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Labor Law

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Labor Law

*Morrison Torrey**
*and John B. Kavanagh***

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I. INTRODUCTION

During the *Survey* year, the Illinois Supreme Court and Illinois appellate courts addressed a variety of labor law topics. The Illinois courts considered such issues as retaliatory discharge,[1] workers compensation,[2] and employment discrimination[3]. Applicable legislation also is reviewed in this article.

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1. *See infra* notes 4-59 and accompanying text.
2. *See infra* notes 60-94 and accompanying text.
3. *See infra* notes 110-25 and accompanying text.

II. Retaliatory Discharge

The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason continues to be the law in Illinois.[4] The Illinois Supreme Court, however, has recognized the tort of retaliatory discharge as a limited exception to the employee-at-will doctrine.[5] To succeed in a retaliatory discharge action, the employee must prove that the employer discharged him in retaliation for his activities, and that this discharge was in contravention of a clearly mandated public policy.[6] The scope and application of the retaliatory discharge cause of action was questioned in several Illinois Supreme Court decisions during the Survey year.

A. *Scope*

In *Gould v. Campbell's Ambulance Service, Inc.*,[7] the supreme court held that the discharge of at-will city ambulance employees for reporting that a co-worker was not properly licensed as required by a local home rule ordinance[8] did not violate a clearly mandated public policy. On the date of the plaintiffs' discharge, there was no state statute purporting to set standards for ambu-

4. Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 525, 478 N.E.2d 1354, 1356 (1985).

5. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 876 (1981); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The tort of retaliatory discharge was first recognized by the Illinois Supreme Court in *Kelsay*. The *Kelsay* court held that the Workers Compensation Act established a strong public policy, and that this policy would be frustrated if workers could be discharged for exercising their rights under the Act. *Kelsay*, 74 Ill.2d at 181, 384 N.E.2d at 357. Additionally, the court determined that punitive damages may be properly awarded in future retaliatory discharge actions. *Id.* at 187, 384 N.E.2d at 359-60.

6. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 134, 421 N.E.2d 876, 881 (1981). In *Palmateer*, the court discussed the troublesome problem of determining what constitutes a "clearly mandated public policy." In an attempt to provide an analytical framework, the court stated that "public policy concerns what is right and just and affects the citizens of the [s]tate collectively." *Id.* at 130, 421 N.E.2d at 878. This public policy is found in the state's constitution, statutes, and judicial decisions. *Id.* Although there is "no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other states involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Id.* at 130, 421 N.E.2d at 878-79. According to the *Palmateer* court, "[t]he cause of action is allowed where the public policy is clear, but is denied where it is equally clear that only private interests are at stake." *Id.* at 131, 421 N.E.2d at 879.

7. 111 Ill. 2d 54, 488 N.E.2d 993 (1986).

8. Alton, Ill., Ordinance, ch. 23, para. 4-23-8(C)(4) (1979). The City of Alton ordinance provided that qualified ambulance attendants and drivers had to be certified as emergency medical technicians by the state of Illinois or by other qualified professional medical persons. *Id.*

lance operations. Even though the city of Alton had its own ordinance concerning the necessary qualifications of ambulance personnel,[9] the court reasoned that this local ordinance affected only the citizens of Alton and was not indicative of a policy that "affects the citizens of the state collectively."[10] Therefore, the plaintiffs did not prove a cause of action for retaliatory discharge.[11]

In rejecting the plaintiff's retaliatory discharge claim in *Price v. Carmack Datsun, Inc.*,[12] the supreme court strictly applied the holding of *Palmateer v. International Harvester Co.*,[13] and ruled that the discharge of an at-will employee for filing a claim under a health insurance policy does not violate a clearly mandated public policy. The *Price* court reasoned that a company-provided health insurance plan is a private contractual matter between the plaintiff and his employer.[14] Although the plaintiff had argued that the health insurance provisions of the Illinois Insurance Code represent a public policy against the discharge of employees for filing health insurance claims, the court stated that "the Code was designed to govern operations of insurance companies, not insureds, such as the defendant."[15] The fact that employers commonly provide group health insurance, the court held, does not establish a clearly mandated public policy to provide them.[16] The *Price* court thus considered plaintiff's claim a private grievance rather than one affecting the citizens of Illinois collectively.[17]

The supreme court continued its narrow interpretation of the tort of retaliatory discharge in *Barr v. Kelso-Burnett Co.*.[18] The eight plaintiffs, formerly employed by the defendant as foremen at the construction site of a nuclear power plant, alleged that they were discharged because they had informed other employees of layoff procedures being used by the defendant. They claimed that various statutory and constitutional rights, including free speech, due process, and privacy, were violated by their discharge. Plaintiffs asserted that these violations frustrated the public policy of Illinois established by those statutory and constitutional provi-

9. *Id.*
10. *Gould*, 111 Ill. 2d at 57-58, 488 N.E.2d at 995.
11. *Id.* at 58, 488 N.E.2d at 995.
12. 109 Ill. 2d 65, 485 N.E.2d 359 (1985).
13. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).
14. *Price*, 109 Ill. 2d at 69, 485 N.E.2d at 361.
15. *Id.*
16. *Id.*
17. *Id.*
18. 106 Ill. 2d 520, 478 N.E.2d 1354 (1985).

