October 1985

Retaliatory Discharge in Illinois: Recent Developments - The Kenneth M. Piper Lectures

Geri J. Yonover

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation


This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
RETALIATORY DISCHARGE IN ILLINOIS: RECENT DEVELOPMENTS

Geri J. Yonover*

As predicted by the dissenting Illinois Supreme Court Justices in the seminal cases fashioning the tort of retaliatory discharge,1 the retaliatory discharge remedy has been sought in a variety of situations, some far beyond the original parameters of Kelsay v. Motorola, Inc.,2 and Palmateer v. International Harvester Co.3 Recent Illinois Supreme Court and Appellate decisions,4 as well as federal decisions,5 have struggled to fill in the contours of the tort of retaliatory discharge, with a variety of results. This article will analyze those decisions in an effort to uncover a common thread, if there is one, or, as is more likely, to draw a map indicating the current boundaries of the "new" tort.

I. BACKGROUND: A BRIEF OVERVIEW

The Illinois Supreme Court first recognized a cause of action for retaliatory discharge in Kelsay v. Motorola, Inc., where an at-will employee was discharged in retaliation for filing a workers' compensation claim against her employer.6 The tort was crafted to limit an employer's


2. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).


5. Horton v. Miller Chemical Co., Inc., 776 F.2d 1351 (7th Cir. 1985) (district court should have granted defendant's motion for judgment notwithstanding the verdict; while plaintiff may have been discharged without just cause, an employer is not liable in tort for discharging an at-will employee because it erroneously believes that the employee is permanently disabled).

6. 74 Ill. 2d 172, 384 N.E.2d 353 (1978). Illinois is thus in the clear majority of jurisdictions which place limits on the otherwise absolute right of employers to discharge employees with or without cause. See F. Strasser, Employment-at-will: The Death of a Doctrine, 8 Nat'l L.J. 1 (Jan. 20, 1986) (by the end of 1985, courts in 40 states had adopted some limitations to the doctrine of em-
otherwise absolute power to terminate an at-will employee when that right was exercised to prevent the employee from asserting his statutory rights under the Workers' Compensation Act. The Kelsay court reasoned that in the absence of a recovery in tort, an employee terminable at will has no recourse against his employer if the employer decides to discharge the employee for filing a workers' compensation claim. Under these circumstances, the employee would be forced to choose between continued employment and the workers' compensation legally due him or her.

The Illinois Supreme Court further refined the tort of retaliatory discharge in Palmateer v. International Harvester Co., in which the company terminated an employee for informing local law enforcement authorities of suspected criminal activities of his co-employee and for agreeing, if requested, to assist in the investigation and trial of the co-employee. In finding that plaintiff had stated a cause of action for retaliatory discharge, the court held that the gist of the tort "lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses.

The Palmateer majority stressed that the cause of action for retaliatory discharge is allowed where "public policy is clear, but is denied where it is equally clear that only private interests are at stake." Recognizing that there is no precise definition of "public policy", the court nevertheless stated that:

public policy concerns what is right and just and what affects the citizens of the State collectively. It is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions. Although there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal, a survey of cases in other States involving retaliatory discharges shows that a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.

employment at will). Note that this author misleadingly states that Illinois' exception to the employment-at-will doctrine is based on "implied contract." That statement was based on information contained in H.H. Perritt, Employee Dismissal Law and Practice (1984 and Supp. 1985). Cf. Dykstra v. Crestwood Bank, 117 Ill. App. 3d 821, 454 N.E.2d 51 (1st Dist. 1983) (court refused to create an exception sounding in contract to the general rule that an at-will employment is terminable at any time for any or no cause. Such an exception would be broader than the exception created by the Illinois Supreme Court when it recognized the tort of retaliatory discharge). See infra notes 88-100 and accompanying text.

8. Kelsay, 74 Ill. 2d at 182, 384 N.E.2d at 357.
10. Id. at 131, 421 N.E.2d at 879.
11. Id. at 130, 421 N.E.2d at 878-79 (citation omitted).
Since *Kelsay* and *Palmateer*, the elements of the tort of retaliatory discharge consist of the following: (1) an employer discharged the plaintiff-employee in retaliation for his "activities" (such as filing a workers' compensation claim, or "whistle-blowing" on a co-employee); and (2) that the "discharge be in contravention of a clearly mandated public policy." This two-pronged test determines the viability of a retaliatory discharge claim.

II. RECENT DECISIONS

The question whether certain "activities" are protected by a "clearly mandated public policy" has been answered by Illinois courts in a variety of ways.

A. Worker's Compensation Claims

Illinois courts have taken a broad view with respect to workers' compensation claims in connection with retaliatory discharge. For instance, in *Darnell v. Impact Industries, Inc.*, the Illinois Supreme Court extended *Kelsay* to embrace circumstances where a plaintiff had filed a workers' compensation claim against a prior employer and was subsequently discharged by the current employer when it discovered that the employee had filed the earlier claim. Impact Industries had argued, unsuccessfully, that plaintiff's discharge because of a claim against a prior employer was not violative of a "clearly mandated public policy." The court rejected this argument, reasoning that defendant's position "would seriously undermine the comprehensive statutory scheme which provides 'for efficient and expeditious remedies for injured employees.'" Illinois appellate court decisions, both before and after *Darnell*, evidence a similar tendency to afford the protections of the tort in cases involving work-


16. *Id.* at 162, 473 N.E.2d at 937 (citations omitted) (citing *Kelsay*, 74 ILL. 2d 172, 182, 384 N.E.2d 353, 357 (1978)).
ers' compensation claims. For example, in *Wolcowicz v. Intercraft Industries Corp.*, the court reversed the dismissal of plaintiff's complaint. The trial court had found that plaintiff's allegation, that he was discharged for the purpose of preventing him from pursuing his rights under the Illinois Workers' Compensation Act, was conclusory due to the lack of facts showing that intent on the part of defendant. The trial court, apparently, based its ruling on the timing of the complained-of activities.

