Illinois Institute For Continuing Legal Education

Digest of Recent Retaliation Decisions

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This paper reviews some of the more recent important decisions from different areas of law addressing selected legal points pertaining to retaliation claims by employees under Illinois and federal law.

I. Particular Causes of Action

A. FLSA Retaliation Issues

The Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*, --- U.S. --- 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011) held that the anti-retaliation provision of FLSA, protecting employees who "file" complaints, extended to oral complaints as well as written ones. The case is discussed in greater detail below, under "Activity Protected."

B. False Claims Act Issues

In *Halasa v. ITT Educational Services, Inc.*, 690 F.3d 844, 848 (7th Cir. 2012), the court found that the employee had been engaged in protected activity when he investigated activity and reported violations to management, including incentive payments to recruiters and assistance on placement examinations that were prohibited by applicable regulations. The court found that these activities fell within the scope of the statute's protection afforded to those who act to stop such violations. Plaintiff's case failed, however, as he did not show that any of those who participated in the decision to terminate him were aware of any of this activity. The court said that the Plaintiff's argument that knowledge of his activity should be imputed to the decision-makers "seriously misunderstands the way liability rules work in the corporate setting."

C. Title VII & ADA Retaliation Issues

See discussion of the U.S., Supreme Court decision in *Thompson v. North American Stainless, LP,* --- U.S. ---, 131 S.Ct. 863, 178 L.Ed.2d 694 (2011) under "Persons Protected."

In *Hicks v. Forest Preserve District of Cook County,* 677 F.3d 781, 787-88(7th Cir. 2012), the court found a material adverse action sufficient to assert a claim of retaliation where the employee had accepted a demotion faced with the alternative that his current supervisor might terminate his employment. He accepted the demotion and then sued, and the employer protested that a *voluntary* demotion could not be a materially adverse action. "A demotion to a different position that pays significantly less than the former position is certainly materially adverse," said the court. Addressing the employee's decision to accept the demotion, and the fact that choice he was given to keep his current position included a risk of termination, the court added, "[s]uch a choice could be said to be no choice at all…"

D. Illinois Whistleblowers Act

Brame v. City of North Chicago, 2011 IL App (2d) 100760, 955 N.E.2d 1269, 1271-72, 353 Ill.Dec. 458, 460-61 (2nd Dist. 2011) construed the statutory requirement of a report to "a government or law enforcement agency" where the employee was reporting information about alleged criminal activity by the Chief of Police. The court agreed that the employee was protected by the Act when he advised the Mayor, who had general supervision and control of the police department. The fact that the employee had reported the information to his own employer, which typically does not qualify under the Act, did not alter the outcome. The court rejected the employer's suggestion that to qualify for protection, the employee would have had to go to the State Police or Attorney General, finding that the reference to "government" in the Act was not qualified and could not fairly be so construed. Indeed, the court went on to observe that it did not even believe that the legislature intended to deny protection to an employee who reports illegal conduct by fellow police officers to his superiors within the police department.

The court went on to find that the evidence, not recounted in the decision, was sufficient for the former employee to have reasonably believed that a crime had been committed. It found the shift change the officer complained of was a sufficient act of retaliation to invoke the protection of the Act. *Id.*, 955 N.E.2d at 1273, 353 Ill.Dec. at 462.

In *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, 964 N.E.2d 632, 639-40, 357 Ill.Dec. 953, 960-61 (4th Dist. 2012), the court held that the Illinois Whistleblower Act prohibition on retaliation against employees who refuse to engage in illegal conduct, 740 ILCS 174/1, was not violated. The plaintiff failed to cite to a specific "law, rule or regulation" that would have been violated by her certification of medical records although she believed the record-keeping system did not fully comply with legislative and certification requirements. Her citation to rules of evidence and an unidentified criminal penalty were insufficient to satisfy the statutory requirements, the court said.

By contrast, the court in *Willms v. OSF Healthcare System*, 2013 IL App (3d) 120450, at 82 (3rd Dist. 2013)(decision not released for publication and subject to revision) found that protection under the Act was proper for a maintenance director who was fired after a $33,600 fine was imposed by the Department of Public Health. The fine was for failure to correct an out-of-compliance sidewalk after the defect was identified in an inspection. The maintenance director had provided the initial report to his boss because he did not have authority to order major repairs. He later confirmed to the inspector that the repairs had not been made but that he had confirmed that the sidewalk was defective. He was subsequently fired for poor performance related to the fine. The court rejected the employer's contention that the Act could not apply because the inspector had already discovered the defect:

> The language focuses on the employee's belief; the focus is not on what the government agency already knows or could discover. There is no language in the statute to support an interpretation that the employee's disclosure has to be the first, or only, disclosure of the violation.

Sardiga v. Northern Trust Co., 409 Ill.App.3d 56, 61, 948 N.E.2d 652, 657, 350 Ill.Dec. 372, 377 (1st Dist. 2011) construed the prohibition on retaliation against employees who refuse to participate in illegality under 740 ILCS 174/20. The court formulated the requirements for an action under the statute as follows: "in order to sustain a cause of action under the Act, a plaintiff must establish that (1) he refused to participate in an activity that would result in a violation of a state or federal law, rule, or regulation and (2) his employer retaliated against him because of that refusal." The court found that his complaints and questions about practices he believed unwise or illegal did not constitute refusing to participate in an activity that would be unlawful. See "Activity Protected," below.

