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SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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I. INTRODUCTION

This survey covers Illinois Supreme Court and Illinois Appellate Court decisions from January 2009 through December 2009. It is the result of the combined efforts of Debra L. Stegall, Kevin J. Luther, Patrick D. Cloud, Natalie D. DeLong, Brian M. Smith and J. Matthew Thompson, who are all attorneys with Heyl, Royster, Voelker & Allen. The purpose of this survey is to provide a general overview of Illinois cases across the state. One of the most significant decisions changes how the courts interpret the vicarious liability of an employer. In *Sangamon County Sheriff's Dept. v. Illinois Human Rights Commission*, an employer may now be held vicariously liable simply because the harasser is a supervisor whether or not that supervisor is the supervisor of the harassed victim.

This survey is divided into nine major sections related to employment law: sexual harassment, discrimination, restrictive covenants, reappointment to medical staff, compensation & benefits, FOIA, labor, respondeat superior, and termination, arbitration, retaliatory discharge & subject matter jurisdiction. Many of these sections include subsections covering topics of interest to both private and public sectors.

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II. SEXUAL HARASSMENT

The Illinois Supreme Court reversed the Appellate Court by holding that an employer is strictly liable for a supervisory employee's sexual harassment of another employee, even when the supervisory employee was not the supervisor of that employee in *Sangamon County Sheriff's Dept. v. Illinois Human Rights Commission*.¹

Donna Feleccia ("Feleccia"), a records clerk with the Sheriff's Department, filed a charge of sexual harassment and retaliation against the Sheriff's Department and Ron Yanor ("Yanor"), a sergeant.² Section 2-102(D) of the Illinois Human Rights Act ("Act") states that "an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or non-managerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures."³ Yanor was a supervisor but had no supervisory authority over Feleccia, and the two worked different shifts and in separate divisions of the Sheriff's Department.⁴ The incident giving rise to the claim was a letter that Yanor forged and put in Feleccia's mail informing her that she may have been recently exposed to a sexually transmitted disease; the letter was forged on stationery from the Illinois Department of Public Health, and Yanor stated he intended it as a practical joke.⁵ Yanor was disciplined with a four day suspension, and Feleccia was told not to file sexual harassment charges and to avoid Yanor.⁶

As a result, Feleccia said she felt "degraded" and "insignificant" because nothing more was done, began seeing a psychiatrist more often, lost sleep and missed work days.⁷ Feleccia met with the Sheriff's Department and told them she was unhappy with the situation, and disclosed prior incidents of sexual harassment by Yanor, including a forced kiss, and propositions to go with him to a motel for the night.⁸

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1. *Sangamon Cnty. Sheriff's Dep't. v. Ill. Human Rights Comm'n*, 233 Ill. 2d 125, 908 N.E.2d 39 (2009).
 2. *Id.* at 129, 908 N.E.2d at 40-41.
 3. 775 ILL. COMP. STAT. 5/2-102(D) (1998).
 4. *Sangamon*, 233 Ill. 2d at 131, 908 N.E.2d at 41-42.
 5. *Id.* at 131-32, 908 N.E.2d at 42.
 6. *Id.* at 133, 908 N.E.2d at 42.
 7. *Id.* at 133, 908 N.E.2d at 43.
 8. *Id.* at 133-34, 908 N.E.2d at 43.

An administrative law judge concluded that Feleccia failed to establish her claims with prima facie evidence.⁹ The Illinois Human Rights Commission (“Commission”) dismissed the retaliation claims, but found that Feleccia established sexual harassment based on a hostile work environment.¹⁰ The Commission found the Sheriff’s Department strictly liable for Yanor’s actions, as he was a supervisory employee.¹¹ The appellate court reversed, holding that Yanor was a co-employee of Feleccia and, as such, the Sheriff’s Department was not liable for Yanor’s harassment because it took reasonable corrective measures upon learning of the harassment.¹²

The Court stated that the case involved the construction of a statute, and that the cardinal rule of statutory construction is to give the statute the intent of the legislature.¹³ Illinois courts have interpreted section 2-102(D) as imposing strict liability on an employer for the sexual harassment of an employee by the employee’s direct supervisor, regardless of whether the employer knew of the offending conduct.¹⁴ The issue in this case was stated as whether an employer is strictly liable for sexual harassment of its supervisory employee when the supervisor has no authority to affect the terms and conditions of the complainant’s employment.¹⁵

The Court stated that section 2-102(D) is unambiguous. It also stated that Yanor was neither a nonmanagerial nor nonsupervisory employee and, therefore, under the statute the Sheriff’s Department is liable for the harassment regardless of whether it was aware of it or took measures to correct it.¹⁶ Further, the Court decided that whether Yanor had direct supervisory authority over Feleccia was irrelevant under the statute, as there is no language in the Act that limits the employer’s liability based on the harasser’s relationship to the victim.¹⁷

The Court rejected the request of the Sheriff’s Department to look to federal law, and stated that it was bound by the language in the Act, not by federal court decisions.¹⁸ The Court stated that there was a necessity to establish a *prima facie* case of sexual harassment, and determined that for “hostile environment” sexual harassment, an employee must prove that there

9. *Id.* at 135, 908 N.E.2d at 43.

10. *Id.* at 135, 908 N.E.2d at 43–44.

11. *Id.* at 135, 908 N.E.2d at 44.

12. *Id.*

13. *Id.*

14. *Id.* at 136–37, 908 N.E.2d at 44–45.

15. *Id.*

16. *Id.* at 138, 908 N.E.2d at 45.

17. *Id.*

18. *Id.* at 138–39, 908 N.E.2d at 46.

were unwelcome sexual advances that substantially interfered with an individual's work performance or created an "intimidating, hostile or offensive working environment."¹⁹ The Court found that Feleccia had sufficient proof of sexual harassment and its effect on her work environment.²⁰

The Court stated that it was not unfair to hold the Sheriff's Department responsible, as the supervisors are the "public face" of the employer, employers are in the best position to prevent sexual harassment at the supervisory level and Yanor's supervisory status afforded him more power to harass Feleccia, a lower-level employee.²¹

In conclusion, the Court held the Sheriff's Department was strictly liable for the harassment by Yanor, a supervisory employee and confirmed the decision of the Commission.²² Justice Karmeier dissented, and stated that an employer should only be liable for the harassment by a direct supervisor, as there is no potential for abuse of power when the parties involved have no authority over one another.²³

III. DISCRIMINATION

A. Sexual Orientation

In *Powell v. City of Chicago Human Rights Commission*, the issue was whether the Plaintiff was discriminated against based on her sexual orientation.²⁴ The court held she was not, as the evidence was insufficient to support an allegation of discrimination and the City of Chicago Commission on Human Relations' ("Commission") investigation was reasonable.

Christina Powell filed a discrimination complaint with the Commission.²⁵ She claimed the Chicago Transit Authority ("CTA"), her former employer, discriminated against her based on her sexual orientation, and this violated the City of Chicago Human Rights Ordinance ("Ordinance").²⁶

Powell was terminated by CTA for excessive absenteeism, and filed a complaint alleging she was subjected to differential treatment and sexual preference discrimination in violation of the ordinance because she took time off to care for her life partner, Cuppie Webb ("Webb"), during Webb's breast

19. *Id.* at 139, 908 N.E.2d at 46.

20. *Id.*

21. *Id.* at 140, 908 N.E.2d at 46-47.

22. *Id.* at 144, 908 N.E.2d at 49.

23. *Id.* at 145, 908 N.E.2d at 49.

24. *Powell v. City of Chi. Human Rights Comm'n*, 389 Ill. App. 3d 45, 906 N.E.2d 24 (1st Dist. 2009).

25. *Id.* at 46, 906 N.E.2d at 25.

26. *Id.* at 46, 906 N.E.2d at 25-26.

cancer treatment.²⁷ Powell stated that she provided CTA with a calendar of dates she would be absent in order to accompany Webb to her treatments, and occasionally missed work due to Webb's poor reactions to chemotherapy.²⁸ She also missed work for time off for a back problem she had, and was issued notice and then a written warning for unexcused absences.²⁹ Powell was placed on a six-month probation period for two additional unexcused absences, and upon being tardy one morning, she was terminated.³⁰

Powell claimed she was subjected to greater scrutiny than non-gay employees.³¹ She provided the Commission with eight witnesses who would state that Michele Cash ("Cash"), Powell's supervisor, invited all other female employees to lunch besides Powell, and disclosed ten witnesses who would state that Cash singled Powell out in front of the others for having a bad attitude.³² CTA submitted a statement denying different treatment based on Powell's sexual orientation and stated that Powell was terminated after a lengthy discipline process to turn her attendance around.³³ CTA attached evidence to show that in a 12-month period, Powell had worked 1,109.25 hours out of 2,080, and she had 34 days lost, 7 sick entries and 1 tardy in addition to excused absences, and that one excused absence included a 17-day leave of absence.³⁴ CTA asserted her FMLA request was denied because Powell had not worked at least 1,250 hours in the previous 12 months.³⁵ The Commission investigator found no evidence that CTA treated other non-gay employees differently under similar circumstances and noted that an employer is not obligated to retain an employee who does not come to work.³⁶

A plaintiff must first establish a *prima facie* case of unlawful discrimination by showing she is a member of a protected class, she was performing satisfactorily, she was discharged despite her adequacy and a similarly situated employee who was not in a protected group was not discharged.³⁷ Powell did not argue she had shown sufficient evidence, but instead argued that the reason for the lack of evidence was the failure of the Commission to perform an adequate investigation.³⁸

27. *Id.* at 46–47, 906 N.E.2d at 26.

28. *Id.* at 47, 906 N.E.2d at 26.

29. *Id.* at 47, 906 N.E.2d at 26–27.

30. *Id.* at 48, 906 N.E.2d at 27.

31. *Id.*

32. *Id.*

33. *Id.* at 49, 906 N.E.2d at 28.

34. *Id.* at 50, 906 N.E.2d at 28.

35. *Id.*

36. *Id.* at 51, 906 N.E.2d at 29.

37. *Id.* at 53, 906 N.E.2d at 31.

38. *Id.*

The court stated that while Powell did not need to prove her case at the complaint stage, she did need to give the Commission some hint of specific evidence for it to direct its investigation, and that the Commission has power to thoroughly investigate but only if there is reason to believe a violation has occurred.³⁹ The incidents disclosed by Powell did not have any discriminatory overtones, and her discipline for excessive absenteeism did not show discrimination on the basis of sexual orientation.⁴⁰ Plaintiff was absent from work more than she was there, and the information she disclosed to the Commission was irrelevant to showing that her lesbianism was the basis of her treatment by CTA.⁴¹ In fact, CTA granted her a 17-day leave of absence to care for her partner, knowing that Powell was a lesbian.⁴² Powell points to no non-gay employee who was granted FMLA leave even though he/she did not work enough hours to qualify for FMLA, and the court stated that the Commission should not be required to go on a “fishing expedition” to support Powell’s claim.⁴³

The court stated that the Commission does not have to support the plaintiff’s allegation of discrimination, and CTA provided a nondiscriminatory reason for the termination.⁴⁴ The evidence supported the Commission’s finding that the investigation was adequate, and therefore the circuit court’s decision was affirmed.⁴⁵

B. Gender

*Budzileni v. Department of Human Rights*⁴⁶

Susan Budzileni filed a two-count charge with the Illinois Department of Human Rights (“IDHR”) claiming that her employer, the Illinois Department of Commerce and Economic Opportunity (“IDCEO”) discriminated against her by 1) not giving her equal pay and 2) by not giving her equal terms and conditions of employment.⁴⁷ The Department IDHR dismissed her discrimination charge, and Budzileni appealed only Count I that it 1) misinterpreted Illinois law regarding sex discrimination by setting too high a

39. *Id.* at 55, 906 N.E.2d at 33.

40. *Id.* at 56, 906 N.E.2d at 33.

41. *Id.*

42. *Id.*

43. *Id.* at 56, 906 N.E.2d at 34.

44. *Id.* at 57, 906 N.E.2d at 34.

45. *Id.*

46. *Budzileni v. Dep’t of Human Rights*, 392 Ill. App. 3d 422, 910 N.E.2d 1190 (1st Dist. 2009).

47. *Id.* at 425, 910 N.E.2d at 1192.

standard for “substantial evidence” and 2) improperly rendered credibility in favor of respondent in violation of a federal court injunction.⁴⁸

Budzileni alleged that the IDCEO paid her less than similarly situated employees, David Streicker (“Streicker”) and Kyle Berry (“Berry”), and that even though she was more experienced and performed work of equal skill and responsibility, their annual salary exceeded hers by \$25,000.⁴⁹ Budzileni admitted that she had a different job title as a public service administrator (“PSA”) where Streicker and Berry were senior public service administrators (“SPSA”), but asserted that these differences were pretextual.⁵⁰ IDCEO admitted to the above facts, but stated that the pay difference was for more than the difference in title and was for the difference in skill and responsibility.⁵¹

Budzileni alleged that she was an attorney doing most of the work when Streicker and Berry were hired, that she trained them and that she picked up the slack where the men lacked the experience and expertise.⁵² The IDHR’s investigator spoke with Budzileni’s direct supervisor, Jeanine Jiganti (“Jiganti”), who informed him that the salaries are calculated based on prior salary history and a formula and procedure regarding training, experience, position and negotiated rate.⁵³ The personnel files of the IDCEO showed evidence that was consistent with these procedures, for both male and female employees.⁵⁴ Jiganti also informed the IDHR that Budzileni was a merit employee, while Streicker and Barry are term employees, and the investigator noted that the jobs of a PSA and a SPSA involve different duties.⁵⁵ On the other hand, the investigation also showed that there may have been complaints about Streicker and Barry’s lack of knowledge, but this information was obtained from someone who had little contact with the two.⁵⁶ The IDHR found there to be no discrimination based on the evidence.⁵⁷

Budzileni filed a request for review of the dismissal, and contended that she had received a favorable ruling by the Illinois Department of Labor (“IDOL”) for a violation of the Illinois Equal Pay Act, and this was substantially similar.⁵⁸ The chief legal counsel for the IDHR vacated the

48. *Id.* at 426, 910 N.E.2d at 1193.

49. *Id.* at 427, 910 N.E.2d at 1194.

50. *Id.*

51. *Id.*

52. *Id.* at 428–29, 910 N.E.2d at 1195.

53. *Id.* at 429, 910 N.E.2d at 1195–96.

54. *Id.* at 430–431, 910 N.E.2d at 1196–97.

55. *Id.* at 432, 910 N.E.2d at 1197.

56. *Id.* at 433, 910 N.E.2d at 1199.

57. *Id.*

58. *Id.* at 434, 910 N.E.2d at 1199.

dismissal and remanded for further investigation.⁵⁹ After further investigation, the IDHR again dismissed both counts of Budzileni's complaint, this time based on a lack of jurisdiction as it found that the charge was untimely.⁶⁰ Specifically, Budzileni filed her complaint on November 7, 2005, which was 621 days after Barry was hired and 629 days after Streicker was hired, far in excess of the 180-day time limit.⁶¹

A second request for review of the dismissal was filed, complaining that the addendum was issued too quickly, that she was not involved at all and that the IDHR incorrectly measured the 180-day period, and the dismissal was vacated again.⁶² The IDHR found that there was proper jurisdiction, but again dismissed the complaint for lack of substantial evidence.⁶³

A third request for review was submitted by Budzileni, asserting that the second addendum was entered too quickly, that she was not contacted by the IDHR, and that the second addendum just "recycled" the first investigation.⁶⁴ The chief legal counsel of the IDHR sustained the dismissal of the discrimination charge, and noted that Budzileni was not similar to Streicker and Barry because they were hired for different positions and had different assignments and duties.⁶⁵ He also noted that Budzileni failed to provide any additional evidence that would warrant reversal, and that the IDOL decision had no bearing on the outcome of the IDHR's investigation.⁶⁶

On appeal, the court found that the IDHR could only consider allegations of unequal pay from May 11, 2005 to November 7, 2005 based on the 180 day time period that petitioners have to file a discrimination charge.⁶⁷ The court stated that Budzileni needed to show a *prima facie* case of unlawful discrimination, and if this is rebutted, she must establish that the employer's reason was untrue and pretextual.⁶⁸ The court found that this test was to be used rather than the standard under the Equal Pay Act.⁶⁹

The court agreed with IDHR in the finding that Budzileni had established a *prima facie* case of discrimination, and that the IDCEO carried its burden of showing the reasoning for the disparate pay.⁷⁰ Budzileni alleged that IDCEO's

59. *Id.*

60. *Id.* at 435, 910 N.E.2d 1200.

61. *Id.*

62. *Id.* at 436, 910 N.E.2d 1200.

63. *Id.* at 437, 910 N.E.2d 1201.

64. *Id.* at 438, 910 N.E.2d 1202.

65. *Id.*

66. *Id.* at 439, 910 N.E.2d at 1203.

67. *Id.* at 442, 910 N.E.2d at 1205.

68. *Id.* at 444, 910 N.E.2d at 1207.

69. *Id.*

70. *Id.* at 447-48, 910 N.E.2d at 1209-10.

reason was pretextual, but the court disagreed based on the evidence of different job responsibilities and adherence to the pay plan by the IDCEO.⁷¹ Also, a female SPSA who was more similarly situated to Streicker and Barry made more than both men.⁷² Based on this evidence, the court found that the chief legal counsel did not abuse his discretion.⁷³

Budzileni asserted that the decision was made in error because it was based on a credibility determination that was in violation of a Seventh Circuit decision.⁷⁴ The Seventh Circuit held that the IDHR was prohibited from making credibility determinations in the course of its investigation.⁷⁵ The IDCEO stated that the decision did not rest on credibility, but on documentation, and the court agreed based on the ample documentation.⁷⁶ The court also agreed with the chief legal counsel of the IDHR in his decision that the IDOL decision was in no way binding on the IDHR.⁷⁷ There was no merit found in Budzileni's arguments regarding the length of time of the reviews either, as the court's review is limited to the chief legal counsel's determination, and Budzileni's charge was pending with the IDHR for over two and a half years.⁷⁸

The appellate court affirmed the order of the chief legal counsel for the IDHR and dismissed Budzileni's charges.⁷⁹

C. Full Faith & Credit

Ferreri v. Hewitt Associates, LLC involved a dispute regarding whether a discrimination claim brought directly in an Illinois circuit court violated public policy, whether a discrimination claim brought directly in an Illinois circuit court was prohibited by the Illinois Human Rights Act and whether a venue provision of the Missouri Human Rights Act barred an employee from filing suit in an Illinois circuit court.⁸⁰

James Ferreri ("Ferreri") filed a claim alleging age and gender discrimination against Hewitt Associates, LLC ("Hewitt"), and was issued a right-to-sue letter by the Missouri Commission on Human Rights.⁸¹ He

71. *Id.* at 448–50, 910 N.E.2d at 1210–11.

72. *Id.* at 450, 910 N.E.2d at 1211.

73. *Id.*

74. *Id.*

75. *Cooper v. Salazar*, 196 F.3d 809 (7th Cir. 1999).

76. *Budzileni*, 392 Ill. App. 3d at 451, 910 N.E.2d at 1212.

77. *Id.*

78. *Id.* at 452, 910 N.E.2d at 1213.

79. *Id.* at 453, 910 N.E.2d at 1214.

80. *Ferreri v. Hewitt Assoc.*, 391 Ill. App. 3d 221, 908 N.E.2d 1073 (2d Dist. 2009).

81. *Id.* at 222, 908 N.E.2d at 1074.

brought suit in Lake County, Illinois where Hewitt had its headquarters.⁸² The trial court granted Hewitt's motion to dismiss based on the exclusivity provision of the Illinois Human Rights Act ("IHRA"), which stated that Illinois circuit courts had no original jurisdiction over employment discrimination cases.⁸³

The IHRA states that "[e]xcept as provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act."⁸⁴ Ferreri responded to this by stating that Illinois courts routinely apply the laws of other jurisdictions and that the full faith and credit clause required them to do so.⁸⁵ Hewitt acknowledged that if Ferreri had brought his claim in Missouri courts, he would not have needed to file his claim with the Illinois Human Rights Commission, but insisted that Ferreri could not bring his Missouri employment discrimination claim in an Illinois circuit court and that it would violate Illinois public policy to do so.⁸⁶

Before the parties' supplemental briefs were due to the court, a new Illinois Supreme Court decision was entered in which the Supreme Court held that a plaintiff could bring his common-law claim in the circuit court because it did not arise under the IHRA, so the exclusivity provision of the IHRA did not apply.⁸⁷ Hewitt then argued that even if the exclusivity provision does not apply, the right-to-sue letter was from the Missouri Human Rights Commission, and therefore the action must be filed in a Missouri county, based on the language of §213.111 of the Missouri Revised Statute that states that such action may be brought in any county in which the unlawful discriminatory practice is alleged to have occurred.⁸⁸

The court stated that under the full faith and credit clause, Illinois courts are bound to recognize laws of sister states, so an Illinois court is not prevented from hearing the lawsuit that arose in Missouri.⁸⁹ The court also stated that the claim was not against public policy, as *Blount* undermined that argument.⁹⁰ The Missouri Supreme Court had not interpreted §213.111 as Hewitt claimed it should be, as the language states the claim may be brought

82. *Id.* at 222, 908 N.E.2d at 1075.

83. *Id.*

84. 775 ILL. COMP. STAT. 5/8-111(c) (2006).

85. *Ferreri*, 391 Ill. App. 3d at 223, 908 N.E.2d 1075.

86. *Id.* at 223, 908 N.E.2d 1076.

87. *Blount v. Stroud*, 232 Ill. 2d 302 (2009).

88. *Ferreri*, 391 Ill. App. 3d at 225, 908 N.E.2d at 1077.

89. *Id.*

90. *Id.*

in “any county,” not any Missouri County, and the court in the instant case held the same.⁹¹

Accordingly, the court reversed the judgment dismissing the complaint, and remanded for further proceedings.⁹²

IV. RESTRICTIVE COVENANT

In *Sunbelt Rentals, Inc. v. Ehlers*,⁹³ the appellate court expressly rejected the “legitimate-business-interest” test and concluded that the only relevant factors for determining the enforceability of restrictive covenants in an employment agreement are time and territory.⁹⁴ In May of 2003, Neil N. Ehlers (“Ehlers”) was offered and accepted a sales position with Sunbelt Rentals, Inc. (“Sunbelt”). Shortly thereafter, Sunbelt and Ehlers entered into a written employment agreement which included restrictive covenants. In pertinent part, the restrictive covenants prohibited Ehlers from being employed by any business in competition with Sunbelt for one year, if Ehlers was to be employed in a location that was within 50 miles of any Sunbelt branch where Ehlers had worked.⁹⁵

In January of 2009, Ehlers accepted employment with Midwest Aerials & Equipment, Inc. (“Midwest”), a competitor of Sunbelt’s.⁹⁶ Sunbelt sent “cease and desist” letters to both Ehlers and Midwest and later sued both parties seeking preliminary and permanent injunctive relief.⁹⁷ The circuit court granted a preliminary injunction to Sunbelt. Relying on the Supreme Court’s decision in *Mohanty v. St. John Heart Clinic, S.C.*,⁹⁸ it found that the time and territory terms of the restrictive covenant were reasonable.⁹⁹

Ehlers and Midwest argued that the circuit court had erred in that it had failed to follow controlling precedent and that Sunbelt had not demonstrated a legitimate business interest sufficient to support a preliminary injunction.¹⁰⁰ After providing a history of the “legitimate-business-interest” test and acknowledging that all the districts of the Illinois Appellate Court have used the “legitimate-business-interest” test at one time or another, the appellate

91. *Id.* at 226, 908 N.E.2d at 1078.

92. *Id.* at 227, 908 N.E.2d at 1079.

93. *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421, 915 N.E.2d 862 (4th Dist. 2009).

94. *Id.* at 432–33, 915 N.E.2d at 870–71.

95. *Id.* at 422–24, 915 N.E.2d at 863–65.

96. *Id.* at 424, 915 N.E.2d at 864.

97. *Id.* at 424–25, 915 N.E.2d at 864–65.

98. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill.2d 52, 866 N.E.2d 85 (2006).

99. *Sunbelt Rentals*, 394 Ill. App. 3d at 425, 915 N.E.2d at 865.

100. *Id.*

court found that its application was inconsistent with Supreme Court precedent. The “legitimate-business-interest” test has been articulated as follows:

A legitimate business interest exists where: (1) because of the nature of the business, the customers’ relationship with the employer are near permanent and the employee would not have contact with the customers absent the employee’s employment; and (2) the employee gained confidential information through his employment that he attempted to use for his own benefit.¹⁰¹

Upon review of the Supreme Court’s decisions regarding restrictive covenants, the appellate court came to the conclusion that only time and territory are relevant factors.¹⁰² The court noted that *Mohanty*, the Supreme Court’s most recent decision on the enforceability of restrictive covenants, made no mention of the “legitimate-business-interest” test.¹⁰³ Thus, “when presented with the issue of whether a restrictive covenant should be enforced, [courts] should evaluate only the time-and-territory restrictions contained therein.”¹⁰⁴ Having rejected the “legitimate-business-interest” test, the appellate court then concluded the restrictive covenants in Sunbelt’s employment agreement with Ehlers were reasonable as the time restriction was limited to one year and the restricted territory confined to within 50 miles of any Sunbelt branch where Ehlers had worked.¹⁰⁵

V. REAPPOINTMENT TO MEDICAL STAFF

In *Dookeran v. County of Cook*¹⁰⁶ the Court reviewed the Cook County Board’s decision to deny Dr. Dookeran’s 2004 application for reappointment to the medical staff at John H. Stroger, Jr., Hospital of Cook County (“Stroger Hospital”). Dr. Dookeran applied for a surgery position at Stroger Hospital in 1999. He had previously worked at Mercy Hospital in Pittsburg where, on November 18, 1999, he received a letter formally reprimanding him for “creating a hostile work environment.”¹⁰⁷ Dr. Dookeran was hired by Stroger

101. *Id.* at 427–28, 915 N.E.2d at 867 (quoting *Hanchett Paper Co. v. Melchiorre*, 341 Ill. App. 3d 345, 351, 792 N.E.2d 395, 400 (3d Dist. 2003)).

102. *Id.*, 394 Ill. App. 3d at 428–31, 915 N.E.2d at 867–70.

103. *Id.* at 429, 915 N.E.2d at 868.

104. *Id.* at 431, 915 N.E.2d at 869.

105. *Id.* at 432–33, 915 N.E.2d at 871.

106. *Dookeran v. Cnty. of Cook*, 396 Ill. App. 3d 800, 920 N.E.2d 633 (1st Dist. 2009).

107. *Id.* at 802, 920 N.E.2d at 637.

Hospital in 2000 and as a condition of his employment he was required to apply for reappointment every two years. The 1999 application did not request information regarding formal reprimands; however, the 2002 reappointment application did. In 2002, Dr. Dookeran indicated he had not been reprimanded during the four prior years, despite Mercy Hospital's reprimand letter which had come three years and eight months prior.¹⁰⁸

In 2004, Dr. Dookeran again applied for reappointment and at this time disclosed the details of the Mercy Hospital reprimand letter. Pursuant to the hospital's bylaws, the credentials committee submitted a recommendation to the executive medical staff ("EMS") recommending that Dr. Dookeran's reappointment application be denied. EMS referred the matter to a peer review committee for investigation of Dr. Dookeran's alleged misconduct. Upon review and interviews, the peer review committee issued a written recommendation to EMS and concluded that Dr. Dookeran "willfully falsified" his 2002 reappointment application and that he had a "long history of inappropriate behavior with hospital personnel."¹⁰⁹ The peer review committee recommended a 29-day suspension of Dr. Dookeran's clinical privileges.¹¹⁰ EMS reviewed the peer review committee's recommendation and increased the suggested suspension to 30 days, which triggered Dr. Dookeran's right to a hearing.¹¹¹

The hearing committee heard testimony regarding Dr. Dookeran's reappointment application and allegations of unprofessional conduct. After hearing testimony about incidents with medical students, other doctors and staff at Stroger Hospital, and others, the hearing committee submitted written findings to the EMS President in accordance with the bylaws.¹¹² The hearing committee found that Dr. Dookeran failed to provide "clear and convincing evidence . . . that he did not willfully falsify his 2002 reappointment application" and did not "provide convincing evidence that he did not display abusive or unprofessional behavior toward several people presented at this hearing."¹¹³ The hearing committee recommended suspension or revocation of Dr. Dookeran's staff membership.¹¹⁴ EMS reviewed the hearing committee's recommendation and recommended to the joint conference committee that Dr. Dookeran be suspended for 30 days.¹¹⁵ The joint

108. *Id.* at 802-03, 920 N.E.2d at 637.

109. *Id.* at 804, 920 N.E.2d at 638.

110. *Id.* at 804, 920 N.E.2d at 639.

111. *Id.*

112. *Id.* at 810, 920 N.E.2d at 642.

113. *Id.*

114. *Id.*

115. *Id.* at 810, 920 N.E.2d at 643.

conference committee, however, decided to adopt the hearing committee's position to revoke Dr. Dookeran's staff membership.¹¹⁶ This was forwarded to the Cook County Board and on June 20, 2006, the Board adopted that recommendation.¹¹⁷

Dr. Dookeran filed a petition for common law writ of *certiorari*. The circuit court issued an order finding that, while there was evidence in support of the factual findings of the inappropriate and abusive behavior and of a failure to disclose the reprimand in his 2002 reappointment application, there was no analysis supporting why lesser sanctions were inappropriate.¹¹⁸ The Board's decision was vacated and remanded for a lesser sanction.¹¹⁹

On appeal, Cook County argued that denial of Dr. Dookeran's reappointment application was supported by the facts. Dr. Dookeran cross appealed the hearing committee's factual findings.¹²⁰ "A common law writ of *certiorari* is a general method for obtaining a court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other forum of review."¹²¹ "Our review of an administrative agency's discharge of an employee proceeds in two stages: first we determine that the agency's findings of facts are contrary to the manifest weight of the evidence; then we decide whether 'the agency's factual findings provide a sufficient basis for concluding 'cause' for discharge exists."¹²² As to the first stage, the agency's factual findings will only be reversed if they are against the manifest weight of the evidence.¹²³ As to the second stage, "we will overturn 'a public hospital's rejection of an application for staff membership . . . [only] if the rejection is arbitrary, capricious or unreasonable."¹²⁴

The court reviewed the hearing committee's decision and the evidence heard in support thereof and found that there was no evidence to undermine the hearing committee's finding that Dr. Dookeran "willfully falsified" his 2002 reappointment application.¹²⁵ Likewise, "the evidence presented at the hearing supported a finding that Dr. Dookeran engaged in a pattern of 'abusive

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 811, 920 N.E.2d at 643.

