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ILLINOIS LAW MANUAL

CHAPTER XVII EMPLOYMENT LAW

B. RETALIATORY DISCHARGE

Retaliatory discharge is the exception to the at-will employment doctrine and was first recognized in Illinois in the case of Kelsay v. Motorola, Inc., 74 Ill. 2d 172 (1978). Retaliatory discharge has been described as a limited and narrow tort. Balla v. Gambro, Inc., 145 Ill. 2d 492, 498-499 (1991). To prove this cause of action, the plaintiff must show that she was discharged in retaliation for legally protected conduct, and that her termination violated a clearly mandated public policy. Zimmerman v. Buchheit of Sparta, Inc., 164 Ill. 2d 29, 35 (1994). While all of the policies that may be recognized as bases for retaliation claims have not yet been identified, the Illinois Supreme Court has recognized two types of protected activities. One is when an employee is discharged for making a claim for workers' compensation. The other occurs when an employee is fired because she reported improper or illegal conduct by her employer or refused to engage in an illegal activity. Jacobson v. Knepper & Moga, P.C., 185 Ill. 2d 372, 376 (1998).

1. Retaliatory Discharge in Anticipation of a Claim for Workers' Compensation

For a plaintiff to recover for retaliatory discharge in a workers' compensation case, she must prove that she:

- 1) was employed at the time of the injury;
- 2) sought workers' compensation for that injury;
- 3) lost her job; and
- 4) was terminated due to her attempt to obtain workers' compensation benefits.

Clemons v. Mechanical Devices Co., 184 Ill. 2d 328, 336 (1998).

In a retaliatory discharge case, the employer is not required to offer a reason for terminating the employee. While the burden to prove the case is always on the employee, if the employer can prove that the employee was fired for a different reason than seeking workers' compensation benefits, then it will prevail. Id.

2. Retaliatory Discharge for Reporting Employers' Conduct ("Whistle Blowing") or Refusing to Engage in Illegal Activity

a. Reporting Illegal Activity

The cause of action of retaliatory discharge involving the reporting of improper or illegal conduct of an employer or fellow employees was first recognized in Illinois in 1981.

Palmateer v. International Harvester Co., 85 Ill. 2d 124 (1981). In Palmateer, the plaintiff was fired after reporting the illegal conduct of a fellow employee to the police. Id. at 127. The court explained that firing a person for reporting illegal conduct violated the clearly mandated need for ordered liberty. Id. at 132.

In Fisher v. Lexington Health Care, Inc., 188 Ill. 2d 455 (1999), the Illinois Supreme Court declined to imply a private cause of action for nursing home employees who alleged that their employer retaliated against them for cooperating in a Department of Public Health (“Department”) investigation of a nursing home resident’s death. The court so held despite the fact that the Nursing Home Care Act mandates that facility employees report resident abuse or neglect to the Department and expressly prohibits nursing homes from retaliating against employees for making such a report or otherwise cooperating in enforcement of the Act. The court applied a stringent standard for the implication of private causes of action. Private rights of action under a statute may be implied only where:

- 1) the plaintiff is a member of a class for whose benefit the statute was enacted;
- 2) the plaintiff’s injury is one which the statute was designed to prevent;
- 3) a private right of action is consistent with the underlying purpose of the statute; and
- 4) implying a private right of action is necessary to provide an adequate remedy for violation of the statute.

The Fisher court found the first, second, and fourth prerequisites for implying a private cause of action lacking. It held that:

- 1) the intended class of protected individuals under the Act were nursing home residents;
- 2) the damages alleged by the plaintiffs were thus not those that the Act sought to prevent; and
- 3) the Act included broad remedial measures to safeguard residents from violations of its provisions, which were sufficient to implement its protections of residents without implying a private cause for retaliation.

If applied consistently in the future, the Fisher rationale could significantly limit Illinois employees’ efforts to expand, without express statutory mandates, private causes of action for so-called “whistle-blowing.” C.F. King v. Senior Service Associates, 341 Ill.App.3d 264, 267 (2d Dist. 2003) (recognizing plaintiff’s cause of action for retaliatory discharge based upon “blowing the whistle” on a co-employee who was eventually convicted of criminal offenses.)

b. Refusing to Violate the Law

An employee who is fired because she refuses to violate the law has a valid claim of retaliatory discharge. In Russ v. Pension Consultants Co. Inc., 182 Ill. App. 3d 769 (1989), an employee was fired after he refused to falsify pension plans in violation of federal law. The court held that “public policy favors and in certain instances requires full disclosure, truthfulness, and accuracy in financial reports.”

Id.