E. IHRA & Other State Statute Retaliation Issues

The 2008 Amendments to the Human Rights Act, which authorized suit by employees in the Circuit Court, did not waive the State's sovereign immunity from suit with respect to such claims, which previously could only be heard by the Commission. *Lynch v. Department of Transportation,* 2012 IL App (4th) 111040, 979 N.E.2d 113, 365 Ill.Dec. 747 (4th Dist. 2012); *Watkins v. Office of the State Appellate Defender,* 2012 IL App (1st) 111756, 976 N.E.2d 387, 364 Ill.Dec. 109 (1st Dist. 2012); *Harris v. Illinois,* 753 F.Supp.2d 734 (N.D. Ill. 2010). Thus, State employees continue to be required to litigate their Human Rights Act claims only before the Commission.

Owens v. Department of Human Rights, 403 Ill.App.3d 899, 936 N.E.2d 623, 344 Ill.Dec. 94 (1st Dist. 2010) upheld the Chief Legal Counsel's decision that a written reprimand was not a sufficient adverse employment action to support a claim under the IHRA.

The Illinois Citizen Participation Act, also known as the anti-SLAPP statute, 735 ILCS 110/1 *et seq.*, provides a different form of relief for retaliation—dismissal of a retaliatory lawsuit on short notice without trial or even discovery of the merits of the lawsuit. That is what happened in *Hytel Group, Inc. v. Butler,* 405 Ill.App.3d 113, 938 N.E.2d 542, 345 Ill.Dec. 103 (2nd Dist. 2010). In that case, six months after the employee filed a modest claim with the Illinois Department of Labor for unpaid final compensation, the former employer filed an action for breach of fiduciary duty seeking millions of dollars in damages. The decision upheld dismissal of the case with prejudice on the statutory ground that the suit was "based on, relates to, or was in response" to her wage claim. Under the statute, the former employer could prevent this outcome only by clear and convincing evidence that the lawsuit was not in response to the claim she filed with the Department or that her claim was not protected.

More recently, the Illinois Supreme Court limited the scope of the statute in *Sandholm v. Kuecker*, 2012 IL 111443, 962 N.E.2d 418, 356 Ill.Dec. 733 (2012). The court required, among other things, that the suit in question be lacking in merit and for a decision on that subject based on the pleadings and the statutory motion. See further discussion below under "Forms of Retaliation."

L. Retaliatory Discharge Violating Public Policy

Michael v. Precision Alliance Group, LLC, 2011 IL App (5th) 100089351, 952 N.E.2d 682, 688, 351 Ill.Dec. 890, 896 (5th Dist. 2011) concerned an internal report and indirect external report that the employer was consistently shipping underweight seed bags. On the sufficiency of the showing of protected activity, see discussion below under "Activity Protected." The court made the point that common law standards for the tort of retaliatory discharge are separate and distinct from the standards of the Illinois Whistleblower Act, 740 ILCS 174/1 *et seq*., which requires a report to a government agency or law enforcement.

To show a "clearly mandated public policy," plaintiff pointed to the Illinois Seed Law, 505 ILCS 110/1 *et seq*. and the establishment of the federal National Institute of Standards and Technology, 15 U.S.C. § 271. Finding a sufficient public policy, the court noted that the Seed Law established standards for weights and labeling of seeds and an administrative enforcement mechanism. The mislabeling and distortion of weight ran counter to this public policy, the court concluded. *Id.*, 952 N.E.2d at 690, 351 Ill.Dec. at 898.

Rabin v. Karlin and Fleisher, LLC, 409 Ill.App.3d 182, 945 N.E.2d 681, 348 Ill.Dec. 912 (1st Dist. 2011) presented a variation on the problem of treating the Rules of Professional Conduct ("RPC") for attorneys as a "clearly mandated public policy." In that case, a law firm investigator alleged that his employment was terminated for refusing to participate in conduct that he claimed violated the RPC.

The former employee alleged that the firm directed him to prepare invoices using his personal address for the time he spent as an investigator to include in billing to clients. The employee contended that this was misleading because his time was a cost that was properly part of an attorney's overhead. The court noted that his own exhibits showed that the firm's clients signed agreements in which they agreed to pay customary rates for such services. Agreeing with the former employee that he need only show a reasonable, good faith belief that the conduct he complained about was illegal, the court nevertheless found that his belief was not reasonable.

While the court was not entirely comfortable with the practice, it found that it did not violate a clear mandate of public policy:

> Although attorney honesty and fidelity are vital to the legal system and a matter in the public interest, we do not believe that a former law firm employee can be immune from the general rule of at-will employment merely by complaining to the Firm and its attorneys prior to being fired about deceitful but seemingly legal billing practices he no longer wishes to participate in. While we do not condone the Firm's alleged misconduct here, we are not persuaded that plaintiff's allegation of "honesty and fidelity" in the legal system satisfies the supreme court's "narrow definition of public policy" in retaliatory discharge cases.
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> *Id.*, 409 Ill.App.3d at 190, 945 N.E.2d at 691-91, 348 Ill.Dec. at 921-22.

Ulm v. Memorial Medical Center, 2012 IL App (4th) 110421, 964 N.E.2d 632, 357 Ill.Dec. 953 (4th Dist. 2012) found no clearly mandated public policy was implicated where the employee who had been discharged had been responsible for compliance with the legal standards for accuracy and completeness of subpoenaed medical records that she complained were not being met.

Lucas v. County of Cook, 2013 IL App (1st) 113052, at *11 (1st Dist. 2013)(decision not released for publication and subject to revision) held that "medical practice safety and health violations" reported to the Office of Professional Regulation was not sufficiently specific to serve as a clearly mandated public policy. The court relied upon *Turner v. Memorial Medical Center*, 233 Ill.2d 494, 496-99, 911 N.E.2d 369, 331 Ill.Dec. 548 (2009), which had refused to recognize "sound nursing and medical practices under the Medical Patients' Rights Act" as a clearly mandated public policy.