sions.[19] The supreme court dismissed the plaintiffs' retaliatory discharge claim, finding that the public policy clearly mandated by the constitutional and statutory provisions cited in the plaintiffs' complaint was restricted to governmental action limiting the rights of an individual.[20] The court found nothing in the cited provisions indicating an established public policy affecting private employer-employee relationships.[21]

In *Mein v. Masonite Corp.*,[22] the supreme court upheld a determination that a claim of wrongful discharge based upon age discrimination does not constitute a cause of action in Illinois for retaliatory discharge. The plaintiff did not dispute his classification as an employee-at-will who could be discharged at any time, for any or for no cause, without his employer incurring any liability. Nevertheless, he claimed that he was discharged because of his age, a violation of the public policy of Illinois prohibiting age discrimination.[23] In reviewing Mein's claim, the supreme court acknowledged that while the Illinois Human Rights Act[24] states a public policy against age discrimination, it also contains comprehensive procedures to investigate and adjudicate alleged violations of the Illinois Human Rights Act.[25] In fact, the court determined that the legislature intended the Act, with its comprehensive scheme of remedies and administrative procedures, to be the exclusive source for age discrimination redress.[26] Thus, Mein could not pursue an independent action for retaliatory discharge.[27]

B. Federal Preemption

Federal preemption of state court retaliatory discharge claims was at issue in three Illinois cases during the *Survey* year. In

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19. *Id.* at 523-24, 478 N.E.2d at 1355. Specifically, the plaintiffs in *Barr* claimed that their discharge violated their right to freedom of speech, their right not to be deprived of property without due process, their right to privacy of communications, and their right to be free from either being enjoined or restrained from terminating the relation of employment or from peaceably persuading others to do so. *Id.*

20. *Id.* at 526, 478 N.E.2d at 1356.

21. *Id.* at 527, 478 N.E.2d at 1357.

22. 109 Ill. 2d 1, 485 N.E.2d 312 (1985).

23. *Id.* at 3-4, 485 N.E.2d at 313. Mein also filed a complaint with the Illinois Department of Human Rights (the "IDHR"). According to Mein, as a result of his IDHR complaint, Masonite offered him reinstatement to his prior position which he rejected because the defendant's conduct had "irreparably damaged" his ability to function as a creative designer. *Id.*

24. ILL. REV. STAT. ch. 68, paras. 1-102 to 9-102 (1985).

25. *Mein*, 109 Ill. 2d at 5, 485 N.E.2d at 314.

26. *Id.* at 7, 485 N.E.2d at 315.

27. *Id.*

Beaird v. Miller's Mutual Insurance Association,[28] the Illinois Appellate Court for the Fifth District held that a complaint alleging retaliatory discharge in violation of the right to participate in collective bargaining activities was preempted by federal statute. The plaintiff claimed that he was fired because he tried to organize a union of the defendant's insurance agents, an activity explicitly protected by the National Labor Relations Act (the "NLRA").[29] Relying upon the general rule of preemption stated by the United States Supreme Court,[30] the Illinois appellate court determined that Beaird's organizational activities were protected by section 7 of the NLRA, and hence fell within the exclusive jurisdiction of the National Labor Relations Board.[31] Therefore, the court held that the plaintiff's state court retaliatory discharge claim was preempted.[32]

The Illinois Supreme Court addressed the issue of whether the federal Railway Labor Act (the "RLA")[33] preempts an action for a retaliatory discharge claim brought by an employee covered by the RLA. In *Koehler v. Illinois Central Gulf Railroad Co.*,[34] the plaintiff, a railroad worker, alleged that he was discharged in retaliation for filing suit against the railroad pursuant to the Federal Employer's Liability Act (the "FELA"),[35] which governs interstate railroads in their capacity as employers. The Illinois Supreme court in *Koehler* held that the state court tort action was preempted by the RLA.[36] The *Koehler* court relied on the United States Supreme Court decision in *Andrews v. Louisville & Nashville*

28. 133 Ill. App. 3d 670, 479 N.E.2d 374 (5th Dist. 1985), *cert. denied*, 106 S. Ct. 1193 (1986).

29. *Id.* at 671, 479 N.E.2d at 375 (citing 29 U.S.C. § 151 (1982)).

30. *Beaird*, 133 Ill. App. 3d at 671, 479 N.E.2d at 376 (citing San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244 (1959)). "When it is clear or may fairly be assumed that the activities which a [s]tate purports to regulate are protected by § 7 of the National Labor Relations Act [29 U.S.C. § 157], or constitute an unfair labor practice under § 8 [29 U.S.C. § 158], due regard for the federal enactment requires that state jurisdiction must yield." *Garmon*, 359 U.S. at 244 (1959).

31. *Beaird*, 133 Ill. App. 3d at 671, 479 N.E.2d at 375-76 (citing *Garmon*, 359 U.S. at 244).

32. *Beaird*, 133 Ill. App. 3d at 672, 479 N.E.2d at 376.

33. 45 U.S.C. §§ 151-163 (1982). The RLA has its own elaborate scheme for dispute resolution. It does not accord original jurisdiction over employment-related disputes to either federal or state courts. The National Railroad Adjustment Board has original jurisdiction over disputes arising under the Act. Decisions of the Adjustment Board are final and binding and are accorded limited review in federal district court. *See id.*

34. 109 Ill. 2d 473, 488 N.E.2d 542 (1985), *cert. denied*, 106 S. Ct. 3297 (1986).