Wolcowicz had alleged that he suffered a work-related heart attack on August 26, 1980, while working for defendant. He did not return to work until November 17, 1980. On November 18, 1980, he allegedly fell at work, injuring his back. Upon return to work on November 19, 1980, he was told to sign a "severance agreement" which terminated his employment. Wolcowicz eventually filed a workers' compensation claim on December 1, 1981, almost 13 months after his discharge. In his complaint, Wolcowicz claimed that he was discharged for the purpose of preventing him from pursuing his rights under the Act.

Reviewing the trial court's dismissal of the complaint, taking as true all well-pleaded facts and all reasonable inferences which could be drawn from the language of the complaint, the appellate court found that the circumstances of the case were sufficient to show an improper intent on the part of the defendant. The court found persuasive Wolcowicz's argument that a cause of action for retaliatory discharge was stated "even though he did not allege that he actually filed a workers' compensation claim subsequent to being terminated. A reasonable reading of plaintiff's complaint reveals the essence of his claim to be that he was discharged in order to deter him from exercising his statutory rights under the Act." Central to this holding was the court's concern that "unscrupulous employers may intimidate employees to keep them from exercising their rights under the Act."  

18. *Id.* at 161, 478 N.E.2d at 1041-42.
19. *Id.* at 162, 478 N.E.2d at 1042. *Cf.* Colley v. Swift & Co., 129 Ill. App. 3d 812, 473 N.E.2d 364 (2d Dist. 1984) (plaintiff, covered by a collective bargaining agreement stated a cause of action for retaliatory discharge when he was terminated during the pendency of a workers' compensation claim and before a decision was issued by the Illinois Industrial Commission). *But see* Burgess v. Chicago Sun-Times, 132 Ill. App. 3d 181, 476 N.E.2d 1284 (1st Dist. 1985) (a clearly mandated public policy is not involved where there is no allegation that defendant was informed, or in any way found out, that plaintiff was pursuing any remedy under the Act and that defendant discharged him because of it); Pientka v. Bd. of Fire Commissioners of The North Main Fire Protection Dist., 125 Ill. App. 3d 124, 465 N.E.2d 677 (1st Dist. 1984) (record showed plaintiff was terminated for falsely claiming injury while on duty; he was not discharged for exercising his right to file Workers' Compensation claim). It should be noted, as well, that an Illinois court has recently held that an action by a discharged employee for retaliatory discharge, seeking compensatory and punitive damages,
Similarly, in Beauvoir v. Rush-Presbyterian-St. Luke's Medical Center, the appellate court adopted a broad view with respect to the chronology of filings of workers' compensation claims. In Beauvoir, plaintiff appealed the trial court's dismissal of his complaint and its refusal to allow him leave to amend the retaliatory discharge count of his third amended complaint, contending that the trial court had abused its discretion. The trial court had refused the post-judgment motion on the grounds that an amendment could not bring the claim within the parameters of Kelsay. In his proposed amendment, plaintiff alleged that while he was an at-will employee of the hospital he filed workers' compensation claims and an alleged agent of the hospital warned him that if he continued to file such claims, he would be fired.

Considering the proposed amendment and the settlement agreement subsequently entered into between Beauvoir and the hospital, the appellate court found that plaintiff began filing worker's compensation claims in 1979 or 1980; subsequently the agent told him not to file more claims while employed by the hospital; he was fired on July 16, 1981; and on September 1, 1981, he entered into the settlement agreement. The appellate court concluded that the proposed amendment stated a cause of action for retaliatory discharge under Kelsay in that plaintiff stated facts from which a court could conclude that he was fired because he filed workers' compensation claims.

B. Private Health Insurance Claims

Such broad protections afforded those who are fired allegedly in retaliation for filing workers' compensation claims or to deter the filing of claims does not, however, extend to claims filed with private insurers. In Price v. Carmack Datsun, Inc., the Illinois Supreme Court held that the discharge of an employee for filing a claim under defendant's group health insurance plan does not violate a clearly mandated public policy. In Price, plaintiff argued that employers commonly provide group health insurance for employees and thus a great many Illinois workers have this coverage. To show that his discharge violated clearly mandated public policy, Price cited sections of the Illinois Insurance Code regulating health insurance. The Illinois Supreme Court squarely rejected this argument predicated upon filing a workers' compensation claim, survives the death of the discharged employee. Raisl v. Elwood Industries, Inc., 134 Ill. App. 3d 170, 479 N.E.2d 1106 (1st Dist. 1985).