121. *Id.* (quoting *Lapp v. Vill. of Winnetka*, 359 Ill. App. 3d 152, 166, 833 N.E.2d 983 (1st Dist. 2005)).

122. *Id.*, 920 N.E.2d at 643-44 (quoting *Applegate v. Dep't of Transp.*, 335 Ill. App. 3d 1056, 1062, 783 N.E.2d 96 (4th Dist. 2002)).

123. *Id.* at 812, 920 N.E.2d at 644.

124. *Id.* (quoting *Evers v. Edward Hosp. Ass'n*, 247 Ill. App. 3d 717, 729, 617 N.E.2d 1211 (1993)).

125. *Id.* at 813, 920 N.E.2d at 645.

or unprofessional behavior”¹²⁶ Turning to the second stage, whether denial of reappointment was the appropriate sanction, the appellate court noted that administrative agencies are to be afforded great deference and that reversal is only proper if the decision to deny Dr. Dookeran’s 2004 reappointment application was arbitrary or capricious.¹²⁷

The appellate court reviewed *Lapidot v. Memorial Medical Center*,¹²⁸ a very similar case which concluded that false answers on employment applications were grounds for dismissal.¹²⁹ Stroger Hospital’s reappointment application contained language that made clear that any omission could be grounds for termination.¹³⁰ Furthermore, Dr. Dookeran’s unprofessional behavior was supported by the evidence.¹³¹ Given the difficulty of determining an appropriate sanction, “[t]he wiser course, in a case where there was ample evidence that Dr. Dookeran’s professional conduct warranted a sanction, is to uphold the sanction the Cook County Board has determined is both reasonable and within the bylaws of Stroger Hospital.”¹³² Thus, the Board was affirmed and the circuit court reversed.¹³³

VI. COMPENSATION AND BENEFITS

A. Equal Pay Act

Because an employer failed to negate an inference of a violation of the Equal Pay Act (“Act”), judgment was entered in favor of the employee in *People ex rel. Illinois Dept. of Labor v. 2000 W. Madison Liquor Corp.*¹³⁴

Mary Arrington (“Arrington”) was employed by Main Street Liquors, and when she quit she filed a complaint with the Illinois Department of Labor (IDOL), stating that Main Street Liquors had violated the Act because it paid her less than male employees for substantially similar work.¹³⁵ Compliance officer Ron Ward (“Ward”) of the IDOL concluded that Andreas Yiannris (“Yiannris”), the owner of Main Street Liquors, had paid Arrington less than Harper Yannoulis (“Yannoulis”), a male employee, for substantially similar

126. *Id.* at 817, 920 N.E.2d at 648.

127. *Id.*

128. *Lapidot v. Mem’l Med. Ctr.*, 144 Ill. App. 3d 141, 494 N.E.2d 838 (1986).

129. *Dookeran*, 396 Ill. App. 3d at 818, 920 N.E.2d at 649.

130. *Id.*

131. *Id.* at 820, 920 N.E.2d at 650.

132. *Id.*

133. *Id.* at 820, 920 N.E.2d at 651.

134. *People ex rel. Ill. Dep’t. of Labor v. 2000 W. Madison Liquor Corp.*, 394 Ill. App. 3d 813, 917 N.E.2d 551 (1st Dist. 2009).

135. *Id.* at 814, 917 N.E.2d 553.

work.¹³⁶ Ward estimated \$4,061.25 in back wages, but there were inadequate records, so the exact amount was difficult to determine.¹³⁷ Main Street Liquors did not comply with IDOL's payment demand, and suit was filed against it.¹³⁸ At trial, Main Street Liquors was ordered to pay and then appealed, arguing that the judgment was against the manifest weight of the evidence.¹³⁹

Ward testified that he spoke with Arrington regarding her hours worked as well as with Yiannaris and Yannoulis.¹⁴⁰ Ward determined the hours and wages of the employees and the tasks for which each was responsible, and found that assuming that Arrington and Yannoulis worked the same amount of hours, she was paid substantially less than he was paid.¹⁴¹ Ward had to use reasonable inferences to determine that amount owed to Arrington because of the poor payroll records, and used the gross totals for Yannoulis to determine the amount owed to Arrington.¹⁴²

The appellate court agreed that because adequate records are lacking, the "reasonable inferences" standard applied in the case.¹⁴³ An employee has met the burden, if she can show sufficient evidence that she has performed work for which she was not properly compensated, and the burden will then be on the employer to produce evidence to rebut this.¹⁴⁴ The court found that IDOL established by a preponderance of the evidence that Arrington and Yannoulis were similarly situated.¹⁴⁵ The court held that Arrington's evidence, supplemented by Ward's testimony, was reasonable and credible evidence of her pay rate, hours worked and wages paid, and that Yiannaris failed to negate this inference.¹⁴⁶ As such, the judgment of the trial court was affirmed.

B. Minimum Wage Act

Robinson v. Tellabs, Inc. found there to be a difference between reductions and deductions in regard to the Minimum Wage Law ("Wage Law"), and that prospective reductions by an employer in the future pay of

136. *Id.*

137. *Id.*

138. *Id.* at 815, 917 N.E.2d 553.

139. *Id.* at 814, 917 N.E.2d 533.

140. *Id.* at 815, 917 N.E.2d at 554.

141. *Id.* at 815-16, 917 N.E.2d at 554.

142. *Id.*

143. *Id.* at 818, 917 N.E.2d at 556.

144. *Id.* at 819, 917 N.E.2d at 557.

145. *Id.*

146. *Id.* at 821, 917 N.E.2d at 558-59.

professional employees due to economic conditions did not trigger the loss of the overtime exception in the Wage Law.¹⁴⁷

Theodore Robinson (“Robinson”) brought a class action appeal after a finding of no liability under the Wage Law for Tellabs, Inc. (“Tellabs”), Robinson’s former employer.¹⁴⁸ Tellabs faced a dramatic and unexpected decline in profits, and implemented an “unpaid holiday” policy where employees could not work on and would not be paid for five specific days either preceding or following paid holidays.¹⁴⁹ Robinson alleged in his complaint that this practice triggered the loss of the overtime exemption under the Wage Law and that class members were entitled to overtime wages for the weeks in which they worked more than 40 hours.¹⁵⁰ The circuit court found for Tellabs.¹⁵¹

The Wage Law generally requires employers to pay employees time and one-half for any hours over 40 hours worked in one week.¹⁵² This does not apply to those who are employed in a professional capacity¹⁵³ and paid on a “salary basis.”¹⁵⁴ An employee is considered to be paid on a salary basis if he regularly receives on each pay period a predetermined amount which is not subject to reduction because of variations in the quality or quantity of the work performed.¹⁵⁵ Opinion letters from the U. S. Department of Labor (“USDOL”) have interpreted the regulations as allowing reductions to employees’ salaries to address *bona fide* business needs.¹⁵⁶ The court held that Tellabs’ unpaid holiday policy fell within this exception that had been recognized by the USDOL.¹⁵⁷

The court relied heavily on *In re Wal-Mart Stores, Inc.*, which determined that Wal-Mart reduced base hours and base pay for the company’s own interest, and that this did not circumvent the salary basis requirement.¹⁵⁸ *In re Wal-Mart* relied on three USDOL opinion letters that allowed for a fixed reduction in salary due to economic conditions without payment of overtime.¹⁵⁹ *In re Wal-Mart* made it clear that Wal-Mart could reduce work

147. Robinson v. Tellabs, 391 Ill. App. 3d 60, 907 N.E.2d 501 (1st Dist. 2009).

148. *Id.* at 62, 907 N.E.2d at 503.

149. *Id.* at 62–63, 907 N.E.2d at 503–04.

150. *Id.* at 63, 907 N.E.2d at 504.

151. *Id.* at 64, 907 N.E.2d at 504.

152. 820 ILL. COMP. STAT. 1054a (2008).

153. 820 ILL. COMP. STAT. 105/4a(2)(E) (2008).

154. 29 C.F.R. §541.1-541.3.

155. 29 C.F.R. §541.1118(a).

156. Robinson, 391 Ill. App. 3d at 66, 907 N.E.2d at 506.

157. *Id.* at 67, 907 N.E.2d at 507.

158. *In re Walmart Stores, Inc.*, 395 F.3d 1177 (10th Cir. 2005).

159. *Id.* at 1186.

hours and salaries to decrease its operational costs and, so long as the practice was not too common, it would be a bona fide reduction.¹⁶⁰ The court in *Robinson* agreed with this ruling and the reliance on the DOL opinion letters, and held that the case at bar involved reductions in future pay rather than deductions in current pay.¹⁶¹

The court also determined that the predetermined dates qualified as a fixed period of time, as they applied to all employees' work weeks and salaries and were not dependent on the employees' conduct or made on a day-to-day or week-to-week basis.¹⁶² The court ultimately held that the circuit court's finding should be affirmed and that the employees' exempt, professional status was consistent with the salary basis test, and that the mandatory days off without pay policy did not make them hourly workers.¹⁶³

C. Wage Payment & Collection Act

As the bonus referred to in an employment agreement that was not guaranteed to be paid, *McLaughlin v. Sternberg Lanterns, Inc.* found that the employee was not entitled to a pro rata share of that bonus under the Wage Payment and Collection Act ("Act").¹⁶⁴

Donald McLaughlin ("McLaughlin") worked as vice president of sales for Sternberg Lanterns, Inc. ("Sternberg") until October 12, 2006.¹⁶⁵ When he was promoted to this position, McLaughlin signed an agreement that outlined the financial terms, including that he would "earn a bonus of \$2,000 for every 1% increase in released incoming orders" per year, and his base salary would be guaranteed for 6 months for early termination by the company, unless the termination was for substantial cause, in which case he would receive his base salary for 60 days.¹⁶⁶ McLaughlin was terminated based on poor interpersonal skills, negative comments from other employees, and direct disobedience of the employer's order.¹⁶⁷

McLaughlin filed a claim seeking recovery of final compensation under the Act, alleging he was owed a *pro rata* share of his performance bonus and that he was owed an additional four months of pay because his termination

160. *Id.*

161. *Robinson*, 391 Ill. App. 3d at 70–71, 907 N.E.2d at 509–10.

162. *Id.* at 73, 907 N.E.2d at 511–12.

163. *Id.* at 74, 907 N.E.2d at 512.

164. *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536, 917 N.E.2d 1065 (2d Dist. 2009).

165. *Id.* at 538, 917 N.E.2d at 1066.

166. *Id.*

167. *Id.* at 539, 917 N.E.2d at 1067–68.

was not for substantial cause.¹⁶⁸ The Act states that final compensation should include “earned bonuses.”¹⁶⁹ After reviewing several cases, the court decided that in sum, an employee is only entitled to a *pro rata* share of a bonus, if he was unequivocally promised a bonus by his employer.¹⁷⁰ This is consistent with the Illinois Department of Labor’s regulations construing the Act, which state that a former employee shall be entitled to an earned bonus when the employee performs the requirements for a bonus set forth in the agreement between the parties.¹⁷¹

The court decided that the language in the contract between McLaughlin and Sternberg was not a guarantee that McLaughlin would receive the bonus, rather the sales would have to increase throughout the year.¹⁷² Whether McLaughlin would in fact be entitled to a bonus would not be known for two months after his termination.¹⁷³ The court also found that there was nothing in the record to suggest Sternberg acted in bad faith in determining that McLaughlin’s termination was for substantial cause.¹⁷⁴ The court affirmed the judgment of the circuit court.

D. Prevailing Wage Act

As a matter of first impression, the appellate court in *Town of Normal v. Hafner* held that developers were not a public body and, therefore, the redevelopment project was not a public work to which the Prevailing Wage Act (“Act”) applied.¹⁷⁵

The Town of Normal (“Normal”) entered into an agreement with the Hafners to redevelop properties in Normal in exchange for a portion of the increased tax revenues generated by the redevelopment.¹⁷⁶ Normal filed a complaint seeking declaratory judgment that the Hafners had to pay prevailing wages and, as they did not, the agreement was terminable.¹⁷⁷ Incentive payments were in place and if the Act is applicable, the Hafners are not entitled to these payments. If the Act is not applicable, the Hafners are entitled to them.¹⁷⁸ The issue before the court was: “does the Act apply to private

168. *Id.* at 540, 917 N.E.2d at 1068.

169. 820 ILL. COMP. STAT. 115/2.

170. *McLaughlin*, 395 Ill. App. 3d at 543, 917 N.E.2d at 1071.

171. ILL. ADMIN. CODE tit. 56, §300.500 (2009).

172. *McLaughlin*, 395 Ill. App. 3d at 544, 917 N.E.2d at 1071.

173. *Id.* at 545-46, 917 N.E.2d at 1072.

174. *Id.* at 546, 917 N.E.2d at 1073.

175. *Town of Normal v. Hafner*, 395 Ill. App. 3d 589, 918 N.E.2d 1268 (4th Dist. 2009).

176. *Id.* at 591, 918 N.E.2d 1269.

177. *Id.* at 592, 918 N.E.2d at 1270.

178. *Id.* at 592, 918 N.E.2d at 1271.

developers constructing private family residences in a tax increment financing district where the developers receive a public incentive in the form of a portion of the tax increment generated from the project?”¹⁷⁹

The court looked at the Act, which states that its purpose is to pay a wage of no less than the general prevailing hourly rate to all workers employed by or on behalf of all public bodies engaged in public works.¹⁸⁰ The Act defines public works as works constructed by a public body and defines public body as the State or any political subdivision thereof or any institution supported in whole or part by public funds.¹⁸¹ Normal contends the Hafners were obligated to pay prevailing wages because they became a public body for purposes of the Act by agreeing to take the public funds.¹⁸² Both cases relied on by Normal show institutions consistently receiving public funds over many years.¹⁸³

In this case, the Hafners were building private residences, not public fixtures, and the public funds the Hafners are entitled to are generated by the property-tax dollars assessed to private property.¹⁸⁴ Also, the court interpreted the exclusion of the Tax Increment Allocation Redevelopment Act (“TIF Act”) to mean that projects do not become public works by accepting the benefits of the TIF Act.¹⁸⁵ The court reversed and remanded for the trial court to vacate its order granting summary judgment for Normal and to enter summary judgment for the Hafners instead.¹⁸⁶

E. Unemployment

1. *Fraudulent Misrepresentation/Preemption*

In *Johnson v. Waterfront Services Co.*,¹⁸⁷ plaintiff filed suit against the defendant alleging that he had left his former job to work for the defendant in reliance on promises.¹⁸⁸ The plaintiff alleged that when he joined the defendant, he did receive a promised pay raise as well as credit for years of service elsewhere, but he was not provided with promised shares of the defendant’s stock through the ESOP as though he has been employed by the

179. *Id.* at 593, 918 N.E.2d at 1271.

180. 820 ILL. COMP. STAT. 130/1 (2004).

181. 820 ILL. COMP. STAT. 130/2 (2004).

182. *Town of Normal*, 395 Ill. App. 3d at 594, 918 N.E.2d at 1272.

183. *Id.* at 595-96, 918 N.E.2d at 1273.

184. *Id.* at 597, 918 N.E.2d at 1274.

185. *Id.* at 598, 918 N.E.2d at 1275.

186. *Id.* at 599, 918 N.E.2d at 1276.

187. *Johnson v. Waterfront Serv. Co.*, 391 Ill. App. 3d 985, 909 N.E.2d 342 (5th Dist. 2009).

188. *Id.* at 986-87, 909 N.E.2d at 345.

defendant from the date in which the ESOP came into existence (which was before his employment).¹⁸⁹ The trial court granted summary judgment in favor of the defendants.¹⁹⁰

On appeal, the defendants argued that the state lawsuit filed by the plaintiff was preempted under ERISA.¹⁹¹ The defendants pointed to instances where state law claims for enhancement of ESOPs based on oral modifications of ERISA plans have been found to be preempted and without merit.¹⁹² The court noted that the plaintiff's complaint is not derived from the substance of the ESOP, nor is the plaintiff's complaint concerned with the regulation of the plan.¹⁹³ It determined that the substance and regulation of the ESOP are only tangential and incidental to the plaintiff's claim of fraud.¹⁹⁴ Because the modification of the ERISA plan, oral or otherwise, was not an issue in this case, the question here was whether the plaintiff was induced by fraudulent misrepresentation.¹⁹⁵ Accordingly, the court found that there was no preemption.¹⁹⁶

The second issue raised on appeal was whether the plaintiff's cause of action for fraudulent misrepresentation was appropriately supported.¹⁹⁷ In order to succeed on a claim of fraudulent misrepresentation, the plaintiff must prove the following: "(1) a false statement of material fact, (2) knowledge or belief of the falsity on behalf of the party making the statement, (3) an intention to induce the other party to act, (4) action by the plaintiff in reliance on the truth of the statement, and (5) damage to the plaintiff resulting from that reliance."¹⁹⁸ The court noted that with respect to summary judgment motions, a plaintiff need not prove his case but must present some factual basis that would support his or her claim.¹⁹⁹ The appellate court determined that there were genuine issues of material fact that precluded summary judgment.²⁰⁰

189. *Id.* at 987, 909 N.E.2d at 345.

190. *Id.* at 989, 909 N.E.2d at 347.

191. *Id.*

192. *Id.* at 990, 909 N.E.2d 347 (citing *Lister v. Stark*, 890 F.2d 941, 945 (7th. Circ. 1989); *Chapman v. Health Works Med. Group of W. Va., Inc.*, 170 F.Supp.2d 635, 640 (N.D. W. Va. 2001)).

193. *Id.* at 992, 909 N.E.2d at 349.

194. *Id.*

195. *Id.*

196. *Id.* at 989, 909 N.E.2d at 347.

197. *Id.*

198. *Id.* (quoting *Schrager v. N. Cmty. Bank*, 328 Ill. App. 3d 696, 703, 767 N.E.2d 376, 381 (1st Dist. 2002)). The court also noted that the plaintiff's reliance must be justified to sustain the cause of action. See *Neptuno Treuhand-Und Verwaltungsgesellschaft Mbh v. Arbor*, 295 Ill. App. 3d 567, 571, 692 N.E.2d 812, 815 (1st Dist.1998).

199. *Johnson*, 391 Ill. App. 3d at 993, 909 N.E.2d at 350.

200. *Id.* at 994, 909 N.E.2d at 351.

The appellate court determined that a reasonable trier of fact could find that the defendant's issue of misrepresentation was designed to induce the plaintiff to change his employment.²⁰¹ It noted that the same trier of fact could also find that the plaintiff conducted a prudent investigation and that the plaintiff's reliance on the defendant's statements was justified.²⁰² Accordingly, the trial court's granting of summary judgment in favor of the defendant was reversed.²⁰³

2. Time for Proceedings

In *Carroll v. Department of Employment Security*,²⁰⁴ the plaintiff applied for unemployment insurance benefits after his termination from the employer.²⁰⁵ The Illinois Department of Employment Security (hereafter "IDES") denied the plaintiff's application.²⁰⁶ The plaintiff appealed to the board, which affirmed the denial of benefits.²⁰⁷

The reviewing board mailed its two-page decision to the plaintiff at his last known address in Nevada.²⁰⁸ At the bottom of the second page, it indicated that the decision was mailed on April 11, 2007, and a notice informed the plaintiff that if he was aggrieved by the decision and wanted to appeal, he must file a complaint for administrative review and have summons issued in the appropriate circuit court within 35 days from the mailing date of April 17, 2007.²⁰⁹ The plaintiff, who was *pro se*, filed his complaint for administrative review on May 18, 2007, 37 days after the date of the issuance of the board's decision.²¹⁰ The IDES moved to dismiss the plaintiff's claim for lack of subject matter jurisdiction pursuant to Sections 2-619(a)(5), 3-102 and 3-103 of the Illinois Code of Civil Procedure.²¹¹ The circuit court granted the motion to dismiss and the plaintiff timely appealed the decision of the circuit court to the appellate court.

On appeal, the plaintiff argued that the 35-day deadline in Section 3-103 is vague because it did not define whether a day should be counted as either a business or calendar day for purposes of calculating the deadline in the

201. *Id.*

202. *Id.*

203. *Id.* at 995, 909 N.E.2d at 351.

204. *Carroll v. Dep't of Emp't Security*, 389 Ill. App. 3d 404, 907 N.E.2d 16 (1st Dist. 2009).

205. *Id.* at 406, 907 N.E.2d at 19.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* See 735 ILL. COMP. STAT.5/2-619(a)(5), 3/102, 3/103 (2006).

statute.²¹² The plaintiff argued that this vagueness required application of Section 1-106 of the Illinois Code of Civil Procedure, which states that the “act shall be liberally construed, to the end that controversies may be speedy and finally determined according to the substantive rights of the parties.”²¹³

The appellate court found that Section 3-103 of the Illinois Code of Civil Procedure was not ambiguous.²¹⁴ If the statute is unambiguous, the provisions of Section 1-106 of the Illinois Code of Civil Procedure, which encourages liberal construction, are not to be applied to aid in any further interpretation.²¹⁵

The plaintiff also argued that his due process rights were violated because the statutes governing the appeal of administrative decisions did not specify that the 35-day period was computed by counting calendar days.²¹⁶ The plaintiff argued that failure to give him clear, reliable information regarding the appeals process was a denial of due process.²¹⁷

The appellate court stated that it reviews *de novo* whether a plaintiff’s due process rights are violated.²¹⁸ “There is no constitutional due process right to judicial review at an administrative decision.”²¹⁹ Nevertheless, administrative proceedings are governed by due process requirements.²²⁰

The appellate court found that the IDES clearly informed the plaintiff that his application for unemployment insurance benefits was denied.²²¹ “Furthermore, the board informed him that if he wanted to appeal the decision, he must file his complaint in the circuit court within 35 days of April 11, 2007.”²²² It determined that there was no due process violation merely because the board did not calculate the exact due date for the plaintiff or warn him to count calendar days when computing the 35-day period.²²³ The record established that the plaintiff failed to timely file his complaint for administrative review after he received a fair and adequate notice of the board’s final decision.²²⁴ Accordingly, there is no due process violation.²²⁵

212. *Carroll*, 389 Ill. App. 3d at 408, 907 N.E.2d at 21.

213. *Id.* at 408–09, 907 N.E.2d at 21 (citing 735 ILL. COMP. STAT. 5/1-106 (2006)).

214. *Id.* at 409, 907 N.E.2d at 22.

215. *Id.* (citing *Ultsch v. Ill. Mun. Ret. Fund*, 226 Ill. 2d 169, 178, 874 N.E.2d 1 (2007)).

216. *Id.* at 410, 907 N.E.2d at 23.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* (citing *Carver v. Nall*, 186 Ill. 2d 554, 563, 714 N.E.2d 486, 491 (1999)).

221. *Id.* at 410–11, 907 N.E.2d at 23.

222. *Id.* at 411, 907 N.E.2d at 23.

223. *Id.*

224. *Id.*

225. *Id.*

Finally, the plaintiff argued that IDES failed to meet its burden to prove that its decision was actually mailed on April 11, 2007.²²⁶ The plaintiff contended that the affidavit introduced by the IDES did not establish that he had any personal knowledge or recollection concerning service of the decision.²²⁷

While an administrative agency does bear the burden of establishing that a petition for review under the administrative review law was filed more than 35 days after notice of the decision was served, the appellate court determined that the defendant did establish this burden.²²⁸ The defendant does not have the burden of proving a mailing beyond a reasonable doubt, but rather it must show that it is more probable than not that the mailing occurred on a specific date.²²⁹ The affidavit introduced by IDES showed that the affiant had personal knowledge that the defendant's custom was followed when the decision was mailed to the plaintiff.²³⁰ Accordingly, the circuit court's decision granting the defendant's motion to dismiss the complaint for administrative review was affirmed.

3. *Misconduct*

In *Sudzus v. Department of Employment Security*,²³¹ the plaintiff was employed as an apprentice electrician for the employer.²³² It was alleged that he was terminated for dismantling heating, ventilation and air conditioning units on the roof of one of the defendant's customers.²³³ When the plaintiff returned from work after a weeklong vacation, he received a voice message from the defendant's/employer's owner stating that he should not return to work but should instead contact the employer.²³⁴

The plaintiff filed a claim for unemployment benefits with the IDES and claimed that the reason for his separation was lack of work.²³⁵ The employer protested, and the claims adjudicator determined that the plaintiff was discharged because of misconduct relating to the air conditioning units and therefore was not eligible for benefits.²³⁶

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.* (citing *Saunders v. Dep't of Pub. Aid*, 198 Ill. App. 3d 1076, 1082, 556 N.E.2d 736 (1990)).

230. *Id.* at 412, 907 N.E.2d at 23.

231. *Sudzus v. Dep't of Emp't Sec.*, 393 Ill. App. 3d 814, 914 N.E.2d 208 (5th Dist. 2009).

232. *Id.* at 816, 914 N.E.2d at 211.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 816, 914 N.E.2d at 211–12.

The plaintiff sought further review by the IDES appeals division.²³⁷ In a telephonic hearing conducted by a hearing officer, testimony was received along with relevant exhibits.²³⁸ At the telephonic hearing, the plaintiff confirmed that he did dismantle and remove parts from the rooftop HVAC units; however, he stated that an employee of the defendant told him that the parts removed from the units were garbage and could be removed.²³⁹ The plaintiff also claimed that he had never actually been informed of when he was actually fired.²⁴⁰

The referee affirmed the claim adjudicator's rejection of benefits. The plaintiff appealed the decision, which affirmed the findings and the denial of benefits. It was concluded that the plaintiff was discharged for misconduct connected with work and was subject to disqualification of benefits under Section 602(a) of the Illinois Unemployment Insurance Act.²⁴¹ The plaintiff sought judicial review of the board's decision and the circuit court affirmed the rejection of benefits.

The appellate court noted that the standard of review depends on whether the question presented is one of fact, law, or mixed question of law and fact.²⁴² In reviewing the administrative agency's factual findings, a court does not weigh the evidence or substitute its judgment for that of the agency.²⁴³ Factual findings of an administrative agency are deemed *prima facie* true and correct, and a reviewing court will only determine if those findings are contrary to the manifest weight of the evidence.²⁴⁴ Factual determinations are only against the manifest weight of the evidence if the opposite conclusion is clearly evident.²⁴⁵

In the case of an agency's determination involving mixed questions of law and fact, it has been held that when a mixed question is one in which the historical facts are admitted or established, the rule of law is undisputed and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated.²⁴⁶ Mixed questions indicate the clearly erroneous standard, which is less deferential to

237. *Id.* at 816, 914 N.E.2d at 212.

238. *Id.*

239. *Id.* at 817, 914 N.E.2d at 212.

240. *Id.* at 818, 914 N.E.2d at 213.

241. *Id.* at 819, 914 N.E.2d at 213 (citing 820 ILL. COMP. STAT. 405/602(a) (2006)).

242. *Id.* at 819, 914 N.E.2d at 214.

243. *Id.* (citing *Abrahamson v. Ill. Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 1117 (1992)).

244. *Id.* at 819, 914 N.E.2d at 214 (citing *Jackson v. Bd. of Review of the Dep't of the Labor*, 105 Ill. 2d 501, 513, 475 N.E.2d 879, 885 (1985)).

245. *Id.* at 819, 914 N.E.2d at 214 (citing *Abrahamson*, 153 Ill. 2d at 88, 606 N.E.2d 1117 (1992)).

246. *Id.* at 820, 914 N.E.2d at 214 (citing *Moss v. Dep't of Emp't Sec.*, 357 Ill. App. 3d 980, 984, 830 N.E.2d 663, 667-68 (2005)).

the IDES than the manifest weight of the evidence standard because the agency is deciding the legal application of a factual determination.²⁴⁷

The first issue addressed by the appellate court was whether or not the employer-defendant's representative participated in an unauthorized practice of law at the administrative hearing.²⁴⁸ The appellate court determined that the individual did not engage in an unauthorized practice of law by participating in the administrative hearing involving its employer. It noted that he participated at an informal hearing in which all parties, including the plaintiff and the employer, can participate without legal representation.²⁴⁹ The appellate court determined from the record that the employee was simply acting on behalf of the employer in a manner that would benefit the corporation and that the character of the action did not require legal knowledge or skill.²⁵⁰ The individual simply supplied fact-based answers to questions.²⁵¹

The plaintiff also claimed that he was denied a full and fair opportunity to be heard and therefore was denied the requirement of due process of law.²⁵² A fair hearing before an administrative agency includes the opportunity to be heard, the right to cross-examine adverse witnesses, and impartiality in the ruling upon the evidence.²⁵³

The claim of due process violation will be sustained only upon a showing of prejudice in the proceedings. Without a showing of prejudice, there will be no basis for the plaintiff's claim of a denial of due process.²⁵⁴ In the case at hand, the appellate court determined that the plaintiff did not make a sufficient showing of a due process denial. During the hearings, the plaintiff was afforded a full opportunity to present testimony as to his understanding that the HVAC units could be dismantled. He was given an opportunity to be heard in compliance with due process.²⁵⁵ The referee provided the plaintiff with the opportunity to question other witnesses, and the plaintiff did indeed question some of the witnesses.²⁵⁶ Finally, the plaintiff made no claim that the referee made a biased determination on the evidence in violation of due process.

247. *Id.* at 820, 914 N.E.2d at 214 (citing *Carpetland U.S.A., Inc. v. Ill. Dep't of Emp't Sec.*, 201 Ill. 2d 351, 369, 776 N.E.2d 166, 177 (2002)).

248. *Id.* at 820, 914 N.E.2d at 214–15.

249. *Id.* at 820, 914 N.E.2d at 215 (citing 820 ILL. COMP. STAT. 405/806 (2006)).

250. *Id.* at 823, 914 N.E.2d at 217.

251. *Id.*

252. *Id.* at 824, 914 N.E.2d at 217–18.

253. *Id.* at 824, 914 N.E.2d at 218 (citing *Abrahamson v. Ill. Dep't of Prof'l Regulation*, 153 Ill. 2d 76, 88, 606 N.E.2d 1111, 1117 (1992)).