35. 45 U.S.C. §§ 51-60 (1982). The FELA imposes liability on railroad employers for injuries to employees caused by an employer's negligence. *Koehler*, 109 Ill. 2d at 476, 488 N.E.2d at 544.

36. *Koehler*, 109 Ill. 2d at 479, 488 N.E.2d at 545.

Railroad Co.,[37] in which the United States Supreme Court stated that the RLA preempted state actions based on wrongful discharge because the National Railroad Adjustment Board has exclusive jurisdiction to adjudicate all claims arising under the RLA.[38]

The court in *Koehler* rejected the plaintiff's attempt to distinguish his case on the grounds that it involved a retaliatory discharge that was tortious in nature rather than a wrongful discharge based on a breach of an employment contract.[39] Citing a Seventh Circuit Court of Appeals opinion for support,[40] the court determined that the exclusivity of the administrative remedy provided by the RLA arises from the Act itself rather than from any contractual relationship between the parties.[41] Moreover, the *Koehler* court characterized retaliatory discharge as simply one type of wrongful discharge.[42] Because the plaintiff's state law tort claim was identical to the claim he would have made during his grievance proceeding under the RLA, the plaintiff's claim was preempted.[43]

In one Illinois Supreme Court case decided during the *Survey* year, the Illinois Supreme Court ruled that the plaintiff's retaliatory discharge claim was not preempted by federal law.[44] In *Wheeler v. Caterpillar Tractor Co.*,[45] the plaintiff asserted that he was discharged in retaliation for his refusal to work with radioactive materials under conditions which allegedly exposed him to radiation hazards in violation of federal safety regulations governing the handling of radioactive materials.

In reviewing *Wheeler*, the court acknowledged the extensive federal regulation of radioactive materials under the Atomic Energy Act of 1954[46] and the clearly enunciated federal public policy con-

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37. 406 U.S. 320 (1972).

38. *Id.* at 323-24.

39. *Koehler*, 109 Ill. 2d at 478, 488 N.E.2d at 545. In rejecting the plaintiff's distinction between wrongful discharge and retaliatory discharge, the Illinois court quoted the Supreme Court's pronouncement in *Andrews*: "[T]he compulsory character of the administrative remedy provided by the Railway Labor Act for disputes . . . stems not from any contractual undertaking between the parties but from the [a]ct itself." *Id.* (quoting *Andrews*, 406 U.S. 320, 323).

40. Jackson v. Consolidated Rail Corp., 717 F.2d 1045, 1049 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

41. *Koehler*, 109 Ill. 2d at 478-79, 488 N.E.2d at 545.

42. *Id.* at 478, 488 N.E.2d at 545 (citing *Jackson*, 717 F.2d at 1049).

43. *Koehler*, 109 Ill. 2d at 480, 488 N.E.2d at 546.

44. *Wheeler v. Caterpillar Tractor Co.*, 108 Ill. 2d 502, 511, 485 N.E.2d 372, 377 (1985), *cert. denied* 106 S. Ct. 1641 (1986).

45. 108 Ill. 2d 502, 485 N.E.2d 372.

46. 42 U.S.C. § 2011 (1982).

cerning safety in connection with such materials.[47] The court raised, sua sponte, the issue of preemption of the state tort action by the comprehensive federal law.[48] Nevertheless, relying heavily upon a United States Supreme Court decision,[49] the Illinois Supreme Court found that it was not inconsistent to vest the Nuclear Regulatory Commission with exclusive regulatory authority over the safety aspects of nuclear development and at the same time permit plaintiffs to recover for injuries caused by nuclear hazards.[50] Comparing the plaintiff in *Wheeler* to the plaintiff in *Palmateer*, the court determined that the protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence.[51] Based on these safety considerations, the court recognized a cause of action for retaliatory discharge for refusing to work under conditions contravening the public policy of safe use of radioactive materials,[52] regardless of Wheeler's failure to file a complaint with any federal agency.

C. Survivability

In *Raisl v. Elwood Industries, Inc.*,[53] the Illinois Appellate Court for the First District addressed the issue of the survivability of a retaliatory discharge claim upon the death of the plaintiff, who had filed suit seeking both compensatory and punitive damages. The plaintiff died shortly after initiating a suit which alleged that she had been fired in retaliation for filing a workers' compensation claim. Relying upon prior expansive readings of the Illinois Survival Statute,[54] the court decided that compensatory damages for retaliatory discharge constituted "personal property" within the meaning of the survival statute.[55] This interpretation was reinforced under a second test: if the right asserted is assignable, it survives the death of either party.[56] Thus, the court held that an action for retaliatory discharge seeking compensatory damages does not abate upon the death of an employee.[57]

47. *Wheeler*, 108 Ill. 2d at 506, 485 N.E.2d at 374-75.
48. *Id.* at 506, 485 N.E.2d at 375.
49. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984).
50. *Wheeler*, 108 Ill. 2d at 509, 485 N.E.2d at 376.
51. *Id.* at 511, 485 N.E.2d at 377.
52. *Id.*
53. 134 Ill. App. 3d 170, 479 N.E.2d 1106 (1st Dist. 1985).
54. ILL. REV. STAT. ch. 110½, para. 27-6 (1985).
55. *Raisl*, 134 Ill. App. 3d at 173, 479 N.E.2d at 1109.
56. *Id.*
57. *Id.*