20. 137 Ill. 3d 294, 484 N.E.2d 841 (1st Dist. 1985).
21. Id. at 303, 484 N.E.2d at 846.
23. Id. at 67, 485 N.E.2d at 360 (citing ILL. REV. STAT. ch. 73, § 613 et. seq. (1981)).
argument. It noted that the Code was designed to govern operations of insurance companies, not insureds, and that the filing of a claim under an insurance policy pursuant to an individual contract between the insurer and the insured is a private, individual matter, "rather than one affecting our society." The court concluded that "discharge of an employee for filing a claim under a policy in which he is a beneficiary does not violate a clearly mandated public policy." 24

Justice Simon dissented. 25 He noted that public policy is implicated as employers are encouraged to provide health insurance plans for their employees so that in case of illness or injury those employees would not become destitute or public charges. In fact, federal tax law provides employers with deductions as incentive if their group health policies coordinate with federal medical assistance, 26 as does the State of Illinois under identical circumstances. 27 Justice Simon also found that Illinois public policy assures that insureds receive, without delay or harassment, contracted for and relied upon benefits. 28 Contrary to the majority, Justice Simon concluded, therefore, that "[t]he court should recognize plaintiff’s complaint, not to expand the exception to the employment-at-will doctrine, but as a cause of action based on an unconscionable abuse of economic power in derogation of public policy . . . the real essence and basis of the tort of retaliatory discharge." 29

The holding of the Price majority is significant. It suggests that, despite the Illinois Supreme Court’s apparent willingness to focus on "the protection of the lives and property of citizens," in connection with the possible hazards of radioactive waste, 30 the court will also reject an attempt to rely on a statute, not directly affecting the issue in the case, as a "public policy" umbrella.

C. Other Matters of "Public Policy"

Despite the majority’s somewhat narrow definition of public policy in Price, in a case decided the same day the Illinois Supreme Court showed some willingness to extend the public policy concept.

24. Id. at 69, 485 N.E.2d at 361.
25. Id. (Simon, J. dissenting).
27. Id. at 70, 485 N.E.2d at 362 (citing ILL. REV. STAT. ch. 120, § 2-203(c)(1)(1981)).
28. Id. (citing ILL. REV. STAT. ch. 73, § 767 (1983)) (recovery of legal fees and specified punitive damages where an insurer delays payment through "vexatious and unreasonable" means).
29. Id. at 71-72, 485 N.E.2d at 362.
In *Wheeler v. Caterpillar Tractor Co.*, the court considered whether the tort of retaliatory discharge was available to plaintiff under the following facts. Wheeler had been employed by Caterpillar since 1955. As of August, 1979, he was employed in the X-ray department as a radiographer. Some months earlier, he was told by his supervisors that Caterpillar was installing a unit, which Wheeler was expected to operate, that utilized live radioactive cobalt. Wheeler repeatedly requested a transfer out of the X-ray department, allegedly because the unit was not properly operated, could cause serious and permanent injury, and a Nuclear Regulatory Commission ("NRC") investigation disclosed a number of inadequacies and violations of published regulations. Caterpillar allegedly refused Wheeler's transfer request and, in retaliation for his refusal to work with the unit, discharged him. He claimed that the discharge contravened Illinois public policy and resulted from Caterpillar's violation of federally-mandated safety codes.

In reviewing the trial court's dismissal of the complaint, the Fourth District appellate court, after a careful and thorough review of the record, concluded that there was no indication that any NRC investigation was contemplated nor pending on the date of Wheeler's discharge, nor were any inadequacies of the unit of a life-threatening nature. Thus, on the date of plaintiff's discharge, "there was no hard evidence of unsafe conditions, but rather only plaintiff's unilateral and subjective decision that such conditions did exist." The appellate court concluded, therefore, that the "public policy" implicated in *Palmateer*, and later reconsidered by the First District appellate court in *Petrik v. Monarch Printing Corp.*, was not to be found in this case.

The Illinois Supreme Court, either misreading or misconstruing the record evidence, reversed. Considering *sua sponte* the issue of preemption of the cause of action by section 210 of the Energy Reorganization Act, and finding none, the court rejected the chronological analysis of the facts articulated by the appellate court. Instead, the court found that "[t]he legislation and the regulations declared public policy, and the existence of that public policy did not depend upon whether plaintiff had

33. *Id.* at 544-45, 462 N.E.2d at 1267.
34. *Id.* at 545, 462 N.E.2d at 1267.
communicated a complaint to the Nuclear Regulatory Commission or whether its investigation preceded or followed that complaint." 38 The court reasoned that

'[t]here is no public policy more important or more fundamental than the one favoring the effective protection of the lives and property of citizens . . . . ' The protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence, and by the enactment of the legislation cited, Congress has effectively declared a clearly mandated public policy to that effect. We hold, therefore, that counts III and VI stated a cause of action for retaliatory discharge for refusing to work under conditions which contravened the clearly mandated public policy, and the circuit court erred in dismissing them. 39

Justice Moran, joined by Justice Ryan, dissented, disagreeing with the majority's conclusion that plaintiff's cause of action was not preempted by federal law and finding no justification for extending the tort of retaliatory discharge to cases where existing remedies adequately protect both the individual interest in employment and the public's interest in safety. 40 Justice Moran found persuasive the fact that section 210 of the Energy Reorganization Act provides extensive remedies, not shown to be inadequate, for employees who believe they have been discharged or discriminated against in violation of the Act. 41 Thus, even if the majority correctly found that plaintiff's action was not preempted by federal law, Justice Moran believed it inappropriate for the court to "intrude into an area already regulated by a comprehensive Federal statute." 42

A broad view of public policy similar to that taken by the majority in Wheeler can be found in Petrik v. Monarch Printing Corp. 43 Petrik was an appellate court decision which preceded Wheeler, and was the first post-Palmateer case to address squarely the "public policy" issue. In Petrik, the appellate court concluded that Palmateer was not limited to cases where criminal conduct was actually reported to outside law enforcement authorities. Rather, a cause of action for retaliatory discharge can be brought by an employee who has been discharged for complaining internally of wrongs and possibly criminal conduct which are not viola-