254. *Id.* at 825, 914 N.E.2d at 218 (citing *Booker v. Dep't of Emp't Sec.*, 216 Ill. App. 3d 320, 322, 576 N.E.2d 1028, 1030 (1991)).

255. *Id.* at 826, 914 N.E.2d at 219.

256. *Id.*

The appellate court then determined whether or not the plaintiff committed statutory misconduct so as to cause himself to be ineligible to receive unemployment benefits under the Act.²⁵⁷ The question whether an employee was properly terminated for misconduct in connection with his work involves a mixed question of law and fact. This means that the clearly erroneous standard of review is required.²⁵⁸

To establish statutory misconduct which leads to disqualification of IDES benefits, the board is required to determine whether there was (1) a deliberate and willful violation of a rule or policy, (2) the rule or policy of the employing unit was reasonable, and (3) the violation either had harmed the employer or was repeated by the employee despite previous warnings.²⁵⁹

The appellate court determined that the trier of fact was free to conclude that all of these elements were met. The appellate court affirmed judgment of the circuit court which upheld the decision of the board.

In *Hurst v. Department of Employment Security*,²⁶⁰ the plaintiff appealed from an order of the Circuit Court of Cook County, which affirmed the ruling of the board of review of the IDES that the plaintiff was ineligible for benefits under Section 602(a) of the Illinois Unemployment Insurance Act.²⁶¹ The finding was that benefits were not appropriate due to misconduct in connection with the plaintiff's work.²⁶²

The plaintiff was employed as a customer assistant technician for over ten years for Illinois Bell Telephone.²⁶³ The plaintiff was terminated on May 23, 2005, for failing to report that he had been arrested and incarcerated for driving while intoxicated on April 18 and 19, 2005.²⁶⁴ The plaintiff testified that he performed his job duties in the field and was required to have a valid driver's license.²⁶⁵ After his incarceration for a DUI, he returned to work. His supervisor asked the plaintiff to produce a driver's license, and he produced an expired driver's license, mistakenly thinking it was his current one.²⁶⁶ The plaintiff was told that he could not work and had to go home until he could produce a valid driver's license.²⁶⁷

257. *Id.*

258. *Id.* at 26, 914 N.E.2d at 219 (citing *Oleszczuk v. Dep't of Emp't Sec.*, 336 Ill. App. 3d 46, 50, 782 N.E.2d 808, 811 (2002)).

259. *Id.* at 826, 914 N.E.2d at 219 (citing 820 ILL. COMP. STAT.405/602(a) (2006)).

260. *Hurst v. Dep't of Emp't Sec.*, 393 Ill. App. 3d 323, 913 N.E.2d 1067 (1st Dist. 2009).

261. *Id.* at 324, 913 N.E.2d at 1069 (citing 820 ILL. COMP. STAT. 405/602(a) (2004)).

262. *Id.* at 324, 913 N.E.2d at 1069.

263. *Id.*

264. *Id.* at 324, 913 N.E.2d at 1069.

265. *Id.*

266. *Id.*

267. *Id.*

The plaintiff did return to work and explained to his employer that he had been arrested. The plaintiff was told that he must inform the employer of his arrest as soon as he returned to work, and the plaintiff stated he was unaware of this requirement.²⁶⁸ The plaintiff was discharged by the employer on May 23, 2005, for failing to timely inform the employer of his traffic violation for operating a vehicle while intoxicated. He claimed he was also told that if he had reported the violation, he would not have been discharged.²⁶⁹

The hearing referee issued an order disqualifying the plaintiff for unemployment benefits finding that he had been discharged for misconduct in connection with his work. The referee determined that the plaintiff knowingly failed to report his arrest and to inform the employer that the driver's license was being held by the police. The board affirmed the denial of benefits. After the matter was appealed to the circuit court and then remanded, a second board decision was rendered which also denied benefits.²⁷⁰

The appellate court noted that when an individual claims unemployment insurance benefits, he or she has the burden of establishing his or her eligibility.²⁷¹ If he or she was discharged for misconduct, then he or she is deemed ineligible to receive those benefits.²⁷² Misconduct is defined as the deliberate and willful violation of a reasonable rule or policy governing the individual's behavior in performance of his work, provided such violation has harmed the employer or has been repeated by the employee despite previous warnings.²⁷³

The plaintiff asserted that the employer requiring him to report his arrest to his immediate supervisor upon returning to work did not govern his behavior in the performance of his work and thus could not form the basis of a finding of misconduct.²⁷⁴ The IDES board responded that the plaintiff forfeited this issue by failing to raise it in the administrative proceedings before the hearing referee.²⁷⁵

The appellate court considered whether or not the plaintiff waived his contention that the employer's rule does not govern his behavior in the performance of his work. The appellate court found that the plaintiff first alleged that the rule did not govern his behavior in the performance of his work in his January 5, 2007, memorandum of law in support of his complaint

268. *Id.* at 324, 913 N.E.2d at 1069–70.

269. *Id.* at 325, 913 N.E.2d 1070.

270. *Id.* at 326, 913 N.E.2d at 1070.

271. *Id.* at 327, 913 N.E.2d at 1071.

272. *Id.* (citing *Manning v. Dep't of Emp't Sec.*, 365 Ill. App. 3d 553, 557, 850 N.E.2d 244 (2006)).

273. *Id.* at 327, 913 N.E.2d at 1071 (citing 820 ILL. COMP. STAT. 405/602(a) (2004)).

274. *Id.* at 327–28, 913 N.E.2d at 1071.

275. *Id.* at 328, 913 N.E.2d at 1071.

for administrative review of the board's decision.²⁷⁶ Thus, it is clear that he failed to raise this issue before the administrative agency, and the rule of procedural default precludes judicial review of that issue.²⁷⁷ Moreover, the appellate court found that the rule at issue did govern the plaintiff's behavior in performance of the work and that it required the plaintiff to report any criminal charges upon his return to work and, as such, was the rule governing his behavior in the performance of work.²⁷⁸

The plaintiff asserted that he was unaware of the rule at issue and therefore did not deliberately violate it.²⁷⁹ The plaintiff testified that he received and read the employee handbook containing the rule at issue, and the appellate court noted that the employer representative testified that the plaintiff attended a work meeting two weeks before the incident at which time the rule was addressed.²⁸⁰ The appellate court determined therefore that the board's determination that the plaintiff was aware of the rule and willfully disregarded it was proven.²⁸¹

Finally, the plaintiff asserted that there was no evidence that the employer was harmed by the violation or that it was repeated.²⁸² The appellate court noted that the weight of legal authority recognizes that harm to an employer can be established by potential harm and is not limited to just actual harm.²⁸³

The appellate court concluded that the IDES board's determination that the plaintiff was discharged for misconduct in connection with his work and subject to disqualification of benefits was not clearly erroneous.²⁸⁴ The ruling of the circuit court that affirmed the denial of benefits was affirmed by the appellate court.

4. *Employee/Independent Contractor*

In *Veterans Messenger Service, Inc. v. Jordan*,²⁸⁵ a delivery service sought administrative review of a decision by the IDES regarding the issue of independent contractors. The IDES recharacterized the defendant's delivery

276. *Id.* at 328, 913 N.E.1d at 1072.

277. *Id.*

278. *Id.*

279. *Id.* at 328–29, 913 N.E.2d at 1072.

280. *Id.* at 329, 913 N.E.2d at 1072.

281. *Id.*

282. *Id.* at 329, 913 N.E.2d at 1073.

283. *Id.* (citing *Livingston v. Dep't of Emp't Sec.*, 375 Ill. App. 3d 710, 717, 873 N.E.2d 444 (2007)).

284. *Id.* at 330, 913 N.E.2d at 1073.

285. *Veterans Messenger Serv., Inc. v. Jordan*, 393 Ill. App. 3d 715, 913 N.E.2d 1094 (1st Dist. 2009).

service couriers as employees and assessed contribution to the department's unemployment trust fund. The circuit court affirmed the department's decision, and the appellate court thereafter affirmed.

The defendant was a delivery brokerage service located in Bensenville, Illinois. After delivery orders were received, dispatchers of the defendant relayed orders to couriers that it had contracted with to carry out delivery orders. The defendant recorded the couriers, the location of the delivery items, the weight of each item, and any other customer requirements the moment the couriers came into physical contact with the delivery items.²⁸⁶

Couriers signed a standard contract which characterized themselves as independent contractors. Couriers were only responsible for the delivery results. The couriers controlled the manner of the work and set their own hours and vacation. They were free to reject any deliveries offered by the dispatchers and were free to perform delivery services for other courier service brokers. The contract set a standard rate for each item delivered, and either party was free to terminate the contract although the contract required the defendant to pay \$100 to any courier, if terminated.²⁸⁷

Following an audit in 1991, the IDES found that the couriers were employees and assessed \$79,352.14 plus interest in unpaid contributions. The defendant filed a timely protest.²⁸⁸

The circuit court affirmed the IDES' decision, and an appeal was made to the appellate court. The defendant first alleged that its due process was violated by the department when it failed to interview a single courier.²⁸⁹ The department responded that the defendant forfeited this argument by failure to raise it in a written objection to its 1993 recommended decision that couriers did not qualify as independent contractors.²⁹⁰ The appellate court noted that the defendant did file other objections in writing to the recommended decision of the board, but this due process claim was not made.

With respect to the actual employment status of the couriers, the appellate court noted that whether a company's workers are employees or independent contractors is a mixed question of law and fact.²⁹¹ Section 212 of the Act permits a company to classify a worker as an independent contractor when the worker meets three certain requirements.

286. *Id.* at 717, 913 N.E.2d at 1096.

287. *Id.*

288. *Id.* at 718, 913 N.E.2d at 1096.

289. *Id.* at 719, 913 N.E.2d at 1097.

290. *Id.*

291. *Id.* at 720, 913 N.E.2d at 1098 (citing *Carpetland U.S.A. v. Ill. Dep't of Emp't Sec.*, 201 Ill. 2d 351, 369, 776, N.E.2d 166 (2002)).

Section 212 of the Unemployment Insurance Act²⁹² provides that a company may classify a worker as an independent contractor exempt from contribution requirements when the worker meets the following three requirements:

- A. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and
- B. Such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- C. Such individual is engaged in an independently established trade, occupation, profession, or business.²⁹³

With respect to the third requirement, the appellate court noted that workers are engaged in an independent business under Section 212(c) when the worker's "business" is "capable of operation without hindrance from any other individual."²⁹⁴ Further guidance is given by the Administrative Code which provides a nonexclusive list of factors that should be considered in determining whether a worker's business is independent.²⁹⁵

The court noted that no evidence was presented that the defendant's couriers could operate the delivery services without the solicitation of customers by the defendant or another similarly situated "delivery brokerage service."²⁹⁶ The defendant set the delivery prices, made delivery assignments, billed customers, paid drivers, and reserved the right to terminate its relationship with couriers.²⁹⁷ The couriers were not independent contractors under the totality of the circumstances test, and it was not "error" by the IDES to make this conclusion.²⁹⁸

The defendant also presented an *estoppel* argument.²⁹⁹ The defendant argued that because IDES performed an audit in 1987 and did not state that the couriers should not have been classified as independent contractors, the

292. 820 ILL. COMP. STAT. 405/202 (2006).

293. *Veterans*, 393 Ill. App. 3d at 721, 913 N.E.2d at 1099 (quoting 820 ILL. COMP. STAT. 405/212 (2006)).

294. *Id.* at 721, 913 N.E.2d 1099 (citing *AFM Messenger Serv., Inc. v. Dep't of Emp't Sec.*, 198 Ill. 2d 380, 395, 763 N.E.2d 272 (2001)).

295. *Id.* at 721, 913 N.E.2d 1099 (citing ILL. ADMIN. CODE tit. 56, § 2732.200(e) (Conway Greene CD-Rom June 2001)).

296. *Id.* at 722, 913 N.E.2d at 1099.

297. *Id.*

298. *Id.* at 722, 913 N.E.2d at 1100.

299. *Id.*

department should be *estopped* from classifying the couriers as employees based on a 1990 audit.³⁰⁰ The appellate court noted that *estoppel* can only be invoked against the State of Illinois when “some positive acts by state officials” induced a party to take action, making it inequitable to hold that party liable.³⁰¹

The appellate court affirmed the Department of Employment Security’s assessment against the defendant. It rejected the defendant’s due process argument and *estoppel* argument, and found that the department’s conclusion that the couriers were not independent contractors was not error.³⁰²

In *Emergency Treatment, S.C. v. Department of Employment Security*,³⁰³ the plaintiff, Emergency Treatment, S.C., was required to pay unpaid employer contributions pursuant to the Illinois Unemployment Insurance Act after a board hearing. The plaintiff and its client hospital entered into a six-year renewable contract for the plaintiff to be the exclusive provider of physicians to staff an emergency room department at a hospital. Under the contract, the plaintiff was responsible for recruiting physicians, setting hourly compensation and creating schedules in order to assure continuous coverage.³⁰⁴

Pursuant to this agreement, 15 physicians were under contract to the plaintiff. The documents were designated as “independent contractor agreements.” Pursuant to the agreement, the physicians were required to submit monthly timesheets to the plaintiff’s auditor, and the auditor reviewed the timesheets and then paid the physicians. The physicians retained responsibility to pay all particular taxes and contributions.³⁰⁵

At the administrative hearing, testimony was provided that several physicians maintained employment at other hospitals during the pendency of their contracts with the plaintiff. The “scheduler” of the plaintiff was set up in her own office and was provided a separate phone line and answering service from the plaintiff. The plaintiff reimbursed the scheduler for all the expenses such as photocopies, messenger services, and postage.³⁰⁶

The director of the department determined that the plaintiff failed to prove that the physicians, scheduler, or auditor operated as independent contractors.³⁰⁷ The plaintiff filed an action for administrative review, which

300. *Id.*

301. *Id.* (citing *SMRJ, Inc. v. Russell*, 378 Ill. App. 3d 563, 884 N.E.2d 1152 (2007)).

302. *Id.* at 724, 913 N.E.2d at 1101.

303. *Emergency Treatment, S.C. v. Dep’t of Emp’t Sec.*, 394 Ill. App. 3d 893, 917 N.E.2d 135 (1st Dist. 2009).

304. *Id.* at 896, 917 N.E.2d at 138.

305. *Id.* at 897, 917 N.E.2d at 139.

306. *Id.* at 898, 917 N.E.2d at 139–40.

307. *Id.* at 900–01, 917 N.E.2d 141.

was affirmed by the circuit court. The appellate court noted that with respect to allegations that persons are independent contractors, the burden rests on the employer in this exclusion to prove that all conditions of independent contractor status are established.³⁰⁸ The plaintiff argued that it only supplies physicians to hospital emergency rooms and it is not qualified to render medical services, and thus it is not in the business of providing emergency room care.³⁰⁹

The appellate court agreed with the IDES that the individual hospital where the doctors were placed is the plaintiff's place of business, as the plaintiff is the exclusive provider of emergency room physicians at that hospital.³¹⁰ The appellate court also rejected the plaintiff's due process challenge to the finding of the IDES.³¹¹ The decision of the board was affirmed, which found that the physicians were not independent contractors but were employees.

5. *Witness Credibility*

In *Grafner v. Department of Employment Security*,³¹² the plaintiff appealed a decision from the Illinois Department of Employment Security that denied unemployment compensation. The plaintiff worked for the defendant as a part-time musician playing music for two hours a week, which included a choir rehearsal on Thursday nights and one mass on Sunday mornings. The plaintiff claimed that she was entitled to benefits, as she was hired to work for the defendant parish during the Christmas season only, which ended with the mass of the Epiphany on January 7, 2007. The defendant took the position that the plaintiff voluntarily quit because she was not getting along with the choir, and work as a musician remained available for her.³¹³

The department adjudicator rendered a decision that the plaintiff was ineligible for benefits because she left work voluntarily without good cause attributable to the employer.³¹⁴ The appellate court noted that the IDES is the trier of fact in evaluating unemployment benefit claims, and its findings of fact

308. *Id.* at 902, 917 N.E.2d at 143 (citing *AFM Messenger Serv., Inc. v. Dep't of Emp't Sec.*, 198 Ill. 2d 380, 397, 763 N.E.2d 272 (2001)).

309. *Id.* at 904, 917 N.E.2d at 144.

310. *Id.* at 905, 917 N.E.2d at 145.

311. *Id.* at 907-13, 917 N.E.2d at 147-51.

312. *Grafner v. Dep't of Emp't Sec.*, 393 Ill. App. 3d 791, 914 N.E.2d 520 (1st Dist. 2009).

313. *Id.* at 793-93, 914 NE.2d at 522.

314. *Id.* at 793, 914 N.E.2d at 522.

are considered *prima facie* true and correct.³¹⁵ The claim regarding the denial of unemployment benefits is to be reviewed under the manifest weight of evidence standard in this situation.³¹⁶

The court did consider the unauthorized practice of law argument being presented by the plaintiff, but it rejected the same. In the circumstances of the instant case, no unauthorized practice of law occurred on behalf of a non-attorney representative of the defendant.³¹⁷

The plaintiff's other contention on appeal that the IDES' decision was against the manifest weight of the evidence.³¹⁸ The court noted that the plaintiff has the burden under the Act of establishing eligibility for employment insurance benefits.³¹⁹ The trial court noted that the board was charged with the responsibility of assessing the parties' credibility, and in the instant case the board found the defendant's witnesses more credible.³²⁰ This finding is not against the manifest weight of the evidence, and the plaintiff failed to meet her burden of establishing her eligibility for unemployment benefits.³²¹

6. *Benefit Ineligibility*

In *Murphy v. Illinois Department of Employment Security*,³²² the plaintiff contended that he was entitled to unemployment compensation when he was discharged from the defendant. During the time period that he was seeking unemployment benefits, the plaintiff also held the position of township supervisor for a local township. He received weekly compensation in the amount of \$515.23.³²³

The IDES terminated the plaintiff's unemployment benefits and demanded that the plaintiff reimburse the department for the amount of unemployment benefits he had received. An administrative law judge of the IDES denied benefits, and the Plaintiff appealed the decision to the board of review. The board of review found that the plaintiff was ineligible for

315. *Id.* at 796, 914 N.E.2d at 525 (citing *Acevedo v. Dep't of Emp't Sec.*, 324 Ill. App. 3d 768, 771, 755 N.E.2d 93, 96 (2001)).

316. *Id.* at 796, 914 N.E.2d at 525.

317. *Id.* at 801-04, 914 N.E.2d at 529-31.

318. *Id.* at 804, 914 N.E.2d at 531.

319. *Id.*

320. *Id.* at 805, 914 N.E.2d at 532.

321. *Id.*

322. *Murphy v. Ill. Dep't of Emp't Sec.*, 394 Ill. App. 3d 834, 917 N.E.2d 559 (1st Dist. 2009).

323. *Id.* at 835, 917 N.E.2d at 561.

benefits, and this was appealed to the Circuit Court of Cook County, which affirmed.³²⁴

The appellate court reviewed this matter as a mixed question of law and fact.³²⁵ Under this standard, the appellate court will be largely deferential toward the agency rendering the decisions, and the decision will be reversed only when it is clearly erroneous.³²⁶ The board determined that the plaintiff was not eligible for unemployment benefits because he was not an “unemployed individual.” The plaintiff argued that his position as township supervisor cannot be considered “employment.” Section 220(D)(1)(a) of the Act provides that the term “employment” shall not include service performed in the employ of a governmental entity if such service is performed in the exercise of duties as an elected official.³²⁷ The court noted that Section 234 of the Act provides that “wages” are “every form of remuneration for personal services, including salaries, commissions, bonuses, and the reasonable money value of all remuneration in any medium other than cash.”³²⁸ The appellate court affirmed the board’s finding that the plaintiff did earn wages and that the plaintiff was not an “unemployed individual.”³²⁹ The plaintiff’s final argument that he was denied equal protection under the law was rejected by the appellate court.³³⁰

F. Trade Readjustment Allowance—Procedure

The plaintiff appealed the order of the circuit court affirming the decision of the IDES which denied the plaintiff a trade readjustment allowance in *Williams v. Board of Review*.³³¹ The Trade Act of 1974 and the 2002 amendments in effect at the time of the plaintiff’s displacement provided federally funded trade readjustment assistance to workers displaced by foreign competition.³³² Trade readjustment allowance is a cash benefit that supplements regular state unemployment insurance. To receive this trade readjustment allowance, a qualified worker must enroll in a training program approved by the Secretary of Labor by “the last day of the 16th week after the worker’s most recent total separation from adversely affected employment” or

324. *Id.* at 835, 917 N.E.2d at 561–62.

325. *Id.* at 836, 917. N.E.2d at 562.

326. *Id.* (citing *Chi. Messenger Serv. v. Jordan*, 356 Ill. App. 3d 101, 106, 825 N.E.2d 315 (2005)).

327. *Id.* at 837, 917 N.E.2d at 563 (citing 820 ILL. COMP. STAT.405/220(d)(1)(a) (2006)).

328. *Id.* at 837, 917 N.E.2d at 563 (citing 820 ILL. COMP. STAT. 405/234 (2006)).

329. *Id.* at 838, 917 N.E.2d at 564.

330. *Id.*

331. *Williams v. Bd. of Review*, 395 Ill. App. 3d 337, 917 N.E.2d 1094 (1st Dist. 2009).

332. 19 U.S.C. § 2010 (2002 Supplement).

“the last day of the 8th week after the week in which the Secretary issues a certification covering the worker.”³³³

The Illinois Department of Employment Security administers the trade readjustment allowance.³³⁴

The plaintiff testified that she had heard of the Trade Act benefits from a coworker. The plaintiff was given an application for trade readjustment allowance and filled out the forms. The plaintiff was told that she had missed the deadline for enrolling in job training and that her trade readjustment allowance would most likely be denied.³³⁵

A hearing officer of the IDES found that although the plaintiff was unaware of her eligibility for trade vocational allowances and missed the deadline, he had no authority to grant a waiver. The board affirmed the hearing officer’s decision, and the plaintiff filed her review to the circuit court, which affirmed the board’s decision.³³⁶

The appellate court noted that there is no factual dispute that the IDES failed to notify the plaintiff about the deadline.³³⁷ The appellate court found that the deadline should be extended pursuant to the governing regulation that provides for a “good cause exception” to the application deadline.³³⁸ The appellate court noted that the plaintiff had “good cause” for not timely filing her application, as she lacked knowledge of the weekly deadline.³³⁹ The appellate court therefore reversed the board’s finding and held that the plaintiff was entitled to the readjustment allowance.

G. Insurance Agent Eligibility

In *Western and Southern Life Insurance Co. v. Department of Employment Security*,³⁴⁰ the IDES found that former insurance agents of the defendant were not exempt from covered employment under the Illinois Unemployment Insurance Act. The defendant contended that the agents were exempted under the Act and not entitled to unemployment insurance benefits.

The plaintiff argued that the term “employment” shall not include services performed by an individual such as an insurance agent or insurance

333. *Murphy*, 394 Ill. App. 3d at 338, 917 N.E.2d at 1095 (citing 19 U.S.C. § 2291(a)(5) (2002 Supplement)).

334. *Id.* at 338, 917 N.E.2d at 1095.

335. *Id.* at 339, 917 N.E.2d at 1096.

336. *Id.*

337. *Id.* at 340, 917 N.E.2d at 1096.

338. *Id.*

339. *Id.*

340. *W. & S. Life Ins. Co. v. Dep’t of Emp’t Sec.*, 2009 WL 5125752 (1st Dist.2009).

solicitor, as such services performed by such individuals are performed for remuneration solely by way of commission.³⁴¹ The employees in this case were given guaranteed minimum payments in varying amounts for the first 13 weeks of employment.³⁴² The IDES advised that those payments constituted remuneration as opposed to commissions under the Act by the plaintiff. The plaintiff argued that these payments should be disregarded because they were made prior to each claimant's respective base period, but the appellate court noted that Section 228 contained no language dictating the time frame to which it is applicable or otherwise restricting its applicability only to the base period.³⁴³

The appellate court believed it was proper for the IDES' board to consider the guaranteed minimum payments made to claimants in determining whether they were exempted from the term "employment" of the Act and concluded that the claimants were not exempted under Section 228.

The defendant also argued that insurance benefits and retirement benefits should not be considered in evaluating a claimant's status under Section 228.³⁴⁴ The defendant argued that it would discourage insurance companies from providing these benefits.³⁴⁵ The appellate court noted that while this may be true, such an interpretation would also result in the exemption under Section 228 casting a "wider net" causing economic hardship upon a greater number of individuals that would now be ineligible to receive unemployment benefits.³⁴⁶

The appellate court affirmed the judgment of the circuit court and confirmed the decisions of the board holding that the agents were employees. The Illinois Department of Employment Security administers the trade readjustment allowance.

VII. DISABILITY/PENSION BENEFITS

A. Administrative Review—Disability

In *Kouzoukas v. Retirement Board of the Policemen's Annuity and Benefit Fund of the City of Chicago*,³⁴⁷ the Illinois Supreme Court held that the

341. *Id.* at *1 (citing 820 ILL. COMP. STAT. 405/228 (2006)).

342. *Id.* at *1.

343. *Id.* at *4 (citing 820 ILL. COMP. STAT. 405/237 (2006)).

344. *Id.* at *6.

345. *Id.*

346. *Id.*

347. *Kouzoukas v. Ret. Bd. of the Policemen's Annuity & Benefit Fund*, 234 Ill. 2d 446, 917 N.E.2d 999 (2009).

Board's decision denying plaintiff's application for duty disability benefits was against the manifest weight of the evidence and prejudgment interest is not available on disability benefit awards from police pension funds.³⁴⁸ Maria Kouzoukas ("Kouzoukas") injured her back on July 25, 2004, while on patrol with the Chicago Police Department. On September 17, 2004, she returned to work for a short period of time and then returned to medical leave on October 23, 2004. Over the course of the next 14 months, Kouzoukas worked occasionally on a restricted duty basis, but was otherwise on medical leave. On December 15, 2005, after medical leave had been exhausted, Kouzoukas applied for duty disability benefits.³⁴⁹

The Board held a hearing on Kouzoukas' application; documentary evidence was presented and witness testimony was heard. The documentary evidence showed that Kouzoukas was treated by numerous physicians over the course of her medical leave. In August 2005, she was seen by Dr. Spencer, who stated, "I believe that her pain is not coming from an identifiable injury in her lumbar spine based on the pristine appearance on the MRI scan."³⁵⁰ Later that year, Dr. Yapor opined that Kouzoukas was "permanently disabled as a police officer," and also Dr. Konowitz concluded that Kouzoukas was unable to work due to injury.³⁵¹ Dr. Yapor and Dr. Demorest testified at the hearing. Dr. Yapor testified that he did not believe Kouzoukas was malingering or faking her pain and opined that she could not work as a police officer any longer due to her physical condition and pain medication.³⁵² Dr. Demorest opined that if the police department could accommodate Kouzoukas's need to sit and change positions frequently, then she could maintain employment and further opined that the medication she was taking would not prevent her from working.³⁵³ Officer Schaedel testified that assignments exist within the Chicago Police Department that would permit Kouzoukas to walk around as needed and not wear a gun belt, which was causing additional pressure on her hips and back.³⁵⁴

The Board concluded there were no objective findings of back, spine or S.I. joint pain, the Chicago Police Department could assign Kouzoukas to a full duty position with or without restriction and therefore, denied her application for duty disability benefits.³⁵⁵ On appeal, the Supreme Court

348. *Id.* at 927, 917 N.E.2d at 1002.

349. *Id.*

350. *Id.* at 929, 917 N.E.2d at 1004.

351. *Id.*

352. *Id.* at 930, 917 N.E.2d at 1005.

353. *Id.* at 930-31, 917 N.E.2d at 1006.

354. *Id.* at 933, 917 N.E.2d at 1008.

355. *Id.* at 933-34, 917 N.E.2d at 1008-09.

reviewed the Board's findings of fact under the applicable standard of review, reversing only if the findings were against the manifest weight of the evidence.³⁵⁶ The Board also questioned whether Kouzoukas was disabled within the meaning of the Pension Code, a mixed question of law and fact, reviewed under the clearly erroneous standard.³⁵⁷

Though the Court acknowledged that the Board's credibility determinations should be given considerable deference, the Court found the Board's decision that Kouzoukas was not disabled and could return to work in a full duty capacity to be against the manifest weight of the evidence.³⁵⁸ The evidence indicated that Kouzoukas was in fact experiencing objective pain.³⁵⁹ The primary evidence to the contrary was the report from Dr. Spencer who did not testify at the hearing.³⁶⁰

In its decision, the Board denied Kouzoukas's disability benefits, arguing that Kouzoukas was not disabled within the meaning of the Illinois Pension Code.³⁶¹ Section 5-115 of the Illinois Pension Code defines "disability" as, "[a] condition of physical or mental incapacity to perform *any assigned duty* or duties in the police service."³⁶² The Board contended that because of Officer Schaedel's testimony, there were positions within the Chicago Police Department which Kouzoukas could perform, even given her restrictions, she was not disabled within the meaning of the Pension Code.³⁶³ The Supreme Court rejected this argument as Kouzoukas was never "assigned" any duty within her restrictions; no position within her restrictions was offered to her.³⁶⁴ The Court held that the Board should have granted duty disability benefits and instructed Kouzoukas to consult with her physicians regarding work restrictions which she could work within and then present those restrictions to the Chicago Police Department. If a position was available and offered to her within those restrictions, then she would no longer be entitled to duty disability benefits.³⁶⁵ The Court also found the Board to have erred in its finding that Kouzoukas had failed to prove her injury was work related, as all the evidence was to the contrary.³⁶⁶

356. *Id.* at 934–35, 917 N.E.2d at 1009–10.

357. *Id.* at 935, 917 N.E.2d at 1010.

358. *Id.* at 937, 917 N.E.2d at 1012.

359. *Id.* at 936–37, 917 N.E.2d at 1011–12.

360. *Id.* at 936, 917 N.E.2d at 1011.

361. *Id.* at 938, 917 N.E.2d at 1013 (citing 40 ILL. COMP. STAT. 5/5-115 (2006)).

362. *Id.* at 939, 917 N.E.2d at 1014 (quoting 40 ILL. COMP. STAT. 5/5-115 (2006)).