The court in *Raisl* also addressed the issue of the survivability of the plaintiff's punitive damages claim by analyzing prior Illinois Supreme Court decisions concerning the general issue of survivability of a claim for punitive damages.[58] The *Raisl* court articulated a two-part test to determine whether a claim will survive the claimant's death: (1) whether there exists either a "statutory basis" for such claims or whether such claims are an "integral component of the regulatory scheme and of the remedy which is available under it," or, (2) whether "strong equitable considerations" advocate survival. The court concluded that both tests were satisfied. Accordingly, the appellate court in *Raisl* held that the plaintiff's claim for punitive damages predicated upon a retaliatory discharge for seeking workers' compensation benefits should not have been dismissed.[59]

III. WORKERS' COMPENSATION

Under the Illinois Workers' Compensation Act,[60] an injury is compensable if it "arises out of and in the course of employment."[61] "Arising out of" refers to the causal connection between the employment and the accidental injury. This connection exists when the injury's origin is in some way related to the employment.[62] Two supreme court cases during the *Survey* year and one appellate court decision addressed issues of whether the claimant's injury arose out of and in the course of employment.

A. *Eligibility*

In *Hoffman v. Industrial Commission*,[63] the Illinois Supreme Court ruled that the Industrial Commission's finding that injuries sustained during work hours by a "traveling employee" were not compensable was not against the manifest weight of the evidence or contrary to law and therefore, should be upheld. The plaintiff in *Hoffman* was director of health services for a large school district, a job which required her to use her own car to travel to the various

58. *Id.* (citing Froud v. Celotex Corp., 98 Ill. 2d 324, 456 N.E.2d 131 (1983); National Bank v. Norfolk and Western Kentucky Ry. Co., 73 Ill. 2d 160, 383 N.E.2d 919 (1978); Mattyasovszky v. West Towns Bus Co., 61 Ill. 2d 31, 330 N.E.2d 509 (1975)).

59. *Raisl*, 134 Ill. App. 3d at 177, 479 N.E.2d at 1109.

60. ILL. REV. STAT. ch. 48, paras. 138.1-.30 (1985).

61. *Id.* at para. 138.2.

62. Unger v. Continental Assurance Co., 107 Ill. 2d 79, 85, 481 N.E.2d 684, 687 (1985) (citing *Scheffler Greenhouses Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366, 362 N.E.2d 325, 327 (1977); *Jewel Companies v. Industrial Comm'n*, 57 Ill. 2d 38, 40, 310 N.E.2d 12, 14 (1974)).

63. 109 Ill. 2d 194, 486 N.E.2d 889 (1985).

schools within the district. The plaintiff injured her knee during working hours while at a retail store buying a picnic table, benches, and other supplies she needed to conduct a work-related meeting at her home. She subsequently filed a workers' compensation claim. The arbitrator awarded her medical expenses. The Industrial Commission reversed this award.

The court noted that Hoffman was a traveling employee and that courts generally are more liberal with such employees when deciding whether an injury arose out of and in the course of employment. Nevertheless, the *Hoffman* court held that traveling employees must prove that an injury arose out of and in the course of employment in order to be compensable under the Act. Applying the test set forth by the Illinois Supreme Court in *Robinson v. Industrial Commission*,[64] the court ruled that the injury was not compensable under the Workers' Compensation Act.[65] Hoffman's injury was not foreseeable and she was not instructed, nor did she have a duty, to go to the store to buy materials. Furthermore, although the plaintiff was injured while buying materials to conduct a work-related meeting at her home, she also intended to keep the materials for her own use and did not seek reimbursement.[66] Considering these factors, the court ruled that it was permissible for the Industrial Commission to find that the plaintiff's injuries did not arise out of the course of her employment with the defendant school district.[67]

The decision in *Peoria Co. Nursing Home v. Industrial Commission*,[68] represents an expansion of the types of injuries deemed compensable under the Workers' Compensation Act. The Illinois Appellate Court for the Third District (Industrial Commission Division) ruled that, despite the absence of a precise incident, clearly identified by a court as an accident, an injury sustained as the result of work-related repetitive trauma is compensable under the

64. 96 Ill. 2d 87, 91, 449 N.E.2d 106, 108 (1983). The *Robinson* court held that the Workers' Compensation Act was intended only to compensate those injuries which arise out of (1) acts which an employee was instructed to perform by his employer, (2) acts which he has a common law or statutory duty to perform while working, or (3) acts which the employee might be reasonably expected to perform as part of his assigned duties. *Id.*

65. *Hoffman*, 109 Ill. 2d at 200, 486 N.E.2d at 892.

66. *Id.* at 200-01, 486 N.E.2d at 892.

67. *Id.*

68. 138 Ill. App. 3d 880, 487 N.E.2d 356 (Industrial Comm'n Div., 3d Dist. 1985). The court granted a request for a statement under Illinois Supreme Court Rule 315(a), declaring a substantial question which warrants supreme court consideration. *Id.* at 894, 487 N.E.2d at 366.

