive absences violated the terms of the School Code.[242] In *Board of Education*, the employer discharged the employee under its absenteeism policy.[243] The hearing officer who reviewed the decision found that the employer misapplied its own policy by aggregating the teacher's absences over a two-year period.[244] The court stated that the School Code requires judicial deference toward the findings of the hearing officer rather than interpretations by the local school boards.[245] The court then concurred with the hearing officer's interpretation of the policy and his view that the teacher was discharged improperly.[246]

In *Zink v. Board of Education*,[247] the Illinois Appellate Court for the Fourth District found no violation of the School Code when a high seniority, female teacher was removed by the board from a newly created full-time position because it believed she was not qualified for that position.[248] The court said that the School Code gives local school boards discretion to set up reasonable job qualifications and requirements.[249] The court concluded that the school board in this case correctly removed the female teacher because she

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240. *Id.*

241. 154 Ill. App. 3d 375, 507 N.E.2d 134 (1st Dist. 1987).

242. *Id.* at 384, 507 N.E.2d at 140 (citing ILL. REV. STAT. ch. 122, para. 10-22.4 (1985)). The defendant was hospitalized on several occasions for health problems including chronic laryngitis, obesity, diverticulitis, and pulmonary disease. *Id.* at 378, 507 N.E.2d at 136. The court stated that section 10-22.4 of the School Code "provides that a school board may not discharge a teacher for temporary illness or incapacity." *Id.* at 383, 507 N.E.2d at 139.

243. *Id.* at 377, 507 N.E.2d at 137. The policy stated that:

> If illness, incapacity or any other condition renders a certified public employee to be absent from such duties for more than 90 days after the exhaustion of accumulated sick leave, such absence may be considered cause for termination of contractual continued service.

Id.

244. *Id.* at 380, 507 N.E.2d at 137.

245. *Id.* at 382, 507 N.E.2d 138 (citing ILL. REV. STAT. ch. 122, para. 24-12 (1985)).

246. *Id.* at 383, 507 N.E.2d at 139.

247. 146 Ill. App. 3d 1016, 497 N.E.2d 835 (4th Dist. 1986).

248. *Id.* at 1021, 497 N.E.2d at 839. The plaintiff, a female teacher, was reduced to half-time status because part of her responsibilities were eliminated by her employer's broad changes in curriculum. *Id.* at 1017, 497 N.E.2d at 836. The plaintiff claimed that she was entitled to a full-time physical education teaching position created by the reorganization, but the employer gave the position to a male teacher with less seniority. *Id.*

249. *Id.* (citing ILL. REV. STAT. ch. 122, para. 24-1 (1985)).

had no experience teaching physical education and because she would have been required to monitor male student locker-rooms.[250]

C. *Illinois Educational Labor Relations Act (The "IELRA")*

In *Service Employees International v. Illinois Educational Labor Relations Board*,[251] the Illinois Appellate Court for the Fourth District adopted the federal law standard for determining when a duty to bargain over a subcontracting issue arises under the Labor Management Relations Act for application in analagous questions under the Illinois Educational Labor Relations Act.[252] The employer in *Service Employees* subcontracted maintenance and custodial work previously performed by the plaintiff union.[253] Relying principally on the United States Supreme Court's decision in *Fibreboard Paper Products Corp. v. NLRB*,[254] the court held that the subcontracting decision in this case was a mandatory subject for bargaining.[255]

The court next considered whether the Illinois Educational Labor Relations Board (the "IELRB") used the proper standard for determining whether the employer had bargained in good faith.[256] The court held that the IELRB's standard, which required notifying the union of a subcontracting possibility before a decision is made, meeting with the union to discuss and explain the em-

250. *Id.* at 1021-22, 497 N.E.2d at 839.

251. 153 Ill. App. 3d 744, 505 N.E.2d 418 (4th Dist. 1987).

252. *Id.* at 752-53, 505 N.E.2d at 424-25.

253. *Id.* at 749, 505 N.E.2d at 423. The employer, who had recently experienced budget deficit problems, authorized bid requests on maintenance and custodial work as part of its efforts to explore cost-cutting measures. *Id.* at 746, 505 N.E.2d at 421. When the union contacted the employer to begin bargaining on contract renewal, the employer informed the union of its plans to consider subcontracting the union's work. *Id.* at 747, 505 N.E.2d at 421. After obtaining bids for the work that were substantially below what the union had previously charged, the employer met with the union to discuss a new union contract. *Id.* at 748, 505 N.E.2d at 421-22. The employer showed the union the bid specifications it had received, stated that a union counter-proposal would be considered, and offered to negotiate with the union on the matter of the effects of subcontracting. *Id.* After receiving a letter from one bidder who stated he was confident he could perform the work at the bid price, the union gave the employer a counter-proposal for only part of the work that exceeded the outside bidder's price by approximately $50,000.00. *Id.* at 748-49, 505 N.E.2d at 422.

254. 379 U.S. 203 (1964).

