2017 IL App (1st) 162574-U
No. 1-16-2574

SECOND DIVISION
September 26, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

RUDOLPH FRANCEK,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 14 L 9691
	)	
DOMINICK'S FINER FOODS, LLC, and	)	
SAFEWAY, INC.,	)	The Honorable
	)	Joan Powell,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's judgment affirmed as modified and cause remanded with directions.

¶ 2 Following a jury trial in this retaliatory discharge case, the circuit court entered judgment in favor of plaintiff Rudolph Francek and against former employer, Dominick's Finer Foods, LLC, and its parent company, Safeway, Inc. (collectively, defendants) in the total amount of $2,656,315.50. Defendants filed a motion for postjudgment relief from the jury verdict and the judgment entered thereon pursuant to sections 2-1202(b) and 2-1207 of the Code of Civil

Procedure (Code) (735 ILCS 5/2-1202(b), 2-1207 (West 2014)), which the circuit court denied in a three-page order. Defendants filed a timely notice of appeal.

¶ 3 BACKGROUND

¶ 4 On April 3, 2007, Francek and Grabs filed a joint complaint against defendants alleging they were discharged in retaliation for filing claims pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)). They argued that defendants' actions constituted *per se* retaliatory discharge. Dominick's maintained that it discharged Francek and Grabs based on its neutrally applied attendance policy, after obtaining an opinion from an independent medical examiner (IME) that they could return to work without restrictions, and Francek and Grabs failed to do so or call in for three consecutive days.

¶ 5 On May 2, 2008, the circuit court entered an order denying Francek and Grabs' motion for summary judgment and granted defendants' motion for severance of the trials. Upon reconsideration on September 19, 2008, the circuit court granted Francek and Grabs' motion for summary judgment on liability, finding "that Plaintiffs' discharge was directly and proximately related to their claims for benefits under the Act." The circuit court also denied Francek and Grabs' motion to reconsider severance of their trials, noting they presented no authority for the proposition that their cases should be tried together "simply for purposes of punitive damages." The circuit court added, "[o]ur ruling that Plaintiffs cannot have a joint trial does not preclude the possibility that Plaintiffs may be allowed to introduce evidence of each other's circumstances in order to prove punitive damages; that issue is not before the Court at this point, and we will not make a ruling regarding the admissibility of such evidence at this time."

¶ 6 Defendants filed a motion for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Jan. 1, 2016), and on October 21, 2008, the circuit court certified the following question for review:

> "Does the Workers' Compensation Act give the Illinois Workers' Compensation Commission the exclusive authority to determine whether an 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?" *Grabs v. Safeway, Inc.*, 395 Ill. App. 3d 286, 287-88 (2009).

¶ 7 This court granted defendants' application for an interlocutory appeal and on September 30, 2009, answered the certified question as follows:

> "[W]e find 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. We decline 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." *Grabs*, 395 Ill. App. 3d at 288.

¶ 8 After Francek and Grabs filed a second amended complaint, Grabs proceeded, separately, to a jury trial in 2012, to determine whether his discharge was causally related to the exercise of his rights under the Act. The jury found in favor of defendants and Grabs appealed.[1]

¶ 9 On September 17, 2014, the circuit court entered an order granting Francek's motion to return his case to the trial call and assign a new docket number. In so doing, the circuit court directed the clerk of the circuit court to renumber and caption the case as 14 L 9691 and *Rudolph Francek v. Dominick's Finer Foods, LLC, and Safeway, Inc.*

¶ 10 On January 19, 2016, one day before Francek's jury trial was scheduled to begin, defense counsel made an oral motion *in limine* to bar Grabs from testifying and the following colloquy[2] occurred:

> "THE COURT: What else do I have on motions *in limine*? Anything else?
>
> MR. SAKS [FRANCEK'S COUNSEL]: Grabs.
>
> THE COURT: Do I have one on that here?
>
> MR. WILDE [DEFENSE COUNSEL]: There's not a motion on it.
>
> MR. SPANGLER [DEFENSE COUNSEL]: We just found out about it.
>
> THE COURT: This is going to be defendant's motion *in limine*?
>
> MR. SPANGLER: To bar Grabs, I guess? Right. Most [*sic*] *limine* 10, oral.
>
> THE COURT: You want to bar Mr. Grabs from testifying in this case?

[1] On February 22, 2017, we entered an order granting, in part, Francek's motion to strike defendants' references to the unpublished order issued in Grabs's appeal from his 2012 jury trial and the hard copy included in defendants' appendix to its appellees' brief.

[2] We quote the colloquy at length given the nature of defendants' claim. *People v. Pearse*, 2017 IL 121072, ¶ 20; *People v. Lewis*, 2017 IL App (1st) 150070, ¶ 4.

MR. SPANGLER: Well, I'm learning for the first time on Thursday or Friday that they intend to produce Mr. Grabs at trial for the reasons stated in your rulings on the other warehouse workers.

He doesn't have knowledge of Mr. Francek's termination or personal knowledge of that. He wasn't working there at the time that Mr. Francek was terminated order [*sic*] physically at the facility.

The only similarity is that he also claimed a retaliatory discharge. And if he is allowed to testify, we absolutely should be able to bring in the fact that he brought that claim in, lost it and appealed it up to the Illinois Supreme Court. There is no way that this guy could ever testify. I don't think he should for the reasons that you barred the other warehouse witnesses, because I don't think that he has any facts that are relevant, but if he is allowed to testify, you've got to let us get in that his claim was rejected by a jury of 12 people.

MR. SAKS: I completely disagree with the second part. But to address the first part first.

Mr. Grabs and Mr. Francek really seem to be part of the same scheme. Frank Zangara testifies that Leitner told him that Fred and Rudy, Fred Grabs and Rudy Francek both now had been subject to this call-in policy.