38. Id. at 510, 485 N.E.2d at 376.
39. Id. at 511, 485 N.E.2d at 377 (citation omitted) (quoting Palmateer, 85 Ill. 2d 124, 132, 421 N.E.2d 876, 879).
40. Id. at 512, 485 N.E.2d at 377 (Moran, Ryan, J.J., dissenting).
41. Id. at 512-14, 485 N.E.2d at 377-78 (citing 42 U.S.C. §§ 5851(a), 5851(b)(1), 5851(b)(2)(B) (1982)).
42. Id. at 518, 485 N.E.2d at 380.
tions of the criminal law, but which are nonetheless violations of public policy.

In Petrik, plaintiff alleged that he had been discharged from his position as vice president in retaliation for his reporting suspicions of embezzlement to Monarch's president and to its chief operating officer and that Monarch officers and/or employees "might be involved in violation of the criminal laws of Illinois." The trial court granted Monarch's motion to dismiss the complaint with leave to amend, ruling that since Petrik did not allege that he had disclosed his suspicions of wrong-doing to the public authorities, his complaint merely alleged an internal corporation dispute which did not involve violations of public policy. This view was squarely rejected by the appellate court.

Subsequent to the dismissal, the parties stipulated that Petrik did not report his discovery of alleged wrongdoing to the police or to any other law enforcement officials; that no criminal or quasi-criminal investigation was ever conducted as a result of any of the alleged wrongdoings; and that, to the best of his knowledge; Petrik was never a party to a criminal or quasi-criminal investigation of the matters alleged. Based on this stipulation, the trial court dismissed with prejudice Petrik's complaint.

On appeal, the First District found incorrect Monarch's characterization of the facts as involving a mere internal dispute. Although recognizing that "there is no precise line of demarcation dividing matters that are the subject of public policies from matters purely personal," the court found persuasive, and consistent with the national trend, a Connecticut Supreme Court decision holding that a cause of action for retaliatory discharge had been stated where plaintiff, the quality control director of defendant corporation, alleged that he had been discharged for calling to his employer's attention repeated violations of the Connecticut Uniform Food, Drug and Cosmetic Act.

Wheeler and Petrik, taken together, portend failure of possible motions to dismiss retaliatory discharge complaints which are based on internal criticism or information allegedly given to appropriate authorities. Given the broad view of these cases toward public policy, it would be easy for plaintiffs to argue successfully that a refusal to falsify reports directly affects the safety and well-being (Wheeler) of Illinois citizens and

44. 111 Ill. App. 3d at 504, 444 N.E.2d at 590.
45. Id. at 507, 444 N.E.2d at 592 (quoting Palmateer, 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981)).
46. Id. at 508-09, 444 N.E.2d at 592-93 (citing Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 427 A.2d 385 (1980)).
that a failure to report the alleged misconduct to public law enforcement officials \textit{(Petrik)} does not necessarily affect the sufficiency of a complaint.

This is not to suggest, however, that the mere use of the "magic word"—"public policy"—is sufficient to state a cause of action, as the \textit{Price} case indicates.\textsuperscript{47} For example, in May of this year, the Illinois Supreme Court again enunciated the limits of the tort of retaliatory discharge. In \textit{Barr v. Kelso-Burnette Co.},\textsuperscript{48} the court declined to extend the clear mandate of public policy to allegations that defendant discharged plaintiffs in retaliation for exercise of their rights of free speech, due process, equal protection, and privacy, among others.

The \textit{Barr} plaintiffs were employed by defendants as foremen at the construction of the Clinton nuclear power plant. They alleged that they were discharged in violation of constitutional and statutory rights. The trial court denied defendants' motion to dismiss for failure to state a cause of action, but certified the questions for interlocutory appeal. The appellate court denied the petition for interlocutory appeal,\textsuperscript{49} and the Illinois Supreme Court granted leave to appeal.\textsuperscript{50}

The court held that plaintiffs failed to state a valid retaliatory discharge cause of action. Reasoning that the constitutional and statutory provisions upon which plaintiffs relied were limitations only on the power of government, not private employers, a point which plaintiffs conceded, the court concluded that "[t]here is nothing in either the Illinois Constitution or the Illinois Human Rights Act to mandate the inclusion of the right of free speech [speaking out against layoff procedures] into those rights which are applicable to the employer-employee relationship."\textsuperscript{51} Although plaintiffs contended that the relevant constitutional and statutory provisions were "indicators of public policy" and a violation of them by anyone is a violation of public policy, the court disagreed.\textsuperscript{52}

In reaching its conclusion, the court cautioned against too broad a reading of the tort of retaliatory discharge, Justice Ryan stated:

Contrary to plaintiffs' assertion, however, this court has not, by its \textit{Palmateer} and \textit{Kelsay} decisions, "rejected a narrow interpretation of the retaliatory discharge tort" and does not "strongly support" the expansion of the tort. The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still

\textsuperscript{47} For a discussion of the \textit{Price} decision, see \textit{supra} notes 22-29 and accompanying text.
\textsuperscript{48} 106 Ill. 2d 520, 478 N.E.2d 1354 (1985).
\textsuperscript{49} \textit{Id.} at 524, 478 N.E.2d at 1355.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at 528, 478 N.E.2d at 1357.
\textsuperscript{52} \textit{Id.}
the law in Illinois, except for when the discharge violated a clearly mandated public policy.\textsuperscript{53}