Gordon v. Fedex Freight, 674 F.3d 769, 773-74 (7th Cir. 2012) recognized that an employee could assert a claim for workers compensation retaliatory discharge without filing a workers compensation claim. First, the court said, Illinois has recognized that a plaintiff fired preemptively because the employer learned that she intended to file such a claim could sue on that basis, so long as there was evidence showing that the employer had been so informed. But in addition, the court noted, *Hinthorn v. Roland's of Bloomington, Inc.,* 119 Ill.2d 526, 519 N.E.2d 909, 116 Ill.Dec. 694 (1988) held that the act of requesting and seeking medical treatment for a work-related injury was the exercise of a right under the statute, allowing the employee to sue if fired thereafter.

In *Hughes v. United Airlines,*634 F.3d 391 (7th Cir. 2011), the Court of Appeals overruled the holding of *Graf v. Elgin, Joliet & Eastern Ry.*, 790 F.2d 1341 (7th Cir. 1986) that claims by airline employees for workers compensation retaliatory discharge are "completely" pre-empted by the Railway Labor Act. "Complete" pre-emption means that the court regards the State law claim as being brought under federal law because there can be no State law cause of action. This permits the defendant to remove the case to federal court to make its motion to dismiss the action based on pre-emption, where the argument will presumably be made to a judge more familiar with these principles.

The court concluded that *Graf* was no longer viable after *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988) (rejecting "complete" LMRA pre-emption of workers compensation retaliatory discharge) and *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994)(holding that the Railway Labor Act does not pre-empt causes of action independent of the collective bargaining agreement). It relied on these two Supreme Court cases, as well as decisions in three other Court of Appeal Circuits reaching the same conclusion.

This did not mean that the employee's action would ultimately be able to proceed, however. Whether pre-emption applies in such cases depends on whether one must interpret the collective bargaining agreement to decide the case; if so, then pre-emption applies. The employee in that case had used up her permitted time to be off work due to an injury that was not work-related. While training to return to her job, she suffered a work-related injury, was off work again, and was terminated because her time off now exceeded the maximum permitted leave time. The employer tried to persuade the Seventh Circuit signal to the State court on remand that pre-emption would apply, but the court concluded it would be inappropriate to discuss the subject.

II. Scope of Action

A. Persons Protected

The U.S. Supreme Court ruled in *Thompson v. North American Stainless, LP,* --- U.S. ---, 131 S.Ct. 863, 868, 178 L.Ed.2d 694 (2011) that Title VII's prohibition on retaliation extended to the discharge of an employee whose fiancée had filed a charge of discrimination against the employer. The Court reasoned that under *Burlington Northern & S.F. R. Co v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), "a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." The court went on to decline to identify a "fixed class of relationships for which third party reprisals are unlawful." But it did provide some hints for the lower courts to apply:

> We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in *Burlington* [citation omitted], 'the significance of any given act of retaliation will often depend upon the particular circumstances.' Given the broad statutory text and the variety of workplace contexts in which retaliation may occur, Title VII's antiretaliation provision is simply not reducible to a comprehensive set of clear rules. We emphasize, however, that 'the provision's standard

> for judging harm must be objective,' so as to 'avoid the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings.' [citation omitted]

The court also addressed the defendant's contention that only the person who filed the charge of discrimination was a "person aggrieved" permitted to sue under Title VII, 42 U.S.C. §2000e-5(f)(1). Prior decisions construing the Civil Rights Act had concluded that this provision made Title VII standing identical to the standard for Article III standing, "injury in fact caused by the defendant and remediable by the court." The Court parsed its prior decisions on this point and declared that interpretation standard to be *dicta*. It then modified existing law on Title VII standing, rejecting the prior view. This did not help the defendant limit the protection against retaliation, however. Instead, the Court adopted the "zone of interests" test as the standard for Title VII standing, which it found the plaintiff easily met. *Id.*, 548 S.Ct. at 869-70.

In *Ulm v. Memorial Medical Center*, 2012 IL App (4th) 110421, 964 N.E.2d 632, 357 Ill.Dec. 953 (4th Dist. 2012), the plaintiff was in charge of medical records for the hospital and refused to certify medical records under subpoena because of her belief that the new electronic medical record system was not compliant with legislative and accreditation standards. Declining to allow an action, the court said:

> According to our weighing of the interests of the parties and the citizens of this State, plaintiff's discharge, even if motivated by these actions plaintiff took, could not have violated a clearly mandated public policy. This is because plaintiff, as operations manager of the health information department and its representative with respect to the hospital's accreditation, was herself responsible for bringing defendant into compliance with the regulations she complained defendant violated. Whether plaintiff was adequately performing her job with respect to defendant's compliance with laws governing the maintenance of its patients' medical records is more a dispute for the parties to resolve privately than a public matter justifying the courts' involvement on behalf of the citizenry as well as the individual employee, even though the integrity of essential health information may have been at stake. Even if, as she alleges, plaintiff was fired for speaking out against defendant's failure to protect the confidentiality and ensure the accuracy of patients' medical records as required by law and the industry's best practices, it would be unfair to punish defendant for releasing plaintiff under these circumstances.

The court in *Lucas v. County of Cook*, 2013 IL App (1st) 113052, at *9-10 (1st Dist. 2013)(decision not released for publication and subject to revision) similarly declined to extend protection to an employee based on her own conduct rather than focusing

narrowly on the legality of the activity described by the employee. In that case, the plaintiff claimed she was terminated for refusing to treat or attend treatment of male patients because, she contended, she was not properly trained. The doctor had complained that the ten-day training offered to her by the hospital to prepare for assignment to a clinic treating hiv-positive patients was inadequate. She refused to attend because the assignment was outside her speciality, ob/gyn, and undertaking it with so little training would result in substandard medical care.