THE COURT: Okay.

MR. SAKS: And both Fred Grabs and Rudy Francek were sent to an IME doctor, Section 12 doctor, both had filed Workers' Compensation claims. Both were saying they were supposed to be off work. Both of their claims were denied at that point. And upon

receipt of those Section 12 reports within weeks is when both of them had their attendance coding changed.

So this is to show a scheme. If we go to Reinneck versus Taco Bell, that case I think is instructive here, because a scheme goes to motive. And what Mike Leitner's [*sic*] going to come in and say is this is just a mistake. I thought that this independent medical examiner was just this independent doctor and I thought that was his doctor and I said, oh, I guess he can work, but he's not working, so we fired him. The fact that this happened twice shows that this is something he knew what he was doing and intended to do it and it was malicious to do it.

THE COURT: What was the time line [*sic*]? Did he do Grabs first and Francek second or …

MR. SAKS: Grabs was the week before Francek. Grabs was June –

THE COURT: Did he change the code and then said three days in a row, you're out?

MR. SAKS: Yep. Yep. Exactly the same. And both of them where they changed the coding and they waited until after those three days were up before sending out any notices. You will see Francek's terminations are 19, 20, and 21 and then they're signed June 23 and they're not even sent out until June 26. He doesn't even get them until June 29.

THE COURT: Okay. But there's some dispute on this about union people knowing, lawyers knowing, Grabs admitted apparently in his trial that he had notice of it –

MR. SPANGLER: Grabs also had an approved claim off the bat.

THE COURT: Had an –

MR. SPANGLER: An approved claim off the bat. Francek was denied off the bat.

MR. WILDE: Dominick's never denied his comp claim.

MR. SAKS: Once he saw the IME they denied it.

MR. SPANGLER: True.

MR. SAKS: Based on that IME –

MR. SPANGLER: Look all that's true –

THE COURT: Forgive me for not knowing this stuff. So just take me through the steps a little bit.

Grabs had an approved claim that you say they thought it was work related.

MR. SPANGLER: So Grabs filed a work-related claim or a claim for Workers' Compensation benefits. The Dominick's risk department which is your first step for whether or not you figure out it's Workers' Comp or not said that it was the [*sic*] approved. So they approved it.

THE COURT: Finding that it was work-related?

MR. SPANGLER: Initially, yes. Subject to review or whatever.

MR. SAKS: And later –

MR. SPANGLER: At later point in time he was requested to go to an IME because – whatever, he was off for a prolonged period and was having various medical treatments and the company said, let's find out what's going on here; see if the treatment is appropriate. Whatever. Sent him to IME. IME comes out and says he's at, you know – we don't agree with the – that he needs further medical treatment. He can come back to work. So that was [a] little bit different than Mr. Francek's situation.

MR. WILDE: He had been off for a year.

MR. SPANGLER: Yeah, he had been off for a longer period of time and he was getting benefits during that period of time.

THE COURT: Okay. So he was approved, he got benefits during the period of time.

MR. SAKS: Then they cut him off based on the IME which is their right.

THE COURT: After about a year. So then they say, okay, come see our doctor and then the doctor says you can go back to work and he doesn't go back to work.

MR. SPANGLER: Yeah. And there are differences in the way that the facts are going to come out on what they knew about IMEs and those kinds of things, but, I mean, our point is look, we don't – we don't think it's relevant, but if his only argument is that it's relevant because he also claimed a retaliatory discharge based on a similar fact pattern, we have to get in that his claim – that he filed a lawsuit, he lost in front of a jury, a jury find [*sic*] that Mike Leitner was – did not retaliate against him. That was approved by the Illinois Appellate Court. How can we not. I mean, that's –

MR. SAKS: The question is not legally what he did, what a jury found, whether he got a dollar or whether he got $100. He may have gotten a zero verdict because they didn't find any damages. So there is no special interrogatory saying they did not violate the law. Of course, if you don't get damages you have no occasion to – Hey, we're letting all this other evidence in. There's all these offsets. They['re] going [to] say, hey, you have no damages; not guilty verdict.

MR. SPANGLER: Look –

MR. SAKS: Let me finish, please. I'm arguing with two people here.

The operation of Mike Leitner vis-à-vis each of these employees is identical and they may be lawyers and try to pinpoint little differences, but both of them upon the receipt of

the IME and the reliance on the IME is when Safeway changes the attendance policy as it applies specifically to both of these plaintiffs and fires them; three days, no-call/no-show – which is a Code 10, Code 10, Code 10, Code 99 on the last day – without telling him, without giving them of any notice. Now – And they're going to say notice was given. The only people that ever called them were the union.

***

THE COURT: Okay. Mr. Grabs can testify. He is not going to be able to testify about his own trial or the result of his own trial, but he can give testimony about the – about the situation that he encountered where he filed a Workers' Comp claim and the testimony can come out that it wasn't whatever it is that Dominick's did – I forgot – they didn't deny it and the IME doctor's report and the fact that the – the code was changed pretty much based on the IME's report and if that was the case – I don't know if that was the case – he can testify about those facts.

Now, some of his facts are going to be different in terms of his knowledge and all that kind of stuff and that can be brought out – that can be brought out in cross. It can be – It can be disclosed or he can testify to the fact that Dominick's – I don't know what they did – they rehired him, they rehired him at the same status or whatever they did and continued to work there for three-plus years or whatever he did. All of that – the only thing that I'm not allowing is I'm not going to open this door and.

I realize is there is some prejudice involved with that, but I'm not going to let his case hijack this case for six or seven hours thinking about all the differences and what went on in his trial, so …

MR. SPANGLER: So everything but the fact that he sued us and lost can get in?

THE COURT: Yeah.

