250.00

Retaliatory Discharge

Introduction

ILLINOIS SUPREME COURT CASES

The tort of retaliatory discharge was first recognized by the Illinois Supreme Court in *Kelsey v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978), where the plaintiff was terminated in retaliation for filing a workers' compensation claim. The court reasoned that workers' compensation law provided an efficient and expeditious remedy for an injured employee, and terminating an employee for filing a claim seriously undermined that scheme.

Later, in *Palmateer v. International Harvester Company*, 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981), the plaintiff claimed that he was discharged after sixteen years of employment for supplying information to law enforcement authorities that a company employee might be involved in criminal activity. The court again recognized an action for retaliatory discharge when an employee is fired in violation of an established public policy that favors citizen crime-fighters, and the dismissal of the plaintiff's complaint was reversed.

The Illinois Supreme Court again recognized a retaliatory discharge tort in Wheeler *v. Caterpillar Tractor Co.*, 108 Ill.2d 502, 485 N.E.2d 372, 92 Ill.Dec. 561 (1985). In Wheeler, the plaintiff alleged he was discharged in violation of public policy for refusing to handle radioactive material as a part of his job duties allegedly in violation of the Nuclear Regulatory Rules applicable to the defendant employer.

In 1988, the court held that the right to recover for retaliatory discharge does not depend upon an analysis of the terms of any collective-bargaining agreement and is not preempted by such an agreement. This right is derived from Illinois public policy and is equally available to employees at will; it cannot be negotiated or bargained away. *Ryherd v. General Cable Company*, 124 Ill.2d 418, 530 N.E.2d 431, 125 Ill.Dec. 273 (1988). Additionally, the court held that employees could bring a tort action for retaliatory discharge even though they had not pursued contractual remedies pursuant to a collective-bargaining agreement. Midgett *v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280, 85 Ill.Dec. 475 (1984). Further, in *Gonzalez v. Prestress Engineering Corporation*, 115 Ill.2d 1, 503 N.E.2d 308, 104 Ill.Dec. 751 (1986), the court held that a union member does not have to exhaust the grievance-arbitration procedure established in the collective-bargaining agreement to file a common law claim for retaliatory discharge.

In 1986, however, the Illinois Supreme Court held in Koehler *v. Illinois Central Gulf Railroad Co.*, 109 Ill.2d 473, 488 N.E.2d 542, 94 Ill.Dec. 543, that a suit for retaliatory discharge against a railroad was preempted by the Federal Railway Labor Act, 45 U.S.C.A. §§151-163. Therefore, the Illinois state courts had no jurisdiction to hear and resolve such wrongful discharge disputes. *See also Bartley v. University Asphalt Co.*, 111 Ill.2d 318, 489 N.E.2d 1367, 95 Ill.Dec. 503 (1986), wherein the court held that a discharged employee's cause of action

against a union for civil conspiracy based upon its alleged conspiracy with his employer to inadequately represent the employee on his claim of retaliatory discharge, was preempted by federal labor law. When the plaintiff's claim for wrongful discharge is based upon age, the court held that such a claim is preempted by the Illinois Human Rights Act. *Mein v. Masonite Corporation,* 109 Ill.2d 1, 485 N.E.2d 312, 92 Ill.Dec. 501 (1985).

In *Hinthorn v. Roland's of Bloomington, Inc.*, 119 Ill.2d 526, 519 N.E.2d 909, 116 Ill.Dec. 694 (1988), the court upheld the worker's retaliatory discharge claim when she alleged that she had been discharged for asserting her rights for medical attention when the worker alleged she was forced to sign a "voluntary resignation" form or be fired which the court held sufficient to support a finding that she was "discharged." There is no cause of action for retaliatory discharge, however, predicated on an employer's alleged demotion of or discrimination against an employee in retaliation for the assertion of rights under the Workers' Compensation Act. There must be an actual discharge. *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill.2d 29, 645 N.E.2d 877, 206 Ill.Dec. 625 (1994).

In workers' compensation discharge cases, the plaintiff may only bring a retaliatory discharge action against his employer, as compared to the employee or agent of his employer who caused the discharge on behalf of the employer. *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12, 694 N.E.2d 565, 230 Ill.Dec. 596 (1998).