363. *Id.* at 938, 917 N.E.2d at 1013.

364. *Id.*

365. *Id.* at 939, 917 N.E.2d at 1014.

366. *Id.* at 939–40, 917 N.E.2d at 1014–15.

Finally, the Supreme Court addressed an issue about which there was a split in authority, “[w]hether prejudgment interest is available on an award of disability benefits from a public pension fund.”³⁶⁷ After reviewing Section 2 of the Interest Act,³⁶⁸ and appellate court decisions on the issue, specifically *Fenton v. Board of Trustees*,³⁶⁹ the Supreme Court concluded that a “public pension agreement, as provided by the Pension Code, is [not] an ‘instrument of writing’ within the meaning of the [Interest] Act.”³⁷⁰ “[P]ublic pension funds do not share sufficiently similar characteristics with the instruments specified in section 2 [of the Interest Act] and, thus, we find that the *Fenton* court misapplied the principles of *ejusdem generis*.”³⁷¹ Thus, Kouzoukas was not entitled to prejudgment interest.³⁷²

B. Subject Matter Jurisdiction

In *Ross v. Illinois Municipal Retirement Fund*³⁷³ the appellate court held that the circuit court did not have subject matter jurisdiction to review the administrative decision terminating a municipal employee’s temporary total disability benefits.³⁷⁴ In July of 2003, the Illinois Municipal Retirement Fund Board of Trustees (“Board of Trustees”) issued a final administrative decision terminating Robin Ross’ (“Ross”) temporary total disability benefits. Ross filed a complaint pursuant to the Administrative Review Law, naming as defendants the “Illinois Municipal Retirement Fund and its Board of Trustees and the St. Clair County Housing Authority.”³⁷⁵ Summons was issued solely to the Illinois Municipal Retirement Fund (“IMRF”), but was delivered to the legal department for both the IMRF and the Board of Trustees. Defendants filed a motion to dismiss which eventually led to Ross filing a motion for voluntary dismissal pursuant to section 2-1009 of the Code of Civil Procedure.³⁷⁶ Nearly a year later, Ross filed her second complaint for administrative review, this time, naming the IMRF, the Board of Trustees, and the St. Clair Housing Authority as defendants and mailing separate summonses to each.³⁷⁷

367. *Id.* at 940, 919 N.E.2d at 1015.

368. 815 ILL. COMP. STAT. 205/2 (2006).

369. *Fenton v. Bd. of Trs.*, 203 Ill. App. 3d 714, 516 N.E.2d 105 (1990).

370. *Kouzoukas*, 234 Ill. 2d at 942, 917 N.E.2d at 1017.

371. *Id.* at 942, 917 N.E.2d at 1017.

372. *Id.*

373. *Ross v. Ill. Mun. Ret. Fund*, 395 Ill. App. 3d 1073, 919 N.E.2d 496 (5th Dist. 2009).

374. *Id.* at 1074, 919 N.E.2d at 500.

375. *Id.* at 1074, 919 N.E.2d at 497.

376. *Id.* at 1074–75, 919 N.E.2d at 497–98 (citing 735 ILL. COMP. STAT. 5/2-1009 (2004)).

377. *Id.* at 1074–76, 919 N.E.2d at 496–98.

The IMRF and the Board of Trustees filed a motion to dismiss, arguing *inter alia*, that the Administrative Review Law does not permit a plaintiff to refile a complaint for administrative review following a voluntary dismissal.³⁷⁸ The circuit court denied the motion to dismiss and found the Board of Trustees' decision to be against the manifest weight of the evidence.³⁷⁹ On appeal, the appellate court noted the Administrative Review Law grants courts authority to review the decisions of administrative agencies.³⁸⁰ "Unlike most other types of cases, the courts' jurisdiction to hear administrative review cases flows from the Administrative Review Law, not the Illinois state constitution."³⁸¹ The Administrative Review Law's requirements are jurisdictional and failure to strictly adhere deprives the court of subject matter jurisdiction.³⁸² Based on section 3-102 of the Administrative Review Law the appellate court concluded "if a party seeks a voluntary dismissal, as Ross did here, the court's jurisdiction to review the administrative decision terminates and the decision becomes final and unappealable."³⁸³ Consequently, after the voluntary dismissal order was entered, the court lost jurisdiction to review the agency's decision.³⁸⁴ The fact that Ross argued the defendants had agreed to allow Ross an opportunity to refile was held to be of no consequence as subject matter jurisdiction is not waivable.³⁸⁵

C. Administrative Decision Triggering 35-Day Period for Review

In *Board of Education of the City of Chicago v. Board of Trustees of the Public Schools Teachers' Pension and Retirement Fund of Chicago*,³⁸⁶ the appellate court concluded that a systemic miscalculation was not an administrative decision and therefore the 35-day period to seek review pursuant to the Administrative Review Law was not triggered.³⁸⁷ The Board of Education of the City of Chicago ("Board") filed a complaint against the Board of Trustees of the Public Schools Teachers' Pension and Retirement Fund of Chicago ("Trustees") alleging that the Board had overpaid teachers who received 22 paychecks per year. The Retired Teachers Association of

378. *Id.* at 1075, 919 N.E.2d at 498.

379. *Id.*

380. *Id.* at 1077, 919 N.E.2d at 499.

381. *Id.* (citation omitted).

382. *Id.*

383. *Id.* at 1078, 919 N.E.2d at 500 (citing 735 ILL. COMP. STAT. 5/3-102 (2004)).

384. *Id.* at 1078, 919 N.E. 2d at 500.

385. *Id.*

386. *Bd. of Educ. v. Bd. of Trs.* 395 Ill. App. 3d 735, 701, 917 N.E.2d 527 (1st Dist. 2009).

387. *Id.* at 744, 917 N.E.2d at 535.

Chicago (“Retired Teachers”) intervened and filed a complaint for declaratory relief and supporting brief, construed as a motion to dismiss, arguing that the Board was prohibited from seeking administrative review of the pension awards for having failed to bring the complaint within 35 days of the Board’s administrative decision.³⁸⁸

The Illinois Pension Code (“Pension Code”) provides that the Administrative Review Law governs all proceedings for the judicial review of final administrative decisions and specifies that the term “administrative decision” is defined by section 3-101 of the Code of Civil Procedure.³⁸⁹ Under the Administrative Review Law, an “administrative decision” is “any decision, order or determination of any administrative agency rendered in a particular case The term . . . does not mean or include rules, regulations, standards, or statements of policy of general application”³⁹⁰ A complaint for review of an administrative decision must be filed within “35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision.”³⁹¹ As more than 35 days had passed since the Trustees had issued their “administrative decision” the circuit court dismissed the complaint pursuant to Section 2-619(a)(5) of the Code of Civil Procedure and later denied plaintiff’s motion for leave to amend its complaint.³⁹²

On appeal, the Board argued that the Trustees’ decision to award retired teachers, who had received 22 paychecks per year, higher pensions than those who received 26 paychecks per year violated the Pension Code and therefore the decision could be challenged any time as void.³⁹³ The appellate court rejected this argument and explained the distinction between void and voidable decisions, the later not being subject to collateral attack.³⁹⁴ The Pension Code grants the Trustees authority to calculate pensions and therefore, even assuming a miscalculation had occurred, the Trustees’ decision would have been voidable, not void as the agency did not exceed the scope of its authority.³⁹⁵ Consequently, the Board’s argument that the Trustees’ actions could be challenged at any time was found to be without merit.³⁹⁶

However, the appellate court determined that plaintiffs should be allowed an opportunity to amend their complaint, to the extent that any such amended

388. *Id.* at 737–38, 917 N.E.2d at 529–30.

389. *Id.* at 738, 917 N.E.2d at 530 (quoting 40 ILL. COMP. STAT. 5/17-158 (2006)).

390. *Id.* at 738, 917 N.E.2d at 530 (quoting 735 ILL. COMP. STAT. 5/3-101 (2006)).

391. *Id.* at 739, 917 N.E.2d at 531 (quoting 735 ILL. COMP. STAT. 5/3-103 (2006)).

392. *Id.* at 737, 917 N.E.2d at 530.

393. *Id.* at 739, 917 N.E.2d at 531.

394. *Id.* at 739–40, 917 N.E.2d at 531–32.

395. *Id.* at 740, 917 N.E.2d at 532 (citing 40 ILL. COMP. STAT. 5/7-116 (2006)).

396. *Id.* at 740, 917 N.E.2d at 532.

complaint would allege a systemic decision of the Trustees to calculate pensions in an inappropriate way.³⁹⁷ “A systemic miscalculation falls outside the definition of an ‘administrative decision’ under the review law.”³⁹⁸ Thus, the 35 day period to commence review of a final administrative decision had not started to run.³⁹⁹

D. Mandamus Requiring Payment

In *Morris v. Harper*,⁴⁰⁰ the appellate court affirmed the circuit court’s order for *mandamus*, which required the Treasurer of the City of Harrisburg (“Treasurer”) to pay retirement benefits as directed by the Trustees of the Harrisburg Police Pension Fund (“Trustees”). The Trustees alleged the Treasurer had refused to pay retirement benefits as the Trustees had directed. There was no dispute between the parties that the payments ordered by the Trustees were greater than the amounts paid by the Treasurer. The Treasurer reduced the retirement benefits for four individuals based on an audit by the Illinois Department of Financial and Professional Regulation, Division of Insurance. The audit pointed out several mistakes in the beneficiaries’ salaries. The Treasurer brought these mistakes to the attention of the Trustees. After receiving no response, he unilaterally adjusted the pension payments to reflect the audit.⁴⁰¹

The appellate court concluded that *mandamus* against the Treasurer was appropriate. “A writ of *mandamus* commands a public officer to perform an official, nondiscretionary duty that the petitioner is entitled to have performed and that the officer has failed to perform.”⁴⁰² First, the appellate court reviewed the Illinois Pension Code and concluded that the Trustees, not the Treasurer, had the authority to control, manage, and order pension payments.⁴⁰³ The Treasurer’s duty was nondiscretionary, as he was only authorized to make pension payments at the direction of the Trustees.⁴⁰⁴ Second, the Trustees were entitled to have pensions paid as they determined.⁴⁰⁵ Finally, it was not disputed that the Treasurer had not made payments as

397. *Id.* at 744, 917 N.E.2d at 535.

398. *Id.*

399. *Id.* at 708–09, 917 N.E.2d at 534–35.

400. *Morris v. Harper*, 393 Ill. App. 3d 624, 912 N.E.2d 1288 (5th Dist. 2009).

401. *Id.* at 625–26, 912 N.E.2d at 1289–90.

402. *Id.* at 626, 912 N.E.2d at 1290 (quoting *Chi. Bar Ass’n v. Ill. State Bd. of Elections*, 161 Ill.2d 502, 641 N.E.2d 525 (1994)).

403. *Id.* at 627, 912 N.E.2d at 1290–91 (citing 40 ILL. COMP. STAT. 5/3-128, 40 ILL. COMP. STAT. 5/3-132, 40 ILL. COMP. STAT. 5/3-133 (2006)).

404. *Id.* at 626–27, 912 N.E.2d at 1290–91.

405. *Id.* at 627, 912 N.E.2d at 1291.

directed.⁴⁰⁶ The Treasurer relied on section 3-144.2 of the Illinois Pension Code which states, “[t]he amount of any overpayment due to fraud, misrepresentation[,] or error, of any pension or benefit granted under this Article may be deducted from future payments to the recipient of such pension or benefit.”⁴⁰⁷ The appellate court concluded “[t]o the extent this section of the Illinois Pension Code authorizes the correction of overpayments, it gives that authority to the Trustees, not the Treasurer.”⁴⁰⁸ Thus, the Treasurer’s unilateral decision to adjust pension payments was not justified.⁴⁰⁹

E. Surviving Spouse Annual Benefit Increases

In *Roselle Police Pension Board v. Village of Roselle*,⁴¹⁰ the Supreme Court addressed whether a surviving spouse was entitled to annual benefit increases following the death of her spouse, who at the time of his death was receiving annual benefit increases based on having reached 60 years of age and had been granted a line of duty disability pension.⁴¹¹ Charles Gurke, Jr., was awarded a “line of duty” disability pension pursuant to section 3-114.1(a) of the Illinois Pension Code.⁴¹² After attaining the age of 60, Gurke was entitled to and received a 3% annual increase on the original pension.⁴¹³ After Officer Gurke’s death, his surviving spouse continued to receive her husband’s “line of duty” disability pension in the same amount the husband had been receiving; this amount was never in dispute.⁴¹⁴ Whether Mrs. Gurke was entitled to annual increases after her husband’s death was a matter of statutory construction, a question of law and therefore, considered *de novo*.⁴¹⁵ The relevant provisions of the police pension system for a municipality the size of the Village of Roselle are set out by article 3 of the Pension Code.⁴¹⁶ The Pension Code sets out two basic types of pensions, “retirement pensions” and “disability pensions,” which can be further divided into three subcategories: “line of duty,” “not on duty,” and “occupational disease” disability pensions.⁴¹⁷

406. *Id.*

407. *Id.* at 627–28, 912 N.E.2d at 1291 (quoting 40 ILL. COMP. STAT. 5/3-144.2 (2006)).

408. *Id.* at 628, 912 N.E.2d at 1291.

409. *Id.*

410. *Roselle Police Pension Bd. v. Vill. of Roselle*, 232 Ill. 2d 546, 905 N.E.2d 831 (2009).

411. *Id.* at 548–49, 905 N.E.2d at 832.

412. *Id.* at 549, 905 N.E.2d at 832–33 (citing 40 ILL. COMP. STAT. 5/3-114.1(a) (2004)).

413. *Id.* at 550, 905 N.E.2d at 833 (citing 40 ILL. COMP. STAT. 5/3-111.1(c) (2004)).

414. *Id.* at 550, 905 N.E.2d at 833.

415. *Id.* at 552, 905 N.E.2d at 834.

416. *Id.* at 553, 905 N.E.2d at 835 (citing 40 ILL. COMP. STAT. ANN. 5/3-101 (2004)).

417. *Id.* at 553, 905 N.E.2d at 835 (citing 40 ILL. COMP. STAT. ANN. 5/3-111, 40 ILL. COMP. STAT. ANN. 5/3-114.1, 40 ILL. COMP. STAT. ANN. 5/3-114.2, 40 ILL. COMP. STAT. ANN. 5/3-116.6 (West 2004)).

Officer Gurke's pension was governed by section 3-114.1, which in subsection (b) states that, "[i]f a police officer on disability pension dies while still disabled, the disability pension shall continue to be paid to his or her survivors . . ." ⁴¹⁸ The relevant provisions of the Pension Code pertaining to 3% annual increases only address increases "the police officer shall receive" and are silent on the question of whether the increases continue to accrue after the officer's death to the benefit of the officer's survivors. ⁴¹⁹

The Supreme Court noted that the legislature's silence in article 3 of the Pension Code on this question stands in contrast to numerous other Pension Code sections, which include express and specific language authorizing annual increases to survivors. ⁴²⁰ "Because the legislature failed to provide for annual increases with equal clarity with respect to pension benefits awarded to survivors of police officers who had been granted 'line of duty' disability pensions, we must conclude that no such annual increases were authorized." ⁴²¹ The Supreme Court found additional support for its holding in other provisions of section 3-114.1, most notably section 3-114.1(d) which applies to officers who had received line of duty disability pensions but had yet to reach the age of 60. There, it is specified that survivors are entitled to all annual increases previously received, "but no additional increases shall accrue under this subsection." ⁴²² Concluding it would make no sense to provide more favorable treatment to the survivors of officers 60 years of age or older, the Supreme Court left it in the hands of the legislature to respond to policy arguments to the contrary. ⁴²³ Also, the Supreme Court gave considerable deference to the Public Pension Division of the Department of Financial Professional Regulation's interpretation of article 3 of the Pension Code, which stated that the benefits to a surviving spouse were "fixed at the date of death with no further increases being payable." ⁴²⁴

418. *Id.* at 554, 905 N.E.2d at 835 (citing 40 ILL. COMP. STAT. ANN. 5/3-114.1(b) (West 2004)).

419. *Id.* at 554, 905 N.E.2d at 835-36 (quoting 40 ILL. COMP. STAT. 5/3-111.1(c) (2004)).

420. *Id.* at 556, 905 N.E.2d at 836-37.

421. *Id.* at 556-57, 905 N.E.2d at 837 (citation omitted).

422. *Id.* at 557, 905 N.E.2d at 837 (quoting 40 ILL. COMP. STAT. 5/3-114.1(d) (2004)).

423. *Id.* at 558-59, 905 N.E.2d at 837-38.

424. *Id.* at 559, 905 N.E.2d at 838 (quoting ADVISORY SERVICES UPDATE (Pub. Pension Div. of the Dep't of Fin. & Prof'l Reg.), Mar. 2005).

F. Transfer of Pension Funds and Service Credits

In *Smith v. Policemen's Annuity and Benefit Fund*,⁴²⁵ a retired judge sought transfer of his pension funds and service credits from the Chicago Policemen's Annuity and Benefit Fund ("Police Fund") to the Judicial Retirement System ("JRS"). From 1968 to 1981, George J. W. Smith ("plaintiff") worked as a police officer with the City of Chicago. Upon his resignation, the Police Fund issued plaintiff a refund in the amount of \$18,089.81. In March of 1995, plaintiff became a judge until his resignation in 2002. In November of 2005, plaintiff inquired to the Retirement Board of the Policemen's Annuity and Benefit Fund ("Retirement Board") regarding whether he could repay the \$18,089.81 refund for the purpose of transferring those funds and service credits towards his judicial pension. Plaintiff was advised to repay the \$18,089.81 plus 3% per annum accumulated interest, for a total payment of \$37,412.44. This amount was tendered to the Retirement Board which then attempted to transfer the funds to JRS, where they were rejected.⁴²⁶

The JRS rejected the funds on the basis that only active members of the JRS may transfer service credit from the Police Fund and as plaintiff was not a sitting judge who was making salary contributions to JRS at the time he sought the transfer, he was not entitled to do so.⁴²⁷ Plaintiff filed a complaint for administrative review and later an amended complaint, seeking, *inter alia*, *mandamus* relief against JRS to accept the funds. JRS was granted summary judgment and an appeal followed.⁴²⁸

The case hinged on whether plaintiff was an "active member" of JRS at the time he sought to transfer his pension fund and service credits from the Police Fund to JRS. This question in turn hinged on interpretation of articles 5, 18 and 20 of the Illinois Pension Code.⁴²⁹ The appellate court concluded that article 20, the Reciprocal Act of the Pension Code, was inapplicable because the Police Fund had not accepted it.⁴³⁰ "The Reciprocal Act does not apply here and the plaintiff may only transfer and combine his pension funds

425. *Smith v. Policemen's Annuity & Benefit Fund*, 391 Ill. App. 3d 542, 909 N.E.2d 300 (1st Dist. 2009).

426. *Id.* at 543, 909 N.E.2d at 302-03.

427. *Id.* at 544, 909 N.E.2d at 303.

428. *Id.* at 544-46, 909 N.E.2d at 303-04.

429. *Id.* at 547, 909 N.E.2d at 305 (citing 40 ILL. COMP. STAT. 5/5-232, 18-101, 40 ILL. COMP. STAT. 5/20-101 (2006)).

430. *Id.* at 549, 909 N.E.2d at 307 (citing 40 ILL. COMP. STAT. 5/18-157, 40 ILL. COMP. STAT. 5/20-129 (2006)).

and service credits to the extent allowed by Articles 5 and 18.”⁴³¹ Section 5-232 of the Illinois Pension Code allows “active members” of JRS to transfer their “credits and creditable service” from the Police Fund to JRS.⁴³² However, neither Articles 5 nor 18 define the term “active member.”⁴³³ The appellate court noted that the term “participant” and “member” are used interchangeably within article 18 and further noted the Article draws a distinction between an “active” and “inactive” participant or member.⁴³⁴ Active members of JRS were found to be “sitting judges who currently pay salary contributions toward their judicial pensions.”⁴³⁵ As plaintiff was neither a sitting judge nor contributing to JRS at the time he sought the transfer, he was not an “active member” of JRS.⁴³⁶ Consequently, plaintiff was not entitled to transfer his pension funds and service credits from the Police Fund to JRS.⁴³⁷

G. Widow’s Annuity

In *Hooker v. Retirement Board of Firemen’s Annuity and Benefit Fund of Chicago*⁴³⁸ the appellate court examined a widow’s annuity under sections 6-141.1 and 6-140 of the Illinois Pension Code. Fireman Hooker was awarded a duty disability benefit pursuant to section 6-151 of the Pension Code in August of 1989. He died in December of 2000 and in January of 2001 the Pension Board advised Mrs. Hooker that she would be receiving a widow’s annuity pursuant to section 6-141.1 of the Pension Code. Fireman Murphy was awarded a duty disability benefit pursuant to section 6-151 in December of 1985. He died in March of 1998 and Mrs. Murphy was notified that she too would be receiving a widow’s minimum annuity pursuant to section 6-141 of the Pension Code. Mrs. Hooker and Mrs. Murphy filed a complaint for administrative review of the Board’s decision and sought a duty death annuity calculated from the date of each husband’s death pursuant to section 6-140 of the Pension Code. The cases were continued to allow the First District an opportunity to issue rulings on similar cases, *Barry v. Retirement Board of the*

431. *Id.* at 550, 909 N.E.2d at 307.

432. *Id.* at 550, 909 N.E.2d at 307 (citing 40 ILL. COMP. STAT. 5/5-232 (2006)).

433. *Id.* at 550, 909 N.E.2d at 308.

434. *Id.* at 551, 909 N.E.2d at 308 (citing 40 ILL. COMP. STAT. 5/18-112(f), 40 ILL. COMP. STAT. 5/18-128.01, 40 ILL. COMP. STAT. 5/18-122, 40 ILL. COMP. STAT. 5/18-123, 40 ILL. COMP. STAT. 5/18-129 (2006)).

435. *Id.* at 551, 909 N.E.2d at 308.

436. *Id.* at 551, 909 N.E.2d at 309.

437. *Id.* at 553, 909 N.E.2d at 310.

438. *Hooker v. Ret. Bd. of Firemen’s Annuity & Benefit Fund of Chi.*, 391 Ill. App. 3d 129, 907 N.E.2d 447 (1st Dist. 2009).

*Firemen's Annuity & Benefit Fund*⁴³⁹ and *Bertucci v. Retirement Board of the Firemen's Annuity & Benefit Fund*.⁴⁴⁰ In June of 2005, the circuit court remanded the case to the Board for a hearing consistent with the *Barry* opinion.⁴⁴¹

The Board determined the widows were entitled to receive a widow's duty death annuity pursuant to section 6-140 of the Pension Code, but retroactive payment would only be made as of the date of the *Bertucci* opinion.⁴⁴² In August of 2006, Mrs. Hooker and Mrs. Murphy filed a motion to amend their complaint, arguing that they were entitled to receive a widow's duty death annuity pursuant to section 6-140 of the Pension Code and that it was to be calculated from the dates of their respective husband's death, not the *Bertucci* decision.⁴⁴³ The circuit court agreed and also awarded Mrs. Hooker and Mrs. Murphy prejudgment and postjudgment interest.⁴⁴⁴

On appeal, the Board argued that the circuit court lacked jurisdiction to enter an order on the amended complaint, arguing that the remand for a hearing consistent with the *Barry* opinion constituted a final disposition.⁴⁴⁵ The appellate court rejected this argument and in so doing found that *Creamer v. Police Pension Fund Board*⁴⁴⁶ was no longer to be followed.⁴⁴⁷ "In our opinion, when a circuit court remands a case to an administrative agency for further proceedings, the circuit court retains jurisdiction until the circuit court examines the results of the Board's proceedings."⁴⁴⁸

Next, the Board argued that Mrs. Hooker's and Mrs. Murphy's claims became moot upon remand, as they were provided an opportunity to present evidence demonstrating they were entitled to a widow's duty death annuity, which they were ultimately granted.⁴⁴⁹ The appellate court rejected this argument as well, as "the issue of the widows' entitlement to prejudgment and post-judgment interest was still pending when the case returned to the circuit court."⁴⁵⁰

439. *Barry v. Ret. Bd. of the Firemen's Annuity & Benefit Fund*, 357 Ill. App. 3d 749, 828 N.E.2d 1238 (1st Dist. 2005).

440. *Bertucci v. Ret. Bd. of the Firemen's Annuity & Benefit Fund*, 351 Ill. App. 3d 368, 813 N.E.2d 1021 (1st Dist. 2004).

441. *Hooker*, 391 Ill. App. 3d at 132-34, 907 N.E.2d at 451-53.

442. *Id.* at 134, 907 N.E.2d at 453.

443. *Id.*

444. *Id.*

445. *Id.* at 134-35, 907 N.E.2d at 453.

446. *Creamer v. Police Pension Fund Bd.*, 69 Ill. App. 3d 792, 387 N.E.2d 711 (1978).

447. *Hooker*, 391 Ill. App. 3d at 136-37, 907 N.E.2d at 455.

448. *Id.* at 137, 907 N.E.2d at 455 (citations omitted).

449. *Id.* at 137-38, 907 N.E.2d at 456.

450. *Id.* at 138, 907 N.E.2d at 456.

As to when to compute a widow's duty death annuity, the appellate court examined the statutory language of the Pension Code and held that the unambiguous language of the statute directs the Board to compute a widow's death duty annuity from the date of the fireman's death.⁴⁵¹

The Board next argued that *Bertucci* established a new principle of law; namely, that a widow's death duty annuity should be paid from the date of the fireman's death, and therefore, a widow's death duty annuity should be paid from the date of the *Bertucci* decision, and not retroactively applied.⁴⁵² This argument failed on multiple grounds. First, the appellate court had previously determined that the language of the Pension Code indicated that a widow's duty death annuity is to be paid from the date of the fireman's death, and thus no new principle of law had been established.⁴⁵³ Furthermore, the presumption in Illinois is that Illinois courts retroactively and prospectively apply their decisions.⁴⁵⁴ To overcome this presumption, (1) the issuing court must expressly state that the decision is only to be applied prospectively, or (2) the issuing court established a new principle of law.⁴⁵⁵ The court found that neither *Bertucci* nor *Barry* established a new principle of law or decided an issue of first impression.⁴⁵⁶ Likewise, the *Bertucci* court did not expressly state the claim was only to be applied prospectively.⁴⁵⁷

The appellate court next addressed the issue of prejudgment interest, which had been granted to Mrs. Hooker and Mrs. Murphy by the circuit court pursuant to section 2 of the Interest Act, which provides in pertinent part:

Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing . . .⁴⁵⁸

The appellate court recognized a split within the districts as to whether section 2 of the Interest Act applies to pension funds, but sided with those courts who concluded that it does. Of note, subsequent to this decision, the Supreme Court decided *Kouzoukas v. Retirement Board of the Policemen's Annuity and*

451. *Id.* at 139–40, 907 N.E.2d at 457–58 (citing 40 ILL. COMP. STAT. 5/6-116, 40 ILL. COMP. STAT. 5/6-140 (2000)).

452. *Id.* at 140, 907 N.E.2d at 458.

453. *Id.*

454. *Id.*

455. *Id.*

456. *Id.* at 141–42, 907 N.E.2d at 459.

457. *Id.* at 141, 907 N.E.2d at 458.

458. *Id.* at 142, 907 N.E.2d at 459–60 (quoting 815 ILL. COMP. STAT. 205/2 (2002)).

Benefit Fund,⁴⁵⁹ which expressly rejected such a construction of section 2 of the Illinois Interest Act.

Finally, the Board argued that any post-judgment interest owed should be paid at a rate of 6% and not 9%. Section 2-1301 of the Code of Civil Procedure provides that an unsatisfied judgment shall draw 6% per annum when the judgment debtor is a unit of local government.⁴⁶⁰ The court concluded that the Pension Board was “not a government entity and that pension funds were not public funds that benefit the general public” and thus, 9% was the correct rate.⁴⁶¹

In *Cunningham v. Retirement Board of the Firemen’s Annuity and Benefit Fund of Chicago*⁴⁶² the appellate court issued an opinion on the same day and substantially similar to *Hooker v. Retirement Board of the Firemen’s Annuity and Benefit Fund of Chicago*.⁴⁶³ The only difference between the two opinions is that the issue of mootness was not raised or addressed in *Cunningham*. Otherwise, the opinions are identical.

H. Duty Disability Pension

In *Cole v. Retirement Board of the Policemen’s Annuity and Benefit Fund of the City of Chicago*,⁴⁶⁴ the appellate court addressed the issue as to whether an officer was entitled to a duty disability pension or an ordinary disability benefit. On October 30, 1993, and again on May 10, 1996, plaintiff was involved in an act of duty accident. Additionally, plaintiff had other injuries and incidents which were not acts of duty as defined in the Pension Code, in January of 1996, September of 1998, June of 2001 and April of 2006. These incidents led to back pain, hip pain and left knee pain and resulted in various periods of time off work and light duty.⁴⁶⁵

Plaintiff applied for a duty disability pension pursuant to section 5-154 of the Pension Code, which provides that an active police officer who becomes disabled in the performance of an act of duty shall receive 75% of her salary.⁴⁶⁶

459. *Kouzoukas v. Ret. Bd. of the Policemen’s Annuity & Benefit Fund*, 234 Ill.2d 446, 917 N.E.2d 999 (2009).

460. *Hooker*, 391 Ill. App. 3d at 145–46, 907 N.E.2d at 462–63 (quoting 735 ILL. COMP. STAT. 5/2-1301 (2002)).

461. *Id.* at 146, 907 N.E.2d at 463.

462. *Cunningham v. Ret. Bd. of the Firemen’s Annuity & Benefit Fund of Chi.*, 389 Ill. App. 3d 1065, 907 N.E.2d 463 (1st Dist. 2009).

463. *Hooker*, 391 Ill. App. 3d 129, 907 N.E.2d 447 (1st Dist. 2009).

464. *Cole v. Ret. Bd. of the Policemen’s Annuity & Benefit Fund of the City of Chicago*, 396 Ill. App. 3d 357, 920 N.E.2d 476 (1st Dist. 2009).

465. *Id.* at 358–65, 920 N.E.2d at 477–83.

466. *Id.* at 366, 920 N.E.2d at 483 (citing 40 ILL. COMP. STAT. 5/5-154(a) (2006)).