Act.[69]

The claimant in *Peoria* suffered from carpal tunnel syndrome in her wrist as a result of repeated trauma in operating two large washing machines. While she was uncertain exactly when she began experiencing the symptoms of the injury, she sought medical assistance on October 5, 1976. In determining that the plaintiff's injury was compensable, the court rejected a previous holding that either the cause or the effect of an injury or a disease must be traceable to a specific time, place, and cause before an employee could recover under the Act.[70] In abandoning this rule, the *Peoria* court stated that its interpretation of "accident" reflected the purpose of the Act and the reality of employees obligated to perform repetitive tasks.[71]

The *Peoria* court's holding made necessary a determination as to whether the claim was timely filed.[72] Noting the difficulty of ascertaining precisely when the statute of limitations should begin running in repetitive trauma cases, the court developed the following test: when an employee in Illinois suffers a work-related injury due to repeated trauma, the date of the accidental injury is the date on which the injury manifests itself.[73]

B. *Exclusivity of Remedy*

In *Unger v. Continental Assurance Co.*,[74] the supreme court held that the exclusive remedy provision of the Workers' Compensation Act barred the plaintiff's common law medical malpractice action against his employer and co-employee for an injury arising out of a company-sponsored physical examination that failed to uncover a malignancy. Both Dr. Hines, the physician who performed the examination, and the plaintiff were doctors employed by the Continental Assurance Company. The court determined that the alleged injury was sustained "in the course of" plaintiff's employ-

69. *Id.* at 885, 487 N.E.2d at 360.

70. *Id.* at 884, 487 N.E.2d at 359. Previous case law stated that an injury is accidental within the meaning of the Act only if it is traceable to a definite time, place and cause. *Id.* at 883, 487 N.E.2d at 359 (citing General Electric Co. v. Industrial Comm'n, 89 Ill. 2d 432, 433 N.E.2d 671 (1982)); International Harvester v. Industrial Comm'n, 56 Ill. 2d 84, 305 N.E.2d 529 (1973). Those courts noted that "aggravation of a pre-existing disease was compensable under the Act where the employee's existing physical structure gives way . . . and he is suddenly disabled." *Peoria*, 138 Ill.App. 3d at 882-83, 487 N.E.2d at 358.

71. *Peoria*, 138 Ill. App. 3d at 884, 487 N.E.2d at 359.

72. *Id.* at 886, 487 N.E.2d at 361.

73. *Id.* at 887, 487 N.E.2d at 361.

74. 107 Ill. 2d 79, 481 N.E.2d 684 (1985).

ment after determining that the examination occurred in a company clinic during working hours and was a necessary condition of plaintiff's continued employment.[75] Relying on an earlier Illinois Supreme Court ruling that a claimant can establish compensability by establishing that employment was one causative factor in the resulting injury,[76] the *Unger* court held that any injury stemming from the negligence of Dr. Hines arose out of and in the course of plaintiff's employment.[77] Therefore, pursuant to section 5(a) of the Workers' Compensation Act, the exclusive remedy provision, Unger's common law malpractice claim was barred.[78]

C. Survivors' Benefits

In *A.O. Smith Corp. v. Industrial Commission*,[79] the Illinois Supreme Court ruled that survivor's benefits must be determined by the statutory rates in effect on the date of a decedent's death rather than on the date of his work-related accident. The decedent suffered compensable injuries on October 29, 1971, while employed at A.O. Smith Corp.. He became comatose and died almost nine years later on June 3, 1980. An arbitrator for the Industrial Commission found that A.O. Smith had paid the decedent compensation in excess of the survivor's benefits that would have been payable under the statute in force on the date of his injury. The arbitrator thus denied his dependents' claim for survival benefits. Recognizing the distinction between a cause of action created in favor of the employee for injuries suffered but not resulting in death, and a cause of action created in favor of his dependents for injuries resulting in death, the supreme court reversed the Commission's denial and awarded the dependents the full amount of compensation determined under the Act in force on the date of the decedent's death.[80]

D. Recoupment

Two Illinois Supreme Court cases decided during the *Survey* year reviewed situations in which the employer attempted to recoup some of the payments made to an injured employee from

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75. *Id.* at 87-89, 481 N.E.2d at 688-89.
76. Field Enterprises v. Industrial Comm'n, 37 Ill. 2d 335, 340, 226 N.E.2d 867, 870 (1967).
77. *Unger*, 107 Ill. 2d at 87-89, 481 N.E.2d at 688-89.
78. *Id.* at 84, 481 N.E.2d at 687 (citing ILL. REV. STAT. ch. 48, para. 138.5(a) (1985)).
79. 109 Ill. 2d 52, 485 N.E.2d 335 (1985).
80. *Id.* at 57, 485 N.E.2d at 338.

proceeds of third party tort actions. In *Freer v. Hysan*,[81] the supreme court ruled that it was proper for the circuit court to suspend an Industrial Commission's award at the end of a related third-party action. In *Freer*, the plaintiff had been permanently injured at work when a drum of sewer solvent exploded and burned his body. The Industrial Commission ordered his employer, the Village of Glendale Heights, to pay to the plaintiff a weekly amount for life, along with medical expenses as required by the Act. The plaintiff then instituted a third-party action against the manufacturer and distributor of the solvent. The Village intervened pursuant to section 5(b) of the Act to protect its right to a lien on any award received by the plaintiff. When the third-party action was settled for a large sum of money, the employer moved for a suspension of payments in order to satisfy its lien on the proceeds of the settlement. Rejecting the plaintiff's position that the issue should be remanded to the Industrial Commission, the Illinois Supreme Court interpreted section 5(b) of the Act to impose a duty upon the circuit court to protect the employer's statutory lien.[82] The court thus held that the responsibility of protecting the employer's reimbursement rights lies with the courts and not the Industrial Commission.[83]

