RETALIATORY DISCHARGE ISSUES
AND SOLUTIONS

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The cases and materials presented here are in summary and outline form. To be certain of their applicability and use for specific claims, we recommend the entire opinions and statutes be read and counsel consulted.
I. RETALIATORY DISCHARGE CLAIM IS RECOGNIZED

It is an employer’s worst nightmare. An employee’s nominal workers’ compensation claim is transformed overnight into a significant claim for damages against the employer because the employer discharged the employee for filing the claim. While such a scenario may sound implausible, that is precisely what occurred in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1979).

In *Kelsay*, the employee suffered a cut to her thumb while working for Motorola. She received medical attention at the local hospital and returned to work the same day. She also visited her attorney, who sent Motorola notice of an impending workers’ compensation claim. Motorola’s human resources manager, in turn, told the employee that it was corporate policy to terminate employees that filed workers’ compensation claims. The employee filed a claim and was thereafter discharged.

While the workers’ compensation claim was settled, the employee filed a state court lawsuit for retaliatory discharge. At the trial court level, the jury awarded $1,000 in compensatory damages and $25,000 in punitive damages. The issues before the Illinois Supreme Court were whether Illinois would recognize a cause of action for retaliatory discharge and whether punitive damages could be awarded in such a case.

The Court acknowledged that the Workers’ Compensation Act did not expressly provide a cause of action for retaliatory discharge. It nonetheless found that “retaliatory discharge is offensive to the public policy of” the State of Illinois and that such policy could “only be effectively implemented and enforced by allowing a civil remedy for damages ...” With respect to the issue of punitive damages, the Court found such damages could be awarded for a claim of retaliatory discharge, but they would not be awarded in that case because the cause of action forming the basis for the award was novel.

The Court in *Kelsay* illustrates how a nominal workers’ compensation claim for a simple thumb injury can be transformed into a civil claim for compensatory and punitive damages. To prevail on such a claim, the employee must establish: (1) he was an employee before the injury, (2) he exercised a right granted by the Workers’ Compensation Act, and (3) that he was discharged and that the discharge was causally related to his assertion of rights. *Clemons v. Mechanical Devices Co.*, 184 Ill. 2d 328, 704 N.E.2d 403, 235 Ill. Dec. 54 (1998). If the employer comes forward with a valid, non-pretextual basis for discharging the employee which is believed by the fact-finder, the causation element is not proven. Since *Kelsay*, courts have defined the parameters of the tort of retaliatory discharge in the workers’ compensation context.
II. RETALIATORY DISCHARGE CLAIM CAN EXTEND TO ACTION TAKEN BECAUSE CLAIM WAS FILED WITH PRIOR EMPLOYER

In *Darnell v. Impact Industries*, 105 Ill. 2d 158, 473 N.E.2d 935, 85 Ill. Dec. 336 (1985) the plaintiff had filed a workers’ compensation claim with her prior employer. On her job application for Impact Industries, plaintiff denied having a serious illness or injury in the past five years and she denied having received compensation for injuries. Shortly after plaintiff was hired, her co-worker told the personnel office that she had previously had an on-the-job injury at a prior employer. The employer then contacted the plaintiff’s prior employer and confirmed that the plaintiff had filed a workers’ compensation claim with that prior employer. After Impact Industries and the plaintiff discussed her prior injuries and claim, she was suspended and ultimately discharged. The plaintiff subsequently filed a claim for retaliatory discharge.

The first issue addressed by the Illinois Supreme Court was whether an employee could have a claim for retaliatory discharge when the workers’ compensation claim was made against a prior employer. The Court found that such discharge was just as offensive to the public policy of the State of Illinois. Accordingly, an employee can state a claim for retaliatory discharge when he or she is discharged because of a workers’ compensation claim filed with a prior employer. Notably, the concurring opinion noted that the majority opinion was not meant to suggest or hold that an employer could not have discharged the employee for dishonesty if the employee had lied on her application.

Consistent with *Darnell*, the Court of Appeals for the Fifth District in *Reinneck v. Taco Bell Corp.*, 297 Ill. App. 3d 211, 696 N.E.2d 839, 231 Ill. Dec. 543 (5th Dist. 1998) held that an employee could assert a retaliatory discharge claim where she was discharged for asserting her rights under another state’s workers’ compensation laws.