The Illinois Supreme Court again declined to expand the notion of "public policy" to all situations where a plaintiff can allege that a statute supports his cause of action for retaliatory discharge.\textsuperscript{54} In \textit{Mein v. Masonite Corp.}, plaintiff claimed that he was wrongfully discharged in violation of Illinois public policy prohibiting age discrimination in the workplace.\textsuperscript{55} The court held that the complaint did not state a cause of action for wrongful discharge as the legislature intended the Illinois Human Rights Act to be the exclusive source for redress of alleged violations.\textsuperscript{56}

In many respects, it is difficult to reconcile the rationale of \textit{Mein} with the more expansive holding in \textit{Wheeler},\textsuperscript{57} decided merely one month later. In fact, although \textit{Mein} is cited neither by the majority nor dissent in \textit{Wheeler}, its reasoning could have easily worked into Justice Moran's dissent which stresses not only the preemption of a federal statute, but also the adequacies of its remedy.\textsuperscript{58}

Appellate courts evidence similar reluctance to extend the tort far beyond the \textit{Kelsay/Palmateer} parameters. For instance, a complaint alleging that an at-will employee was terminated for failure to take a polygraph examination during the course of his at-will employment does not state a cause of action for retaliatory discharge.\textsuperscript{59} The court rejected plaintiff's assertion that polygraph examinations are inherently unreliable and that there is a clearly mandated public policy against their use in the employment setting.\textsuperscript{60} Similarly, discharge of an at-will employee for

\textsuperscript{53} \textit{Id.} at 525, 478 N.E.2d at 1356 (citing Palmateer v. International Harvester Co., 85 Ill. 2d 124, 421 N.E.2d 875 (1981)).

\textsuperscript{54} Mein v. Masonite Corp., 109 Ill. 2d 1, 485 N.E.2d 312 (1985).


\textsuperscript{56} Mein, 109 Ill. 2d at 7, 485 N.E.2d at 315 (citing ILL. REV. STAT. ch. 68, § 8-111 (D) (1983) (Illinois Human Rights Act)). It should be noted, additionally, that plaintiff's complaint was pending before the Human Rights Commission at the time of oral argument before the court. The Illinois Human Rights Act provides in relevant part: "(D) Limitation. Except as otherwise provided by law, no court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act." See also Teale v. Sears, Roebuck & Co., 66 Ill.2d 1, 359 N.E.2d 473 (1976) (an employee cannot maintain an action for retaliatory discharge for termination in violation of the public policy set forth in the Age Discrimination Act). \textit{Teal} held that the Act did not authorize a civil action for damages.

\textsuperscript{57} For a discussion of the \textit{Wheeler} decision, see supra notes 31-42 and accompanying text.


\textsuperscript{60} Id. at 524-25, 481 N.E.2d at 23-24. Plaintiff relied, unsuccessfully, on Kaske v. City of Rockford, 96 Ill. 2d 298, 450 N.E.2d 314, cert. denied \textit{sum nom} City of Rockford v. Kaske, 464 U.S. 960 (1983). Kaske involved a public employee's (police officer) refusal to take a polygraph exam. The Illinois Supreme Court held that because polygraph examinations are too unreliable to be used as substantive evidence, the refusal to submit to one cannot serve as a basis of a finding of legitimate
failure to report to work or for seeking and receiving medical treatment necessitating absence from work does not support an action for retaliatory discharge. Stressing that an action for retaliatory discharge is not allowed where it is clear that only private interests are at stake, the court found illustrative Palmateer's discussion of cases in other jurisdictions:

The action has not been allowed where the worker was discharged in a dispute over a company's internal management system, where the worker took too much sick leave, where the worker tried to examine the company's books in his capacity as a shareholder, where the worker impugned the company's integrity, where the worker refused to be examined by a psychological-stress evaluator, where the worker was attending night school, or where the worker improperly used the employer's Christmas fund.

Private, not public, interests are similarly implicated where a newspaper delivery driver, covered by a collective bargaining agreement, requests reassignment to an allegedly less "dangerous" route and is denied. The record there revealed that plaintiff chose not to return to work on the same route, claiming he suffered from stress and anxiety. When he refused to return to the assigned route, he was discharged. The court found that such a discharge does not ground the tort of retaliatory discharge, as "plaintiff was not asked to do anything illegal or improper" or "asked to engage in any activities that were in contravention of a clearly mandated public policy."

Similarly, where defendant contests plaintiff's interpretation of a collective bargaining agreement and thereafter discharges plaintiff over the disputed contractual claim, the underlying controversy is a private contractual dispute; plaintiff's discharge is not in contravention of a clearly mandated public policy. Where plaintiff sought to have liability imposed because defendant lied about the reason for her termination, the court held that an employer's lying to an employee, both personally and through its internal records, is not against cause as a basis for properly discharging a public employee. The Cipov court stressed the private/public distinction and refused to extend Kaske to private employees.