MR. SPANGLER: What about through Leitner, can he present testimony that Grabs filed a lawsuit against the company, he testified in that trial with and what the result was?

THE COURT: No.

MR. SPANGLER: Okay. Just for the record, I will make a proffer of evidence that the Judge's ruled on motion *in limine*. I understand it's an interim ruling, but just so I don't forget to this do [*sic*] later, that Mike Leitner would testify – allowed to – that Mr. Grabs filed a case against the company in which the company contested. It went before a jury of 12 individuals who found that the company did not violate the act by fact patterns that the judge believes are similar.

The same goes for Mr. Grabs, if we were allowed to elicit testimony, we would be able to – Mr. Grabs would testify that he filed a lawsuit against the company in 2007; took that case before a jury in 2012, lost that case in front of a jury and lost that case in front of the appeals court and had the appeal denied with the Illinois Supreme Court.

THE COURT: Okay. That's fair enough.

And you know what, a lot of the facts are similar and a lot of the facts are different and that's – and that's one of the reasons I'm allowing it on the similarity of facts as to the IME report and then coding and then the no-call/no-show and termination and that's – that's what he's being brought in to testify to and that, plus, what Dominick's did after that that we've just put on the record.

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THE COURT: Where am I in this? I was still thinking about Grabs testifying, right?

MR. WILDE: Yes.

THE COURT: I've already ruled on that.

***

MR. SPANGLER: We would ask you to reconsider it. I mean, it creates a lot of issue in the case. And we're asking you to reconsider it based on, you know, what you now know is [*sic*] the differences and what is going to be presented at trial, not based on depositions or the '09 opinion.

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THE COURT: At this point, I'm still – I'm still thinking it's – it's, um, okay to put Grabs in.

***

THE COURT: *** While [Grabs] has some very similar circumstances they are not identical, but they are close enough with the same decision maker. It has to do with changing the coding for calling in, no-show aspects of the policies of Dominick-Safeway. I find that it's relevant.

Now – And so the issue before the Court is I have been asked to reconsider my prior ruling today that Grabs' testimony could come in. I have taken a look at it and I am still sticking with how I ruled Grabs' testimony can come in.

The problem that the Court has is whether or not to bar any aspects of a – because Mr. Grabs had a prior trial on retaliatory discharge and a jury returned a verdict of not guilty in favor of the defense; it was the same defense here; he was employed at the same place. What the Court is finding is relevant are the similarities of the case and the closest [*sic*] in time and the same decision maker.

But, of course, then the Court is put in the dilemma of whether or not to allow the jury in this case to know the determination of the trial, Grabs' trial and – I'm finding that is too prejudicial. Unless it comes up through impeachment, because there was certainly testimony that was given in another trial that a jury would be able to consider the credibility of the witness giving that testimony. ***

***

THE COURT: ***

I'm barring information to this jury about the verdict in favor of the defense against Mr. Grabs in the other case for reasons that I've previously put on the record. Okay.

***

THE COURT: *** If it comes out in an impeachment that, didn't you testify on such-and-such date when you gave testimony in a trial then part – then that much of it is out, that there was a trial and the jury can speculate or wonder all they want about that, but that's really not going to be the verdict."

¶ 11 The circuit court also considered opposing motions *in limine*, namely defendants' motion *in limine* number 2 to exclude testimony and evidence concerning the workers' compensation claim process and decisions of the arbitrator and Illinois Workers' Compensation Commission, and Francek's motion *in limine* number 13[3] to introduce the IWCC findings into the record as evidence. After hearing arguments, the circuit court ruled that "the finding – that it was a work-related injury – not all other findings – whatever it is that they found – but that the fact that it was work-related injury in the commission is – can be heard by the jury in this case." The circuit

[3] Francek's counsel acknowledged "that this motion is kind of copied and pasted from the Grabs motion in the first trial," and we note that the relevant motion *in limine*, included in the record on appeal, is incorrectly captioned as pertaining to both Francek and Grabs, and only under Grabs's docket number 07 L 3417.

court told the defense, "You're just going to have to argue that the commission ruling was after the fact and it couldn't have – if this is your line of – and Leitner couldn't haven't entertained that, because he didn't know about it ***."

¶ 12 At trial, before Grabs took the witness stand, the circuit court addressed the parties outside the presence and hearing of the jury, noting that it had previously denied defendants' motion *in limine* to bar Grabs from testifying. The circuit court clarified that it never intended "to go into the name of the case, who sued whom and what the outcome was." Defense counsel responded, "That's my understanding," and Francek's counsel added, "I think counsel has made his record. I just want to make sure that there's no evidence or cross-examination questions of the fact of his trial or the outcome."

¶ 13 After the jury reconvened, Grabs testified about the termination of his employment with Dominick's. Grabs testified that he began working for Dominick's in July 1985 and he had worked there for almost 30 years. Like Francek, Grabs was an order picker at Dominick's distribution center in Northlake, Illinois. Grabs testified that he was injured on March 4, 2005, while moving a 10-pound box of frozen peas; he sustained three herniated disks in his back. He reported the injury to his supervisor, Frank Zangara, and Dominick's paid him temporary total disability (TTD) benefits while he was off work. When asked whether he called Dominick's each day to tell them that he would be absent, Grabs answered "no" and explained that "[w]hen you're on TTD it's not required according to their policy." Grabs testified that Dominick's stopped paying his TTD benefits after he was examined by Dominick's own doctor. He then hired a lawyer who filed a petition to have the matter heard by the IWCC. When asked whether he intended for this dispute between his doctor and Dominick's doctor to be resolved by the IWCC, defense counsel objected to the question as leading, and the circuit court sustained the

objection. Francek's counsel rephrased the question and Grabs testified, without objection, that he hoped his lawyer and defendants' lawyer could come together and reach some kind of decision. Grabs further testified that he received a certified letter on June 16, 2006, containing two "no call, no show" notices and a termination notice based on his failure to call in his absences. Before Grabs was discharged, defendants did not tell him that his attendance coding had been changed or that he had to start calling in his absences, and he received no warning that he was violating defendants' attendance policy.