Plaintiff also sought prejudgment interest.⁴⁶⁷ The Board issued its decision in October of 2007, finding that plaintiff had suffered degenerative disc disease prior to the October 30, 1993 auto accident and that “[h]er disc disease condition was not disabling at the time, did not result from the October 30, 1993, incident and it did not prevent the plaintiff from returning to full duty.”⁴⁶⁸ The Board thus concluded that plaintiff was not entitled to duty disability benefits but was entitled to ordinary disability benefits under section 5-155 of the Code, which provides that disability benefits shall be 50% of the policeman’s salary, but shall not exceed more than five years.⁴⁶⁹

Plaintiff filed a complaint for administrative review, arguing the Board’s findings of fact were clearly erroneous and against the manifest weight of the evidence and that she was entitled to a rate of 75% of her salary and interest pursuant to section 2 of the Interest Act.⁴⁷⁰ “The circuit court found that the plaintiff was disabled as a result of duty-related injuries but that the disability resulted from a pre-existing physical defect.”⁴⁷¹ Thus, the circuit court reversed and remanded the case to the Board with instructions to award the plaintiff duty disability benefits at 50% of the plaintiff’s salary.⁴⁷² The Board appealed the decision.

Initially, the appellate court noted that the plaintiff had not filed a cross appeal on the issue of whether she was entitled to a 75% duty disability benefit and prejudgment interest. As these decisions were against her, having not filed a cross appeal deprived the appellate court of jurisdiction to decide the matter.⁴⁷³

The court then reviewed section 5-154 of the Pension Code, and concluded that the circuit court made the proper decision in finding the Board’s decision regarding duty disability pensions was against the manifest weight of the evidence.⁴⁷⁴ The appellate court examined *Samuels v. Retirement Board of the Policemen’s Annuity & Benefit Fund*,⁴⁷⁵ which had previously construed section 5-154 “as providing benefits in two separate instances: ‘(1) where a disability occurs *as a result of* (is caused by) an on-duty injury; and (2) where a disability *results from* (stems from) a *preexisting*

467. *Id.*

468. *Id.* at 365, 920 N.E.2d at 483.

469. *Id.* at 365–66, 920 N.E.2d at 483 (citing 40 ILL. COMP. STAT. 5/5-155 (2006)).

470. *Id.* at 365, 920 N.E.2d at 483 (citing 815 ILL. COMP. STAT. 205/2 (2006)).

471. *Id.* at 365, 920 N.E.2d at 483.

472. *Id.* at 365–66, 920 N.E.2d at 483.

473. *Id.* at 366, 920 N.E.2d at 483–84.

474. *Id.* at 371, 920 N.E.2d at 487.

475. *Samuels v. Ret. Bd. of the Policemen’s Annuity & Benefit Fund*, 289 Ill. App. 3d 651, 682 N.E.2d 276 (1st Dist. 1997).

condition as opposed to being *caused by the injury*.”⁴⁷⁶ Thus, “if the plaintiff’s disability resulted from a preexisting condition, which existed at the time the act-of-duty injury was sustained, she is entitled to a duty disability benefit at 50% of her salary rate.”⁴⁷⁷ The appellate court concluded that “the record in this case clearly establishes that the plaintiff’s disability resulted from a preexisting condition, entitling her to a 50% duty disability benefit.”⁴⁷⁸ Therefore, the Board’s decision was against the manifest weight of the evidence and the circuit court was correct in ordering a 50% duty disability benefit to be awarded.⁴⁷⁹

VIII. FREEDOM OF INFORMATION ACT

A. Scope of Personal Privacy Exemption

In 2009, the Illinois Supreme Court and Illinois Appellate Court issued opinions interpreting the scope of the personal privacy exemption under FOIA for personnel records. In *Stern v. Wheaton-Warrenville Community Unit School District 200*,⁴⁸⁰ a plaintiff brought an action against a school district seeking the disclosure of the district superintendent’s employment contract.⁴⁸¹ The school district asserted that the contract was part of the superintendent’s personnel file and thus exempt from disclosure under Section 7 of the FOIA.⁴⁸² The trial court sided with the district and found that an employment contract found within a personnel file is *per se* exempt from disclosure under Section 7.⁴⁸³ The Supreme Court disagreed.⁴⁸⁴

The Supreme Court initially noted that the school district was a “public body” and that the employment contract was a “public record” under FOIA.⁴⁸⁵ Thus, the school district was obligated to disclose the employment contract unless it qualified for an exemption under Section 7 of FOIA.⁴⁸⁶ Section 7 exempts certain information that would otherwise be disclosed under FOIA, including

476. *Cole*, 396 Ill. App. 3d at 369, 920 N.E.2d at 486 (quoting *Samuels*, 289 Ill. App. 3d at 661, 682 N.E.2d at 282 (1997)).

477. *Id.* at 39, 920 N.E.2d at 486.

478. *Id.* at 371, 920 N.E.2d at 488.

479. *Id.* at (citing 735 ILL. COMP. STAT. 5/3-111 (West 2006)).

480. 233 Ill.2d 396, 910 N.E.2d 85 (2009).

481. *Id.* at 399–400, 910 N.E.2d at 88–89.

482. *Id.* at 400, 910 N.E.2d at 88.

483. *Id.*

484. *Id.* at 413, 910 N.E.2d at 96.

485. *Id.* at 405–06, 910 N.E.2d at 91–92.

486. *Id.* at 406–07, 910 N.E.2d at 91–92.

Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy. Information exempted under this subsection (b) shall include but is not limited to:

(ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body or applicants for those positions[.]⁴⁸⁷

The Supreme Court found that this exemption did not apply to preclude the disclosure of the superintendent's employment contract. The Supreme Court first observed that FOIA "is intended to 'open governmental records to the light of public scrutiny[.]'" and, thus, is liberally constructed.⁴⁸⁸ Furthermore, while Section 7 exempts from disclosure "information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy," Section 7 also expressly states that the "disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy."⁴⁸⁹ Thus, because the superintendent's contract, "by its very nature, . . . constitut[ed] 'information that bears on [his] public duties,'" the contract did "not constitute an invasion of personal privacy for purposes of section 7(1)(b) of the Act and must be disclosed as a matter of law."⁴⁹⁰

Moreover, the Supreme Court found that "[t]he fact that an employment contract may be physically maintained within a public employee's personnel file is insufficient to insulate it from disclosure."⁴⁹¹ According to the Court,

[i]f the purpose of the personnel file exemption is to prevent the Act from being used to violate personal privacy, and the Act expressly provides that "[t]he disclosure of information that bears on the public duties of public employees," such as employment contracts, "shall not be considered an invasion of personal privacy," then a contract's physical location within an otherwise exempt record is irrelevant.⁴⁹²

487. *Id.* at 406, 910 N.E.2d at 92 (quoting 5 ILL. COMP. STAT. ANN. 140/7(1)(b) (West 2009)).

488. *Id.* at 410, 910 N.E.2d at 94.

489. *Id.* at 411, 910 N.E.2d at 95 (quoting 5 ILL. COMP. STAT. ANN. 140/7(1)(b) (West 2009)).

490. *Id.* at 411–12, 910 N.E.2d at 95.

491. *Id.* at 411, 910 N.E.2d at 95.

492. *Id.* at 412, 910 N.E.2d at 95.

The Illinois Appellate Court also addressed the scope of the personnel records exemption under the FOIA during 2009 in *Gekas v. Williamson*.⁴⁹³ In that case, the plaintiff filed a complaint for declaratory judgment against a sheriff's department seeking the disclosure of all prior complaints against a deputy.⁴⁹⁴ The deputy in question had allegedly beaten the plaintiff.⁴⁹⁵ These complaints and related documents were found within 27 investigative files.⁴⁹⁶ The sheriff objected asserting that the records were part of the deputy's personnel file and, thus, exempt from disclosure.⁴⁹⁷ The trial court overruled the objection in part and ordered the sheriff to disclose four of the 27 files. The trial court permitted the sheriff to withhold the other 23 files because the department "had found the [other] complaints . . . unfounded or because the complaints did not resemble the complaint plaintiff had made against" the deputy.⁴⁹⁸ On appeal, the Appellate Court ordered that the disclosure of all 27 investigative files.⁴⁹⁹

The Appellate Court first determined that the complaints and investigative files were not exempt from disclosure under FOIA. Using rationale similar to *Stern*, the Court ruled that the complaints did not qualify for protection under the Section 7 exemption of FOIA even though these records were maintained within the deputy's personnel file.⁵⁰⁰ According to the Court, the "legislature exempted 'personnel files and personal information,' as if it considered personnel files to be a repository of personal information."⁵⁰¹ The 27 complaints and corresponding investigative files, however, were "not generated for [the deputy's] personal use" and did "not concern his personal affairs."⁵⁰² In essence, "what [the deputy] does in his capacity as a deputy sheriff is not his private business."⁵⁰³

The Appellate Court also decided that the sheriff could not withhold complaints that the department deemed "unfounded" or were "dissimilar" to the allegations against the deputy.⁵⁰⁴ The Appellate Court reasoned that the Act specified that the disclosure of information is not an "invasion of personal

493. 393 Ill.App.3d 573, 912 N.E.2d 347 (4th Dist. 2009).

494. *Id.* at 574, 912 N.E.2d at 349.

495. *Id.*

496. *Id.*

497. *Id.*

498. *Id.*

499. *Id.* at 590, 912 N.E.2d at 361.

500. *Id.* at 583–84, 912 N.E.2d at 355–56.

501. *Id.* at 583, 912 N.E.2d at 356.

502. *Id.*

503. *Id.*

504. *Id.* at 584–86, 912 N.E.2d at 357–58.

privacy” if it “*bears on* the public duties of public employees and officials.”⁵⁰⁵ “Whether information ‘bears on’ . . . the public duties of public employees depends on the subject matter of the information, not its ultimate accuracy.”⁵⁰⁶ Furthermore, the exclusion of complaints deemed “unfounded” would undermine the purpose of the FOIA by permitting agencies to shelter their investigation of “unfounded” complaints from public scrutiny.⁵⁰⁷

B. Test Results

In *Kopchar v. City of Chicago*,⁵⁰⁸ the Illinois Appellate Court examined the ability of a job applicant to procure information about physical tests taken during a job application with a public body. In *Kopchar*, an applicant for a firefighter position failed the fire department’s “physical abilities test” and was eliminated from consideration for a position.⁵⁰⁹ The applicant sent the fire department a FOIA request seeking his “‘test results of the Firefighter Physical Abilities Test’ and ‘criteria that the Department uses to determine pass/fail.’”⁵¹⁰ The fire department agreed to give the applicant his cumulative test score and “a copy of the Firefighter’s Physical Abilities Test Guide, which described the tasks covered by the test.”⁵¹¹ After the department refused to give any additional information, the applicant filed an action seeking to compel the further disclosure. During the litigation, the department asserted that the information sought was exempted from disclosure by Sections 7(1)(a), 7(1)(j), and 7(1)(w) of the FOIA.⁵¹² The Appellate Court concurred.

Section 7(1)(j) of the FOIA exempts from disclosure “test questions, scoring keys and other examination data used to administer an academic examination or determine the qualifications of an applicant for a license or employment.”⁵¹³ The Illinois Appellate Court found that the plain language of this statute made no distinction between academic, psychological, and physical tests.⁵¹⁴ As a consequence, “the results of the physical test for admission to the fire department fall squarely within the exemption of ‘other examination data’ used to determine the qualifications of an applicant for a

505. *Id.* (quoting 5 ILL. COMP. STAT. ANN. 140/7(1)(b) (West 2009) (emphasis added)).

506. *Id.* at 584-86, 912 N.E.2d at 357-58.

507. *Id.* at 585-86, 912 N.E.2d at 357-58.

508. *Kopchar v. City of Chi.*, 395 Ill. App. 3d 762, 818 N.E.2d 76 (1st Dist. 2009).

509. *Id.* at 763, 919 N.E.2d at 79.

510. *Id.*

511. *Id.*

512. *Id.* at 764-73, 919 N.E.2d at 79-87.

513. *Kopchar*, 395 Ill. App. 3d at 766, 919 N.E.2d at 82 (quoting 5 ILL. COMP. STAT. ANN. 140/7(1)(j) (West 2009)).

514. *Id.* at 767-68, 919 N.E.2d at 82.

license or employment.”⁵¹⁵ Similarly, Section 7(1)(w) exempts from disclosure “information related solely to the internal personnel rules and practices of a public body.”⁵¹⁶ The Court found that this exemption applied because “the fire department’s testing criteria and scoring process . . . relate to personnel practices.”⁵¹⁷

Finally, Section 7(1)(a) of the FOIA exempts from disclosure “information specifically prohibited from disclosure by federal or State law or rules and regulations adopted under federal or State law.”⁵¹⁸ The Illinois Personal Record Review Act states that “[t]he right of the employee . . . to inspect his or her personnel records does not apply to . . . any portion of a test document, except that the employee may see a cumulative test score[.]”⁵¹⁹ The Court reasoned that the applicant had already procured his cumulative test score for the physical abilities test, which was the extent of his entitlement under the Personal Record Review Act.⁵²⁰ As a consequence, Section 7(1)(a) exempted the disclosure of any additional information about the physical abilities test.⁵²¹

IX. LABOR

A. Illinois Education Labor Relations Act (“IELRA”)

1. Scope

In 2009, the Illinois Appellate Court examined the scope of the IELRA and determined that it did not apply to charter schools. In *Northern Kane Educational Corporation v. Cambridge Lakes Educational Association*,⁵²² a union “filed a majority interest representation petition pursuant to section 7 of the” IELRA with the Illinois Educational Labor Relations Board (IELRB).⁵²³

515. *Id.* The Court also found its result as consistent with the Illinois Appellate Court’s previous interpretation of Section 7(1)(j) in *Roulette v. Dep’t. of Cent. Mgmt. Serv.*, 141 Ill.App.3d 394, 490 N.E.2d 60 (1986).

516. *Kopchar*, 395 Ill. App. 3d at 763, 919 N.E.2d at 78 (quoting 5 ILL. COMP. STAT. ANN. 140/7(1)(w) (West 2009)).

517. *Id.* at 763, 919 N.E.2d at 78. Again, in making this determination, the Illinois Appellate Court used *Roulette*, 141 Ill.App.3d 394, 490 N.E.2d 60, as a guide in its decision making process.

518. *Kopchar*, 395 Ill. App. 3d at 764, 919 N.E.2d at 79 (quoting 5 ILL. COMP. STAT. ANN. 140/7(1)(a) (West 2009)).

519. *Id.* at 764, 919 N.E.2d at 78 (quoting 820 ILL. COMP. STAT. 40/10 (2006)).

520. *Id.*

521. *Id.*

522. 394 Ill.App.3d 755, 914 N.E.2d 1286 (4th Dist. 2009).

523. *Id.* at 756, 914 N.E.2d at 1287.

In its petition, the union sought to represent employees at an Illinois charter school.⁵²⁴ The charter school objected to the petition, asserting that the Board had no jurisdiction over it.⁵²⁵ The IELRB disagreed and asserted jurisdiction.⁵²⁶

On appeal, the Appellate Court sided with the charter school and ruled that the Illinois Charter Schools Law exempted charter schools from the purview of the IELRA.⁵²⁷ The Court reasoned that “[t]he plain language of . . . the Charter Schools Law states, in pertinent part, that ‘[a] charter school is exempt from *all other [s]tate laws* and regulations in the School Code’ . . . except for certain specified statutes.”⁵²⁸ The IELRA was not one of these specified statutes.⁵²⁹ As a consequence, the IELRB had no jurisdiction over charter schools.⁵³⁰

Although it certainly affected the parties to the litigation, *Northern Kane Educational Corporation* probably will not have a lasting impact. During the pendency of the *Northern Kane Educational Corporation* appeal, the General Assembly passed a Public Act amending the Charter School Law, which became effective on January 1, 2010.⁵³¹ After this amendment, Section 5 of the Charter School Law now reads:

A charter school shall comply with all provisions of this Article, the Illinois Educational Labor Relations Act, and its charter. A charter school is exempt from all other State laws and regulations in the School Code governing public schools and local school board policies, except the following [certain enumerated state laws and regulations].⁵³²

As such, charter schools are no longer exempt from the IELRA and likely will be subject to the jurisdiction of the IELRB.

2. *Unfair Labor Practices*

In *Speed District 802 v. Warning*,⁵³³ the Appellate Court found that a teacher’s request that a union representative accompany her to remedial meetings with her school principal was a protected union activity under the

524. *Id.*

525. *Id.*

526. *Id.*

527. *Id.* at 758, 914 N.E.2d at 1288–89.

528. *Id.* at 759, 914 N.E.2d at 1289 (quoting 105 ILL. COMP. STAT. 5/27A-5(g)(2009)).

529. *Id.* at 759, 914 N.E.2d at 1289.

530. *Id.* at 760, 914 N.E.2d at 1291.

531. Pub. Act 96-0108, eff. January 1, 2010.

532. 105 ILL. COMP. STAT. ANN. 5/27A-5 (West 2009).

533. 392 Ill. App. 3d 628, 911 N.E.2d 425 (1st Dist. 2009).

IELRA. In *Warning*, a teacher was placed on a “corrective action plan” which included her attendance at remedial meetings with her principal.⁵³⁴ According to the corrective action plan, unless the teacher “corrected certain identified deficiencies by May 1, 2005, there would be a recommendation to terminate her contract.”⁵³⁵ The teacher requested that a union representative accompany her to these meetings.⁵³⁶ The principal and executive director of the school district objected to this request, and during the course of the remedial meetings, heated discussions and encounters between the teacher, the union, the principal, and the director occurred.⁵³⁷ The school district eventually did not renew the teacher’s contract.⁵³⁸ After the non-renewal, the teacher and her union filed “an unfair labor practices charge with the IELRB against the District.”⁵³⁹ The Administrative Law Judge (“ALJ”) assigned to the case issued a recommended order finding that “the District had violated section 14(a)(3) and, derivatively, section 14(a)(1) of the Act by failing to renew” the teacher’s “contract because she insisted on having a union representative attend remedial meetings.”⁵⁴⁰ The ALJ also ordered that the District reinstate the teacher and awarded back pay.⁵⁴¹ The reinstatement led to the teacher receiving tenure.⁵⁴² The IELRB affirmed the ALJ’s order, and the District appealed the Board’s decision.⁵⁴³ The Appellate Court affirmed.⁵⁴⁴

Section 14(a)(3) of the IELRA prohibits “discrimination based on union activity,” and Section 14(a)(1) prohibits “adverse action against an employee due to protective activity not necessarily involving a union.”⁵⁴⁵ Where “alleged violations of sections 14(a)(1) and 14(a)(3) stem from the same conduct, . . . the section 14(a)(1) violation is deemed a derivative action,” and the complainant must satisfy the elements of a section 14(a)(3) violation to succeed.⁵⁴⁶ Under Section 14(a)(3), a *prima facie* case requires proof that “(1)

534. *Id.* at 630, 911 N.E.2d at 428–29.

535. *Id.*

536. *Id.*

537. *Id.* at 631–33, 911 N.E.2d at 429–30.

538. *Id.* at 633, 911 N.E.2d at 431.

539. *Id.* at 634, 911 N.E.2d at 431.

540. *Id.*

541. *Id.*

542. *Id.* at 639, 911 N.E.2d at 435.

543. *Id.* at 634, 911 N.E.2d at 431.

544. *Id.* at 638, 911 N.E.2d at 435.

545. *Id.* at 635, 911 N.E.2d at 432. Section 14(a) of the IELRA reads: “Educational employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act . . . (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization.” 115 ILL. COMP. STAT. 5/14(a) (2010).

546. *Speed Dist.* 802, 392 Ill. App. 3d at 635, 911 N.E.2d at 432.

[the complainant] was engaged in protected activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against the complainant for engaging in that activity.”⁵⁴⁷ A complainant satisfies the third element of the *prima facie* case if she “establishes that the protected activity was a substantial or motivating factor in the employer’s adverse action against the employee.”⁵⁴⁸ If the complainant makes a *prima facie* case, the employer must “show by a preponderance of the evidence that it had a legitimate nondiscriminatory reason for discharging the employee and that the employee would have been terminated for that reason even in the absence of the protected activity.”⁵⁴⁹ If the employer makes this showing, “the employee must then show that the employer’s stated reason for the action was merely pretextual.”⁵⁵⁰

After reviewing the evidence and the aforementioned legal principles, the Illinois Appellate Court ruled that the Board’s decision was not clearly erroneous.⁵⁵¹ The Court found that the teacher made a *prima facie* case. Her request that a union representative accompany her to the remedial activities was a protected union activity.⁵⁵² According to her union’s collective bargaining agreement, its employees were allowed “union representation at investigatory meetings which might possibly led to disciplinary action.”⁵⁵³ The remedial plans were part of a corrective action plan that the teacher had to satisfactorily complete to retain her employment.⁵⁵⁴ As such, the remedial meetings were “investigatory,” and the teacher had the right to union representation at them.⁵⁵⁵ Furthermore, the Appellate Court found that the Board had sufficient evidence to find that the teacher’s insistence on union representation at the remedial meetings motivated the non-renewal.⁵⁵⁶ This evidence included the hostility of the principal and executive director to the presence of the union representative at the meetings, the “shifting” reasons proffered by the district for the teacher’s termination, and certain statements

547. *Id.* at 636, 911 N.E.2d at 432–33.

548. *Id.*

549. *Id.* at 638, 911 N.E.2d at 434.

550. *Id.*

551. *Id.* at 638, 911 N.E.2d at 435. Where, as here, the IELRB makes decisions based on mixed questions of law and fact, the Appellate Court reviews the decision on a “clearly erroneous” standard. *Id.* at 635, 911 N.E.2d at 432. “An administrative agency’s decision is clearly erroneous when the reviewing court is left with the definite and firm conviction that a mistake has been committed.” *Id.*

552. *Id.* at 636, 911 N.E.2d at 433.

553. *Id.*

554. *Id.* at 630, 911 N.E.2d at 428–29.

555. *Id.* at 636, 911 N.E.2d at 433.

556. *Id.* at 637, 911 N.E.2d at 433–34.

made by the principal.⁵⁵⁷ Finally, according to the Court, although the district offered non-discriminatory reasons for the teacher's termination, the Board's finding that these reasons were pretextual was not against the weight of the evidence.⁵⁵⁸

On appeal, the school district also challenged the IELRB's remedial order directing the reinstatement of the teacher because reinstatement would lead to tenure.⁵⁵⁹ The Court rejected this argument, concluding "that the powers granted to the Board under sections 14(a)(3) and 15 of the [IELRA] include the authority to direct the District to reinstate a teacher to her teaching position even if reinstatement results in her obtaining tenure."⁵⁶⁰ The Court reasoned that "since the denial of tenure on account of union activity is unlawful, the Board's remedial powers necessarily include the authority to reinstate a teacher who was unlawfully discharged in retaliation for participating in a protected activity, even if the reinstatement results in tenure."⁵⁶¹

B. Illinois Public Labor Relations Act ("IPLRA")

1. *Fragmentation and the Appropriateness of a Proposed Bargaining Unit*

During 2009, the Illinois Appellate Court considered the role that fragmentation plays when considering the appropriateness of a bargaining unit under the IPLRA. In *City of Chicago v. Illinois Labor Relations Board Local Panel*,⁵⁶² a union petitioned "to become the exclusive bargaining representative of 34 City employees, classified as" Public Health Nurses ("PHN") III and PHN IV.⁵⁶³ The city classified nurses who work for it into different categories, including PHN I, PHN II, PHN III, PHN IV, and "Nurse Practitioner"

557. *Id.* A plaintiff can prove motivation through direct and circumstantial evidence. *Id.* at 637, 911 N.E.2d at 433. "Antiunion motivation may be inferred from circumstantial evidence such as: an employer's expressed hostility toward unionization, together with knowledge of the employee's union activities; proximity in time between an employee's union activity and her discharge; inconsistencies between the proffered reason for discharge and other actions of the employer; and shifting explanations for the discharge." *Id.*

558. *Id.* at 638, 911 N.E.2d at 434-35.

559. *Id.* at 639, 911 N.E.2d at 435.

560. *Id.*

561. *Id.* *Speed Dist. 802* also included a dissent by Justice Garcia. *Id.* at 640-44, 911 N.E.2d at 437-39. In his dissent, Justice Garcia disagrees with the majority's determination that the collective bargaining agreement in this matter gave the teacher the right to representation at the remedial meetings. *Id.* at 640-41, 911 N.E.2d at 437. He also opined that the school board has the exclusive right to extend tenure to a teacher and that this power falls outside of the Board's remedial powers. *Id.* at 643-44, 911 N.E.2d at 438-39.

562. No. 1-08-2566, 2009 WL 3762944 (Ill.App.Ct. 1st Dist., Nov. 10, 2009).

563. *Id.* at *1.

(“NP”).⁵⁶⁴ Wages increase as the classification moves from PHN I to NP.⁵⁶⁵ The “classification system [also] reflects an increase in the educational and experience requirements from one title to the next higher title in the series.”⁵⁶⁶ At the time of the petition, a different union already represented nurses classified as PHN I, PHN II, and NP.⁵⁶⁷ The City objected to the petition, arguing that “the PHN IIIs and IVs shared a substantial community of interest with the other PHNs and that placing PHN IIIs and IVs into a separate unit would fragment the bargaining process and disrupt the City’s established bargaining structure.”⁵⁶⁸ The Executive Director of the ILRB certified the union as the exclusive representative of PHN IIIs and IVs, and the City appealed. The Appellate Court affirmed the certification.⁵⁶⁹

Under Section 9 of the IPLRA, the Illinois Labor Relations Board (ILRB) “shall decide . . . a unit appropriate for the purpose of collective bargaining.”⁵⁷⁰ When making this determination, the ILRB considers a number of factors, including

historical pattern of recognition; community of interest including employee skills and functions; degree of functional integration; interchangeability and contact among employees; fragmentation of employee groups; common supervision, wages, hours, and other working conditions of the employees involved; and the desire of the employees.⁵⁷¹

The Board, however, cannot consider “fragmentation:” as “the sole or predominant factor . . . in determining an appropriate bargaining unit.”⁵⁷² Furthermore, the ILRA “does not require that a proposed unit be the most appropriate or the only appropriate unit.”⁵⁷³ When a reviewing court examines the ILRB’s determination as to the appropriateness of a bargaining unit, it uses a “clearly erroneous standard of review” and will uphold the

564. *Id.* at *2.

565. *Id.*

566. *Id.*

567. *Id.* at *1.

568. *Id.* at *3.

569. *Id.* at *12.

570. 5 ILL. COMP. STAT. 315/9(b) (2010).

571. *Id.*

572. *Id.*

573. *City of Chi. v. Ill. Labor Relations Bd.*, No. 1-08-2566, 2009 WL 3762944 at *4 (quoting *Cnty. of Cook v. Ill. Labor Relations Bd.*, 369 Ill. App. 3d 112, 118, 859 N.E.2d 80 (2006)).

decision of the ILRB if it is “reasonable, consistent with labor law and based on finding supported by substantial evidence.”⁵⁷⁴

In light of these factors, the Appellate Court determined that the Executive Director’s certification was not “clearly erroneous.”⁵⁷⁵ First, the Court noted the Executive Director’s finding that a “preference for larger, functionally based units” was insufficient to deny certification because other unions had failed to represent PHN IIIs and PHN IVs and because Section 9 prohibits the use of fragmentation as a sole or predominant reason to deny certification.⁵⁷⁶ Likewise, the Court observed that the other Section 9 factors supported certification. Because PHN IIIs and PHN IVs had never been previously represented, there was “no historical pattern of recognition.”⁵⁷⁷ Additionally, the Court found that

PHN IIIs and IVs share a community of interest including employee skills and functions. They work in the same facilities, have contact with each other and share similar supervision, wages, hours and other working conditions. It is also their desire to have their own bargaining unit as reflected in the tally of majority interest attached to the Executive Director’s certification order.⁵⁷⁸

The City also argued that certification was inappropriate because PHN IIIs and PHN IVs shared a community of interest with PHN Is and PHN IIs.⁵⁷⁹ The Appellate Court rejected this argument because the issue before the ILRB and the Appellate Court was not whether the placement of PHN IIIs and PHN IVs in the same bargaining unit as PHN Is and PHN IIs would be appropriate. Rather, the issue was whether PHN IIIs and PHN IVs alone were an appropriate bargaining unit.⁵⁸⁰

574. *Id.* at *4 (quoting *Ill. Fraternal Order of Police Labor Council v. Local Labor Relations Bd.*, 319 Ill. App. 3d 729, 736, 745 N.E.2d 647 (2001)).

575. *Id.* at *8.

576. *Id.* at *5–6.

577. *Id.* at *7.

578. *Id.*

579. *Id.* at *7.

580. *Id.* at *8. In *City of Chicago*, in addition to its rulings on the Executive Director’s appropriateness findings, the Appellate Court’s opinion contained a few other holdings that warrant some brief discussion. The Appellate Court found that the City was not entitled to a hearing before the ILRB because, based on the City’s evidence, there was “no reasonable cause” to believe that an issue concerning the appropriateness of certification existed. *Id.* at *9. The Court also found that the Executive Director of the ILRB was authorized to certify the petition. *Id.* at *9–10.

2. *Determination of Managerial Employees*

In *Department of Central Management Services v. Illinois Labor Relations Board*,⁵⁸¹ the Illinois Appellate Court discussed circumstances where a state employee is a “managerial employee” for purposes of the IPLRA. In this matter, a union sought to represent six staff attorneys within the Bureau of Administrative Litigation, a subdivision of the Inspector General’s office, and filed a petition with the ILRB.⁵⁸² The Board granted the petition and directed the union to hold a secret ballot to determine whether the attorneys wanted the union as their exclusive representative.⁵⁸³ The State appealed, arguing that the petition should be denied because 1) the attorneys were managerial employees⁵⁸⁴ and 2) the proposed unit inappropriately carved “a subset of employees out of a larger, centralized classification.”⁵⁸⁵ The Appellate Court affirmed the decision of the Board.⁵⁸⁶

The Bureau of Litigation “prosecutes vendors who have engaged in wrongdoing in connection with the [state’s] medical-assistance programs.”⁵⁸⁷ The staff attorneys only appeared at administrative hearings; they could not represent the Inspector General in court.⁵⁸⁸ The duties of the staff attorneys include: “preparing witnesses, reviewing cases, identifying documentation, formulating witness lists and evidence lists, presenting arguments and evidence to the administrative law judge, preparing exceptions[,] * * * drafting rules as assigned[,] and some legal research.”⁵⁸⁹ The attorneys have discretion “to decide what questions to ask witnesses, the order in which to call the witnesses, the documents they would present in the hearing, and the closing argument that they would make.”⁵⁹⁰ For other decisions, the attorneys need to obtain approval from the bureau chief.⁵⁹¹ The staff attorneys “had no authority to change the charges or seek different penalties[,]. . . they had no authority to withdraw [a] case,” and they were not permitted to sign any document other than “exceptions to the recommended decisions of the administrative law

581. 388 Ill. App. 3d 319, 902 N.E.2d 1122 (4th Dist. 2009).