The supreme court again was called upon to interpret section 5(b) of the Act in *J.L. Simmons Co., Inc. v. Firestone Tire & Rubber Co.*[84] In *J.L. Simmons*, the court held that the realignment of the employer as a co-plaintiff with the employee in a suit against a third-party did not violate section 5(b) of the Act when the employer himself did not file the suit and when the employee did not object to the joinder.[85]

E. Constitutionality

In *Yellow Cab Co. v. Jones*,[86] the respondent challenged as unconstitutional Supreme Court Rules 22(g) and 315(a) which concern appeals of orders of the Industrial Commission. Rule 22(g) provides for a five-judge panel of the appellate court to sit as the Industrial Commission Division of the Illinois Appellate Court hearing all appeals of the Industrial Commission orders.[87] The re-

81. 108 Ill. 2d 421, 484 N.E.2d 1076 (1985).
82. *Id.* at 426, 484 N.E.2d at 1079.
83. *Id.*
84. 108 Ill. 2d 106, 483 N.E.2d 273 (1985).
85. *Id.* at 114, 483 N.E.2d at 277.
86. 108 Ill. 2d 330, 483 N.E.2d 1278 (1985).
87. ILL. S. CT. R. 22, 315(a), ILL. REV. STAT. ch. 110A, paras. 22, 315(a) (1985).

spondent contended that because the judges are not selected from the district in which the Division sits, the rule conflicts with article VI of the Illinois Constitution.[88] The court in *Yellow Cab* responded that because there was no specific constitutional language imposing such a limitation on the judiciary, Rule 22(g) was constitutional.[89]

Proceeding to the challenges to Rule 315(a), the court considered respondent's argument that the right to appeal, though not mandatory, must be uniform and nondiscriminatory and that Rule 315(a) deprived litigants of their constitutional rights of equal protection and due process. Respondent urged that these constitutional violations stemmed from the Rule's requirement that two members of the appellate court join in a statement that the case involves a substantial question which warrants consideration in order to be heard by the supreme court.[90] The court rejected this contention.[91] In the exercise of its constitutional authority, the supreme court has created classes of appeals: some as of right, and some by permission.[92] The court determined that a rational basis existed for distinguishing appeals from the Industrial Commission from other appeals. Appeals from Industrial Commission decisions already have been subjected to numerous reviews and there is a strong public interest in speedy resolution.[93] Thus, Rule 315(g) does not serve to deprive litigants of due process or equal protection.[94]

IV. JURISDICTION

Two supreme court decisions during the *Survey* year addressed the issue of whether state courts had jurisdiction to hear certain employment-related actions. In *Pierce v. P.J.G. & Associates, Inc.*,[95] the supreme court ruled that in a suit emanating from the breach of a collective bargaining agreement under section 301 of the Labor Management Relations Act (the "LMRA"),[96] there exists concurrent state and federal court jurisdiction.[97]

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88. ILL. CONST. art. VI, § 16. Section 16 states that all administrative and supervisory power over the courts is vested in the supreme court. *Id.*
89. *Yellow Cab*, 108 Ill. 2d 330, 338, 483 N.E.2d 1278, 1282.
90. *Id.* at 334, 483 N.E.2d at 1282.
91. *Id.* at 341, 483 N.E.2d at 1283.
92. *Id.* at 338, 483 N.E.2d at 1282.
93. *Id.* at 341, 483 N.E.2d at 1283.
94. *Id.*
95. 112 Ill. 2d 535, 494 N.E.2d 482 (1986).
96. *Id.* at 540-41, 494 N.E.2d at 485 (citing 29 U.S.C. § 185 (1985)).
97. *Pierce*, 112 Ill. 2d at 538-39, 494 N.E.2d at 484.

The plaintiffs in *Pierce*, trustees of the Electrical Insurance Trust, filed a complaint in state court against the defendant employer to recover wage payments and fringe benefits owed the Trust under a collective bargaining agreement. Upon being sued in state court, the defendant contended that the federal courts had exclusive jurisdiction of the action under the Employee Retirement Income Security Act of 1974 ("ERISA").[98] The circuit court agreed with defendants and dismissed the case, a decision which was upheld on appeal. The supreme court reversed the lower court's holding and ruled that the LMRA provided for concurrent jurisdiction in cases arising from violations of collective bargaining agreements. In connection with the ERISA preemption claim, the court cited section 514(d) of ERISA: "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States. . . ."[99]

Thus, to apply ERISA as conferring jurisdiction exclusively on federal courts would operate to supercede jurisdictional provisions of the earlier LMRA.[100] Because such invalidation is prohibited under section 514(d) of ERISA, the plaintiff's section 301 action could be brought in state court.[101]

In *Bartley v. University Asphalt Co.*,[102] the Illinois Supreme Court held that an employee's claim of tortious civil conspiracy based upon his union's failure to represent him fairly in grievance proceedings established by a collective bargaining agreement was preempted by federal labor law. The employee in *Bartley* filed a retaliatory discharge claim against his employer and asserted that the Teamsters were guilty of civil conspiracy in furtherance of the retaliatory discharge.[103] The court rejected the plaintiff's contention that his suit for civil conspiracy against the Teamsters was a distinctly different cause of action from a section 301 suit. Acknowledging that plaintiff's complaint made no mention of federal

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98. *Id.* at 538, 494 N.E.2d at 483 (citing 29 U.S.C. § 1001-1461 (1985).