¶ 14 On cross-examination, Grabs testified that he knew Francek's employment was terminated on June 21, 2006, but acknowledged that he did not have personal knowledge of Francek's discharge because he was off work that month. When asked whether Dominick's continued to pay his medical insurance after his termination, Francek's counsel objected on the basis that the question exceeded the scope of direct examination. The circuit court overruled the objection and Grabs testified that Dominick's continued to pay his medical insurance for a few months after his employment was terminated in June 2006. Grabs further testified that Dominick's continued to make contributions to his pension. When asked whether Dominick's was required to continue making contributions to his pension, Francek's counsel objected, and the circuit court sustained the objection. When asked whether he previously "contended" that Dominick's caused him to develop diabetes by terminating his employment, the circuit court sustained the objection of Francek's counsel, and defense counsel requested a sidebar.

¶ 15 During the sidebar, defense counsel argued that Grabs's diabetes claim went to his credibility and bias. Francek's counsel responded that the claim was irrelevant to the case at bar and the probative value thereof had the dangerous consequence of alerting the jury of some prior proceeding with nothing to do with this case. After Francek's counsel reminded the circuit court

that there was a motion *in limine* "on that" and extensive discussions, the court sustained the objection of Francek's counsel.

¶ 16 Then, defense counsel proffered that if the defense were able to question Grabs about his diabetes claim, "we'd be able to put out that he had this prior claim that was, you know, rejected by the jury." The circuit court disagreed and told defense counsel, "at this point you're on the record for your objection."

¶ 17 When cross-examination resumed, Grabs testified that the union filed a grievance on his behalf a couple of weeks after his termination in 2006, his doctor released him to return to work in July 2008, and there was a settlement agreement that brought him back to work in a different capacity. When asked whether he received over $250,000 in settlement of his workers' compensation claim, Francek's counsel objected on the basis of relevancy, and the circuit court sustained the objection. When asked whether the attorneys in his workers' compensation claim were the same as here, Francek's counsel objected to its relevancy. The circuit court initially overruled the objection, but then sustained a second objection by Francek's counsel, who argued, "What does [*sic*] his attorneys and attorney-client privilege have to do with anything here?"

¶ 18 Francek testified that he initially injured himself at work on May 28, 2005. When defendants denied his claim for medical benefits, he paid for his own treatment and continued working.

¶ 19 On January 9, 2006, Francek injured himself while lifting boxes at work. He reported the injury and went to the emergency room. When defendants did not respond to his claim for medical benefits, Francek hired an attorney who sent defendants a letter on February 23, 2006, stating that Francek had a work-related injury and was requesting TTD benefits. Meanwhile,

from January 9 to February 23, 2006, Francek called in his absences to his immediate supervisor, Frank Zangara.

¶ 20 Michael Leitner, the director of distribution at Dominick's Northlake facility, testified regarding the circumstances surrounding his decision to fire Francek. During direct examination, Francek's counsel elicited testimony regarding the IWCC findings in the following colloquy identified in Francek's appellate brief:

"Q. Mr. Leitner, were you and Maryann Faulkner right in determining that Rudy Francek was medically able to return to work on June 19th?

MR. WILDE [DEFENSE COUNSEL]: Objection, misstates the record.

THE COURT: Sustained.

BY MR. SAKS [FRANCEK'S COUNSEL]:

Q. Did your determination of whether Rudy Francek could return to work on June 19, 2006, conflict with what the Illinois Workers' Compensation Commission eventually ruled?

MR. WILDE: Same objection, your Honor.

THE COURT: Overruled.

BY THE WITNESS:

A. I don't know.

BY MR. SAKS:

Q. You didn't know, sir, that Mr. Francek – that the Workers' Compensation Commission found that Mr. Francek's Workers' Compensation claim was compensable?

A. I later found that out.

Q. You later found out that the Workers' Compensation Commission determined his claim to be compensable?

A. Yes.

Q. That's the same claim you denied?

MR. WILDE: Objection, argumentative, mischaracterizes.

THE COURT: It's the same claim you denied. I am going to sustained [*sic*] the objection.

BY MR. SAKS:

Q. That is the same claim that Dominick's denied, isn't it?

A. To my knowledge, yes.

Q. And it's the same claim where you believed as of June that he was able to go back to work, right?

A. June?

Q. June of 2006 you thought Mr. Francek could go back to work?

A. That's what I was informed, yes.

Q. In fact, he didn't actually return to work for another year, right?

A. I believe that's correct."

¶ 21 Leitner initially denied knowing that Francek was claiming a work-related injury before he fired Francek in June 2006. When confronted with his March 1, 2006, email exchange with Mary Ann Faulkner from risk management and Brenda Petersen from human resources, he acknowledged stating therein that Francek had been calling off work with a "personal injury," but that he was represented by an attorney and claiming a "work-related" injury. He also

acknowledged stating in his email exchange, "I can push this via discipline and the attendance policy." Leitner explained that he did not believe Francek's workers' compensation claim was legitimate, and he intended to discipline Francek for not being at work.