III. RETALIATORY DISCHARGE CLAIM DOES NOT INCLUDE CONSTRUCTIVE DISCHARGE

While a number of decisions have expanded the scope of a workers’ compensation retaliatory discharge claim, one significant limit was recognized in *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877, 206 Ill. Dec. 625 (1994). In that case, the employee alleged constructive discharge stemming from a demotion and reduction of hours. The Court rejected this claim, holding that an employee can assert a cause of action for workers’ compensation retaliatory discharge only if he or she is actually discharged. In order to be “actually discharged,” the employer does not have to use the words “you’re fired.” The test is whether the employer’s message that the employee has been involuntarily terminated is clearly communicated to the employee. Thus, there will be an actual discharge if the employer’s message to the employee is that he will be fired unless he signs a voluntary resignation. *Hinthorn v. Roland’s of Bloomington, Inc.*, 119 Ill. 2d 526, 519 N.E.2d 909, 116 Ill. Dec. 694 (1988).
IV. EMPLOYER CANNOT RELY ON IME TO DISCHARGE EMPLOYEE WHEN IT IS DISPUTED BY EMPLOYEE’S PHYSICIAN

Competing physician recommendations were at issue in Hollowell v. Wilder Corp. of Delaware, 318 Ill. App. 3d 984, 743 N.E.2d 707, 252 Ill. Dec. 839 (5th Dist. 2001). Hollowell was a farm laborer who injured his back while riding a tractor. He notified his supervisor, who was also his brother, of the injury. He went home and then to the emergency room. After three weeks off work, the plaintiff returned under physician ordered restrictions and worked under those restrictions for three months. His physician then ordered epidural blocks followed by a work-hardening program. Plaintiff’s physician ordered him not to return to work until he completed the program.

The workers’ compensation carrier for the defendant asked that plaintiff receive an independent medical examination. The IME physician concluded that the plaintiff could return to work. Based on this IME, plaintiff’s brother/supervisor told him that he must return to work immediately or be fired. The plaintiff responded that he was required by his doctor’s order to finish the physical therapy program before returning to work, and he was fired. The employee sued for retaliatory discharge. A judgment, including punitive damages, in favor of the employee was entered.

The Appellate Court affirmed, holding an employer cannot discharge the employee on the basis of suspected laziness or malingering when there is a dispute between an IME and an employee’s physician with no evidence of fraud. Where there are conflicting medical opinions, the dispute is to be resolved by the Industrial Commission. The $50,000 punitive damage award was likewise affirmed because there was evidence of harassment and verbal abuse by the plaintiff’s brother/supervisor.

V. PROTECTED ACTIVITY – WHEN DOES IT BEGIN

The filing of a workers’ compensation claim is not a necessary predicate to a retaliatory discharge claim pursuant to Hinthorn v. Roland’s of Bloomington, Inc., 119 Ill. 2d 526, 519 N.E.2d 909, 116 Ill. Dec. 694 (1988). In that case, the plaintiff suffered a work-related back injury. After she reported the injury and requested medical attention from her supervisor, she was referred to the vice president. The employee reiterated that she was in pain, that she required medical attention, and that she wished to seek medical attention. The vice president told the employee she was getting hurt too much and asked her to sign a voluntary resignation. The Court held that a retaliatory discharge claim could be premised on the employee seeking medical attention for a work-related injury.

On the other end of the spectrum is Wieseman v. Kienstra, Inc., 237 Ill. App. 3d 721, 604 N.E.2d 1126, 178 Ill. Dec. 603 (5th Dist. 1992), wherein the plaintiff filed a lawsuit for retaliatory discharge, contending his employer fired him because it feared the employee would be injured on the job and that he would file a workers’ compensation claim in the future. Notably, the employee had not alleged that he had sustained a work-related injury or that he had filed a
workers’ compensation claim. The Court dismissed the complaint, finding the plaintiff had not alleged any facts that would provide the employer with a retaliatory motive for the discharge.

VI. **ONLY THE EMPLOYER CAN BE LIABLE FOR RETALIATORY DISCHARGE UNDER THE WORKERS’ COMPENSATION ACT**

In *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill. 2d 12, 694 N.E.2d 565, 230 Ill. Dec. 596 (1998), the plaintiff sued his employer, the employer’s safety advisor, and other individual employees for retaliatory discharge. The Court found the only proper defendant in a retaliatory discharge action is the plaintiff’s former employer. Accordingly, former employees cannot sue individual employees for retaliatory discharge.

VII. **AN EMPLOYEE’S ASSERTION OF RIGHTS UNDER THE WORKERS’ COMPENSATION ACT DOES NOT MEAN THE EMPLOYEE CANNOT BE DISCHARGED**

In the workers’ compensation retaliatory discharge context, an employer will be liable for retaliatory discharge if the former employee establishes a causal connection between his discharge and his assertion of rights under the Workers’ Compensation Act. There is no claim, however, if the employer terminated the employee for a valid, non-retaliatory reason. In short, “there is no *per se* rule prohibiting an employer from firing an employee who has filed for benefits;” the reason for the termination, however, must be unrelated to the employee’s claim for benefits. *Goode v. American Airlines, Inc.*, 741 F. Supp. 2d 877 (N.D. Ill. 2010).


When an employee is fired for excessive absenteeism pursuant to a policy, the court will look at the policy to determine whether it is neutral or whether it had “the purpose and effect of penalizing employees for filing workers’ compensation claims.” *Id.* at 450. If an employer has
such policy, it is therefore essential that it is applied evenhandedly “to any employee who had been inactive for the requisite period of time.” Hess, 237 Ill. App. 3d at 450. Otherwise, a court may find the employer’s reason is a pretext.