62. Id. at 391, 480 N.E.2d at 872.
64. For a discussion of the employment status of plaintiff as triggering the protections of the tort, see infra notes 70-87 and accompanying text.
66. Id. at 185, 476 N.E.2d at 1288. Cf. Scheller v. Health Care Service Corp., 138 Ill. App. 3d 219, 485 N.E.2d 26 (4th Dist. 1985) (despite defendant's alleged instructions to plaintiff not to respond to direct inquiries from Illinois officials concerning defendant, plaintiff failed to state a claim for retaliatory discharge; she did not allege "discharge," but "was forced to resign from her job," nor did she allege any retaliatory conduct on defendant's part).
any clearly mandated public policy, but constitutes purely personal matters. In addition, appellate courts have declined to find clearly mandated public policy in actions for retaliatory discharge based on statutes which were repealed.

D. Who is Protected by the Tort?

Until the 1984 Illinois Supreme Court decision in Midgett v. Sackett-Chicago, Inc., the remedies afforded by the tort of retaliatory discharge were available only to at-will employees who were not covered by a collective bargaining agreement. In Midgett, however, the court found that if there is no possibility that an employer is potentially liable for punitive damages, a union employee has been given an incomplete remedy and there is "no available sanction against a violator of an important policy of this State." Further, the court reasoned that it would be unfair to immunize from punitive damages an employer who unjustly discharges a union employee, while providing the remedy of punitive damages to a wrongfully terminated nonunion employee.

69. See, e.g., Dykstra v. Crestwood Bank, 117 Ill. App. 3d 821, 454 N.E.2d 51 (1st Dist. 1983) (to the extent the complaint relies upon public policy stated in the repealed Age Discrimination Act in attempting to state a cause of action, it fails to allege a clear public policy). See also Cuerton v. Abbott Laboratories, Inc., 111 Ill. App. 3d 261, 443 N.E.2d 1069 (2d Dist. 1982) (public policy is not implicated in a retaliatory discharge action based on the Equal Opportunities for the Handicapped Act which was repealed and replaced by the Illinois Human Rights Act which became effective over a year before the complaint was filed; neither party argued whether the complaint stated a cause of action under the latter Act, nor did the court so consider).
Justice Moran, dissenting, argued that an employee covered by a collective bargaining agreement, that requires just cause to be shown in order to discharge a covered employee, is simply not faced with the same dilemma as an at-will employee; for example, an employee's impermissible choice between seeking compensation under a Worker's Compensation Act or, in effect, sacrificing his or her job. Given the plethora of remedies and agencies available to union employees, such as collective bargaining agreements, arbitration rulings, and decisions of the National Labor Relations Board, Justice Moran's position is somewhat persuasive. Nevertheless, in Illinois, union employees, as well as at-will employees, can now rely on the tort of retaliatory discharge, in addition to whatever remedies are available under applicable collective bargaining agreements.

Yet in spite of the broad holding in Midgett, at least one appellate court has carved a niche whereby an employee covered by a collective bargaining agreement cannot be easily assured of being able to state a claim for retaliatory discharge. In Cosentino v. Price, plaintiff alleged that he had made certain claims pursuant to a collective bargaining agreement and that defendant threatened to discharge him and did thereafter discharge him. Noting that Illinois law recognizes a cause of action for retaliatory discharge independent of any remedy the employee may have based on a collective bargaining agreement, the court nevertheless held that the retaliatory discharge tort claimed by the plaintiff was based upon rights pursuant to a collective bargaining agreement; defendant contested plaintiff's interpretation of the contract and thereafter plaintiff was discharged over the "disputed contractual claim." As such, the "underlying controversy is a private contractual dispute" and plaintiff failed to show that his discharge was in contravention of a clearly man-

74. Midgett, 105 Ill. 2d at 155, 473 N.E.2d at 1285-86 (Moran, J., dissenting).
77. Id. at 494, 483 N.E.2d at 299 (citing Midgett, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984)).
dated public policy. Cosentino threads the Midgett needle very carefully.

An additional issue which may be presented, but which so far has not been considered by Illinois courts, is the applicability of the tort of retaliatory discharge to "employment" relationships other than individual at-will or union employees. For instance, can an independent contractor, manufacturers' sales representative, or franchisee avail itself of the tort's remedies? It should be remembered that plaintiffs in both Kelsay and Palmateer were at-will employees who merited the remedies afforded by the judicially fashioned tort of retaliatory discharge due to their unique relationship with their employers in the context of contemporary industry. As Justice Simon noted: "With the rise of large corporations conducting specialized operations and employing relatively immobile workers who often have no other place to market their skills, recognition that the employer and employee do not stand on equal footing is realistic." That the Illinois Supreme Court has, over the strong dissent of Justice Moran, recently extended coverage of the tort to union employees who had not pursued contractual remedies under a collective bargaining agreement, does not change the basic rationale noted in Palmateer. In Midgett, the Court focused on the unfairness and unreasonableness of "immuniz[ing] from punitive damages an employer who unjustly discharges an employee, while allowing the imposition of punitive damages against an employer who unfairly terminates a nonunion employee." It is self-evident that most, indeed if not all, of the Illinois cases concerning retaliatory discharge deal with plaintiffs who are employees. However, a court in another jurisdiction may furnish some guidance as to the likely path Illinois courts will follow in dealing with, for example, an independent contractor who alleges retaliatory discharge. A recent discussion by an Indiana Court of Appeals, in Morgan Drive Away, Inc. v. Brant, directly addresses the issue of the availability to an independent contractor of the cause of action for retaliatory discharge. Morgan held that plaintiff's "recovery for wrongful retaliatory discharge is contingent upon a finding that he was an employee. . . ."