¶ 22 Leitner testified that defendants' attendance policy was that employees who were off work for work-related injuries did not have to call in their absences and, further, he did not want Francek calling in daily because that was "redundant." Leitner added that defendants' attendance policy did not limit how long an employee could remain off work for a work-related injury. Leitner admitted, however, that he retroactively applied and exhausted any leave time that Francek had under the Family and Medical Leave Act (FMLA) "because I didn't know exactly what he was off for." Still, in June 2006, after he learned from risk management that defendants' IME had cleared Francek to return to work, and without asking whether Francek's treating doctor agreed, Leitner decided that Francek needed to return to work. Leitner acknowledged that defendants' attendance policy required an employee to provide defendants with a treating doctor's clearance note before returning to work. Nonetheless, Leitner picked an arbitrary date, June 19, 2006, and instructed one of his subordinates to begin coding Francek's absences as Code 10 or no call/no show. Leitner admitted, however, that he did not inform Francek that he was now expected to return to work. Thereafter, when Francek failed to return to work on June 19, 20, and 21, he was fired. Leitner acknowledged that pursuant to a collective bargaining agreement with Francek's union, defendants were required to give one verbal warning and two written warnings before firing a union employee for attendance violations. Upon further examination, Leitner admitted that the two written warnings and the termination letter that were sent to Francek were all issued on the same date, June 23, 2006, and sent to Francek by certified mail. When asked about the circumstances of Grabs's termination, Leitner

conceded that it looked "like a similar case." When asked, "And just like [Francek], you put all these letters – the two warning letters that didn't actually warn and the termination letter into one envelope and sent them certified mail, right," Leitner responded, "Just consistent as the policy was, yes."

¶ 23 On January 27, 2016, following closing arguments and deliberations, the jury returned a verdict in favor of Francek in the amount of $156,315.50 in compensatory damages and $2,500,000 in punitive damages, plus court costs. On the verdict form, the compensatory damages were itemized as follows: $31,315.50 for the reasonable and necessary cost of psychological treatment and counseling, $75,000 for emotional and/or psychological damages, $50,000 for the emotional and/or psychological damages reasonably certain to be experienced.

¶ 24 Defendants filed a motion for postjudgment relief from the jury's verdict and the judgment entered thereon in favor of Francek. Specifically, defendants moved for a new trial based on the erroneous admission of "non-party evidence related to Fred Grabs and exclusion of evidence showing the lawfulness of" defendants' conduct and of evidence related to the outcome of Francek's IWCC proceeding, and because of jury instruction errors. Moreover, defendants moved for judgment notwithstanding the verdict on the issue of punitive damages, for remittitur under Illinois common law standards, for elimination or reduction of the punitive damages award under federal due process standards, and, alternatively, for a new trial based on the jury's excessive punitive damages award. Defendants also moved for judgment notwithstanding the verdict on the issue of "liability and damages" because the trial evidence so overwhelmingly favored defendants that a contrary verdict could not stand.

¶ 25 On August 30, 2016, the circuit court denied defendant's motion for postjudgment relief in a three-page order stating in pertinent part:

"Francek was released to work full duty almost a year and a half later and was reinstated with full back pay, seniority and benefits. At trial he did not seek any lost wages, benefits or other economic damages and the jury was fully advised that Francek received about $180,000 from [defendants] in settlement of his worker's comp claim and the jury was fully advised of the extent of [defendants'] mitigation of damages.

The jury was able to assess the full picture of [defendants'] actions regarding their attendance policy, changes in their attendance policy and the manner and methods they used to warn and then terminate employees here. This jury awarded Francek $156,315.50 damages plus $2,500,000.00 punitive damages.

Safeway makes a number of contentions in its motion for a new trial, or Judgment Notwithstanding the Verdict on the issue of punitive damages or for the court to eliminate or reduce the award, or remittitur, or Judgment Notwithstanding the Verdict on the issue of liability and damages, and based upon alleged error committed by this court [in] allowing evidence related to the outcome of Francek's Illinois Workers' Compensation Commission case and to allowing the testimony of Fred Grabs and more. This court allowed the testimony because it relates to Safeway's intent, motive, knowledge, state of mind, and gives relevant information for a jury to determine whether the way Safeway handled the Francek incident was simply inadvertence or mistake or more."

¶ 26 This appeal followed.

¶ 27 ANALYSIS

¶ 28 Defendants present the following issues for review: (1) whether the trial court erred in admitting the testimony of nonparty Fred Grabs; (2) whether the trial court erred in admitting the Illinois Workers' Compensation Commission (IWCC) findings; (3) whether the issue of punitive

damages should have gone to the jury; (4) whether the award of punitive damages is unconstitutional under federal due process standards; and (5) whether the award of punitive damages is excessive under Illinois law, and whether the trial judge erred in refusing to grant remittitur.

¶ 29 As a threshold matter, we address Francek's contention that defendants failed to preserve the first two issues identified for review. Francek argues that defendants failed to contemporaneously object on proper grounds when evidence regarding the IWCC findings was introduced at trial and that defendants demonstrated no objection when Grabs took the witness stand. We agree with Francek as to his first point but disagree as to his second.

¶ 30 Generally, a court's evidentiary rulings are not reviewable on appeal unless they have been properly preserved. *Guski v. Raja*, 409 Ill. App. 3d 686, 695 (2011). A court's ruling on a motion *in limine* is interlocutory and remains subject to reconsideration by the court throughout the trial. *Id.* Therefore, "an *in limine* motion, whether granted or denied, does not preserve issues for review." *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1132 (2000). When a motion *in limine* is *denied*, a contemporaneous objection to the evidence at the time it is offered is necessary to preserve the issue. (Emphasis added.) *Roach v. Union Pacific R.R.*, 2014 IL App (1st) 132015, ¶ 28. "Failure to object at trial results in forfeiture of the issue on appeal." *Guski*, 409 Ill. App. 3d at 695. To preserve an issue regarding the exclusion of evidence, the proponent of the evidence must make an adequate offer of proof in the trial court. *Sullivan-Coughlin v. Palos Country Club, Inc.*, 349 Ill. App. 3d 553, 561 (2004). An adequate offer of proof is made where the proponent "informs the trial court, with particularity, of the substance of the witness' anticipated answer." *Snelson v. Kamm*, 204 Ill. 2d 1, 23 (2003).