582. *Id.* at 321–22, 902 N.E.2d at 1124.

583. *Id.* at 329–330, 902 N.E.2d at 1129.

584. Managerial employees have no right to organize and collectively bargain under the Labor Relations Act. *See* 5 ILL. COMP. STAT. 315/3(n) (2010); 5 ILL. COMP. STAT. 315/6(a) (2010).

585. *Dep’t of Central Mgmt. Serv.*, 388 Ill. App. 3d at 322, 902 N.E.2d at 1123–24.

586. *Id.* at 338, 902 N.E.2d at 1136.

587. *Id.* at 326, 902 N.E.2d at 1127.

588. *Id.* at 327, 902 N.E.2d at 1127.

589. *Id.* at 327, 902 N.E.2d at 1128.

590. *Id.* at 328, 902 N.E.2d at 1128.

591. *Id.*

judges.”⁵⁹² The six staff attorneys, however, were classified as public service administrators, a classification largely set aside for state employees engaged in management.⁵⁹³ Within the classification of public service administrator, the six staff attorneys were designated Option 8L employees, a classification that they shared with 130 other attorneys employed by the state.⁵⁹⁴ Furthermore, since 1991, another bargaining unit had represented attorneys employed by the state; this unit, however, never represented or sought to represent these six staff attorneys.⁵⁹⁵

In deciding that the staff attorneys were not “managerial employees,” the Appellate Court employed two tests used by the Board and the Illinois courts to decide the status of an employee: the traditional factual test and the “alternative” test.⁵⁹⁶ Under the traditional test, the Court factually determines “whether the employee conforms to the definition of a ‘managerial employee’” under the IPLRA.⁵⁹⁷ The definition of “managerial employee” requires the satisfaction of two criteria: 1) “the employee must be engaged predominantly in executive and management functions”; and 2) “the employee must be charged with the responsibility of directing the effectuation of management policies and procedures.”⁵⁹⁸ Executive and management functions “relate to running a department and include such activities as formulating department policy, preparing the budget, and assuring the efficient and effective operations of the department.”⁵⁹⁹ On the other hand, “[a]n employee is not a management employee if he or she serves merely a subordinate or advisory function in the development of policy.”⁶⁰⁰ Likewise, an employee is not a management employee simply because he or she exercises professional discretion or technical expertise.⁶⁰¹ In regards to the second criteria,

an employee directs the effectuation of management policies and procedures if the employee “oversees or coordinates policy implementation through development of means and methods of achieving policy objective, determines

592. *Id.*

593. *Id.* at 323, 902 N.E.2d at 1125.

594. *Id.* at 323–24, 902 N.E.2d at 1125.

595. *Id.* at 325, 329, 902 N.E.2d at 1126, 1129.

596. *Id.* at 330, 902 N.E.2d at 1130.

597. *Id.* The IPLRA defines “managerial employee” as “an individual who is engaged predominantly in executive and management functions and is charged with the responsibility of directing the effectuation of management policies and practices.” 5 ILL. COMP. STAT. 315/3(j) (2010).

598. *Dep’t of Central Mgmt. Serv.*, 388 Ill.App.3d at 330, 902 N.E.2d at 1130.

599. *Id.* (quoting *Vill. of Elk Grove Vill. v. Ill. State Labor Relations Bd.*, 245 Ill. App. 3d 109, 121–22, 613 N.E.2d 311, 320 (1993)).

600. *Id.* at 331, 902 N.E.2d at 1130.

601. *Id.*

the extent to which the objectives will be achieved, and is empowered with a substantial amount of discretion to determine how policies will be effected.⁶⁰²

This requires more than the performance of “duties essential to the employer’s ability to accomplish its mission.”⁶⁰³

Considering the evidence in this case, the Appellate Court determined that the staff attorneys did not satisfy the definition of “managerial employee” under the traditional test.⁶⁰⁴ Although they used professional discretion and technical expertise and performed essential duties for the Department, these qualities were insufficient to classify an employee as a “managerial employee.”⁶⁰⁵ The attorney also lacked authority “to settle a case or withdraw a charge,” they did not determine the charges to be brought, and they did not “decide the extent to which the policy objectives of the Inspector General will be achieved” or determine the means to achieve those objectives.⁶⁰⁶

Under the alternative test, the ILRB and Illinois courts can determine that certain employees are managerial employees as a matter of law, even without a factual determination under the traditional test. For instance, assistant State’s Attorneys are managerial employees as a matter of law because “a ‘detailed statutory apparatus’ describe[s] the powers and duties of assistant State’s Attorneys and because assistant State’s Attorneys were ‘generally clothed with all the powers and privileges of the State’s Attorney.’”⁶⁰⁷ The Appellate Court, here, found that the staff attorneys were not akin to assistant State’s Attorneys and did not qualify as “managerial employees” as a matter of law.⁶⁰⁸ The staff attorneys were not “surrogates” of the Inspector General, they were not “assistant Inspectors General,” and they did not have independent statutory authority.⁶⁰⁹ Rather, their authority was limited to the authority granted to them by the Inspector General.⁶¹⁰

Similar to *City of Chicago v. Illinois Labor Relations Board Local Panel* discussed above,⁶¹¹ the Department also asserted that the proposed size of this

602. *Id.* at 331, 902 N.E.2d at 1130–31 (quoting *Dep’t of Central Mgmt. Serv. v. Ill. State Labor Relations Bd.*, 278 Ill. App. 3d 79, 87, 662 N.E.2d 131, 137 (1996)).

603. *Id.* at 331, 902 N.E.2d at 1131 (quoting 21 Pub. Employee Rep. (Ill.) par. 205, at 753).

604. *Id.* at 332, 902 N.E.2d at 1131.

605. *Id.*

606. *Id.*

607. *Id.* at 333, 902 N.E.2d at 1132 (quoting *Office of Cook Cnty. State’s Attorney v. Ill. Local Labor Relations Bd.*, 166 Ill.2d 296, 303, 305, 652 N.E.2d 301, 304, 305 (1995)).

608. *Id.* at 333, 902 N.E.2d at 1132–33.

609. *Id.*

610. *Id.*

611. *See City of Chi. v. Ill. Labor Relations Bd.*, 396 Ill. App. 3d 61, 918 N.E.2d 1103 (1st Dist. 2009).

bargaining unit was an improper fragmentation of a larger, centralized classification.⁶¹² The court discarded this argument finding that the ILRB's determination about the appropriateness of the bargaining unit was not "clearly erroneous."⁶¹³ According to the court, even if "the fragmentation of a classification raises a presumption that the proposed bargaining unit is inappropriate,"⁶¹⁴ this presumption disappears once "evidence contrary to the presumption is introduced."⁶¹⁵ Here, as the court observed, although the staff attorneys were classified as public service administrators (a classification allegedly limited to managerial employees),⁶¹⁶ these staff attorneys clearly were not managerial employees.⁶¹⁷ Furthermore, the record revealed that the staff attorneys and other attorneys classified in Option 8L did not share "the same functions and [a] community of interest."⁶¹⁸ In short, the court refused "to hold that all of the employees in option 8L belong in the same bargaining unit solely and simply because they are attorneys. Such a holding would be simplistic and artificial and not based on the factors in section 9(b)."⁶¹⁹

3. Procedural Issues

i. 15-Day Default Rule

In 2009, the Illinois Appellate Court reviewed and upheld the ILRB's 15-day default rule. In *Wood Dale Fire Protection District v. Illinois Labor Relations Board*,⁶²⁰ after a union filed an unfair labor practices charge, the ILRB issued a complaint against a fire district on February 13, 2008.⁶²¹ The fire district failed to respond within 15 days of the complaint.⁶²² According to regulation, if a party fails to respond to an ILRB complaint within 15 days, it

612. *Dep't of Central Mgmt. Serv.*, 388 Ill. App. 3d at 334, 902 N.E.2d at 1133.

613. *Id.* at 337, 902 N.E.2d at 1135.

614. *Id.*; as in *City of Chicago*, the Court noted that presumptions of inappropriateness based on fragmentation "is difficult to square with section 9(b), which says: 'Fragmentation shall not be the sole or predominant factor used by the Board in determining an appropriate bargaining unit.'" *Id.* at 335, 902 N.E.2d at 1134 (quoting 5 ILL. COMP. STAT ANN. 315/9(b) (West 2009)).

615. *Id.* at 335, 902 N.E.2d at 1134.

616. *Id.* at 336, 902 N.E.2d at 1135.

617. *Id.*

618. *Id.* at 337, 902 N.E.2d at 1135. The Bureau of Administrative Litigation also had administrative law judges, hearing referees, and a staff attorney in the office of General Counsel who were classified as Option 8L employees. *Id.* These employees did not have the same interests or functions as the 6 staff attorneys, who "serve[d] as advocates for the agency in administrative hearings." *Id.*

619. *Id.* For the Section 9(b) factors, *see supra* note 72.

620. 395 Ill. App. 3d 523, 916 N.E.2d 1229 (2d Dist. 2009).

621. *Id.* at 525, 916 N.E.2d at 1231.

622. *Id.*

is in default and admits all legal and factual conclusions of the complaint.⁶²³ On March 19, the union filed a motion asking that the ILRB issue an order that the union had defaulted.⁶²⁴ On March 28, the fire district filed an answer to the complaint.⁶²⁵ On April 21, 2008, the fire district filed a motion for leave to file its answer late.⁶²⁶ Within that motion, the fire district stated that the lateness of its answer resulted from lawyer confusion. The ALJ's recommended decision "noted the untimeliness of [the fire district's] answer to [the] complaint" and "rejected" the fire district's argument that it "was entitled to a variance from the Board's 15-day default rule."⁶²⁷ The fire district filed exceptions to the recommended order and the Board denied the exceptions.⁶²⁸ The ILRB also imposed sanctions onto the fire district for making legal arguments that were meritless and lacked good faith.⁶²⁹ The fire district appealed to the Appellate Court, arguing that the default rule exceeded the scope of the Board's regulatory power, that the fire district was entitled to a variance from the default rule, and that the sanctions were inappropriate.⁶³⁰ The Appellate Court affirmed the Board's application of the default rule but reversed the imposition of sanctions.⁶³¹

The Appellate Court found that the 15-day default rule did not conflict with the IPLRA.⁶³² It noted that the "Act directs the Board to adopt 'procedural rules and regulations which shall govern all Board proceedings.'"⁶³³ As such, "pursuant to that authority," the ILRB adopted its

623. The language of the regulation reads:

Whenever the Executive Director issues a complaint for hearing, the respondent shall file an answer within 15 days after service of the complaint and deliver a copy to the charging party by ordinary mail to the address set forth in the complaint . . . (3) Parties who fail to file timely answers shall be deemed to have admitted the material facts and legal conclusions alleged in the complaint. The failure to answer any allegation shall be deemed an admission of that allegation. Failure to file an answer shall be cause for the termination of the proceeding and the entry of an order of default.

ILL. ADMIN. CODE tit. 80, §1220.40(b) (West 2010).

624. *Wood Dale Fire Prot. Dist.*, 395 Ill. App. 3d at 526, 916 N.E.2d at 1231.

625. *Id.*

626. *Id.*

627. *Id.* at 526, 916 N.E.2d at 1231–32.

628. *Id.* at 526, 916 N.E.2d at 1232.

629. *Id.*

630. *Id.*

631. *Id.* at 537, 916 N.E.2d at 1239.

632. If an administrative agency promulgates regulations that exceed the powers granted to it by its enabling statute or conflict with the enabling statute, the regulation is invalid. *See id.* at 527, 916 N.E.2d at 1233; *Dep't of Revenue v. Civil Serv. Comm'n*, 357 Ill.App.3d 352, 363 827 N.E.2d 960, 972 (1st Dist. 2005).

633. *Wood Dale Fire Prot. Dist.*, 395 Ill. App. 3d at 527, 916 N.E.2d at 1233 (quoting 5 ILL. COMP. STAT. 315/5(1) (2008)).

15-day default rule.⁶³⁴ Furthermore, the Appellate Court did not find that the regulation infringed on a party's "right to file an answer [to a complaint] . . . and to appear in person or by a representative and give testimony"⁶³⁵ in response to a complaint because the rule did not infringe on these rights but only established a time limit for exercising them.⁶³⁶

The Appellate Court also concluded that the fire district was not entitled to a variance from the default rule.⁶³⁷ According to the Board's regulations, the ILRB may waive one of its regulatory provisions, including the default rule, "when it finds that":

- a) The provision from which the variance is granted is not statutorily mandated;
- b) No party will be injured by the granting of the variance; and
- c) The rule from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome.⁶³⁸

The Board has discretion to grant or deny a variance and the Appellate Court will only reverse the Board's decision if it used its discretion in an arbitrary or capricious manner.⁶³⁹ In this case, the Appellate Court determined that the fire district's lack of a compelling reason for the lateness of its answer did not make the application of the 15-day default rule "unreasonable" or "unnecessarily burdensome."⁶⁴⁰ As such, since the fire district could not satisfy the third criteria of the variance rule, the Board did not abuse its discretion in denying a variance.⁶⁴¹

Finally, the Appellate Court ruled that the circumstances did not warrant the imposition of sanctions even though some of the fire district's arguments lacked merit.⁶⁴² The unmeritorious contentions only constituted a small portion of the fire district's arguments. The balance of the arguments, while unpersuasive, "were at least debatable" and the fire district "had every reason

634. *Id.* at 527, 916 N.E.2d at 1233.

635. *Id.* (quoting 5 ILL. COMP. STAT. 315/11(a) (2008)).

636. *Id.* at 527, 916 N.E.2d at 1233.

637. *Id.* at 528, 916 N.E.2d at 1238.

638. ILL. ADMIN. CODE tit. 80, § 1200.160 (West 2010).

639. *Wood Dale Fire Prot. Dist.*, 395 Ill. App. 3d at 525, 916 N.E.2d at 1234.

640. *Id.* at 527, 916 N.E.2d at 1236-37.

641. *Id.* at 529, 916 N.E.2d at 1238.

642. *Id.* at 530, 916 N.E.2d at 1239. The particular argument that irked the Board was the fire district's contention that a default would only constitute an admission of factual allegations of the complaint, not legal conclusions. This position contradicted the plain language of the regulation and case law interpreting the regulation. *See id.* at 523, 916 N.E.2d at 1232.

to present them to try to avoid the resolution of the case before [the fire district] could present its position on the merit.”⁶⁴³

ii. Effective Date of Service

When is service of an ALJ’s order on a party effective under the IPLRA and accompanying regulations? The Appellate Court answered this question in *The City of St. Charles v. Illinois Labor Relations Board*.⁶⁴⁴ In *City of St. Charles*, a union sought certification as the exclusive bargaining representative of police officers employed by the City.⁶⁴⁵ An ALJ issued his decision on June 4, 2008, and sent the decision by certified mail.⁶⁴⁶ The certified mail receipt revealed that the City received the decision on June 6, 2008.⁶⁴⁷ The City filed its exception to the ALJ’s decision via facsimile on June 23, 2008.⁶⁴⁸ The ILRB asserted that the June 23rd exception was untimely because, pursuant to the ILRB’s regulations, a party only has fourteen days to file an exception.⁶⁴⁹ Thus, because the City received the decision on June 6, 2008, it only had until June 20th to file an exception.⁶⁵⁰ The ILRB certified the proposed bargaining unit on the grounds that the June 23rd exception was untimely.⁶⁵¹ The City appealed, and the Appellate Court reversed.⁶⁵²

In its decision, the Appellate Court relied upon an ILRB regulation, which stated,

Service of a document upon a party by mail shall be presumed complete 3 days after mailing, if proof of service shows the document was properly addressed. This presumption may be overcome by the addressee, with evidence establishing that the document was not delivered or was delivered at a later date.⁶⁵³

643. *Wood Dale Fire Prot. Dist.*, 395 Ill. App. 3d at 530, 916 N.E.2d at 1239.

644. 395 Ill. App. 3d 507, 916 N.E.2d 881 (2d Dist. 2009).

645. *Id.* at 508, 916 N.E.2d at 882.

646. *Id.*

647. *Id.*

648. *Id.*

649. *Id.* at 508, 916 N.E.2d at 882–83.

650. *Id.* at 508, 916 N.E.2d at 882. June 21, 2008, was a Saturday, and June 22, 2008, was a Sunday. As such, if service of the decision was not effective on the City until June 7, then the City would have had until June 23 to file its exception. See 80 Ill. Adm. Code § 1200.30(a)(if the last day for a filing falls on a Saturday, Sunday, or legal holiday, the deadline for filing is extended to the next business day).

651. *City of St. Charles*, 395 Ill. App. 3d at 508, 16 N.E. 2d at 883.

652. *Id.* at 511, 916 N.E.2d at 885.

653. ILL. ADMIN. CODE tit. 80, § 1200.30(c) (2009).

Using the maxim of construction *inclusio unis est exclusio alterius*,⁶⁵⁴ the Appellate Court determined that the language of this regulation only permits the addressee of a document to challenge the presumption that service is effective three days after mailing.⁶⁵⁵ As a consequence, under the regulation, the ILRB did not have the ability to overcome the presumption and demonstrate that actual service occurred before three days had passed.⁶⁵⁶

Additionally, the Court rejected the ILRB's argument that the 3-day presumption did not apply when the parties have proof of actual service because such an interpretation was unsupported by the language of the regulation.⁶⁵⁷

iii. Administrative Review

In *City of Chicago v. Illinois Labor Relations Board Local Panel*,⁶⁵⁸ the Illinois Appellate Court discussed when orders from the ILRB are appealable to the Appellate Court. In *City of Chicago*, a union filed a petition with the ILRB to represent a city's "supervising police communications operators."⁶⁵⁹ The Board agreed with the union and issued an order on October 16, 2007, directing that "its executive director . . . certify the Union as the exclusive representative of the City's" supervising police communications operators.⁶⁶⁰ The city appealed the October 16th order, and the Appellate Court dismissed the appeal.⁶⁶¹

The Appellate Court reasoned that "[o]rders entered by an administrative agency such as the [ILRB] are appealable as provided by law."⁶⁶² Section 9 of the IPLRA only identifies "four final and appealable Board orders."⁶⁶³

They are orders: (1) "dismissing a representation petition"; (2) "determining and certifying that a labor organization has been fairly and freely chosen by a majority of employees in an appropriate bargaining unit"; (3) "determining

654. *City of St. Charles*, 395 Ill. App. 3d at 510, 916 N.E.2d at 884. "The maxim of construction *inclusio unius est exclusio* means that the inclusion of one thing implied the exclusion of another; in other words, 'where a statute lists the thing or things to which it refers, the inference is that all omissions are exclusions, even in the absence of limiting language.'" *Id.* (quoting *McHenry Cnty. Defenders, Inc. v. City of Harvard*, 384 Ill. App. 3d 265, 891 N.E.2d 1017 (2nd Dist. 2008)).

655. *Id.* at 510, 916 N.E.2d at 884.

656. *Id.*

657. *Id.* at 510, 916 N.E. 2d at 884–85.

658. 392 Ill. App. 3d 1080, 913 N.E.2d 12 (1st Dist. 2009).

659. *Id.* at 1081, 913 N.E.2d at 13.

660. *Id.* at 1082, 913 N.E.2d at 13.

661. *Id.* at 1081, 913 N.E.2d at 13.

662. *Id.* at 1082, 913 N.E.2d at 13.

663. *Id.*

and certifying that a labor organization has not been fairly and freely chosen by a majority of employees in the bargaining unit”; and (4) “certifying a labor organization in an appropriate bargaining unit because of a determination by the Board that the labor organization is a historical bargaining representative of employees in the bargaining unit.”⁶⁶⁴

In this case, the Board’s October 16th order did not actually constitute a certification. Rather, the order directed its executive director to certify the union as being fairly and freely chosen by a majority of supervisor police communications operators—an act which the executive director did on January 8, 2008.⁶⁶⁵ As a consequence, the Board’s October 16th order did not qualify as one of the four final and appealable orders under the IPLRA, and the Appellate Court lacked jurisdiction to hear the appeal.⁶⁶⁶

X. RESPONDEAT SUPERIOR

The question with *respondeat superior* is whether the employee acted within the scope of their employment. In 2009, the Illinois Supreme Court reaffirmed that Section 228 of the Restatement (Second) of Agency guides Illinois courts when “determining whether an employee’s acts are within the scope of employment.”⁶⁶⁷ In *Adams v. Sheahan*, the plaintiffs sued a county sheriff after the son of a correctional officer shot the plaintiffs’ son.⁶⁶⁸ The plaintiffs alleged that the sheriff was liable for the correctional officer’s negligent storage of his firearm through the doctrine of respondeat superior.⁶⁶⁹ The shooting occurred in 2001 after the correctional officer’s son found his father’s pistol in an unlocked lockbox. The correctional officer had purchased the pistol for his employment with the sheriff’s department.⁶⁷⁰ The correctional officer began working for the sheriff’s department in 1988.⁶⁷¹ From 1988 until 1997 or 1998, the correctional officer carried a pistol to work, including the pistol at issue.⁶⁷² In 1997 or 1998, the correctional officer became a lieutenant, ceased carrying a weapon, and, by 2001, “did not need a weapon in order to perform his job duties.”⁶⁷³

664. *Id.* at 1082, 913 N.E.2d at 14 (quoting 5 ILL. COMP. STAT. 315/9(i) (2006)).

665. *Id.* at 1082–83, 913 N.E.2d at 14–15.

666. *Id.*

667. *See Adams v. Sheahan*, 233 Ill. 2d 276, 298–99, 909 N.E.2d 742,755 (2009).

668. *Adams*, 233 Ill. 2d at 280, 909 N.E.2d at 745.

669. *Id.* at 289–90, 909 N.E.2d at 749–50.

670. *Id.* at 280–84, 909 N.E.2d at 745–47.

671. *Id.* at 283, 909 N.E.2d at 746.

672. *Id.*

673. *Id.*

The sheriff's department had a number of policies about its officers' weapons.⁶⁷⁴ The policies required the officers to "secure their duty weapons in a secured lockbox container or other location that would prohibit access by unauthorized persons, and to store keys to such lockboxes in a separate secure location."⁶⁷⁵ The policies, however, did not require correctional officers to carry weapons or even own weapons.⁶⁷⁶ Furthermore, correctional officers were trained to call "911" when they encountered an emergency, they were not required to be prepared to "use their firearm to protect a person's life if it is in danger," and they were not "expected to respond to crimes" when at home.⁶⁷⁷

The trial court granted summary judgment in favor of the sheriff's department, and the Supreme Court affirmed. According to the Supreme Court, "[p]ursuant to the theory of *respondeat superior*, an employer can be liable for the torts of his employee when those torts are committed within the scope of the employment."⁶⁷⁸ When deciding whether an employee committed a tort within the scope of his employment, the Supreme Court stated that the trial court should consider Section 288 of Restatement (Second) of Agency, which states:

Conduct of a servant is within the scope of employment if, but only if:

- (a) it is of the kind he is employed to perform;
- (b) it occurs substantially within the authorized time and space limits;
- (c) it is actuated, at least in part, by a purpose to serve the master.⁶⁷⁹

The court also must find that "all three criteria of section 288" are "met in order to conclude that an employee was acting within the scope of employment."⁶⁸⁰

In this case, the Supreme Court found satisfaction of none of the Section 288 criteria.⁶⁸¹ According to the Court, the officer's negligent storage of the pistol was not the kind of conduct that he was employed to perform because the sheriff's department did not require him to own or carry a weapon and he did not carry a weapon to work with him at the time of the shooting.⁶⁸² The negligent storage of the firearm was also not "within the authorized time and

674. *Id.* at 285, 909 N.E.2d at 747.

675. *Id.*

676. *Id.* at 748, 909 N.E.2d at 285–86.

677. *Id.*

678. *Id.* at 298, 909 N.E.2d at 754.

679. *Id.* at 299, 909 N.E.2d at 755 (quoting RESTATEMENT (SECOND) OF AGENCY § 228 (1958)).

680. *Id.* at 299, 909 N.E.2d at 755.

681. *Id.* at 303–04, 909 N.E.2d at 757–58.

682. *Id.* at 304, 909 N.E.2d at 758.

space limits” of the correctional officer’s employment because the correctional officer “was not on call 24 hours a day, was not required to respond to emergencies at all times, and was not required to respond to a crime by attempting to stop the crime himself.”⁶⁸³ Finally, the correctional officer did not store the pistol at his home to serve the sheriff; rather, he “kept the [pistol], and thus stored the [pistol], for his own protection and in case he needed it in the future.”⁶⁸⁴

XI. TERMINATION, ARBITRATION, RETALIATORY DISCHARGE, SUBJECT MATTER JURISDICTION

In *Cruz v. Cook County Sheriff’s Merit Board*,⁶⁸⁵ the court considered whether the Cook County Sheriff’s Merit Board’s (“Board”) findings that the plaintiff, a correctional officer, violated the Sheriff’s attendance policy was against the manifest weight of the evidence, and whether the Board acted reasonably in terminating the plaintiff as a result of its findings.⁶⁸⁶

The case centered on an attendance policy regarding unauthorized no-pay status that was unilaterally adopted by the Sheriff to combat a “serious absenteeism condition.” (“policy”).⁶⁸⁷ Under the prior policy, a correctional officer could not be excessively disciplined for calling in sick without sick leave if the officer produced a doctor’s excuse from work. The new policy required employees to have sick days remaining in order to miss work for illness. If the employee had used all of his or her sick days, it was irrelevant whether the employee had a legitimate medical need to be absent. An employee who reported sick without sick days remaining would be disciplined, and discipline imposed graduated for subsequent offenses. For the first violation, the employee would be counseled and advised that he or she could apply for family medical leave or disability leave. For the second, the employee would receive a written reprimand. For the third and other subsequent violations, the employee would be referred to the inspector general for investigation, and the employee would receive due notice of the allegations. An employee was allowed five investigations before termination.⁶⁸⁸

683. *Id.* at 304–05, 909 N.E.2d at 758.

684. *Id.* at 305, 909 N.E.2d at 758–59.

685. 394 Ill. App. 3d 337, 914 N.E.2d 653 (1st Dist. 2009).

686. *Id.* at 342, 914 N.E.2d at 658.

687. *Id.* at 338, 914 N.E.2d at 654.

688. *Id.* at 339, 914 N.E.2d at 655.

The plaintiff was disciplined and eventually terminated under the policy as a result of her absenteeism. In October 2005, the plaintiff was counseled for being on unauthorized no-pay status one day that month, and she was told she could seek family medical or disability leave. Plaintiff was then given a written reprimand in November 2005 for being on unauthorized no-pay status one day that month, and the plaintiff was subsequently investigated five times. Each investigation resulted in recommended suspension, until a recommendation of discharge was made following the fifth investigation.⁶⁸⁹

The plaintiff testified that she was employed as a correctional officer since 2002, but had been off work as a result of an inmate attack from 2003 until September 2005. Therefore, she believed the old policy was in effect, and she could call in sick as long as she produced a doctor's excuse.⁶⁹⁰

A separate case challenging the Sheriff's new policy was significant in the *Cruz* case. The Sheriff and the union representing correctional officers had engaged in arbitration under the collective bargaining agreement. In the separate case, the union argued the Sheriff violated the collective bargaining agreement by unilaterally adopting the new attendance policy regarding unauthorized no-pay status. An arbitrator issued an award finding the Sheriff adopted the policy in a proper manner because it was intended to battle a serious absenteeism policy and a federal court decree was issued requiring the Sheriff to alleviate understaffing. But, the arbitrator also found the policy unreasonable because its imposition of suspensions was punitive rather than remedial.⁶⁹¹ However, in that case, the arbitrator's award was challenged by the Sheriff and overturned on appeal while the *Cruz* appeal was pending.⁶⁹² On appeal in that case, the First District found that "the only issue before [the arbitrator] was whether [Sheriff's] unilateral implementation of the [Policy] violated the collective bargaining agreement between the parties. . . . The issue was not, was there just cause for discipline faced by particular officers pursuant to the [Policy.]" Therefore, the plaintiff in the *Cruz* case could not rely upon the Arbitrator's award to support a motion to dismiss.⁶⁹³

In *Cruz*, the court stated that its review of a plaintiff's discharge for cause involves a two step process. First, the court considers the Board's finding of guilt, and it reverses only if the Board's finding was against the manifest weight of the evidence. Then, the court reviews the Board's finding that guilt

689. *Id.* at 339–40, 914 N.E.2d at 655–56.

690. *Id.* at 340, 914 N.E.2d at 656.

691. *Id.* at 338, 914 N.E.2d at 654–55.

692. *Id.* at 341, 914 N.E.2d at 657 (citing *Metropolitan Alliance of Police v. Cnty. of Cook*, No. 1-08-0208 (2008) (unpublished order under Supreme Court Rule 23)).