99. *Pierce*, 112 Ill. 2d at 539, 494 N.E.2d at 484 (citing 29 U.S.C. § 1144(d) (1985)).

100. *Pierce*, 112 Ill. 2d at 539, 494 N.E.2d at 484.

101. *Id.*

102. 111 Ill. 2d 318, 489 N.E.2d 1367 (1986).

103. *Id.* at 320, 489 N.E.2d at 1368. Plaintiffs earlier had filed a section 301, 29 U.S.C. § 185(a), suit against the two defendants, alleging breach of contract. The complaint stated that his employer had fired him in retaliation for his participation in an FBI investigation of the defendants, and hence, he was not terminated for "justifiable cause" as required by the collective bargaining agreements. He accused the Teamsters of not fairly representing him in contesting his discharge. That initial suit was dismissed as barred by the applicable statute of limitations, and four months later, plaintiffs filed the instant suit with substantially similar allegations. *Bartley*, 111 Ill. 2d at 321-22, 489 N.E.2d at 1369.

law, the court determined that the complaint essentially stated the basis of a section 301 action.

The United States Supreme Court had held that federal labor-contract law preempts state tort actions that are substantially dependent upon analysis of the terms of a labor contract between the parties.[104] Relying on this holding, the court in *Bartley* concluded that any state rule that purports to define the meaning or scope of a term in a labor contract is preempted by federal labor law.[105] Thus, even though the plaintiff's claim was framed as a state tort suit for civil conspiracy, the court concluded that it actually alleged a violation of a collective bargaining agreement,[106] a cause of action which congress intended for federal court. The court in *Bartley* thus held that plaintiff's claim was preempted.[107]

V. Unemployment Compensation

During this *Survey* year the Illinois courts made few developments in the area of unemployment compensation. One significant supreme court case concerned the responsibility of a buyer of a business regarding the unemployment insurance obligations of the seller.[108] In another case, the Illinois Appellate Court for the Second District slightly expanded the type of claimant who is eligible for unemployment benefits.[109]

In *Woodliff v. Department of Labor*,[110] the Illinois Appellate Court for the Second District held that a carpenter who left his job to become self-employed was entitled to unemployment insurance benefits. Generally, an individual is ineligible for benefits when he has left work voluntarily and without good cause attributable to his employer.[111] One exception to this rule is a person who leaves work voluntarily to accept other bona fide work.[112] The court reasoned that the plaintiff's independent carpentry work was bona-fide and that "work" need not involve an employer-employee relationship but may be self-employment.[113]

104. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 218-19 (1985).
105. 111 Ill. 2d at 330, 489 N.E.2d at 1371-72.
106. 111 Ill. 2d at 331-32, 489 N.E.2d at 1373-74.
107. *Id.* at 333, 489 N.E.2d at 1374.
108. Pavlakos v. Department of Labor, 111 Ill. 2d 257, 489 N.E.2d 1325 (1985).
109. Woodliff v. Department of Labor, 139 Ill. App. 3d 539, 487 N.E.2d 645 (2nd Dist. 1985).
110. *Id.*
111. *Id.* at 540, 487 N.E.2d at 646.
112. *Id.*
113. *Id.* at 541-42, 487 N.E.2d at 647.

In *Pavlakos v. Department of Labor*,[114] the supreme court held that section 2600 of the Unemployment Insurance Act,[115] requiring a purchaser of a business to obtain verification that the seller has no unemployment insurance obligations, is not an impermissible classification nor invalid as special legislation. This section further requires that the buyer will be responsible for paying the seller's unemployment insurance obligations if the buyer does not withhold sufficient funds at the beginning of the transaction.[116] After upholding the constitutionality of section 2600, the court in *Pavlakos* refused to apply the doctrines of estoppel or laches against the collection of unpaid unemployment insurance from the purchaser who failed to obtain a receipt of payment from the seller.[117]

VI. Employment Discrimination

During the *Survey* year, there was a notable absence of significant state decisions in the field of employment discrimination. In *Board of Trustees of University of Illinois v. Human Rights Commission.*,[118] the Illinois Appellate Court for the Fourth District held that an employer's refusal to hire an amputee for a sheetmetal worker's position without testing his ability to handle the job was against the public policy as articulated in the Illinois Constitution.[119] The court stated that an employer must focus his inquiry on whether the handicapped person applying for the job could perform the particular work involved.[120] An applicant may not be rejected simply because the employer in good faith thinks a person with that particular handicap could not adequately perform the job.[121]

In *Woodward Governor Co. v. Human Rights Commission*,[122] the Illinois Appellate Court for the Second District held that settlement of an employment discrimination case may occur after a final order is entered by the Human Rights Commission. The court in-