In retaliatory discharge cases, an employer is not required to come forward with an explanation for an employee's discharge, and it remains the plaintiff's burden to prove the elements of the cause of action; however, an employer may choose to offer an explanation if it desires. *Clemons v. Mechanical Devices Company*, 184 Ill.2d 328, 704 N.E.2d 403, 235 Ill.Dec. 54 (1998). Such cases should use traditional tort standards of proof, rather than the three-tier allocation of proof standard applied by federal courts in Title VII employment discrimination cases. *Id.*

Our supreme court has not recognized causes of action for retaliatory discharge in *Fellhauer v. City of Geneva*, 142 Ill.2d 495, 568 N.E.2d 870, 154 Ill.Dec. 649 (1991) (no public policy violation existed where a city employee sued the mayor because the state municipal code allowed the mayor to remove any officer that he appointed; therefore, allowing the plaintiff's claim would frustrate the mayor's discretionary authority over appointments), *Gould v. Campbell's Ambulance Service, Inc.*, 111 Ill.2d 54, 488 N.E.2d 993, 94 Ill.Dec. 746 (1986) (relevant statutory provisions and ordinance failed to show the existence of a clearly mandated public policy), and *Barr v. Kelso-Burnett Co.*, 106 Ill.2d 520, 478 N.E.2d 1354, 88 Ill.Dec. 628 (1985) (no public policy violation existed because the United States Constitution does not provide protection against private individuals or corporations who abridge free expression of others).

ILLINOIS APPELLATE COURT CASES

In *Stebbings v. University of Chicago*, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000), the Illinois Appellate Court upheld the plaintiff's claim for retaliatory discharge when the plaintiff alleged that he was fired for insisting that the radon exposure to participants in a study at the university be reported to the institution that funded the project. In holding that the tort of retaliatory discharge protects whistle-blowers who report illegal or

improper conduct, the court reasoned that the fact that the reported conduct did not constitute a criminal act did not diminish the plaintiff's claim. The tort applies not only where criminal statutes are violated, but also where federal regulations are breached. *Id.*

Similarly, in *Johnson v. World Color Press, Inc.*, 147 Ill.App.3d 746, 498 N.E.2d 575, 101 Ill.Dec. 251 (5th Dist. 1986), a cause of action for retaliatory discharge was recognized when the plaintiff objected to certain company accounting practices which he believed violated federal securities laws. Likewise, in *Petrik v. Monarch Printing Corporation*, 111 Ill.App.3d 502, 444 N.E.2d 588, 67 Ill.Dec. 352 (1st Dist. 1982), the Illinois Appellate Court found that the plaintiff stated facts sufficient to survive a motion to dismiss when he alleged he was discharged for researching a financial discrepancy that he believed may have been due to criminal conduct. In *Mackie v. Vaughan Chapter-Paralyzed Veterans of America, Inc.*, 354 Ill.App.3d 731, 820 N.E.2d 1042, 289 Ill.Dec. 967 (1st Dist. 2004), dismissal of a retaliatory discharge claim was reversed on appeal where the employee alleged that he was terminated after reporting what he believed was the theft of chapter property when a member of the chapter's board of directors downloaded the organization's mailing lists for use by a private business. The court held that those allegations stated a cause of action for retaliatory discharge under the citizen crime-fighter theory.