In Morgan, the purported employee claimed that he was wrongfully

79. Id. On appeal plaintiff attempted to rely on certain provisions of the Illinois Wage Payment and Collection Act, Ill. Rev. Stat. ch. 48, § 39m-14 (1983), to support his "policy" theory. The court refused to consider the argument as it was raised for the first time on appeal.
82. For a list of Illinois retaliatory discharge cases in which an employee is the plaintiff, see Palmateer, 85 Ill. 2d 124, 130-32, 421 N.E.2d 876, 879 (1984).
discharged in retaliation for filing a lawsuit against defendant wherein he sought payment for services performed. At trial, the court had instructed the jury, erroneously, that, "under Indiana law it is a violation of the State's public policy to discharge an employee or terminate an independent contractor relationship in retaliation for the filing of a lawsuit by the employee or independent contractor over a wage or payment dispute."  

The Court of Appeals reversed and remanded, noting that

If [plaintiff] was an independent contractor, his relationship with [defendant] was entirely governed by the contracts which allowed termination by either party after ten days notice without cause or immediately with cause. Only if [plaintiff] was an employee would the employment at will doctrine and its exception for the exercise of statutory rights protect him from discharge for filing the lawsuit.

It should be noted that the Morgan court applied the rule announced by the Indiana Supreme Court in Frampton v. Central Indiana Gas Co. (an employee at-will may not be discharged solely for exercising a right granted by statute). It was the reasoning in Frampton that the Illinois Supreme Court found persuasive in crafting the tort of retaliatory discharge.

E. Retaliatory Discharge and the Implied Duty of Good Faith and Fair Dealing

In seeking remedies for an allegedly wrongful discharge, plaintiffs have often attempted to mix the tort of retaliatory discharge with the implied covenant of good faith and fair dealing, sometimes in the same count. Reliance on these alternative doctrines has not always proved to be successful.

In Gordon v. Matthew Bender & Co., apparently the leading case holding that in the context of an employment-at-will, the implied obligation to deal in good faith is not an independent basis for an action, a federal district court noted that despite Kelsay and Palmateer, "Illinois courts have shown no disposition to abandon the at will doctrine except

84. Id. at 1337 (quoting trial court's instructions).
85. Id. at 1338 (footnote omitted). Cf. Dixon v. Burman, 593 F. Supp. 6, 11, 12 (N.D. Ind. 1983) (former insurance agent was an independent contractor not an employee, and thus his action against insurance company for wrongful discharge was not within purview of Title VII), aff'd mem., 742 F.2d (7th Cir. 1984).
89. See, e.g., Criscione v. Sears Roebuck & Co., 66 Ill. App. 3d 664, 384 N.E.2d 91 (1st Dist. 1978). Note, however, that Criscione pre-dated Kelsay's enunciation of the tort of retaliatory discharge.
in carefully defined areas." 90 In Gordon, plaintiff, who worked as a law book sales representative for defendant, was told that upon reduction of his territory he would be terminated if he failed to achieve the same sales goals set for his previous, larger territory. He did not meet the goals and was subsequently fired.

Plaintiff claimed that defendant "maliciously manipulated circumstances to make [his] job impossible [and that t]his bad faith conduct . . . is actionable." 91 In count I, plaintiff claimed to sue under both tort and contract theories for defendant's breach of its duty and covenant, implied in law, to deal with him in good faith. The court noted that the employment contract at issue was terminable at will by either party at any time. Rather than creating an independent cause of action, however, the principle of performance in good faith only defines and modifies duties which grow out of specific contract terms and obligations—it is a derivative principle. 92 In this regard, the court found persuasive language in a New York decision. While holding that New York law recognizes that an obligation of good faith and fair dealing may be implied in a contract, the New York court stated:

In such instances the implied obligation is in aid and furtherance of other terms of the agreement of the parties. No obligation can be implied, however, which would be inconsistent with other terms of the contractual relationship. Thus, in the case now before us, plaintiff's employment was at will, a relationship in which the law accords the employer an unfettered right to terminate the employment at any time. In the context of such an employment it would be incongruous to say that an inference may be drawn that the employer impliedly agreed to a provision which would be destructive of his right of termination. The parties may by express agreement limit or restrict the employer's right of discharge, but to imply such a limitation from the existence of an unrestricted right would be internally inconsistent. 93

The court also found support for its conclusion, that in at-will employment situations the duty to deal in good faith is appended to nothing which has independent life, in Martin v. Federal Life Insurance Co. 94 Martin held that the principle of good faith and fair dealing is essentially used as a construction aid in determining the parties intent. In Martin, the court dismissed a tort action based on an alleged termination of an employment at will. The court stated that it did "not believe Illinois law recognized a tort remedy based on an employer's 'bad faith' breach of an

91. Id. at 1288.
92. Id. at 1289.
93. Id. at 1289-90 (quoting Murphy v. American Home Products Corp., 58 N.Y.2d 293, 461 N.Y.S.2d 232, 448 N.E.2d 86 (1983)).
94. 109 Ill. App. 3d 596, 440 N.E.2d 998 (1st Dist. 1982).
implied contract of fair dealing,” absent circumstances triggering a Kel-
say/Palmateer exception.95 Further, the court cautioned against judicial
approval of plaintiff’s argument:

Care must be taken to prevent the transmutation of every breach of
contract into an independent tort action through the bootstrapping of
the general contract principle of good faith and fair dealing. We con-
clude that existing principles of tort law are adequate without our cre-
ating a new action based on a vague notion of fair dealing. A general
‘bad faith’ tort based on breach of contract would undoubtedly be diffi-
cult to apply in most cases and superfluous in cases such as the present
one, which primarily sounds in contract.96