¶ 31 We will not address the merits of defendants' challenge to the admission of the IWCC findings because they failed to contemporaneously object on the specific ground being advanced as error before this court, namely that the IWCC's determination that Francek's injury was work-related and compensable was not relevant to the issue of defendants' motive for discharging Francek. Specific grounds must be stated when an objection is made, and grounds not stated are waived on appeal. *Gausselin v. Commonwealth Edison Company*, 260 Ill. App. 3d 1068, 1079 (1994). Here, as Francek correctly points out, defendants' objections to the IWCC findings were limited to purported misstatements of the record (*People v. Sartin*, 361 Ill. 571, 572 (1935)) and to the form of questioning as argumentative (*Zerbenski v. Tagliarino*, 67 Ill. App. 3d 166, 173 (1978)). Moreover, we are unpersuaded by defendants' misplaced reliance on *Brown v. Baker*, 284 Ill. App. 3d 401, 406 (1996), for the proposition that "[w]hen the trial court *grants* a motion to admit evidence prior to trial, a subsequent failure to object to the evidence at trial does not amount to a waiver." (Emphasis added.) Although defendants point out that the circuit court granted Francek's motion *in limine* to *introduce* the IWCC findings, the undisputed fact remains that the circuit court also *denied* defendants' motion *in limine* to *bar* testimony and evidence of the same. Put another way, we are unpersuaded by defendants' reliance on *Baker* to excuse their failure to make a contemporaneous objection on the specific ground now being advanced as error in this court. Defendants have also waived the application of the doctrines of plain error and futility where their request consists of a single sentence in their reply brief, stating that the error is so serious that it denied defendants' substantial rights and thus a fair trial. *In re Commitment of Hooker*, 2012 IL App (2d) 101007, ¶ 83; *People v. Patel*, 366 Ill. App. 3d 255, 268-69 (2006) (citing Supreme Court Rule 341(eff. July 1, 2011) and *People v. Nieves*, 192 Ill. 2d 487, 503 (2000)).

¶ 32 In their reply briefs, on the other hand, defendants point out that their objections to the testimony of Grabs were contemporaneous to the moment immediately before he took the stand, when the circuit court noted that it had previously denied defendants' motion *in limine* to bar Grabs from testifying, and clarified that it never intended "to go into the name of the case, who sued whom and what the outcome was." Defendants also point out that even Francek's counsel acknowledged that such was his understanding of the court's ruling and commented that the defense had made its record. Under these circumstances, and where defendants also made an adequate offer of proof upon the denial of their motion *in limine*, informing the court that Grabs would testify that he lost his own lawsuit against defendants in front of a jury and then on appeal, we find the exclusion of such testimony properly preserved for appellate review. *Kankakee County Board of Review v. Property Tax Appeal Board*, 316 Ill. App. 3d 148, 155 (2000); see *Caliban v. Patel*, 322 Ill. App. 3d 251, 254 (2001) (where the parties stipulated that plaintiff's objections to certain evidence were preserved without need for contemporaneous objection, application of the waiver rule would be inequitable).

¶ 33 On the merits, we note that varying standards of review are involved. *Gomez v. The Finishing Company, Inc.*, 369 Ill. App. 3d 711, 718 (2006). We review *de novo* whether the circuit court erred in denying a motion for a judgment notwithstanding the verdict. *Id.* We review the court's ruling on a motion for a new trial (*Gomez*, 369 Ill. App. 3d at 718) and the court's denial of a motion *in limine* for an abuse of discretion (*Ford v. Grizzle*, 398 Ill. App. 3d 639, 646 (2010)). "An appellate court may find an abuse of discretion only where no reasonable person would take the view adopted by the trial court." *Ford*, 398 Ill. App. 3d at 646.

¶ 34 Defendants first contend that the circuit court erred in admitting the testimony of nonparty Fred Grabs. Defendants argue that the circuit court's decision to admit Grabs's

testimony for purposes of retaliatory motive or intent as to his termination was an error of law. Defendants explain that Grabs's testimony was not probative because he did not have factual knowledge of Francek's discharge, and testimony about his own termination cannot be used "to prove the character of a person in order to show action in conformity therewith," citing Illinois Rule of Evidence 404(b) (eff. Jan. 1, 2011). Defendants also contest the circuit court's reliance on *Reinneck v. Taco Bell Corp.*, 297 Ill. App. 3d 211 (1998), "to admit evidence of Grabs's discharge as evidence of prior conduct probative of retaliatory intent or motive with respect to [defendants'] decision to discharge Francek." Defendants assert that "the critical legal error that the [circuit] court made was that only prior *retaliatory* acts can be admissible to prove retaliatory motive or intent as it relates to a subsequent action." Accordingly, they argue, the circumstances of Grabs's discharge cannot be probative of retaliatory intent in the case at bar because the State of Illinois had already determined that Grabs's termination was not retaliatory.

¶ 35 Francek responds that the admission of Grabs's testimony was crucial to refute defendants' position that Francek's discharge was the result of mistake or inadvertence, and that his discharge was not causally related to his claim for workers' compensation benefits. Francek cites Leitner's admission that the circumstances surrounding Grabs's termination were similar to his own, where similar warning and termination letters were simultaneously issued in clear contradiction to the collective bargaining agreement with Francek and Grabs's union. Francek reasons that such evidence was relevant to show a common scheme to terminate union employees who defendants suspected did not have genuine work-related injuries. Francek cites *Thompson v. Petit*, 294 Ill. App. 3d 1029, 1038 (1998), for the proposition that the greater the similarity in circumstances, the greater the probative value of prior-acts evidence, and he argues

that the evidence of Grabs's termination was relevant to defendants' motive and intent when they applied the ''no-call, no-show' course of discipline." We agree.