The employee in *Willms v. OSF Healthcare System*, 2013 IL App (3d) 120450, at 82 (3rd Dist. 2013), by contrast, was protected under the Illinois Whistleblower Act where he did not have authority to make the correction demanded by the Department of Public Health following an inspection. He had reported the defect to his superior with a copy of the inspection report and later acknowledged to the Department that the defect had not been corrected.

The court in *Bell v. Don Prudhomme Racing, Inc.*, 405 Ill.App.3d 223, 939 N.E.2d 100, 345 Ill.Dec. 371 (4th Dist. 2010) found that an Illinois resident who did work as a marketing and hospitality director around the country, including at three Illinois locations, was protected against retaliatory discharge for filing a worker's compensation claim based on an injury that occurred in Nevada.

B. Persons Liable

Rabin v. Karlin and Fleisher, LLC, 409 Ill.App.3d 182, 186, 945 N.E.2d 681, 687, 348 Ill.Dec. 912, 918 (1st Dist. 2011)(tort of retaliatory discharge) held that the only proper defendant in a case brought by an investigator against the law firm was the law firm, which was the employer. The claim against an individual attorney was rejected.

The decision went on to address the problem of whether a law firm can be liable to a former employee. The Supreme Court had already refused to recognize an action when an attorney sues for retaliatory discharge for conduct that would violate the Rules of Professional Conduct for attorneys ("RPC") because the rules' enforcement scheme was viewed as sufficient to ensure their enforcement, *Jacobson v. Knepper & Moga, P.C.*, 185 Ill.2d 372, 377-78, 706 N.E.2d 491, 493-94, 235 Ill.Dec. 936, 938-39 (1998). In *Johnson,* the Supreme Court found, with respect to the practice of deliberately filing actions where venue was improper, the policies of the collection statutes are adequately protected by RPC prohibitions on false statements to a tribunal and fraud generally.

The *Rabin* court chose not rely on the fact that the conduct in question, billing practices and honesty with clients about them, is also regulated, presumably adequately, by the RPC. Instead, the court examined the details of the alleged misconduct alleged and insisted that the plaintiff identify the specific public policy on which he relied. Finding no such specific public policy, the court upheld the dismissal.

The decision does not identify what conduct an attorney might engage in that would fall outside the preclusive effect of the RPC under *Johnson* that might qualify for protection under the tort of retaliatory discharge. But the court evidently believed that even in this context, a law firm could engage in conduct that exposed it to liability: "Plaintiff may nevertheless succeed on his retaliatory discharge claim by showing that the Firm's termination of his employment for complaining about and refusing to participate in the Firm's alleged misconduct 'violates a clear mandate of public policy.'" *Id.,* 409 Ill.App.3d at 188, 945 N.E.2d at 689, 348 Ill.Dec. at 920. The court then went on to find that a public policy mandating honesty in lawyers was not a sufficiently specific statement, implying that citation to a particular RPC might be sufficient despite *Johnson's* broad statement of preclusion. This is an issue that remains to be addressed in future cases.

C. Activity Protected

Kasten v. Saint-Gobain Performance Plastics Corp., --- U.S. ---, 131 S.Ct. 1325, 179 L.Ed.2d 379 (2011) addressed the issue of whether the protection against retaliation in the Fair Labor Standards Act ("FLSA"), which protects employees who "file" complaints under or related to the Act, extends to oral complaints. The court reviewed dictionary definitions, which it said included at least one instance in which "file" may refer to oral material. *Id.,* 131 S.Ct. at 1331. It found that regulations and judicial usage contemporaneous with the adoption of the Act occasionally included oral expression of grievances. *Id.,* 131 S.Ct. at 1331-32. Concluding that text alone was not sufficient to decide the question, the Court looked to the purposes of the Act, noting that at the time of its adoption, the low-wage workers it was designed to assist had a high illiteracy rate. 131 S.Ct. at 1333-34. Citing to policy considerations, such as the impact of requiring written complaints where hotlines and interviews are part of industrial practice, the Court concluded that a broad, rather than narrow, interpretation was called for. *Id.,* 131 S.Ct. at 1334. The court also relied on interpretation of the Act by the Department of Labor. *Id.,* 131 S.Ct. at 1335-36.

At the same time, the Court laid down a standard to ensure that oral complaints gave employer fair notice of a serious complaint, rather than a triviality. It held that a complaint would be deemed "filed" when "a reasonable, objective person would have understood the employee to have put the employer on notice that the employee is asserting statutory rights under the Act." *Id.,* 131 S.Ct. at 1335. Elaborating on this a bit, the court added, "

> To fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection.
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> *Id.*

The Court refused to consider the employer's alternative argument that the Act's protection does not extend to internal complaints, but only to complaints to the government, because this was not raised as an issue in the certiorari briefing. It thus stated no view on this argument.

In *Michael v. Precision Alliance Group, LLC*, 2011 IL App (5th) 100089351, 952 N.E.2d 682, 685-86, 351 Ill.Dec. 890, 893-94 (5th Dist. 2011) was a common law retaliatory discharge action based on reports that the employer was consistently shipping underweight seed bags. The employee had reported internally and urged remedial action, commenting, "Ain't that kind of wrong?" In a conversation with a former employee who threatened to report this alleged practice if his unemployment benefits were not paid, the employee said, "Have at it. Somebody's got to do something." The court concluded that this could be interpreted as making a communication looking towards enforcement activity. Ultimately, there was a surprise investigation of defendant's practices relating to the weighing and reporting of the weights of sacks of soybean seed by the Illinois Department of Agriculture. The trial court had dismissed the case because (1) the employee had reported internally, not to a governmental agency and (2) discharge based on the employer's mistaken belief that the employee made such a report was not actionable.