255. *Sevice Employees*, 153 Ill. App. 3d at 750, 505 N.E.2d at 423. The court noted that both the IELRA and the LMRA require bargaining on terms and conditions of employment. *Id.* Because the IELRA sections regarding the duty to bargain closely parallel analogous LMRA sections, the court held that federal case law defining terms and conditions of employment were proper authority. *Id.*

256. *Id.* at 751, 505 N.E.2d at 423.

ployer's decision, providing information to the union, and considering union counterproposals, was the functional equivalent of the federal test and, therefore, was correct.[257] The court then affirmed the IELRB's finding that the employer had bargained in good faith.[258]

In *Board of Education v. Compton*,[259] the Illinois Appellate Court for the Fourth District held that the circuit court did not have subject matter jurisdiction over "actions seeking to vacate or enforce arbitration awards involving educational employers and unions representing teachers."[260] The *Compton* employer sought judicial review of an arbitration award.[261] By refusing to comply with the award, the employer committed an unfair labor practice.[262] The *Compton* court stated that the IELRA provides for enforcement of arbitration awards through the IELRB rather than state courts[263] and permits appellate review only of IELRB action.[264] The employer unsuccessfully argued that the Illinois Arbitration Act applied and permitted immediate circuit court review.[265] The court, however, found it clear[266] that the IELRA specifies that all disputes arising from "the filing of grievances allegedly relating to violations of collective bargaining agreements

257. *Id.* at 752-53, 505 N.E.2d at 424-25. *See* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203 (1984); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Amcar Div., ACF Indus., Inc. v. NLRB, 596 F.2d 1344 (8th Cir. 1979); and Olinkraft, Inc. v. NLRB, 666 F.2d 302 (5th Cir. 1982).

258. *Service Employees*, 153 Ill. App. 3d at 754-55, 505 N.E.2d at 425-26. The union asserted that the hearing officer's finding of bad faith, which was based on the fact that the employer suggested effects bargaining and received a "confirmation letter" from a bidder before the union submitted a counterproposal, should prevail because it involved credibility determinations. *Id.* The IELRB reversed, and the court stated that it was required by statute to accept the IELRB's findings as prima facie true and correct. *Id.* (citing ILL. REV. STAT. ch. 110, para. 3-110 (1985)). The evidence supported the IELRB's finding that the employer did not finalize its decision to subcontract until after considering the union's counterproposal. *Id.* at 754-55, 505 N.E.2d at 425-26.

259. 157 Ill. App. 3d 439, 510 N.E.2d 508 (4th Dist. 1987).

260. *Id.* at 441, 510 N.E.2d at 510.

261. *Id.*

262. *Id.* at 442, 510 N.E.2d at 509-10.

263. *Id.* at 443, 510 N.E.2d at 511 (citing ILL. REV. STAT. ch. 48, para. 1715 (1985)).

264. *Id.* (citing ILL. REV. STAT. ch. 43, para. 1716 (a) (1985)).

265. *Id.* (citing the Uniform Arbitration Act, ILL. REV. STAT. ch. 10, paras. 101-123 (1985). The court considered the absence of a reference to the Uniform Arbitration Act significant because the IPLRA, which was passed in the same legislative session as the IELRA, contains such a reference. *Id.* (citing the Illinois Public Labor Relations Act, ILL. REV. STAT. ch. 48, para. 1608 (1985)).

266. *Id.* at 443-44, 510 N.E.2d at 511. The court cited evidence of legislative interest in consistency, early resolution of disputes, expert review, and streamlined procedures in litigation involving public education. *Id.*

must be contested through the Board (IELRB)."[267]

VIII. CONCLUSION

During the *Survey* year, Illinois courts addressed several issues affecting Illinois labor law. Of particular significance were the Illinois Supreme Court and Illinois Appellate Court decisions in cases regarding whether employee handbooks can be binding employment agreements and whether retaliatory discharge claims are preempted by federal law in certain circumstances. Also of note, the Illinois Supreme Court rejected an extensive challenge to the constitutionality of the Public Labor Relations Act.

267. *Id.* at 444, 510 N.E.2d at 511. In a dissenting opinion, Justice Green stated that the majority opinion's rejection of state circuit court review because of the absence of a reference to the Uniform Arbitration Act was based on a "frail inference." *Id.* at 449, 510 N.E.2d at 515 (Green, J., dissenting). Justice Green stated that:

> The suggested procedure that the loser before an arbitrator can raise the traditional attack on the decision by refusing to obey the decision and then attacking the decision when proceedings are brought before the [IELRB] charging an unfair labor practice cannot be used when the decision does not require the loser to do anything. For instance, if a teacher's claim for back salary is submitted to arbitration and the teacher loses under circumstances whereby he or she traditionally could seek vacation of the decision, that teacher cannot reasonably commit an act which would violate the decision and raise the issue of whether the refusal to obey the decision was an unfair labor practice.

Id. at 445, 510 N.E.2d at 515.