¶ 36 In civil cases, "[t]he admission of evidence of prior similar tortious or wrongful conduct to establish purpose, intent, motive, knowledge or other mental state of a party to a civil action, forms an exception to the general rule which prohibits proof of one wrongful act by evidence of the commission of another such act." *Thompson*, 294 Ill. App. 3d at 1035; *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 89. Here, the significance of Grabs's testimony regarding his own termination are the similarities in time and sequence of events involving the same supervisor at the same facility. The testimony was relevant to show a common scheme, and our review of the circuit court's measured consideration of the risk of unfair prejudice against the probative value of Grabs's testimony, leads us to conclude that the circuit court did not abuse its discretion in denying defendants' motion *in limine* to bar Grabs's testimony. Under these circumstances, we further conclude that the circuit court did not err as a matter of law in its reliance on *Reinneck.*

¶ 37 Next, defendants contend that the issue of punitive damages should not have gone to the jury because the evidence adduced at trial did not show willful, wanton, or other egregious conduct. Defendants argue that something more than mailing a discharge letter is required to support award of punitive damages.

¶ 38 "Illinois recognizes that punitive damages are appropriate in cases of retaliatory discharge for filing a workers' compensation claim." *Hollowell v. Wilder Corp. of Delaware,* 318 Ill. App. 3d 984, 988 (2001) (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186 (1978)). "Punitive, or exemplary, damages are not awarded as compensation, but serve instead to punish the offender and to deter that party and others from committing similar acts of wrongdoing in the

future." *Loitz v. Remington Arms Co.*, 138 Ill. 2d 404, 414 (1990), quoted in *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 86. Punitive damages are permissible when the retaliatory discharge was 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." *Holland v. Schwan's Home Service, Inc.*, 2013 IL App (5th) 110560, ¶ 228. Without punitive damages, "there would be little deterrent preventing employers from terminating employees and paying a small fine for violating the Act." *Hollowell*, 318 Ill. App. 3d at 988. Whether the particular facts of a case justify the imposition of punitive damages is a question of law. *Id.* Accordingly, our review of the circuit court's preliminary decision to submit the issue of punitive damages to the jury is *de novo*. *Koehler*, 2016 IL App (1st) 142767, ¶ 86.

¶ 39 Here, the circuit court did not err in submitting the issue of punitive damages to the jury. As the court noted in its order denying defendants' postjudgment motion for relief, "[t]he jury was able to assess the full picture of [defendants'] actions regarding their attendance policy, changes in their attendance policy and the manner and methods they used to warn and then terminate employees here," including Leitner's admission that he began running the clock on Francek's leave allowance under the FMLA simply because he questioned the legitimacy of Francek's work-related injury claim. *Koehler*, 2016 IL App (1st) 142767, ¶ 90; *Holland*, 2013 IL App (5th) 110560, ¶ 231. The jury could find that defendants' actions, when considered in their entirety, showed a pattern of willful and wanton disregard for Francek's rights as an injured employee, including his protection against discharge for exercising his rights under the Act. *Holland*, 2013 IL App (5th) 110560, ¶ 245; *Hollowell*, 318 Ill. App. 3d at 989-90.

¶ 40 Defendants next contend that the award of punitive damages is unconstitutional under federal due process standards and thus should be eliminated or reduced. Because we agree with defendants' contention, we need not address their alternative contention that the punitive damages award is excessive under Illinois law. *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 66. Due process prohibits the imposition of grossly excessive or arbitrary punishments because it serves no legitimate purpose and constitutes an arbitrary deprivation of property. *Holland*, 2013 IL App (5th) 110560, ¶ 257 (citing *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417 (2003)). In determining whether a punitive damages award by a jury comports with due process, the following three guideposts are examined: (1) the degree of reprehensibility of the conduct; (2) the disparity between the harm or potential harm that plaintiff suffered and the amount of punitive damages awarded; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases. *Id.* (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996)). We review *de novo* the jury's award of punitive damages in light of these guideposts. *Id.*

¶ 41 Reprehensibility, the most significant guidepost, requires us to consider 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." *Leyshon v. Diehl Controls North America, Inc.*, 407 Ill. App. 3d 1, 18 (2010).

¶ 42 Here, the harm caused by Francek's discharge included physical manifestations of psychological harm that required treatment and counseling. *Holland*, 2013 IL App (5th) 110560, ¶ 259. The conduct of defendants' agents and employees in handling Francek's workers'

compensation claim showed an intent to deny him the protections afforded to him under the Act, and evidence of defendants' flagrant disregard for Francek and Grabs's statutory rights as injured employees was sufficiently reprehensible and warranted a significant amount in punitive damages. *Id.* Leitner admitted that he did not believe Francek's workers' compensation claim was legitimate and that he intended to discipline Francek "via discipline and the attendance policy," which he did arbitrarily and without notice in violation of the collective bargaining agreement. Leitner also admitted that he dealt with Grabs similarly. These facts demonstrate a conscious disregard for the rights of Francek and Grabs, "as well as a sense of being above the law." *Blount v. Stroud*, 395 Ill. App. 3d 8, 21 (2009). Moreover, Francek was financially vulnerable where he was unable to work for the five months from his injury to his discharge in June 2006, and for the 14 months thereafter, and we are unpersuaded by defendants' suggestion that Francek was "made whole" by their agreement to reinstate him when his own doctor released him to return to work. *Holland*, 2013 IL App (5th) 110560, ¶ 259. The jury could also have found that Francek's discharge was intentional and not a mistake. *Id.* The evidence adduced at trial showed that defendants' arbitrary application of their attendance policy against Francek was not an isolated incident because Grabs was also discharged under circumstances that defendants admitted were very similar. See *Blount*, 395 Ill. App. 3d at 25 ("we may consider the defendant's conduct toward the plaintiff as well as the defendant's related conduct toward other parties"). Accordingly, we conclude that defendants' conduct was sufficiently reprehensible to justify an award of punitive damages. *Koehler*, 2016 IL App (1st) 142767, ¶ 98.