The court considered the problem of indirect reports of wrongdoing. In determining whether conduct is protected, the court said,

> Illinois courts have looked to aspects other than the mechanism or directness of the whistleblowing when evaluating whether an activity is protected under the tort of retaliatory discharge. Illinois has looked to both the intent of the plaintiff and the motive of the employer in evaluating retaliatory discharge actions based on whistleblowing. Undoubtedly, the intent of the employee to blow the whistle is vital to a claim of retaliatory discharge.
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> *Id.*, 952 N.E.2d at 688, 351 Ill.Dec. at 896.

Ultimately the court concluded that:

> [T]he determination of what activity should be protected involves the question of whether an employer is frustrating 'a significant public policy by using its power of dismissal in a coercive manner.' [citation omitted]
>
> Whether plaintiffs reported directly to a government agency or relayed information through another person is irrelevant to questions of whether the motive of defendant was retaliatory and whether the intent of plaintiffs was to blow the whistle. Similarly, a mistaken belief by an employer regarding the mechanism by which an employee blew a

> whistle should not bar an action. Defendant's mistaken belief that plaintiffs had reported directly, and not indirectly, is irrelevant to whether defendant's motive was retaliatory or whether plaintiffs acted with an intent to blow the whistle.
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> *Id.*, 952 N.E.2d at 688-89, 351 Ill.Dec. at 896-97.

In *Sardiga v. Northern Trust Co.*, 409 Ill.App.3d 56, 62, 948 N.E.2d 652, 657, 350 Ill.Dec. 372, 377 (1st Dist. 2011), under the Illinois Whistleblower Act provision protecting refusal to participate in illegal activity, the plaintiff had complained about a number of practices of the former employer while he worked there. "[T]he plaintiff must actually refuse to participate," said the court, rejecting the plaintiff's contention that his repeated complaints and questions about the challenged procedures were sufficient under the Act. The court explained its conclusion this way:

> Sardiga argues that if we were to find that 'refusing' does not mean 'complaining,' as we have done above, where a supervisor promises an employee that he will look into the legality of an activity after the employee complains about it, then this would create a loophole in the Act contrary to public policy. We are not persuaded by this argument. The Act protects employees who call attention in one of two specific ways to illegal activities carried out by their employer. It protects employees who either contact a government agency to report the activity or refuse to participate in that activity. An employee who does not perform either of the specifically enumerated actions under the Act cannot qualify for its protections. We fail to see how the plain meaning of the Act creates a loophole when the Act does not purport to cover the situation described in the instant case. When an employee complains to a supervisor, as opposed to a government agency, and is terminated as a result, a common law claim of retaliatory discharge arises, with which the Act does not interfere.

Gordon v. Fedex Freight, 674 F.3d 769, 773-74 (7th Cir. 2012) discussed the scope of activity protected from retaliation in a workers compensation retaliatory discharge case, which includes both seeking benefits and seeking medical attention following a work-related injury. See discussion of this issue under "Retaliatory Discharge Violating Public Policy."

D. Forms of Retaliation

The court in *Brame v. City of North Chicago*, 2011 IL App (2d) 100760, 955 N.E.2d 1269, 353 Ill.Dec. 458 (2nd Dist. 2011) declined to accept the contention of the employer that a shift change could not be sufficient retaliation to support an action under the Illinois Whistleblower Act.

The Illinois Citizen Participation Act, also known as the anti-SLAPP statute, 735 ILCS 110/1 *et seq.*, provides relief from retaliatory lawsuits—dismissal of a retaliatory lawsuit on short notice without in-depth inquiry into, or discovery concerning, the merits of the suit. In *Hytel Group, Inc. v. Butler,* 405 Ill.App.3d 113, 116, 938 N.E.2d 542, 548, 345 Ill.Dec. 103, 109 (2nd Dist. 2010), the court applied this relief where a former employee had filed a wage claim for final compensation with the Illinois Department of Labor. Six months later, the former employer sued her in Circuit Court seeking $1 million in compensatory damages and $3 million in punitive damages for breach of fiduciary duty arising out alleged skullduggery while she was still employed. She submitted an affidavit that the former employer had told her when she was complaining about not being paid and saying she would go to the Department "that if she did that, he would 'sue [her] a—, honey."

The statute was applicable because her assertion of a claim to the Department of Labor was a valid exercise of her right to petition for redress of grievances. The court acknowledged that an action for retaliatory discharge would not lie for workplace retaliation based on such a private contractual dispute. It nevertheless found that the filing was within the protection of the Citizen Protection Act, adding that "prompt payment of wages by employers is not a matter entirely devoid of public concern." *Id.*, 405 Ill.App.3d at 122, 938 N.E.2d at 552, 345 Ill.Dec. at 113.

Under the statute, the defendant in such a case may file a motion to dismiss based on its provisions, alleging that the suit is based on, relates to or is in response to activity protected under it. 710 ILCS 110/15; 710 ILCS 110/20(a) & (b). The filing of the motion stays discovery and the motion must be heard and decided within 90 days. It must be granted unless the non-movant has produced clear and convincing evidence that the acts of the moving party are not in furtherance of acts immunized by the Act. The filing of the claim with the Department would not be so protected would be if it not genuinely aimed at procuring favorable governmental action, in this case, enforcement of the Wage Payment & Collection Act. The court held that the statute extends to retaliatory lawsuits unrelated to the subject matter of the protected activity. *Id.*, 405 Ill.App.3d at 123-125, 938 N.E.2d at 553-555, 345 Ill.Dec. at 114-116.