In contrast to these cases, the appellate court affirmed the dismissal of an employee's complaint when he alleged that he was discharged because of reporting suspected criminal activity to a supervisor. *Zaniecki v. P.A. Bergner and Company of Illinois*, 143 Ill.App.3d 668, 493 N.E.2d 419, 97 Ill.Dec. 756 (3rd Dist. 1986) (declining to follow *Petrik, infra*). No violation of public policy or illegal or improper criminal conduct was found where a plaintiff reported to his employer that a coworker committed suicide due to job-related pressures. *Lambert v. City of Lake Forest*, 186 Ill.App.3d 937, 542 N.E.2d 1216, 134 Ill.Dec. 709 (2nd Dist. 1989). The appellate court rejected the plaintiff's retaliatory discharge claim because even though the complaint stated a cause of action, the facts addressed at trial did not support the allegations. See also *Doherty v. Kahn*, 289 IllApp.3d 544, 682 N.E.2d 163, 224 Ill.Dec. 602 (1st Dist. 1997), wherein the plaintiff failed to state a cause of action for retaliatory discharge when plaintiff alleged conspiracy because public policies surrounding covenants not to compete and unfair competition do not affect the overall welfare of citizens. Additionally, in *Thompson v. Abbott Laboratories*, 193 Ill.App.3d 188, 549 N.E.2d 1295, 140 Ill.Dec. 423 (2nd Dist. 1990), a jury verdict for the employer was upheld on appeal despite the employee's assertion of error in the denial of a tendered instruction. The trial court denied a “mixed motive” jury instruction tendered by the plaintiff stating that there could be more than one factor or cause for discharge and if one of the factors related to the filing of a workers' compensation claim, then the worker was entitled to recover. The appellate court held that denial of this instruction was proper and did not deny the plaintiff a fair trial. Lastly, in *Cross v. City of Chicago*, 352 Ill.App.3d 1, 815 N.E.2d 956, 287 Ill.Dec. 312 (1st Dist. 2004), the employee brought a retaliatory discharge action against the city alleging that his discharge was in retaliation for exercising his rights pursuant to the Illinois Workers' Compensation Act. The appellate court held, however, that the city was immune from liability under the Local Governmental and Governmental Employees Tort Immunity Act for the City Commissioner's decision to terminate a probationary employee.

SEVENTH CIRCUIT CASES APPLYING ILLINOIS LAW

In *Belline v. K-Mart Corporation*, 940 F.2d 184 (1991), the Seventh Circuit held that an employee, who alleged that he was fired in retaliation for reporting suspicious behavior on the part of his supervisor had a cause of action for retaliatory discharge, even though the employee did not report the matter to the police, as Illinois public policy protects vigilant employees who alert their employers to apparent criminal activity in the workplace. However, in *Long v. Commercial Carriers, Inc.*, 57 F.3d 592 (1995), a truck driver did not state a viable claim for retaliatory discharge when he was discharged as a result of his refusal to sign a lease which governed his employment on the ground that the lease violated Interstate Commerce Commission regulations. The alleged infractions were violations of agency regulations, not statutory law, and the regulations allegedly violated did not involve issues of health or safety of the general public or even of drivers, but instead involved allocation of expenses, responsibility for permits and insurance payments and compensation for drivers. *See also Bourbon v. K-Mart Corporation*, 223 F.3d 469 (2000), wherein summary judgment was affirmed on appeal for the employer when it was held that an employee's reporting of his supervisor's alleged acts of charging customers for unnecessary automobile repairs was not causally linked to the employee's termination. Here, the employee simply failed to establish a primary retaliatory discharge case under Illinois law because he could not offer any direct evidence that the recording was a cause of the termination and the close relation in time between the recording and his termination did not demonstrate any pretext.

CONCLUSION

In summary, retaliatory discharge claims have emerged under two theories: (1) a “clear mandate” action alleging that the complained of conduct contravenes a clearly mandated public policy, but not necessarily a law; and (2) a “citizen crime-fighter” theory. *Stebbings v. University of Chicago*, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000). Citizen crime-fighter cases usually involve an employee terminated for “whistle-blowing” or reporting that a co-worker allegedly committed a crime; however, the crime does not have to be work-related. See *Belline*, 940 F.2d at 187; *Vorpagel v. Maxell Corp. of America*, 333 Ill.App.3d 51, 266 Ill.Dec. 818, 775 N.E.2d 658 (2nd Dist. 2002).

Stebbings described two layers of analysis that apply to a citizen crime-fighter case. First, statutes, constitutional provisions, or case law must mandate a public policy of reporting crime; the *Stebbings* court notes, however, that since *Palmateer*, “there is little question that such a policy has been clearly mandated and so this layer of law will rarely be at issue” in a citizen crime-fighter suit. Second, a law must prohibit the conduct that the employee reported or refused to engage in, and the employee must have a good-faith belief that the law prohibits the conduct in question. The plaintiff need only have a good-faith belief that the defendant was violating the law; the plaintiff need not conclusively show that the law was broken or the regulations in question were violated. *Stebbings*, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000).