There appears to be no backtracking from the clear position es-
poused by Gordon and Martin. For instance, in Powers v. Delnor Hospi-
tal97 the court, citing Gordon approvingly, noted that the duty of good
faith and fair dealing which the law implies in every contract98 does not
create an independent cause of action. And in Zewde v. Elgin Commu-
nity College, the court observed that “Illinois courts have consistently
ruled that the parties to an employment at-will contract may terminate it
for a good reason, a bad reason or no reason at all.”99 Finally, in Scott v.
Sears Roebuck and Co., the court rejected a terminated plaintiff’s claim
that Illinois law implies a covenant of good faith and fair dealing that
limits the circumstances under which defendants can fire employees:
“That is not the law in Illinois.”100 Thus, to the extent that plaintiffs
have tried to expand the tort of retaliatory discharge to encompass an
additional duty of good faith and fair dealing or to create an additional
remedy, those efforts have not been successful.

95. Id. at 606, 440 N.E.2d at 1006.
96. Id.
(2d Dist. 1982).
N.E.2d 1069, 1073 (2d Dist. 1982); Criscione, 66 Ill. App. 3d 664, 669-70, 384 N.E.2d 91, 95 (1st
100. 605 F. Supp. 1047, 1052 (N.D. Ill. 1985). See also Dykstra v. Crestwood Bank, 117 Ill.
App. 3d 821, 826, 454 N.E.2d 51, 55 (1st Dist. 1983); Cuerton, 111 Ill. App. 3d at 263, 443 N.E.2d at
1073; Criscione, 66 Ill. App. 3d at 669-70, 384 N.E.2d at 95. Cf. Payne v. AHFI/Netherlands, B.V.,
522 F. Supp. 18, 23 (N.D. Ill. 1980) (quoting Criscione, supra, in which the court stated:
[RE]quiring an employer in an at will relationship to terminate an employee only for a
legitimate business reason absent any other restrictions by contract or statute would place
the courts in the untenable position of having to assess an employer’s business judgment.
There has been no attempt by the legislature to so alter the State’s employment policy and
such a step is not one for the courts to make. The rule in this state is that an employment
at will relationship can be terminated for “a good reason, a bad reason, or no reason at all.”
CONCLUSION

In the seven years since Kelsay’s enunciation of the tort of retaliatory discharge, Illinois courts have defined and redefined the tort’s parameters. Not unexpectedly, given the relative youth of the remedy in Illinois, the decisions often seem to lack consistency. What is clear, however, is that the tort of retaliatory discharge is now firmly ensconced in Illinois. It is available to both at-will employees and those covered by collective bargaining agreements who have been discharged for certain activities in such a manner so as to contravene public policy. It is the discovery vel non of “public policy” which remains the fulcrum of many recent decisions. This article has reviewed these recent Illinois decisions in an attempt to find a common ground. Although the commonality is questionable, it is hoped that by outlining the boundaries of the various decisions, this article has served to color in the map which represents current views of the tort. As recent decisions make clear, the tort is neither as “amorphous” as one commentator has suggested,101 nor as susceptible of such varied interpretations as Hamlet’s cloud:

Hamlet:  Do you see yonder cloud that’s almost in the shape of a camel?
Polonius:  By the mass and ‘tis like a camel indeed.
Hamlet:  Me thinks ‘tis like a weasel.
Polonius:  It is backed like a weasel.
Hamlet:  Or like a whale?
Polonius:  Very like a whale.102*


* While this article was in the process of being printed, the Illinois Supreme Court issued a significant decision with respect to federal preemption of retaliatory discharge claims. In Koehler v. Illinois Central Gulf Railroad Co., No. 60233 (Ill. Dec. 20, 1985), the court held that the Railway Labor Act, 42 U.S.C. §§ 151-163 (1982) preempts an action for retaliatory discharge brought by an employee covered by the Act. The effect of this holding on post-Midgett decisions should be interesting as Midgett expressly did not consider the issue of federal preemption and, indeed, granted plaintiff’s motion to strike certain portions of the brief raising issues of federal preemption as they were not earlier raised and therefore waived. Note also that the Seventh Circuit recently held that while dispute resolution procedures differ somewhat from those under the National Labor Relations Act (“NLRA”), the Railway Labor Act has no more preemptive effect than the NLRA. Lancaster v. Norfolk and Western Railroad Co., 773 F.2d 807, 816-17 (7th Cir. 1985). Similarly, courts have held that Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, preempt certain state law claims. See, e.g., Allis-Chalmers v. Lueck, 105 S. Ct. 1904 (1985) (bad faith handling of an insurance claim); Gibson v. AT&T Technologies, Inc., No. 85-1815 (7th Cir. Jan. 27, 1986) (fraud); Mitchell v. Pepsi-Cola Bottlers, Inc., 772 F.2d 342 (7th Cir. 1985) (tortious termination of employment); Malone v. Kitchens of Sara Lee, 613 F. Supp. 1074 (N.D. Ill. 1985) (wrongful discharge); Lingle v. Norge Division of Magic Chef, Inc., 618 F. Supp. 1448 (N.D. Ill. 1985) (retaliatory discharge); Beaird v. Miller’s Mutual Insurance Ass’n of Illinois, 133 Ill. App.3d 670, 479 N.E.2d 374 (5th Dist. 1985) (retaliatory discharge).
NOTES
&
COMMENTS