The dispute that remained was whether the lawsuit was retaliatory in nature, a decision that the court said must be made on a case-by-case basis. In deciding this question, the court observed that retaliatory intent may be inferred from temporal proximity. The analysis called for was described this way:

> [W]hen a lawsuit does not arise directly out of the protected activity but instead is alleged to have been brought "in response to" the protected activity, it becomes vital that the trial court engage in a careful examination of the allegations of the complaint and the surrounding facts to determine whether it is truly barred by the Act as a retaliatory suit. We believe that this requirement will prevent the application of the Act beyond its intended scope. For instance, suppose that a homeowner sues a builder for breach of contract and the builder files a counterclaim for nonpayment or *quantum meruit*. Under the Act, even though the dispute between the parties is private, both of these claims represent the litigants' exercise of their right to petition the government for redress of grievances, and thus both claims are protected activity under the Act. However, that does not mean that the claim that happens to have been filed later (in this example, the counterclaim) may be automatically dismissed under the Act. Instead, the court must determine whether the later-filed claim is retaliatory. If it states a potentially valid cause of action and seeks damages within the ordinary range recoverable under the facts of the case, and there are no other facts suggesting an intent to chill the other party's right to seek redress, then the later claim has not been brought "in response to" the other party's exercise of first amendment rights within the meaning of the Act. Thus, it would not be subject to a motion to dismiss under the Act. We anticipate that the vast majority of counterclaims will lie outside the Act's coverage.
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> *Id.,* 405 Ill.App.3d at 125-26, 938 N.E.2d at 555, 345 Ill.Dec. at 116.

The court approved of the trial court's observation that the pleading of an extremely high demand for damages, rather than a good faith estimate of the injury sustained, was an additional indication of retaliatory intent. It noted that a hallmark of SLAPP ("Strategic Lawsuits Against Public Participation") suits against which the law is directed is a complaint seeking damages of millions of dollars. *Id., citing SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act,* 28 N. Ill. U. L. Rev. 559, 563 (Summer 2008)[1].

In *Sandholm v. Kuecker*, 2012 IL 111443, 962 N.E.2d 418, 356 Ill.Dec. 733 (2012), the Supreme Court construed the Citizen Participation Act to be inapplicable to cases unless the allegedly retaliatory suit lacks merit on its face. In that case, members of a school community engaged in a campaign, partly successful, to persuade the school board to remove the plaintiff from his position as a coach. In the course of this

[1] The court also mentioned the article, E. Madiar & T. Sheehan, *Illinois' New Anti-SLAPP Statute*, 96 Ill. B.J. 620, 620-21 (December 2008), indicating that the Illinois statute is broader than any of the other anti-SLAPP statutes that have been adopted around the country.

campaign, the plaintiff was accused of bullying and belittling student players as well as related conduct. The plaintiff filed suit for defamation and interference with prospective economic advantage against a number of the parents.

The court refused to treat the anti-SLAPP statute as providing a new defamation privilege that would preclude suit based solely on the fact that those who publish defamation are engaged in efforts to petition for redress of grievances. Based on its conclusion, the court held that if the purpose of the lawsuit is to recover damages, it is not within the scope of the stature. *Id.*, at ¶42, 962 N.E.2d at 429, 356 Ill.Dec. at 744. "SLAPP's are, by definition, meritless," said the court, *Id.*, at ¶34, 962 N.E.2d at 427, 356 Ill.Dec. at 742.

The court also held that a motion based on the Citizen Participation Act was to be treated as a 2-619(a) motion. In ruling on such a motion, the court said, the court is required to treat the well-pleaded allegations of the Complaint as true; the pleadings and supporting documents were to be construed in the light most favorable to the non-moving party; and all inferences were to be reasonably drawn in plaintiff's favor. Thus, the defendants had the initial burden of proving that the lawsuit was based on, related to or filed in response to their actions in furtherance of their right of petition, speech or association, as distinguished from the defamatory content of their statements. On the pleadings in *Sandholm,* the court concluded, the defendants had not met this burden. *Id.*, at ¶¶24-25, 962 N.E.2d at 434, 356 Ill.Dec. at 749. The court also found that the attorneys' fees provision of the statute limited recovery to legal fees associated with the motion to dismiss, not the entire defense of the case. *Id.*, at ¶¶32, 962 N.E.2d at 435-36, 356 Ill.Dec. at 750-51.

III. Retaliation Proof Issues

A. Temporal Proximity

In *Hicks v. Forest Preserve District of Cook County,* 677 F.3d 781, 788-89 (7th Cir. 2012), the court upheld a jury verdict despite the twenty-two months that elapsed between the protected activity and the challenged demotion. The court recognized that prior decisions where the employee relied on "suspicious timing" had found a one year gap in time to be too long to allow an inference of causation. But in *Hicks,* the court said, the employee relied on a direct proof method and the gap in time did not have the same significance:

> The 'suspicious timing' argument seeks to prove that an adverse employment action was caused by the plaintiff's opposition to an unlawful employment practice because the opposition and subsequent adverse action were close in time. When the plaintiff uses this fact alone to prove causation, generally he or she must demonstrate that 'an adverse employment action follows close on the heels of protected

> expression....' [citation omitted] But Hicks does not employ a 'suspicious timing' argument here; rather, he points to the direct evidence of retaliatory animus presented at trial via Hruska's testimony. The FPD's arguments on this point are thus mistaken. Furthermore, as the district court noted in its order denying the FPD's motion for judgment as a matter of law, there are no bright-line rules to apply when considering the temporal proximity of adverse actions to protected activities because it is a fact-intensive analysis. While close timing between a plaintiff engaging in a protected activity and then suffering an adverse employment action is useful evidence to establish a causal link between the two events, the law does not require there to be close timing where, as here, direct evidence is used to establish causation.