With respect to fraudulent complaints, it is not enough that there is a dispute about the nature and extent of the employee’s injury. Clark v. Owens-Brockway Glass Container, Inc., 297 Ill. App. 3d 694, 697 N.E.2d 743, 232 Ill. Dec. 1 (5th Dist. 1998). An employer that fires an employee because it believes the employee was exaggerating his injuries will not have a valid reason for terminating the employee, and it will be liable for retaliatory discharge. A valid reason may arise, however, when there is evidence that the employee submitted bogus doctor slips and lied about his absences from work. Wayne, 157 Ill. App. 3d at 518.

VIII. CONSIDERATIONS OF OTHER LAW

The focus of this presentation and paper is on workers’ compensation retaliatory discharge claims. The employer must, however, consider other state and federal laws that might be applicable. The Illinois Human Rights Act and the Americans with Disabilities Act (“ADA”), for example, would proscribe discrimination against the employee because of disability. The Family and Medical Leave Act (“FMLA”) requires that certain employers grant leave for serious health conditions. While an employee must be discharged in order to claim workers’ compensation retaliatory discharge, other laws prohibit “adverse employment actions” because an employee is disabled. In other words, a disabled employee that has filed a workers’ compensation claim and taken a medical leave of absence and is then demoted may not have a workers’ compensation retaliatory discharge claim. He may, however, be able to claim discrimination under the ADA or the FMLA. The employer must therefore consider the potential application of these other laws when making employment-related decisions.

IX. PRACTICAL CONSIDERATIONS

- Adopt strong anti-retaliation policy;
- Train employees who have the authority to hire and fire;
- Equal application of any absenteeism policies to all employees, without regard to their protected status or whether they have filed a workers’ compensation claim;
- Review employment applications to determine whether any impermissible questions are asked;
- Conduct personnel evaluations on a routine annual or semi-annual basis;
- Equal treatment of all employees, without regard to their protected status or whether they have filed a workers’ compensation claim.
Tamara joined Heyl Royster’s Urbana office in 2005, and became a partner in 2008. Her practice focuses on the defense of tort litigation, primarily in the areas of employment, civil rights, and commercial litigation. She is frequently involved in complex litigation involving potentially high exposure.

Tamara aggressively pursues the early dismissal of cases as soon as practicable through motions to dismiss and for summary judgment. She also has experience in the Iowa and Illinois Appellate Courts; and has filed Briefs in Opposition before the United States Supreme Court.

**Significant Cases**

- **Schmidt v. Mahoney**, 659 N.W. 2d 552 (Iowa 2003), overruling **Freese v. Lemmon**, 210 N.W.2d 576 (Iowa 1973) - Finding physician owed no duty to third-party motorist that was injured by physician's epileptic patient.
- **Shank v. H.C. Fields**, 373 Ill. App. 3d 290 (4th Dist. 2007) - Finding the acts of a road construction contractor were not the proximate cause of the plaintiff's injuries.
- **Doe v. Board of Trustees of University of Illinois**, 429 F. Supp. 2d 930 (N.D. Ill. 2006) - A former student sued the University of Illinois after he was dismissed from the medical school program. The 15 count federal complaint asserted damages in excess of $100,000,000. Several counts were dismissed at the pleading stage and the entire lawsuit was dismissed with prejudice before discovery closed.
- **Peters v. Village of Clifton**, 498 F.3d 727 (7th Cir. 2007), cert. denied, 128 S. Ct. 1472 (2008) - Plaintiff sued a municipality, alleging a takings claim. The federal complaint was dismissed on grounds that the district court had no subject matter jurisdiction over the takings claim. The case was appealed to, and affirmed by, the Seventh Circuit. The plaintiff filed a writ of certiorari to the United States Supreme Court and that petition was denied.
- **Kinman v. State Farm** - Unpublished appellate opinion, finding attorney was not liable for malpractice when attorney-client relationship was severed and attorney did not cause the plaintiff any damage.
- **Koester v. Amergen** - 2008 WL 879459 (C.D. Ill. 2008) - Plaintiff sued defendant (our client) for an alleged radiation injury, alleging unspecified damages. Summary judgment for our client based on failure to establish duty owed, breach, or causation.

**Publications**


**Public Speaking**

- "Tort Law Case Update" Heyl Royster (2007)

**Professional Recognition**

- Martindale-Hubbell AV Rated

**Professional Associations**

- Illinois State Bar Association
- American Bar Association

**Court Admissions**

- State Courts of Illinois and Michigan
- United States District Court, Central and Northern Districts of Illinois
- United States Court of Appeals, Seventh Circuit

**Education**

- Juris Doctor (Magna Cum Laude, Order of the Coif), University of Michigan, 1995
- Bachelor of Science (Summa Cum Laude), University of Missouri, 1985