693. *Id.* at 341, 914 N.E.2d at 657 (citing *Metropolitan Alliance of Police*, slip op. at 8).

was sufficient cause for discharge, and the court reverses only if discharge was arbitrary and unreasonable or unrelated to the employee's requirements for service.⁶⁹⁴

With regard to the first step of the test, the court found the defendant Sheriff's "testimony and the documentation of plaintiff's disciplinary process, from counseling and written reprimand through five investigations, expressly belie that she was not told she could apply for disability leave and implicitly refute her unawareness that medical notes were not a defense."⁶⁹⁵ Therefore, the Board's finding that the plaintiff violated the Sheriff's attendance policy was not against the manifest weight of the evidence.⁶⁹⁶

Then, with regard to the second step, the court found "nothing arbitrary or unreasonable in prescribing those multiple unauthorized absences from work, following earlier and repeated discipline for the same, will result in the termination of employment."⁶⁹⁷ First, the court found nothing unreasonable with increased suspensions for repeated violations.⁶⁹⁸ And finally, the court found nothing unreasonable in not excusing absence even if the employee obtained a doctor's excuse because the policy provided the alternatives of family medical leave and disability leave, which the officers were informed of upon the first violation of the Sheriff's policy.⁶⁹⁹

In *Marzano v. Cook County Sheriff's Merit Board*,⁷⁰⁰ the plaintiff was a Cook County correctional officer, and presented the court with a very similar situation to that presented in *Cruz v. Cook County Sheriff's Merit Board*.⁷⁰¹ In *Marzano*, the Cook County Sheriff had implemented the same policy as described in *Cruz*⁷⁰² in order to combat a serious absenteeism that adversely affected jail operations.⁷⁰³ Despite this policy, the plaintiff was in unauthorized no pay status on six occasions. For the first, the plaintiff was counseled and notified of options for family medical leave or disability. The plaintiff next received a written reprimand. The plaintiff was then investigated on three occasions, resulting in a recommended suspension on each occasion. Finally, for her sixth violation, the plaintiff was in unauthorized no-pay status for 21 days between January and February of 2006. The Sheriff then filed a

694. *Id.* at 342, 914 N.E.2d at 657.

695. *Id.* at 343, 914 N.E.2d at 658.

696. *Id.* at 342, 914 N.E.2d at 658.

697. *Id.* at 343, 914 N.E.2d at 658.

698. *Id.*

699. *Id.* at 343, 914 N.E.2d at 659.

700. 396 Ill. App. 3d 442, 920 N.E.2d 1205 (1st Dist. 2009).

701. *See supra* n. 1, 394 Ill.App.3d 337, 914 N.E.2d 653 (1st Dist. 2009).

702. *Supra* n. 4.

703. *Marzano*, 396 Ill. App. 3d at 444, 920 N.E.2d at 1207.

complaint with the Cook County Sheriff's Merit Board ("Board") seeking to terminate the plaintiff as a Cook County correctional officer.⁷⁰⁴

After a hearing on the matter, the Board found that the plaintiff violated the Sheriff's general order regarding unauthorized no-pay status, in addition to Board rules prohibiting violation of the Sheriff's general orders.⁷⁰⁵ Next, the plaintiff appealed to the Cook County circuit court, which affirmed the Board's decision.⁷⁰⁶ The plaintiff then raised three issues for the First District on appeal: "(1) whether the Board's decision to terminate plaintiff was in error where her absences were due to her medical condition; (2) whether the Board incorrectly failed to consider an arbitration award which had found the Policy unreasonable; and (3) whether plaintiff's due process rights were violated when the Board terminated her employment."⁷⁰⁷

The court first considered whether the Board's decision to terminate the plaintiff was in error. The court explained that the review of an administrative agency's decision to terminate an employee consists of two steps.⁷⁰⁸ First, the court determines "whether the agency's findings of fact are contrary to the manifest weight of the evidence."

Then, the court determines whether the "Board's findings of fact provide a sufficient basis for its conclusion that cause for discharge exists."⁷⁰⁹ The plaintiff did not allege that the Board's findings of fact were contrary to the manifest weight of the evidence, so the only issue was whether the findings of fact provided a sufficient basis for the Board's conclusion that cause for discharge existed,⁷¹⁰ with "cause" being defined as, "some substantial shortcoming which renders [the employee's] continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his not longer occupying the place."⁷¹¹

The court recognized that in Illinois, "an employer may fire an employee for unexcused absences when they become excessive," because "[m]anagement's right to discipline and ultimately to discharge an employee for absenteeism and tardiness is based on its right to operate efficiently."⁷¹² In

704. *Id.* at 444–45, 920 N.E.2d at 1207–08.

705. *Id.* at 445, 920 N.E.2d at 1208.

706. *Id.*

707. *Id.* at 445–46, 920 N.E.2d at 1208.

708. *Id.* at 446, 920 N.E.2d at 1208 (citing *Walsh v. Bd. of Fire & Police Commissioners*, 96 Ill. 2d 101, 105, 449 N.E.2d 115, 117 (1983)).

709. *Id.* at 446, 920 N.E.2d at 1208 (citing *Walsh*, 96 Ill. 2d at 105, 449 N.E.2d at 117).

710. *Id.* at 446, 920 N.E.2d at 1208 (citing *Walsh*, 96 Ill. 2d at 105, 449 N.E.2d at 117).

711. *Id.* at 446, 920 N.E.2d at 1208 (citing *Walsh*, 96 Ill. 2d at 105, 449 N.E.2d at 117).

712. *Id.* at 447, 920 N.E.2d at 1209.

finding that the Board's decision to terminate the plaintiff was not arbitrary or unreasonable, the court agreed with the defendants' argument that the plaintiff's inability to be present effectively converted the plaintiff to a part-time position from a full-time position, which had a significant impact on the operations of the sheriff.⁷¹³ The court further noted that its decision was consistent with its recent decision in *Cruz*, which presented a similar factual situation.⁷¹⁴

The court next rejected the plaintiff's argument that the Board's decision was clearly erroneous because it failed to consider the binding legal effect of an arbitration award in a collective bargaining agreement brought before the Illinois Labor Relations Board. The plaintiff argued that the arbitrator in that matter had found the sheriff's policy regarding absenteeism unreasonable.⁷¹⁵ The court rejected the plaintiff's argument because it had previously found, in a separate matter, that the arbitrator had exceeded its authority in finding the sheriff's unauthorized policy unreasonable, as the only issue before the arbitrator was whether the policy violated the collective bargaining agreement between the sheriff and the union.⁷¹⁶ And, in any event, the court found that the policy was reasonable.⁷¹⁷

Finally, the court found the plaintiff's argument that her due process rights were violated was without merit. While the plaintiff properly pointed out that a public pension is "an enforceable contractual relationship, the benefits of which shall not be diminished or impaired,"⁷¹⁸ the plaintiff failed to allege that the contractual relationship was violated by her discharge.⁷¹⁹ Furthermore, the Board's hearing afforded her sufficient due process and it was correct in ignoring the arbitration award which was the result of the arbitrator exceeding his authority.⁷²⁰

In *Reichert v. Board of Fire and Police Commissioners of City of Collinsville*,⁷²¹ the court considered whether a police officer was properly terminated for cause after his federal conviction for "Selling of Goods in

713. *Id.*

714. *Id.* at 447–48, 920 N.E.2d at 1209–10 (citing *Cruz v. Cook Cnty. Sheriff's Merit Bd.*, 394 Ill. App. 3d 337, 342, 914 N.E.2d 653. (1st Dist. 2009)).

715. *Id.* at 448, 920 N.E.2d at 1210 (citing *Metro. Alliance of Police v. Sheriff of Cook Cnty.* (Jan. 10, 2007)).

716. *Id.* at 449, 920 N.E.2d at 1210–11 (citing *Metro. Alliance of Police v. Cnty. of Cook*, No. 1-08-0282 (2008) (unpublished order under Supreme Court Rule 23) (Metropolitan Rule 23 order)).

717. *Id.* at 450, 920 N.E.2d at 1212.

718. *Id.* (citing ILL. CONST. 1970, art. XIII, § 5).

719. *Id.* at 450, 920 N.E.2d at 1212.

720. *Id.* at 451, 920 N.E.2d at 1212.

721. 388 Ill. App. 3d 834, 905 N.E.2d 861 (5th Dist. 2009).

Commerce at Unreasonably Low Prices Eliminating Competition” in violation of 15 U.S.C. § 13(a) (2000).⁷²²

Prior to his discharge, Reichert pled guilty in federal court to charges of “Selling of Goods in Commerce at Unreasonably Low Prices Eliminating Competition,” a misdemeanor that is punishable by not more than one year in prison, for which he was sentenced to two years probation and ordered to pay a \$2,000 fine. In the federal criminal case, Reichert stipulated that he had sold knockoff sunglasses manufactured, distributed, and sold like Oakley brand. He further stipulated that he sold the imitation glasses at an unreasonably low price of \$10 per pair, knowing that he would be damaging competition for actual Oakley sunglasses.⁷²³ In addition to entering the conviction, the Federal District Court entered an order (“the *Zambrana* order”), stating that Reichert’s federal conviction would be admissible for impeachment purposes under Federal Rules of Evidence 608(b) and 609(a)(2) if Reichert were called to testify in the future.⁷²⁴ The District Court emphasized the stipulated fact that Reichert had sold sunglasses that were sold to look like Oakley brand, and therefore, admitted to engaging in misrepresentation, deceit, and falsification. Based upon this, the District Court found Reichert’s “conviction involved specific instances of conduct that would be admissible under Rule 608(b) and that the conviction further constituted an offense involving dishonesty or false statement under Rule 609(a)(2).”⁷²⁵

Thereafter, the Collinsville Chief of Police filed charges against Reichert under section 10-2.1-17 of the Illinois Municipal Code in order to discharge him,⁷²⁶ and the Board of Fire and Police Commissioners of the City of Collinsville (“Board”) held a hearing on the charges.⁷²⁷ At the hearing, State’s Attorneys for both St. Clair County and Madison County testified that they would no longer prosecute cases in which Reichert was a material witness because his credibility would be questioned by defense attorneys at trial. However, both State’s Attorneys also testified that they were unaware of the elements of the offense to which Reichert had pled guilty. Instead, they relied upon the Federal District Court’s *Zambrana* order in reaching their conclusions that the conviction could be used to impeach Reichert in the future.⁷²⁸ The Chief of Police testified that in light of the State’s Attorneys’ opinions, he did not believe Reichert could be an effective police officer

722. *Id.* at 842, 905 N.E.2d at 869.

723. *Id.* at 836, 905 N.E.2d at 863–64.

724. *Id.* at 836, 905 N.E.2d at 864 (citing *United States v. Zambrana*, 402 F. Supp. 2d 953 (S.D. Ill. 2005)).

725. *Id.* at 836–37, 905 N.E.2d at 864 (citing *Zambrana*, 402 F. Supp. 2d at 958–59).

726. *Id.* at 837, 905 N.E.2d at 864 (citing 65 ILL. COMP. STAT. ANN. 5/10-2.1-17 (West 2006)).

727. *Id.* at 837, 905 N.E.2d at 864.

728. *Id.* at 837–38, 905 N.E.2d at 864–65.

because he would not be called to testify in court following arrests, as all officers are expected to.⁷²⁹

Reichert testified in his own defense that, in addition to being a police officer, he operated a small business that sold t-shirts, but at some point also sold knockoff Oakley brand sunglasses. He considered knockoff sunglasses to be those made similar to brand names, but sold at a much cheaper price, whereas counterfeit sunglasses are those made to look identical to the brand name and sold as brand name sunglasses. Before he began selling the knockoff sunglasses, Reichert contacted U.S. Customs and the Illinois State Police, at which point he determined that selling sunglasses was legal. The sunglasses he sold were located on racks marked as “designer alternatives,” and he never represented that the sunglasses were actual Oakley brand sunglasses.⁷³⁰

Based upon the conviction, the Zambrana order from the Federal District Court, and the testimony from the State’s Attorneys, the Board issued an order discharging Reichert, finding that if he would no longer be called to testify, his continued employment would be detrimental to the police force.⁷³¹ For the same reason, the Madison County Circuit Court entered summary judgment in favor of the Board when Reichert sought judicial review of the Board’s administrative order.⁷³² Reichert then appealed to the Fifth District.

On appeal, the Court first recognized that a police officer can only be discharged for cause, which is defined as “some substantial shortcoming which renders [the employee’s] continuance in his office or employment in some way detrimental to the discipline and efficiency of the service and something which the law and a sound public opinion recognize as a good cause for his not longer occupying the place.”⁷³³ The court then found that “the propriety of the Board’s decision turn[ed] on whether the plaintiff’s federal conviction . . . in fact rendered his credibility subject to impeachment in the circuit courts of Madison and St. Clair Counties,” which it stated was a mixed question of law and fact. If the issue was answered in the affirmative, the Board’s finding would not be arbitrary or unreasonable and would not be unrelated to the requirements of Reichert’s position. However, if the issue was decided in the negative, then the Board’s decision was “based on a misapprehension of law.”⁷³⁴

729. *Id.* at 838, 905 N.E.2d at 865.

730. *Id.* at 839, 905 N.E.2d at 866.

731. *Id.* at 840–41, 905 N.E.2d at 867.

732. *Id.* at 842, 905 N.E.2d at 868.

733. *Id.* at 842–43, 905 N.E.2d at 868–69 (internal quotation marks omitted).

734. *Id.* at 843–44, 905 N.E.2d at 869–70.

At the outset, the Fifth District questioned the Federal District Court's determination that Reichert committed an offense involving dishonesty or false statement. However, the court refused to address the issue further because the rules of impeachment of a witness are different under Illinois law than the Federal Rules of Evidence.⁷³⁵

In Illinois, the requirements for impeachment of a witness with evidence of a prior conviction are set forth in the Supreme Court's decision in *People v. Montgomery*.⁷³⁶ Under *Montgomery*, evidence of a prior conviction is admissible to impeach a witness if:

- (1) the witness'[s] crime was punishable by death or imprisonment for more than one year, or the crime involved dishonesty or false statement regardless of the punishment;
- (2) the witness'[s] conviction or release from confinement, whichever date is later, occurred less than 10 years from the date of trial; and
- (3) the danger of unfair prejudice does not substantially outweigh the probative value of the conviction.⁷³⁷

Additionally, "dishonesty" and "false statement," as used in *Montgomery*, "refer to crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, false pretenses . . . and theft."⁷³⁸ Moreover, only the elements of the prior conviction, as defined by statute, may be considered by a court ruling on the admissibility of the prior conviction. In other words, a court cannot consider the factual background of the prior conviction.⁷³⁹

Therefore, the court examined the elements of Reichert's plea agreement for the "Selling of Goods in Commerce at Unreasonably Low Prices Eliminating Competition," in violation of 15 U.S.C. § 13a (2000), which were: (1) Reichert was engaged in commerce, (2) Reichert sold goods at unreasonably low prices in the course of commerce, and (3) Reichert did so for the purpose of destroying competition or eliminating a competitor.⁷⁴⁰ The court found that violation of this section is not a crime involving dishonesty or false statement under Illinois law because it is not based upon lying, cheating, deceiving, or stealing.⁷⁴¹ Therefore, the court held that evidence of

735. *Id.* at 846–47, 905 N.E.2d at 871–72.

736. *Id.* at 847, 905 N.E.2d at 872 (citing *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971)).

737. *Id.* at 847, 905 N.E.2d at 872 (quoting *People v. Harvey*, 211 Ill. 2d 368, 383, 813 N.E.2d 181, 191 (2004)) (internal quotation marks omitted).

738. *Id.* at 847–48, 905 N.E.2d at 873 (quoting *People v. Atkinson*, 186 Ill. 2d 450, 465, 713 N.E.2d 532, 539 (1999)) (internal quotation marks omitted).

739. *Id.* at 848, 905 N.E.2d at 873.

740. *Id.* at 845, 905 N.E.2d at 870.

741. *Id.* at 848, 905 N.E.2d at 873.

Reichert's prior conviction would be inadmissible to impeach his credibility in either Madison County or St. Clair County Circuit Court, and therefore, the Board's decision to discharge Reichert was "based on a misapprehension of the law."⁷⁴²

In *Herman v. Power Maintenance & Constructors, LLC*,⁷⁴³ the court considered whether genuine issues sufficient to avoid summary judgment existed as to the plaintiff's claim—that his employer's stated reason for discharging or refusing to recall him for unsatisfactory job performance was actually a pretext for retaliating against him for filing a workers' compensation claim.⁷⁴⁴ The plaintiff was a boilermaker in his third year of apprenticeship through his local union. The plaintiff was hired out for various jobs through the union, including work for the defendant.⁷⁴⁵

The plaintiff's initial complaint alleged that on November 8, 2005 he sustained injury in the course of his employment with the defendant, that he gave timely notice to the defendant, and on November 15, 2005 the defendant terminated him in retaliation for exercising a right under the Workers' Compensation Act.⁷⁴⁶ However, at his deposition, the plaintiff testified that he was laid off on November 15, 2005 due to work restrictions imposed by his doctor that prevented him from working for the defendant, and specifically denied that being laid off on that date was retaliatory. Instead, the plaintiff testified that the defendant wronged him by sending letters to the union's business agent refusing to recall the plaintiff for the spurious reason that the plaintiff's work product was not up to par.⁷⁴⁷ The plaintiff brought performance evaluations to the deposition, which he presented in support of his testimony, showing that he never received below average marks and generally was rated above average or excellent.⁷⁴⁸

The defendant then moved for summary judgment based upon the plaintiff's deposition testimony, namely that he admitted: (1) defendant laid him off and did not discharge him; (2) defendant had no intention of retaliating against him for exercising his rights under the Act when it laid him off; and (3) laying him off for his physical inability to perform the work was a valid, non-pretextual reason. The defendant also: (1) attached an affidavit of one of its supervisors stating that the plaintiff was laid off instead of terminated; (2) attached a termination slip dated November 15, 2005 showing the reason for

742. *Id.* at 849, 905 N.E.2d at 874.

743. 388 Ill. App. 3d 352, 903 N.E.2d 852 (4th Dist. 2009).

744. *Id.* at 353–54, 903 N.E.2d at 854.

745. *Id.* at 354, 903 N.E.2d at 854.

746. *Id.*

747. *Id.* at 354–55, 903 N.E.2d at 854–55.

748. *Id.* at 355–56, 903 N.E.2d at 855–56.

the plaintiff's termination was a "reduction in force," which also indicated there was "[n]o work available within parameters of doctor's restrictions—see attached;" and (3) attached a handwritten note from the plaintiff's physician dated November 14, 2005, severely restricting his work activity.⁷⁴⁹

At the hearing on defendant's motion to dismiss, plaintiff's attorney argued, "even though, on November 15, 2005, defendant ostensibly laid plaintiff off rather than discharged him, one could infer that, as of that date, defendant decided that plaintiff never would work for defendant again and that the reason for the decision was plaintiff's claim for workers' compensation benefits."⁷⁵⁰ Nevertheless, plaintiff's attorney argued that November 15, 2005 was the accrual date of the action because the plaintiff did not work from that time until the date he reported for work again, when he was discharged for alleged incompetence.⁷⁵¹

The trial court granted the defendant's motion for summary judgment, but also granted plaintiff leave to file an amended complaint, which the plaintiff filed thereafter. In it, the plaintiff alleged that he sustained an injury in the course of his employment on November 8, 2005, and he gave the defendant timely notice of the injury. Plaintiff alleged that prior to the accident, he performed his work in a satisfactory manner. He further alleged that he presented the defendant with a return to work slip on November 15, 2005, and "although [d]efendant stated that it did not have available work at that time[,] [d]efendant also made a decision[,] sometime after this date[,] to permanently discharge plaintiff . . . and[,] in furtherance of such plan[,] provided a pretextual reason for its actions . . . that [p]laintiff's work was unsatisfactory."⁷⁵² In further support of his amended complaint, the plaintiff attached affidavits of two other workers, each of whom stated they were discharged when they tried to return to work for the defendant following a workers' compensation claim, because the defendant said they posed a safety risk, even though neither had been cited for unsafe work practices.⁷⁵³

The defendant again moved for summary judgment, this time on two grounds: (1) the amended complaint alleged that the defendant "discharged" plaintiff and stated a cause for retaliatory discharge, and therefore, plaintiff could not allege defendant refused to recall or rehire plaintiff; and (2) assuming plaintiff was alleging retaliatory refusal to recall or rehire, his attorney judicially admitted that the plaintiff's cause of action accrued on

749. *Id.* at 356, 903 N.E.2d at 856.

750. *Id.*

751. *Id.* at 357, 903 N.E.2d at 856.

752. *Id.* at 357, 903 N.E.2d at 857.

753. *Id.* at 357–58, 903 N.E.2d at 857.

November 15, 2005 at the hearing on defendant's first motion for summary judgment, and therefore, the trial court's finding that no cause of action for retaliation existed for that date was dispositive.⁷⁵⁴ The trial court granted the motion on both grounds, and the plaintiff appealed.⁷⁵⁵

On appeal, the Fourth District first rejected the defendant's argument that plaintiff's counsel's "judicial admission" at hearing on defendant's first motion for summary judgment precluded the plaintiff from alleging a different accrual date in his amended complaint. The court recited that the purposes of the doctrine of judicial admissions are only to prevent perjury and to hold a party to its waiver of proof of a factual issue at trial.⁷⁵⁶ The doctrine is not applied to an "attorney's statement of legal opinion in a summary judgment proceeding, especially if the opinion was manifestly incorrect within the context of the statement itself." Penalizing confusion or an honest mistake is not the purpose of the doctrine of judicial admission.⁷⁵⁷ The court found it "obvious" that plaintiff's counsel was mistaken regarding when the cause of action accrued because a cause of action accrues when the party knows or reasonably should know of an injury that was wrongfully caused. Therefore, plaintiff's cause of action accrued when he knew or reasonably should have known of the defendant's decision to retaliate by not recalling him, not when the defendant actually made the decision.⁷⁵⁸

The court next addressed the trial court's finding that summary judgment was appropriate because the plaintiff claimed retaliatory discharge, instead of retaliatory failure to recall or rehire. The court recognized that plaintiff's amended complaint did allege the defendant discharged him. However, the court construed the complaint, in the light most favorable to the plaintiff, to allege that the defendant "first laid him off for medical reasons and then, in retaliation for his workers' compensation claim, converted the layoff into a discharge" on the pretext that his work was unsatisfactory.⁷⁵⁹

The court acknowledged Section 4(h) of the Workers' Compensation Act provides that it is unlawful for an employer "to discharge or to threaten to discharge, or to refuse to rehire or recall to active service" an employee because of exercising rights under the Act.⁷⁶⁰ The court also acknowledged

754. *Id.* at 358, 903 N.E.2d at 857–58.

755. *Id.* at 359, 903 N.E.2d at 858.

756. *Id.* at 361, 903 N.E.2d at 860.

757. *Id.*

758. *Id.* at 361–62, 903 N.E.2d at 860.

759. *Id.* at 362, 903 N.E.2d at 861.

760. *Id.* (citing 820 ILL. COMP. STAT. ANN. 305/4(h) (West 2004)).

that the First District has distinguished actions for retaliatory discharge from retaliatory failure to rehire and retaliatory failure to recall.⁷⁶¹

The court went on to recognize that the plaintiff admitted the original lay off was legitimately based upon the doctor's restrictions. However, it was the letter sent by the defendant to the local union during the plaintiff's layoff that convinced the court to find in favor of the plaintiff on this issue. That letter stated that the defendant would reject future work from the plaintiff because his work had been substandard.⁷⁶² In the court's words:

Plainly, the letter refused to recall him. Arguably, it also discharged him. Since he was laid off for medical reasons, plaintiff had an expectation of being called back to work when he recuperated . . . but the letter permanently terminated the suspended employment relationship—as plaintiff argues, it converted a layoff into a discharge. We need not become mired in semantics. The substance of plaintiff's theory is clear. He alleges that defendant denied him work in retaliation for his exercising rights or remedies granted to him by the Act. That is the germane point.⁷⁶³

Finally, the court found that there was a genuine issue as to whether the defendant's stated reason for not recalling the plaintiff, i.e. substandard performance, was actually a pretext for retaliating against the plaintiff due to his workers' compensation claim. The court recognized that a plaintiff can meet its burden of proof with regard to retaliatory motive through indirect evidence.⁷⁶⁴ In this case, the court stated, "the letter said that plaintiff had done poor work. The performance evaluations tell a different story." Therefore, the court found that a reasonable trier of fact could find that the defendant gave a false reason for refusing to recall the plaintiff, and the false reason was given because the real reason was illegal and actionable retaliation for filing the workers' compensation claim.⁷⁶⁵

In *Grabs v. Safeway, Inc.*,⁷⁶⁶ the First District was presented with the certified question on interlocutory appeal of:

Does the Workers' Compensation Act give the Illinois Workers Compensation Commission the exclusive authority to determine whether an

761. *Id.* at 362, 903 N.E.2d at 861 (quoting *Webb v. Cnty. of Cook*, 275 Ill. App. 3d 674, 678, 656 N.E.2d 85, 88 (1st Dist. 1995)).

762. *Id.* at 363, 903 N.E.2d at 861.

763. *Id.* at 363, 903 N.E.2d at 862.

764. *Id.* at 364, 903 N.E.2d at 862.

765. *Id.*

766. 395 Ill. App. 3d 286, 917 N.E.2d 122 (1st Dist. 2009).

injured employee may return to work, such that when an employer is faced with conflicting medical opinions from the employee's doctor and the employer's IME, the employer may not rely upon the IME opinion to terminate the employee under the employer's attendance policy for failing to return to work, before the Commission has adjudicated the pending dispute over the conflicting medical opinions?⁷⁶⁷

In *Grabs*, two plaintiffs filed a joint complaint against their former employer alleging retaliatory discharge for exercising their rights under the Workers' Compensation Act.⁷⁶⁸ Both plaintiffs alleged they had been injured while working for the defendant, and both had filed workers' compensation claims. They each had been treated by their personal physicians, who had each recommended that the plaintiffs remain off work at the time. However, the defendant requested that each plaintiff see an independent medical examiner ("IME"), and the IME for each plaintiff recommended that the respective plaintiff return to work with no restrictions.⁷⁶⁹ Based upon the findings of the IMEs, the defendant changed the status of the plaintiffs' absence status from work related injury, which would not require the plaintiffs to call in absences, to normal status requiring the plaintiffs to report to work or call in their absences. When the plaintiffs did not return to work or call in their absences for the following three days, the defendant terminated their employment in accordance with the defendant's no-fault attendance policy allowing the defendant to fire employees that did not come to work or call in absences for three consecutive days.⁷⁷⁰ The plaintiffs then filed complaints alleging retaliatory discharge.⁷⁷¹

The plaintiffs originally moved for summary judgment on their retaliatory discharge claims, which were denied by the circuit court.⁷⁷² Thereafter, however, the arbitrator of the Workers' Compensation Commission accepted the findings of the plaintiffs' treating physicians and found the plaintiffs' injuries were caused by accidents in the course of their employment.⁷⁷³ The plaintiffs then filed a motion to reconsider the circuit court's order denying summary judgment on their retaliatory discharge claims. The circuit court granted the plaintiffs' motion for summary judgment on the issue of liability, finding that the plaintiffs had a right to follow the advice of

767. *Id.* at 287–88, 917 N.E.2d at 123.

768. *Id.* at 287, 917 N.E.2d at 123.

769. *Id.* at 288, 917 N.E.2d 124.

770. *Id.* at 288–89, 917 N.E.2d at 124.

771. *Id.* at 289, 917 N.E.2d at 124.

772. *Id.*

773. *Id.* at 289, 917 N.E.2d at 124–25.

their treating physicians and not return to work until the Workers' Compensation Commission resolved the two conflicting medical opinions.⁷⁷⁴

On appeal, the only issue was whether the plaintiff's discharge was causally related to their workers' compensation claims, and the parties agreed that the circuit court applied a "*per se* standard to find that plaintiffs' discharge was causally related to the improper denial of their right to follow their treating physicians' orders while their claims were pending before the Commission."⁷⁷⁵ The defendant maintained that circuit court's entry of summary judgment was improper because causation was a material fact for a jury to consider.⁷⁷⁶

In answer to the certified question, the court found that "when an employer is faced with conflicting medical opinions from the employee's doctor and the employer's IME, an employer may not rely solely on an IME in terminating an employee for failing to return to work or for failing to call in his absences."⁷⁷⁷ However, the court declined to "find that a *per se* standard exists to recover for a workers' compensation retaliatory discharge claim; rather, an employee must meet his burden of proof to show that his discharge was causally related to the exercise of his rights under the Act."⁷⁷⁸ In accordance with the answer to the certified question, the court found that in order to recover for retaliatory discharge, the plaintiffs were required to prove the defendants relied on the IMEs in terminating the plaintiffs, such that discharge was causally related to their workers' compensation claims. Therefore, the court found, if the IMEs were the sole basis for the change of the plaintiffs' attendance status, and if the defendant terminated plaintiffs for failing to return to work or call in their absences, summary judgment would be appropriate. The court declined to decide the issue because it was not properly before the court.⁷⁷⁹ With regard to the circuit court's grant of summary judgment, however, the court stated:

In the present case, it appears that the circuit court applied a *per se* rule of retaliatory discharge instead of considering whether there was a genuine issue of material fact as to the element of causation that would preclude summary judgment. While it would be improper for defendants to change plaintiffs' attendance coding and then discharge plaintiffs solely based on the IME opinions where it is the role of the Commission to determine the extent of

774. *Id.* at 290, 917 N.E.2d at 125.

775. *Id.* at 290, 917 N.E.2d at 126.

776. *Id.* at 292, 917 N.E.2d at 127.

777. *Id.* at 288, 917 N.E.2d at 124.

778. *Id.*

779. *Id.* at 295, 917 N.E.2d at 129.

plaintiffs' injuries, we decline to apply a per se rule of retaliatory discharge. Rather, cases brought for retaliatory discharge predicated on an employee's filing of a worker's compensation claim are reviewed using traditional tort analysis. It therefore remains the plaintiffs' burden to establish the elements of their cause of action, which involved the claim that defendants wrongfully discharged plaintiffs in retaliation for exercising a right or remedy granted to them under the Act.⁷⁸⁰

The court rejected the defendant's argument, based upon the Supreme Court's decision in *Hartlein v. Illinois Power Co.*,⁷⁸¹ that it had the right to discharge the plaintiffs for failing to return to work.⁷⁸² The *Hartlein* court found that "Illinois law does not obligate an employer to retain an at-will employee who is medically unable to return to his assigned position" and "[A]n employer may fire an employee for excess absenteeism, even if the absenteeism is caused by a compensable injury."⁷⁸³ The court rejected application of this finding in the instant case because it was disputed whether the plaintiffs could return to work, whereas in *Hartlein*, it was undisputed that the plaintiff's work-related injury prevented him from returning to work.⁷⁸⁴ While the court rejected the defendant's argument, it found that the plaintiffs were still required to show that they were discharged in retaliation for exercising their rights under the Workers' Compensation Act.⁷⁸⁵

*Malinowski v. Cook County Sheriff's Merit Board*⁷⁸⁶ involved a suit by a discharged correctional officer. Plaintiff, Pamela Malinowski, was employed as a correctional officer for just over twenty years.⁷⁸⁷ The Sheriff filed a complaint with the Sheriff's Merit Board for her termination, alleging that Malinowski failed to follow procedure, which led to the escape of an inmate.⁷⁸⁸

The evidence showed that an inmate escaped from the correctional center, and when caught the next day, he admitted to hiding in a laundry basket and sneaking out in a laundry truck.⁷⁸⁹ The driver of the truck and his assistant testified that they delivered two carts of clean laundry and picked up two carts of dirty laundry. The driver and the assistant saw an officer look in the back

780. *Id.* at 301, 917 N.E.2d at 135.