The court in *Gordon v. Fedex Freight,* 674 F.3d 769 (7th Cir. 2012) held that while the employee could assert a claim for workers compensation retaliatory discharge based on nothing more than the fact that she sought medical treatment for a work-related injury, her evidence was not sufficient to survive summary judgment. She sought medical attention for the injury one day before the decision to eliminate her position was made, but at the time was expected to be back to work in a day or so—the severity of her injury only became clear later. The court acknowledged that temporal proximity could be an important evidentiary ally of the plaintiff, but repeated a statement from prior cases that, standing alone, it is generally not enough to create an issue of fact for summary judgment. In that case, the countervailing evidence was that the employer was implementing staff reductions nationwide and her facility was required to eliminate one full-time position. She was the only full-time non-supervisor and management believed that her duties could be absorbed by one of those supervisors, so she was selected for termination on that basis. This valid, non-pretextual reason for termination outweighed temporal proximity and justified summary judgment for the employer.

Harper v. C.R. England, 687 F.3d 297, 308 (7th Cir. 2012) also found temporal proximity insufficient on its own to support an inference of retaliatory intent. There, the Plaintiff unsuccessfully argued that the District Court focused on the wrong time period when it compared the initial complaint of racial harassment and the termination (March to August). Rather, the Plaintiff argued, the period of time should have been the shorter interval between his contact with human resources via e-mail on July 31 and the termination on August 3.

In the many cases in which there is an ongoing series of communications between an employee and management arising from the complaint being made, this is a recurring issue, and one that has not been definitively addressed. The parties to the litigation will naturally cherry-pick for the most favorable time interval, plaintiffs lighting on the shortest time period as in this case, and defendants focusing on the

length of time from the initial complaint on the subject to the adverse employment action. It requires little reflection to realize that there can be no general rule, because the capacity of a particular act by the employee to inflame someone will vary with the facts of the specific case and the concerns of the individual members of management who are affected.

The *Harper* court, however, did not perform such an analysis. The court first noted the case law stating that "mere" temporal proximity will rarely be enough to establish retaliatory motive but that together with other facts, it can sometimes raise such an inference. *Id.*, 687 F.3d at 308. The court rather focused on the failure of the Plaintiff to advance other evidence suggesting that his protected activity was in any way linked to his termination. *Id.* See further discussion of this case below under "General Proof Cases."

B. Stray Remarks

The court in *Hicks v. Forest Preserve District of Cook County*, 677 F.3d 781, 788-89 (7th Cir. 2012) was persuaded to uphold a jury verdict for the employee where the employee had a witness who testified to the retaliatory *animus*. The plaintiff had participated in the investigation of another employee's claim of discrimination against his supervisor and was later forced by management into a demotion. The testimony was that the plaintiff's supervisor told the witness, a former supervisor, that the complaining party and the plaintiff "needed to be fired because they had filed charges of discrimination" against him.

In *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012) Plaintiff's supervisor told him that "'getting a lawyer (signaling protected activity) was the worst f* * * ing thing you can do' and that [Plaintiff] was 'going to be sorry.'" This was viewed by the court as direct evidence of the supervisor's retaliatory *animus*. The supervisor's statement recounted in the opinion also included the statement that he intended to let the plant's human resources manager know that Plaintiff had a lawyer and that "we're going to deal with you from here on in, from this point on. You're going to be sorry. You're going to regret this." The question was whether this intent could be attributed to the HR manager, who later prepared a report to corporate headquarters calling for Plaintiff's firing. The court regarded this as the decisive question, concluding that the other evidence of retaliatory motive was insufficient.

Here the court addressed something procedurally important. It noted that the plaintiff sought to argue that the statements of the supervisor could be attributed to the HR manager under Fed.R.Evid. 801(d)(2)(E), the "co-conspirator" exception to the hearsay rule. The procedural challenge was that the employee had not raised this issue in the trial court. But on closer examination, the court recognized a quandary of current summary judgment practice in federal courts—that the plaintiff really had no

opportunity to raise that issue in the briefing of the summary judgment motion. The court recognized that "With the explosive growth in summary judgment practice in recent decades, this is a quandary that can arise frequently," which it does. *Id.*, 681 F.3d at 902

This happens, the court recognized, because the defendant in a retaliation case may make a "no evidence" summary judgment motion, asserting that the plaintiff has the burden of proving retaliatory motive and has no proof to satisfy the burden. The plaintiff then files a response setting forth the evidence relied upon, in this case including the challenged statement by the supervisor. Finally, the defendant replies, at which time the evidentiary objection to admission of the statement is (and was in this case) raised. But it was the end of the briefing and many (in the Northern District, almost all) summary judgment motions are decided without argument. The plaintiff was left with no opportunity to address the objection and advance his argument for an exception to the hearsay rule. *Id.*, 681 F.3d at 902-3. Thus:

> Where the appellant did not have a meaningful opportunity to be heard on the evidentiary issue in the district court, it would not be fair to refuse to consider his arguments presented for the first time on appeal. In managing summary judgment practice in their courts, district courts need to ensure that they do not base their decisions on issues raised in such a manner that the losing party never had a real chance to respond. If a district court does not provide an opportunity to be heard, our doors will be open to consider those arguments.
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> *Id.*,681 F.3d at 903.

The court went on to decide that because there was no opportunity to raise the issue in the District Court, the standard of review for the evidence issue would be *de novo.*

Addressing the co-conspirator exception, the court was unwilling in a case asserting individual liability, at least, to regard concerted behavior between the HR manager and supervisor as sufficient to invoke the co-conspirator exception, because in a corporate setting, some degree of *legitimate* concerted action should be expected between a supervisor and human resources manager. Rather, the court viewed the decisive question to be whether there was admissible evidence that there was a "we're gonna get you" conspiracy between the two. The best evidence on the point was the HR manager's response to the Plaintiff's call to the HR manager about his health insurance when he was on leave, in which she told him that if the supervisor was not going to talk to him, neither would she. Because of the corporate setting, the court concluded that this fell short of proving that she was aware of the supervisor's unlawful motive—it did not show that the two shared that motive. *Id.*, 681 F.3d at 905-6.