114. 111 Ill. 2d 257, 489 N.E.2d 1325.
115. ILL. REV. STAT. ch. 48, para. 750 (1985).
116. *Id.*
117. *Pavlakos*, 111 Ill. 2d at 265, 489 N.E.2d at 1328.
118. 138 Ill. App. 3d 71, 485 N.E.2d 33 (4th Dist. 1985).
119. *Id.* at 74-75, 485 N.E.2d at 36 (citing ILL. CONST. art. I, § 19). Article I, section 19 provides that all persons with physical or mental handicaps shall be free from discrimination unrelated to their ability in the hiring and promoting practices of any employer. ILL. CONST. art. I,§ 19.
120. *Id.* at 75, 485 N.E.2d at 36.
121. *Id.*
122. 139 Ill. App. 3d 853, 487 N.E.2d 653 (2nd Dist. 1985).

dicated that settlement could occur any time before a decision of the circuit court is issued.[123] In *Woodward*, the Human Rights Commission issued an order against Woodward, compelling it to end its discriminatory dress policies. While the matter was pending for administrative review before the circuit court, the parties settled. Woodward then requested the Human Rights Commission to withdraw its order regarding the said discrimination; the Commission refused. Woodward sued to compel the Commission to approve the settlement agreement pursuant to the terms of the Illinois Human Rights Act and the Commission's own regulations.[124] In ruling for Woodward, the court reasoned that the Act reveals a legislative intent to promote settlement of discrimination charges.[125] The plain language of the statute indicates that settlement can occur at any time before a final order of a trial court is issued.[126]

VII. PUBLIC EMPLOYMENT

Two Illinois cases decided during the *Survey* year addressed issues concerning public employment. In *Thaxton v. Walton*,[127] the supreme court held that a wrongfully discharged municipal employee is entitled to recover full compensation measured from the date he was illegally removed from his position. Under *Thaxton*, a public body may no longer reduce the back pay to which the wrongfully discharged employee is entitled by the salary paid to his replacement.[128] Because the Illinois Municipal Code[129] contains no provision governing back pay for wrongfully discharged municipal employees, the court concluded that the Personnel Code[130] is applicable.[131] The *Thaxton* court reasoned that allowing a set-off for a de facto replacement would give a municipality little, if any, incentive to resolve the issue of just cause for the original discharge.[132]

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123. *Id.* at 857-58, 487 N.E.2d at 656.

124. The Illinois Human Rights Act provides that a settlement of any charge on complaint may be affectuated at any time upon agreement of the parties. ILL. REV. STAT. ch. 68, para. 7-103(a) (1983). The Illinois Human Rights Commission Regulation also addresses settlement. ILL. ADMIN. CODE tit. 56, § 2520.510-.540 (1985).

125. *Woodward*, 139 Ill. App. 3d at 857, 487 N.E.2d at 656.

126. *Id.* at 857-58, 487 N.E.2d at 656.

127. 106 Ill. 2d 513, 478 N.E.2d 1350 (1985).

128. *Id.* at 517, 478 N.E.2d at 1352-53.

129. ILL. REV. STAT. ch. 24, paras. 1-1-1 to 11-151-5 (1985).

130. ILL. REV. STAT. ch. 127, para. 63b101-63b119 (1985).

131. *Thaxton*, 106 Ill. 2d at 517, 478 N.E.2d at 1352.

132. *Id.* at 519, 478 N.E.2d at 1353.

In *County of Kane v. Carlson*,[133] the Illinois Appellate Court for the Second District upheld the constitutionality of several provisions of the Public Labor Relations Act (the "PLRA").[134] The court held that the provisions of the PLRA requiring collective bargaining with respect to wages and other conditions of employment and a grievance procedure in collective bargaining agreements, when deputy circuit court clerks are at issue, was not an overly burdensome infringement on the powers of the judicial branch of state government. Thus, the appellate court held that the PLRA did not violate the separation of powers provision of the Illinois Constitution. In reaching this conclusion, the court determined that appointed deputy circuit court clerks did not fall within any of the enumerated exceptions to coverage, but were public employees within the purview of the PLRA.[135] The court, however, did certify its findings of constitutionality to the supreme court.[136]

VIII. CONCLUSION

During the *Survey* year, Illinois courts addressed several issues affecting Illinois Labor Law. Of particular significance, supreme court decisions further delineated the boundaries of the retaliatory discharge cause of action. Both the Illinois Supreme Court and appellate courts considered disputes relating to workers' compensation. Finally, the Illinois Appellate Court for the Second District upheld the constitutionality of several provisions of the Public Labor Relations Act.

133. 140 Ill. App. 3d 814, 489 N.E.2d 467 (2nd Dist. 1985).

134. ILL. REV. STAT. ch. 48, paras. 1602, 1604, 1607, 1609 (1985).

135. *Carlson*, 140 Ill. App. 3d at 817-18, 489 N.E.2d at 471.

136. *Id.* at 821, 489 N.E.2d at 473. On the court's own judgment with three justices concurring, a case may be certified to the supreme court of Illinois pursuant to the provisions of Illinois Supreme Court Rule 316 and article VI, section 4 of the Illinois Constitution as involving questions of such importance that they should be decided by the Illinois Supreme Court. ILL. S. CT. R. 316, ILL. REV. STAT. ch. 110A, para. 316 (1985); ILL. CONST. art. VI, § 4.