¶ 43 As to the second guidepost, the disparity between the actual or potential harm that Francek suffered and the amount of punitive damages awarded, we find that the 16:1 ratio of punitive damages to compensatory damages in this case violates due process. Although the

United States Supreme Court has declined to impose a bright-line ratio that a punitive damages award cannot exceed, the Court has cautioned that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), quoted in *International Union of Operating Engineers, Local 150 v. Lowe Excavating Co.*, 225 Ill. 2d 456, 484 (2006). The Court has also observed that a punitive damages award of " 'more than 4 times the amount of compensatory damages' might be 'close to the line' " (*Gore*, 517 U.S. at 581 (quoting *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. at 23-24)), but acknowledged that "ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages' " (*Campbell*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582)). *Lowe Excavating Co.*, 225 Ill. 2d at 484-85; *Turner*, 363 Ill. App. 3d at 1164.

¶ 44 Our supreme court has stated that the best way to determine whether the ratio of punitive damages to compensatory damages is appropriate is to compare the ratio to awards in other similar cases. *Lowe Excavating Co.*, 225 Ill. 2d at 487; *Leyshon*, 407 Ill. App. 3d at 22. Defendants direct our attention to *Jones v. United Parcel Service, Inc.*, 674 F.3d 1187, 1197 (10th Cir. 2012), where the employer denied the employee reinstatement even though the employee's doctor determined that he could return to work. The United States Court of Appeals for the Tenth Circuit reduced the $2,000,000 punitive damages award to a 1:1 ratio with the $630,307 compensatory damages award. *Id.* at 1207-1208. Defendants also direct our attention to *Holland*, 2013 IL App (5th) 110560, ¶¶ 230 – 245, where the employer engaged in conduct aimed at punishing the employee for filing a worker's compensation claim by refusing to honor medical restrictions, not accommodating the employee's work schedule for physical therapy,

contacting the employee's doctor to obtain a full-duty work release, and running the clock on the employee's leave allowance under the FMLA. The appellate court concluded that an approximate 5.5:1 ratio was "well within the permissible range to further the interest in deterring retaliatory discharges." *Id.* at ¶ 260. Defendants submit and we are persuaded that these cases represent the outer permissible ratios in retaliatory discharge cases.

¶ 45 On the other hand, we are unpersuaded by Francek's reliance on cases with ratios well in excess of the jury's punitive damages award in this case because our review of the facts in those cases reveals that the high, double-digit ratios awarded were more the result of particularly egregious conduct that caused the plaintiffs great personal harm and less the result of small compensatory damages awards. See *Lowe Excavating Co.*, 225 Ill. 2d at 486-88 (noting the particularly egregious conduct in *Routh Wrecker Service, Inc. v. Washington*, 335 Ark. 232, 980 S.W.2d 240 (1998), *Deters v. Equifax Credit Information Services, Inc.*, 202 F.3d 1262 (10th Cir. 2000), and *Jones v. Rent-A-Center, Inc.*, 281 F.Supp.2d 1277 (D. Kan. 2003)).

¶ 46 As to the last guidepost, the difference between the punitive damages awarded and the civil penalties authorized or imposed in similar cases, we disagree with defendants that civil penalties are at issue and observe that the Act provides "only for criminal, not civil, penalties for employers who fired workers for exercising their rights under the Act." *Raisi v. Elwood Industries, Inc.*, 134 Ill. App. 3d 170, 171 (1985) (citing *Kelsay*, 74 Ill. 2d at 180-81). Defendants correctly note that a violation of the Act is considered a "petty offense," but there remains no civil penalty. *Spooner v. Armour-Dial*, 131 Ill. App. 3d 929, 934 (1985). Accordingly, it is not necessary to consider this guidepost further. *Lowe Excavating Co.*, 225 Ill. 2d at 489.

¶ 47 Applying *Campbell* and other United States Supreme Court precedent, we conclude that the misconduct here does not support punitive damages in the amount of $2,500,000. *Turner*, 363 Ill. App. 3d at 1165. We further conclude that an award of punitive damages against defendants in an amount not to exceed $1,406,839.50, or a ratio of 9:1, would be constitutional and appropriately less than the double-digit ratio that the *Campbell* court cautioned against. *Id.* Accordingly, pursuant to Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we hereby remand for a remittitur in the punitive damages award against defendants to an amount not to exceed $1,406,839.50. *Id.* at 1166. The remittitur is conditioned upon Francek's consent, and if he does not consent within a reasonable time as set by the circuit court, then the circuit court shall order a new trial on the issue of the amount of punitive damages. *Id.* Further, although attorney fees can be considered when awarding punitive damages, we observe that it is not within our purview to award such fees outright, nor should they be awarded under the guise of a punitive damages award. *Lowe Excavating Co.*, 225 Ill. 2d at 491.

¶ 48 CONCLUSION

¶ 49 For the reasons stated, we affirm the judgment of the circuit court as modified by a reduction in the punitive damages award from $2,500,000 to an amount not to exceed $1,406,839.50. See *Turner*, 363 Ill. App. 3d at 1165-66 (citing *Luye v. Schopper*, 348 Ill. App. 3d 767, 779 (2004) (appellate court may modify circuit court's order to reflect the proper amount of damages)).

¶ 50 Circuit court judgment affirmed as modified; cause remanded with directions.