C. Cat's Paw Evidence

Smith v. Bray, 681 F.3d 888, 897-99 (7th Cir. 2012)(§1981 retaliation action) also contains an extended discussion of "cat's paw" evidence. The court found that a "cat's paw" theory could support holding a plant human resources manager personally liable if the other requirements for liability were satisfied, noting that at least five federal judicial Circuits had indicated that such an outcome under §1983.

Attribution of retaliatory intent, the court said, is proper "where the plaintiff can show that an employee with discriminatory *animus* provided factual information or other input that may have affected the adverse employment action." *Id.*, 681 F.3d at 897. What the *Smith* court viewed as a question of first impression was whether the "cat," the subordinate with a retaliatory motive, may be individually liable—a question it answered in the affirmative. *Id.*, 681 F.3d at 899.

In *Smith*, the individual defendant human resources manager was claimed to have influenced his termination by members of management who had not retaliatory *animus*. The court concluded that the evidence supporting a claim for liability against her as the "cat" was sufficient to survive summary judgment. This was not the same as showing that she was liable, only that her input was sufficient to blame her for the termination. Ultimately, the court concluded that there was insufficient evidence of retaliatory *animus* on her part for the claim against her to survive summary judgment.

With respect to the attribution issue, the court noted that the HR manager was involved in decisions at every stage of the ongoing workplace controversy. She had also written the report to corporate headquarters requesting the termination and the court said "we can assume for purposes of summary judgment that headquarters relied heavily" on that report in making its decision to fire plaintiff. *Id.*, 681 F.3d at 900.

Hicks v. Forest Preserve District of Cook County, 677 F.3d 781, 789-90 (7th Cir. 2012) found it appropriate to impute the retaliatory intent of the plaintiff's supervisor to other management members because there was evidence indicating that they were totally dependent on the supervisor to supply the information for their decision. In that case, the plaintiff had received 28 disciplinary action forms in the two years after his participation in an investigation of his supervisor. Management offered him a choice between remaining in his present position and accepting a demotion with a pay reduction, cautioning him that if he remained in his current position he could face further disciplinary action up to and including termination. The court observed that the managers who presented plaintiff with this choice acted based on the discipline that had already been issued against him—and one of them so testified at trial. This was sufficient to impute the supervisor's retaliatory intent to them.

D. General Proof Cases

The court in *Smith v. Bray*, 681 F.3d 888 (7th Cir. 2012) found that the evidence of retaliatory *animus* on the part of a plant human resources manager insufficient to survive summary judgment. The principal basis the court considered was a statement by the Plaintiff's supervisor mentioning the HR manager, but that was excluded as hearsay after detailed review discussed above under "Stray Remarks." The court then considered whether the remaining evidence could meet that standard.

The Plaintiff contended that the HR manager's ignoring his complaints of discrimination was such evidence. The court allowed that if the HR manager had stood idly by while he complained of race discrimination, that might provide evidence of discriminatory *animus* on her part. But the record did not contain any evidence that Plaintiff made any specific complaints about discrimination to her. 681 F.3d at 906. The court also found no evidence of retaliatory intent in her failure to return his telephone calls while he was on leave and her telling Plaintiff that if the supervisor was not going to speak with him, she would not, either.

In *Harper v. C.R. England,* 687 F.3d 297, 308 (7th Cir. 2012), the employee was an African American driving instructor who was terminated for an attendance issue while on probation. He had also been the target of a racial slur by an African American co-worker. He claimed but was unable to prove that his African American supervisor, who was a room away at that moment but who had been present immediately before and after the slur, heard it when it was made. He complained about the slur in March and was terminated in August, but pointed out that his termination followed by only four days his conversation about it with a human resources representative. The temporal proximity argument did not impress the court due to the lack of other evidence of retaliatory motive, and is discussed above under "Temporal Proximity."

Plaintiff asserted that the company did not properly investigate his claim about the racial slur immediately after he said it was made, although the evidence in the case did not support that conclusion—the company had investigated, the outcome had been inconclusive, and the company cautioned all of the driving instructors about the use of racial slurs. He also complained that the Lead Instructor, to whom he reported, commented to him when he complained about the lack of action on his complaint that he "needed to grow a thicker skin." But there was no evidence that the decision to terminate his employment was in any way influenced by the Lead Instructor.

The decisive evidence in the case for the court was the comparative evidence. The court noted the familiar standard for comparators requiring that they "dealt with the same supervisor and were subject to the same standards, but also that they had engaged in similar conduct without differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." 687 F.3d at 310.

Because the Plaintiff had failed to identify any other instructor had a comparable attendance record, summary judgment was upheld.

The court also found a lack of proof of causation in *Poer v. Astrue,* 606 F.3d 433 (7th Cir. 2012) where the decision-maker had no knowledge of the employee's protected activity, in that case, his testimony on behalf of two other employees who had asserted claims against his boss's boss. The court acknowledged that causation could still be found if someone with retaliatory *animus* concealed information from or fed false information to the decision-maker. The court found that the evidence supported an inference that this occurred, disqualifying two other candidates for the promotion. Under the applicable rules, this meant that the Plaintiff could not be promoted due to a lack of a sufficient number of candidates available for consideration. However, the court also found that if the information had been accurate, the same outcome would have obtained because the other candidates were disqualified for other reasons.