781. 151 Ill. 2d 142, 601 N.E.2d 720 (1992).

782. *Grabs*, 395 Ill. App. 3d at 295-96, 917 N.E.2d at 130.

783. *Id.* (quoting *Hartlein v. Ill. Power Co.*, 151 Ill. 2d 142, 160, 601 N.E.2d 720, 728 (1992) (internal quotation marks omitted)).

784. *Id.* at 296, 917 N.E.2d at 130 (citing *Hartlein*, 151 Ill. 2d at 163-64, 601 N.E.2d at 730).

785. *Id.* at 296, 917 N.E.2d at 130-31.

786. 395 Ill.App.3d 317, 917 N.E.2d 1148 (1st Dist. 2009).

787. *Id.* at 318, 917 N.E.2d at 1149.

788. *Id.* at 318, 917 N.E.2d at 1149-50.

789. *Id.* at 319, 917 N.E.2d at 1150.

of the truck, but did not see anyone enter the back of the truck, and could not see the rest of the inspection.⁷⁹⁰

When interviewed by internal investigations, the plaintiff stated that her duty was to admit vehicles and search for contraband, but she did not search the truck, even though the Post Order required officers to do so.⁷⁹¹ A Captain of the corrections department testified that officers are expected to enter the laundry truck and physically search the baskets for inmates.⁷⁹² However, another officer testified that he did not look inside the carts because they were too tall, and he had done the inspection the same way for five years.⁷⁹³ He further testified the officers were not given tools to conduct searches, despite their requests.⁷⁹⁴ The plaintiff stated that she had always performed the inspection in the same way without being disciplined, and she was not issued tools or equipment to conduct a search.⁷⁹⁵

The Cook County Sheriff's Merit Board ("Board") issued an order finding that Malinowski had violated regulations and ordered that she be discharged based on the fact that she admitted to not conducting a search of the vehicle and failing to follow proper procedure.⁷⁹⁶ The Board also found Malinowski's testimony was not credible.⁷⁹⁷ Malinowski petitioned the circuit court for review, alleging the Board's order was against the manifest weight of the evidence; but, on review, the circuit court confirmed the Board's decision.⁷⁹⁸

Malinowski contended on appeal that there was no rule requiring her to search the laundry baskets, and it was against the manifest weight of the evidence to conclude that she could have prevented the escape.⁷⁹⁹ The court began by stating that an officer's violation of a single rule may be sufficient for discharge.⁸⁰⁰ Two stages are looked at on review of the discharge: (1) the Board's finding of guilt; and (2) the board's finding that said guilt was sufficient for discharge.⁸⁰¹ The court reviews the Board's decision under a manifest weight of the evidence standard.⁸⁰²

790. *Id.*

791. *Id.* at 320, 917 N.E.2d at 1151.

792. *Id.*

793. *Id.* at 321, 917 N.E.2d at 1152.

794. *Id.*

795. *Id.*

796. *Id.* at 321–22, 917 N.E.2d at 1152.

797. *Id.* at 322, 917 N.E.2d at 1152.

798. *Id.*

799. *Id.*

800. *Id.* at 322, 917 N.E.2d at 1153.

801. *Id.*

802. *Id.* at 322–23, 917 N.E.2d at 1153.

The court first addressed whether there was a rule regarding the inspection of laundry baskets, and concluded that such order existed in the Post Order directing officers to search departing vehicles thoroughly.⁸⁰³ The court found Malinowski's actions were inconsistent with the order, and rejected Malinowski's argument that inside inspections were routinely not made, concluding that routine violation does not negate an order.⁸⁰⁴ The court also found that Malinowski could have prevented the escape by conducting a search of the baskets, and that this inspection was feasible.⁸⁰⁵ As such, the court affirmed the Board's order of discharge, concluding that Malinowski violated the Sheriff's order and that such violation justified discharge.⁸⁰⁶

In *Blount v. Stroud*,⁸⁰⁷ the Illinois Supreme Court considered whether the circuit court had subject matter jurisdiction over the plaintiff's claims for common law retaliatory discharge and retaliation under the Federal Civil Rights Act of 1866⁸⁰⁸ ("section 1981"), or whether the plaintiff's exclusive source of redress was through the Illinois Human Rights Act's ("Act") administrative procedures.⁸⁰⁹

Two counts of the plaintiff's fifth amended complaint were at issue before the court. First, count III was titled a "retaliation" claim, and alleged that the defendants violated section 1981 of the federal Civil Rights Act by taking adverse employment actions against her, including discharging her.⁸¹⁰ The plaintiff alleged that the defendant retaliated against her because the plaintiff supported a coworker in the coworker's federal discrimination suit, having witnessed some of the offensive conduct the coworker complained of. The plaintiff further alleged that she told the defendant she would testify truthfully, but the defendant told her not to testify in support of the coworker or otherwise aid the coworker.⁸¹¹ Because she refused, she was subjected to threats, intimidation, suspension, and finally termination.⁸¹²

Second, the plaintiff stated a claim for common law retaliatory discharge in Count V.⁸¹³ The plaintiff alleged that it was the public policy of Illinois for witnesses to testify truthfully in court and other government proceedings, and

803. *Id.* at 323, 917 N.E.2d at 1153-54.

804. *Id.* at 323, 917 N.E.2d at 1154.

805. *Id.* at 324, 917 N.E.2d at 1154.

806. *Id.*

807. 232 Ill. 2d 302, 904 N.E.2d 1 (2009).

808. 42 U.S.C. § 1981 (2000).

809. *Blount*, 232 Ill.2d at 305, 904 N.E.2d at 4.

810. *Id.* at 305-06, 904 N.E.2d at 4.

811. *Id.* at 305, 904 N.E.2d at 4.

812. *Id.* at 305-6, 904 N.E.2d at 4.

813. *Id.* at 306, 904 N.E.2d at 4.

it was against public policy for someone to interfere with this.⁸¹⁴ The plaintiff alleged that the defendant violated Illinois public policy, in part, by discharging her when she refused to commit perjury.⁸¹⁵

Prior to trial, the defendant asserted in both affirmative defenses and a motion to dismiss that the circuit court did not have subject matter jurisdiction over the plaintiff's claims.⁸¹⁶ Instead, the defendant argued that the plaintiff was required to seek redress for her federal and state retaliation claims through the Act's administrative procedures, based upon 8-111(c) of the Act, which provides: "Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act."⁸¹⁷ Additionally, the defendant argued that the plaintiff's retaliation claims were "inextricably linked" to a civil rights violation, as described in the Act, and therefore the Act preempted the plaintiff's claims.⁸¹⁸ The trial court rejected the defendant's argument, and the case eventually went to trial.⁸¹⁹

After the jury found in favor of the plaintiff on her retaliation claims, the defendant filed a post-trial motion, again arguing that they were entitled to judgment as a matter of law because the circuit court lacked jurisdiction.⁸²⁰ At the same time, the plaintiff filed a motion to recover attorneys fees and costs as the prevailing party in a section 1981 claim, pursuant to 42 U.S.C § 1988 (2000).⁸²¹ The trial court again rejected the defendant's argument, and granted the plaintiff's motion for fees and costs.⁸²² On appeal, the First District reversed, finding that the Act "deprives Illinois circuit courts of subject matter jurisdiction over all civil rights claims, regardless of whether they are brought under state or federal law."⁸²³ The plaintiff then filed the instant appeal.

Before delving into the plaintiff's specific claims, the Court examined the provisions of the Act. The Court recognized that, at the time suit was filed, the Act did not expressly authorize private suits. Instead, the Act "expressly limited the court's jurisdiction," providing that: "Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an

814. *Id.* at 306, 904 N.E.2d at 4-5.

815. *Id.* at 306, 904 N.E.2d at 5.

816. *Id.*

817. *Id.* at 306-07, 904 N.E.2d at 5.

818. *Id.* at 307, 904 N.E.2d at 5.

819. *Id.*

820. *Id.* at 307-08, 904 N.E.2d at 5-6.

821. *Id.* at 308, 904 N.E.2d at 6.

822. *Id.*

823. *Id.* (citing *Blount v. Stroud*, 376 Ill. App. 3d 935, 949, 877 N.E.2d 49, 61-62 (1st Dist. 2007)).

alleged civil rights violation other than as set forth in this Act.”⁸²⁴ Furthermore, “retaliation” is one of the civil rights violations specifically identified in the Act, which provides that it is a civil rights violation to: “Retaliate against a person because he or she has opposed that which he or she reasonably and in good faith believes to be unlawful discrimination . . . or because he or she has . . . testified, assisted, or participated in an investigation, proceeding, or hearing under this Act.”⁸²⁵ In light of these specific sections of the Act, the parties disputed whether the circuit court had jurisdiction to hear the plaintiff’s common law retaliatory discharge claim or her section 1981 retaliation claim.⁸²⁶

The Court first considered the plaintiff’s common law retaliatory discharge claim. The Court stated that, on this issue, it was guided by its decisions in *Geise v. Phoenix Co. of Chicago, Inc.*,⁸²⁷ and *Maksimovic v. Tsogalis*.⁸²⁸ In *Geise*, the plaintiff brought a common law tort action alleging negligent hiring and retention against her employer, alleging that a manager had sexually harassed her and then terminated her when she reported the manager’s misconduct.⁸²⁹ The parties agreed that if the plaintiff’s claim was construed as seeking a remedy for a civil rights violation under the Act, the circuit court would not have jurisdiction, but the plaintiff argued that her tort claims were separate and distinct from the manager’s sexual harassment.⁸³⁰ The *Geise* Court rejected this argument, finding the sexual harassment was “inextricably linked” to the plaintiff’s tort claims, because “[a]bsent the allegations of sexual harassment, the plaintiff would have no independent basis for imposing liability on the company.”⁸³¹

On the other hand, in *Maksimovic*, the court found that the plaintiff’s tort claims were not inextricably linked to claims of sexual harassment. There, the plaintiff was a waitress who alleged that her employer ordered her to perform oral sex, inappropriately touched her, tried to kiss her, and confined her in a walk-in cooler and made sexual advances on her.⁸³² The plaintiff first filed a sexual harassment complaint with the Illinois Human Rights Commission, but later filed a civil suit in circuit court alleging assault, battery, and false

824. *Blount*, 232 Ill. 2d at 310, 904 N.E.2d at 7 (quoting 775 ILL. COMP. STAT. ANN. 5/8-111(C) (West 2000)).

825. *Id.* at 310–11, 904 N.E.2d at 7 (quoting 775 ILL. COMP. STAT. ANN. 5/6-101(A) (West 2000)).

826. *Id.* at 311, 904 N.E.2d at 7.

827. 159 Ill.2d 507, 639 N.E.2d 1273 (1994).

828. 177 Ill.2d 511, 687 N.E.2d 21 (1997).

829. *Blount*, 232 Ill.2d at 311, 687 N.E.2d at 7.

830. *Id.* at 311–12, 687 N.E.2d at 7–8.

831. *Id.* at 312, 687 N.E.2d at 8 (quoting *Geise v. Phoenix Co. Of Chi., Inc.*, 159 Ill. 2d 507, 516–17, 639 N.E.2d 1273, 1277 (1994) (internal quotation marks omitted)).

832. *Id.* at 312, 687 N.E.2d at 8.

imprisonment.⁸³³ The circuit court and appellate court both found the trial court lacked subject matter jurisdiction, based upon the Court's decision in *Geise*.⁸³⁴ However, the Supreme Court reversed, finding that the plaintiff's assault, battery, and false imprisonment claims were not inextricably linked to the sexual harassment claim because the plaintiff alleged facts sufficient to state a claim without reference to legal duties created under the Act.⁸³⁵ The Court found that the legislature must clearly express its intent to abrogate common law, and the language of the Act revealed "no legislative intent to abolish all common law torts factually related to sexual harassment."⁸³⁶

Relying upon those standards, in the instant case the Court found that the circuit court had subject matter jurisdiction of the plaintiff's common law claim for retaliatory discharge.⁸³⁷ The court recognized that the tort of retaliatory discharge only requires a plaintiff to allege she was: "(1) discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy."⁸³⁸ In the instant case, the plaintiff alleged she was discharged for refusing to commit perjury in her coworker's case, which was in violation of Illinois public policy.⁸³⁹ The Court found this case to be synonymous to *Maksimovic*, in that the plaintiff established a basis for her claim of retaliatory discharge without referring to legal duties created under the Act, and therefore, the plaintiff's claim was not "inextricably linked" to a civil rights violation under the Act.⁸⁴⁰

The Court specifically rejected a comparison to *Geise*, finding that while "plaintiff's allegation that she was discharged in retaliation for her refusal to commit perjury in [her coworker's] case could be construed as retaliation for opposing unlawful discrimination—a violation of the Act's retaliation provision," here the "plaintiff need[ed] not and [did] not rely upon the public policy embodied in the Act to satisfy the elements of her common law tort claim."⁸⁴¹ Instead, the Court's conclusion rested on the language of the Act, which provided an exclusive remedy for the Act's defined state civil rights violations, but failed to mention common law tort actions. Therefore, the

833. *Id.*

834. *Id.*

835. *Id.* at 313, 904 N.E.2d at 8.

836. *Id.* at 313, 904 N.E.2d at 9.

837. *Id.* at 314, 904 N.E.2d at 9.

838. *Id.* (quoting *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill. 2d 526, 529, 519 N.E.2d 909, 911 (1988) (internal quotation marks omitted)).

839. *Id.* at 314, 904 N.E.2d at 9 (citing 720 ILL. COMP. STAT. ANN. 5/32-2 (West 2000) ("establishing and defining the offense of perjury, a Class 3 felony")).

840. *Id.* at 314–15, 904 N.E.2d at 9 (citing *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 517, 687 N.E.2d 21, 23 (1997)).

841. *Id.* at 315, 904 N.E.2d at 10 (internal citation omitted).

Court found no clear legislative intent to abrogate the common law claim alleged by the plaintiff.⁸⁴²

The Court next considered whether the circuit court had subject matter jurisdiction of the plaintiff's federal section 1981 claim, or whether the plaintiff was required to litigate her claim administratively under the Act.⁸⁴³ The Court recognized that the Illinois appellate courts, over the course of about 20 years, had repeatedly found that Illinois circuit courts lack subject matter jurisdiction in civil rights claims brought under federal law and that those claims were subject to the Act's administrative procedures.⁸⁴⁴ However, the Court found that the appellate court's decisions were based on an overly broad reading of its decision in *Mein v. Masonite Corp.*,⁸⁴⁵ and the appellate courts improperly on *Mein* for the proposition that the circuit courts do not have subject matter jurisdiction over civil rights claims brought under federal law.⁸⁴⁶

Instead, the Court found the prior appellate court decisions were contrary to the Act's clear language.⁸⁴⁷ That is, the appellate court decisions implied that the Act authorized the Department of Human Rights and Human Rights Commission to resolve claims under relevant federal acts, but "[n]othing in the language of the Act . . . authorize[d] the Department or Commission to do so."⁸⁴⁸ Rather, the definition of "civil rights violation"⁸⁴⁹ in the Act "is limited to civil rights violations arising under the enumerated sections of the Act, and does not include a civil rights violation as defined by, or arising under, federal law."⁸⁵⁰ Therefore, the Court found that the Department and Commission did not have authority to administer federal law, and parties wishing to pursue their rights under federal law cannot do so before the Department or Commission.⁸⁵¹

Having found that the plaintiff's section 1981 claim could not be brought before the Department or Commission, the Court finally considered whether

842. *Id.*

843. *Id.* at 320, 904 N.E.2d at 12.

844. *Id.* at 320, 904 N.E.2d at 12–13 (citing *Cahoon v. Alton Packaging Corp.*, 148 Ill. App. 3d 480, 483, 499 N.E.2d 522, 524 (5th Dist. 1986); *Faulkner-King v. Wicks*, 226 Ill. App. 3d 962, 970–71, 590 N.E.2d 511, 518 (4th Dist. 1992); *Cooper v. Ill. State Univ.*, 331 Ill. App. 3d 1094, 1100, 772 N.E.2d 396, 400–01 (4th Dist. 2002); *Brewer v. Bd. of Trustees of the Univ. of Illinois*, 339 Ill. App. 3d 1074, 1083, 791 N.E.2d 657, 664 (4th Dist. 2003); *Meehan v. Ill. Power Co.*, 347 Ill. App. 3d 761, 763–68, 808 N.E.2d 555, 559–63 (5th Dist. 2004)).

845. 109 Ill.2d 1, 485 N.E.2d 312 (1985).

846. *Blount*, 232 Ill. 2d at 324, 904 N.E.2d at 15.

847. *Id.* at 325, 904 N.E.2d at 15.

848. *Id.* at 325, 904 N.E.2d at 15–16.

849. 77 ILL. COMP. STAT. ANN. 5/1-103(D) (West 2000).

850. *Blount*, 232 Ill.2d at 327, 904 N.E.2d at 16.

851. *Id.*

the plaintiff could pursue her section 1981 claim in the circuit court.⁸⁵² Consistent with its prior ruling, the Court found that “the Act does not demonstrate an intent by the legislature to divest the circuit courts of jurisdiction over claims filed pursuant to section 1981.”⁸⁵³ Therefore, the Court found that the circuit court had subject matter jurisdiction of the plaintiff’s section 1981 claim as a court of general jurisdiction, presumed to be competent to hear claims that arise under federal law.⁸⁵⁴

In *Blount v. Stroud*,⁸⁵⁵ the First District was presented with multiple issues to resolve, after the Supreme Court overturned its finding that the circuit court lacked subject matter jurisdiction over the plaintiff’s common law claim for retaliatory discharge and section 1981 of the federal Civil Rights Act.⁸⁵⁶

In *Blount*, the plaintiff had brought a five-count complaint against the defendant alleging claims for defamation, intentional infliction of emotional distress, and retaliation. The plaintiff also sought punitive damages.⁸⁵⁷ The case was presented to a jury, which returned a verdict for the plaintiff on her retaliation claim, but in favor of the defendant on the claims for defamation and intentional infliction of emotional distress.⁸⁵⁸ For the retaliation, the jury awarded the plaintiff \$257,350 in back pay, \$25,000 for physical and/or emotional pain and suffering, and \$2.8 million in punitive damages. Additionally, the court awarded the plaintiff \$1,182,832.10 in attorney’s fees and costs pursuant to section 1988 of the Civil Rights Act.⁸⁵⁹

Before beginning its analysis of the issues on appeal, the court set forth multiple pages of facts and procedural history regarding the trial. Rather than discuss the lengthy facts at this point, the relevant facts are discussed as to each issue considered by the court on appeal.

On appeal, the defendant first asserted that the trial court erred by denying his motion for judgment notwithstanding the verdict because the Illinois Human Rights Act preempted the plaintiff’s retaliation claim.⁸⁶⁰ However, the court quickly resolved this issue in favor of the plaintiff, because that issue had previously been decided in the plaintiff’s favor by the Illinois Supreme Court.⁸⁶¹

852. *Id.* at 328, 904 N.E.2d at 17.

853. *Id.*

854. *Id.* at 328–29, 904 N.E.2d at 17–18.

855. 395 Ill. App. 3d 8, 915 N.E.2d 925 (1st Dist. 2009).

856. *Id.* at 11, 915 N.E.2d at 931.

857. *Id.* at 18, 915 N.E.2d at 936.

858. *Id.*

859. *Id.* (citing 42 U.S.C. § 1988 (2000)).

860. *Blount*, 395 Ill. App. 3d at 11–12, 915 N.E.2d at 931.

861. *Id.* at 18, 915 N.E.2d at 936.

The court next considered the defendant's argument that the trial court erred in not granting his motion for judgment notwithstanding the verdict because the plaintiff's retaliation claim was not a cognizable claim pursuant to section 1981 of the Civil Rights Act of 1991.⁸⁶² The court conceded that when the defendant filed its brief, the United States Courts of Appeal were divided regarding "whether section 1981, as amended by the Civil Rights Act of 1991, provided an avenue of recourse for individuals who had suffered retaliation for advocating for the right of those protected under section 1981."⁸⁶³ However, the court further recognized that, "[s]ince that time, the United States Supreme Court has definitively held that section 1981 does encompass retaliation claims filed by individuals who have tried to help others who have suffered racial discrimination," and therefore the plaintiff properly asserted a retaliation claim under section 1981.⁸⁶⁴

The United States Supreme Court's decision in *CBOCS West* also disposed of the defendant's third contention on appeal. The defendant contended that the trial court erred in awarding the plaintiff attorney's fees, pursuant to section 1988 of Civil Rights Act, because the plaintiff's retaliation claim was not cognizable under section 1981, and therefore section 1988 did not apply.⁸⁶⁵ However, because the U.S. Supreme Court explicitly found that section 1981 does encompass retaliation claims, the trial court's award of attorney's fees under section 1988 was allowed.⁸⁶⁶

The defendant's fourth contention on appeal was that the trial court erred in submitting the plaintiff's request for punitive damages to the jury, arguing that the plaintiff did not present sufficient proof of aggravating circumstances, such as willfulness or wantonness.⁸⁶⁷ The court recognized that punitive damages can be awarded "where retaliatory discharge has been committed with fraud, actual malice, deliberate violence or oppression, or when the defendant has acted willfully, or with such gross negligence as to indicate a wanton disregard of the rights of others."⁸⁶⁸ In this case, the court found the evidence presented by the plaintiff sufficiently showed the defendant acted willfully and wantonly in retaliating against the plaintiff.⁸⁶⁹ The court noted that the defendant tried multiple thing to influence the plaintiff not to testify on behalf of a coworker claiming discrimination. Most importantly, the court

862. *Id.* (citing 42 U.S.C. §1981 (2000)).

863. *Id.* at 19, 915 N.E.2d at 937.

864. *Id.* at 19–20, 915 N.E.2d at 937 (citing *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 451 (2008)).

865. *Id.* at 20, 915 N.E.2d at 937.

866. *Id.* at 20, 915 N.E.2d at 938 (citing *CBOCS West*, 553 U.S. at 551).

867. *Id.* at 20, 915 N.E.2d at 938.

868. *Id.*

869. *Id.* at 21, 915 N.E.2d at 938.

noted that the defendant threatened the plaintiff's life on several occasions. Additionally, the defendant offered the plaintiff money and her job back, asserted his wealth and power by delivering a picture of himself with President Clinton, and tried to use his connections with Roland Burris to influence a criminal prosecution of the plaintiff for eavesdropping.⁸⁷⁰

Fifth, the defendant asserted that the amount of punitive damages awarded to the plaintiff was excessive. The defendant challenged the amount of punitive damages under Illinois common law and federal due process.⁸⁷¹

The court first addressed the Illinois common law standard regarding the amount of punitive damages. Under this standard, once the court has determined that punitive damages can be awarded in a case, as a matter of law, it is then for the jury to determine whether to award punitive damages based upon the evidence presented at trial, and the amount of punitive damages is also left to the jury.⁸⁷² When reviewing a jury's punitive damages award, the court considers, "the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant."⁸⁷³ Furthermore, a reviewing court will not reverse the amount of a punitive damage award unless it is against the manifest weight of the evidence, and the award is so excessive that it was the result of passion, partiality, or corruption.⁸⁷⁴ The court recognized that, in Illinois, the punitive damage award does not have to bear any certain proportion to the plaintiff's compensatory award.⁸⁷⁵ Instead, the court found that juries have the "unique ability to articulate community values and evaluate the reprehensibility of a defendant's conduct for the purposes of awarding punitive damages."⁸⁷⁶ The court concluded that the \$2.8 million punitive damages award, representing three percent of the defendant's net worth, was not such a great amount that it was necessarily the result of passion or prejudice of the jury.⁸⁷⁷

The court then addressed the defendant's claim that the punitive damage award was so excessive that it violated the defendant's constitutional right to due process under the fourteenth amendment.⁸⁷⁸ The fourteenth amendment's due process clause prohibits "grossly excessive or arbitrary punishments on a

870. *Id.*

871. *Id.* at 22, 915 N.E.2d at 939.

872. *Id.*

873. *Id.*

874. *Id.* at 22, 915 N.E.2d at 939–40.

875. *Id.* at 23, 915 N.E.2d at 940.

876. *Id.* (quoting *Franz v. Calaco Dev. Corp.*, 352 Ill. App. 3d 1129, 1144, 818 N.E.2d 357, 372 (2nd Dist. 2004) (internal quotation marks omitted)).

877. *Id.* at 23, 915 N.E.2d at 940–41.

878. *Id.* at 24, 915 N.E.2d at 941.

tortfeasor because such awards serve no legitimate purpose and constitute an arbitrary deprivation of property.”⁸⁷⁹ Therefore, the U.S. Supreme Court has developed three guides for determining whether a punitive damage award comports with due process: (1) the measure of reprehensibility of the defendant's conduct; (2) the disparity between the amount of harm or potential harm and the amount of punitive damages; and (3) the difference between the amount of punitive damages and the civil penalties imposed or authorized in similar cases.⁸⁸⁰

In assessing the first and most important factor, the court is to consider five subfactors, including whether: “(1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.”⁸⁸¹ In the instant case, the court found that all of the subfactors, except for subfactor (2), weighed in favor of the jury’s award of punitive damages. First, in addition to economic harm, the plaintiff suffered physical harm, including anxiety attacks that led to infection. Furthermore, the defendant threatened the plaintiff with physical harm.⁸⁸² With regard to the third subfactor, the defendant knew that the plaintiff was a single mother and sought to exploit her financial vulnerability to persuade her not to testify in support of her coworker.⁸⁸³ As to the fourth subfactor, the defendant repeatedly threatened not only the plaintiff, but also the coworker she was supporting, and eventually terminated both in retaliation for engagement in protected activity.⁸⁸⁴ And finally, with regard to the fifth factor, the evidence supported a finding that the defendant acted with intentional malice. The defendant repeatedly threatened the plaintiff with physical harm, he tried to exert influence to have her criminally prosecuted so that she would suffer, and he tried to intimidate her by demonstrating his political connections.⁸⁸⁵ In conclusion, the court found the defendant's conduct significantly reprehensible, warranting significant punitive damages.⁸⁸⁶

879. *Id.*

880. *Blount*, 395 Ill. App. 3d (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

881. *Id.* at 24–25, 915 N.E.2d at 941.

882. *Id.* at 25, 915 N.E.2d at 942.

883. *Id.*

884. *Id.* at 25–26, 915 N.E.2d at 942.

885. *Id.*

886. *Id.* at 26, 915 N.E.2d at 943.

The court then considered the second factor, the ratio between the punitive damages and the amount of “actual harm” to the plaintiff.⁸⁸⁷ The court noted the U.S. Supreme Court's general finding that few punitive damages awards exceeding a ratio of ten to one will satisfy due process.⁸⁸⁸ The court conceded that the plaintiff's compensatory damages for pain and suffering and lost wages totaled \$282,350, which was about one-tenth the \$2.8 million in punitive damages.⁸⁸⁹ However, the court also found that in a civil rights action, it could consider the more than \$1.1 million in attorneys fees and costs awarded the plaintiff under federal law as compensatory damages, thereby significantly reducing the ratio of punitive damages to compensatory damages.⁸⁹⁰

The court then considered the third and final factor, the disparity between punitive damages and civil penalties imposed or authorized in similar cases.⁸⁹¹ The court recognized that the most comparable claim to a section 1981 retaliation action is a Title VII retaliation action, which allows a maximum amount of damages of \$300,000.⁸⁹² However, the court further recognized that the amount awarded in similar section 1981 retaliation actions was similar to the \$2.8 million awarded here, and therefore refused to find this factor supported the defendant's position.⁸⁹³

In its sixth and final contention of error by the circuit court, the defendant argued that the trial court abused its discretion by allowing the plaintiff to present evidence regarding the defendant's assertion of his legal right to seek criminal and civil penalties against the plaintiff for eavesdropping.⁸⁹⁴ The defendant argued that allowing such evidence violated the Noerr-Pennington Doctrine,⁸⁹⁵ which recognizes that the first amendment confers the right for people to petition the government for redressing grievances through the courts, by lobbying the government, or by other means.⁸⁹⁶ However, the court recognized that the U.S. Supreme Court has only applied the doctrine in cases involving the Sherman Act, the National Labor Relations Act, and in cases involving economic disputes between

887. *Id.*

888. *Id.* (citing *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003)).

889. *Id.* at 26–27, 915 N.E.2d at 943.

890. *Id.* at 29, 915 N.E.2d at 945.

891. *Id.* at 30, 915 N.E.2d at 945.

892. *Id.* at 30, 915 N.E.2d at 945–46.

893. *Id.* at 30, 915 N.E.2d at 946.

894. *Id.* at 31, 915 N.E.2d at 946–47.

895. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961).

896. *Blount*, 395 Ill. App. 3d at 32, 915 N.E.2d at 947.

competitors.⁸⁹⁷ The court refused to extend the doctrine to provide immunity from retaliation suits, or “[p]ut another way, an employer does not have a right to retaliate against an employee, and the petition clause does not cloak an employer with immunity to do so.”⁸⁹⁸

Having rejected all of the defendant’s contentions of error by the circuit court, the court affirmed the judgment, including punitive damages, rendered in favor of the plaintiff.⁸⁹⁹

XII. CONCLUSION

These decisions highlight some areas that may be helpful in guiding employment-related decisions made by employers and attorneys advising those employers.

897. *Id.* at 33, 915 N.E.2d at 948.

898. *Id.* at 33–34, 915 N.E.2d at 948–49.

899. *Id.* at 38, 915 N.E.2d at 952.