250.01 Retaliatory Discharge Issues Made by the Pleadings— One Plaintiff, One Defendant

[1]. The plaintiff claims that [he] [she] was an employee of the defendant [on] [during][between] ____.

[2]. The plaintiff claims that while employed by defendant [he] [she] *set forth in simple form without undue repetition or emphasis plaintiff's claimed reason(s) for the discharge or firing.*

[3]. The plaintiff further claims that one or more of the reason(s) stated in paragraph [2] above were a proximate cause of [his] [her] [discharge] [firing] and of plaintiff's claimed damages.

[4]. The defendant [denies that the plaintiff was [discharged] [fired] for the reason(s) claimed by the plaintiff], [[denies that the plaintiff's [discharge] [firing] was a proximate cause of the plaintiff's claimed damages]] [denies that plaintiff was damaged to the extent claimed.]

[5]. The defendant claims that the plaintiff was [fired] [discharged] because *set forth in simple form without undue repetition or emphasis defendant's claimed reason(s) for the discharge or firing.*

Notes on Use

This instruction is to be used when there are issues concerning the plaintiff's employment status, and the reason(s) why the plaintiff was terminated from his employment. If the defendant claims that the plaintiff voluntarily terminated his employment, the instruction may be modified accordingly.

If the defendant does not contest the plaintiff's damages, the double bracketed language in paragraph [4] should not be used.

In as much as employment at will is still the law in Illinois, the defendant may choose not to include paragraph [5].

Comments

The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason remains the law in Illinois, except when the discharge violates a clearly mandated public policy. *Kelsey v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353, 23 Ill.Dec. 559 (1978); *Palmateer v. International Harvester Company*, 85 Ill.2d 124, 421 N.E.2d 876, 52 Ill.Dec. 13 (1981); *Barr v. Kelso-Burness Co.*, 106 Ill.2d 520, 525; 478 N.E.2d 1354, 88 Ill.Dec. 628 (1985); *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 722 N.E.2d 1115, 243 Ill.Dec. 46 (1999).

Traditional tort law principles apply to the allocation of proof for retaliatory discharge cases. *See Netzel v. United Parcel Service, Inc.*, 181 Ill.App.3d 808, 812; 537 N.E.2d 1348, 130 Ill.Dec. 879 (1989); *Clemons v. Mechanical Devices Co.*, 184 Ill.2d 328, 704 N.E.2d 403, 235 Ill.Dec. 54 (1998).

If an employer chooses to come forward with a valid, nonpretextual basis for discharging its employees and the trier of fact believes it, the causation element required to be proven is not met. *Hartlein v. Illinois Power Co*., 151 Ill.2d 142, 160; 601 N.E.2d 720, 176 Ill.Dec. 22 (1992). Concerning the element of causation, the ultimate issue to be decided is the employer's motive in discharging the employee. *Hartlein*, 151 Ill.2d at 163, 601 N.E.2d 720, 176 Ill.Dec. 22.

250.02 Retaliatory Discharge Burden of Proof on the Issues— One Plaintiff, One Defendant

The plaintiff has the burden of proving each of the following propositions:

First, that the plaintiff was an employee of the defendant;

Second, that the plaintiff was [discharged] [fired] from [his] [her] employment with the defendant;

Third, that the plaintiff was [discharged] [fired] because [*set forth in simple form without undue emphasis or repetition the plaintiff's claimed reason(s) for the discharge*];

Fourth, that the plaintiff sustained damages as a result of [his] [her] [discharge] or [firing];

Fifth, that the reason(s) stated in paragraph ["Third"] above [was] [were] a proximate cause of [his] [her] [discharge][firing] and resulting damages.

If you find from your consideration of all the evidence that each of these propositions has been proven, then your verdict should be for the plaintiff. On the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proven, then your verdict should be for the defendant.

Notes on Use

This instruction should be given with the issues instruction on Retaliatory Discharge.

Comments

This instruction is to be modified if there are no issues involving employment, or if there is an issue of whether the plaintiff was actually discharged. See Comments to Issues instruction.