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SURVEY OF ILLINOIS LAW: EMPLOYMENT LAW

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I. INTRODUCTION

This survey covers decisions from November 2004 through November 2005. In Section II, the Illinois Supreme Court examined four cases of importance concerning vacation and severance pay, unemployment compensation benefits, pension benefits, and union representation.

Section III of this article covers appellate decisions in employment and labor law in both public and private sectors related to non-compete agreements, wages, pensions, administrative agency filings, retaliatory discharges, majority interest petitions, statutory interest, tort immunity, and unpaid vacation. Some issues of first impression were decided as well.

II. ILLINOIS SUPREME COURT DECISIONS

A. Vacation and Severance Pay

The Supreme Court affirmed the appellate court's decision in *Andrews v. Kowa Printing Corp.*[1] Thomas Kowa ("Kowa") owned all of Kowa Printing Corporation ("Kowa Printing") and 97% of Huston-Patterson Corporation ("Hutson-Patterson").[2] Kowa was also the sole officer and sole director of each legally separate entity.[3] Kowa Printing's accountant embezzled over $500,000 causing financial difficulties that resulted in Kowa Printing's default of its loans with BankIllinois.[4] Kowa entered into a forbearance agreement to allow him

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1. 217 Ill. 2d 101, 838 N.E.2d 894 (2005).
2. *Id.* at 103, 838 N.E.2d at 896.
3. *Id.*
4. *Id.* at 104, 838 N.E.2d at 897.

time to sell the company and save jobs.[5] Kowa found a buyer who presented at least two proposals rejected by the union.[6] The buyer's final offer included honoring all of Kowa Printing's existing obligations, except it would only pay two-thirds of the plaintiffs' accrued vacation with the last third being contingent upon making a pretax profit in its first year.[7] The union again rejected the proposal. BankIllinois foreclosed, seized the assets, and sent the employees home.[8] There is no dispute that Kowa Printing owed vacation and severance pay.[9] However, on appeal, the supreme court decided whether Kowa or Huston-Patterson Corporation are employers under the Wage Payment and Collection Act ("Act").[10] The supreme court analyzed sections 2 and 13 of the Act. Section 2 of the Act provides that "any person . . . acting directly or indirectly in the interest of an employer in relation to an employee" is an employer.[11] The court refused to read this literally because it would result in every supervisory employee being strictly and personally liable for a subordinate wages.[12] The supreme court's position was that section 2 confirmed the employer and its agents are liable for any violations of the Act.[13] The court relies on section 13 as defining who will be employers.[14] Section 13 provides that any officers or agents who knowingly permit the employer to violate the Act shall be deemed employers and impose personal liability.[15] The court expressly rejected the economic realities test of the Fair Labor Standards Act ("FLSA")[16] as not being necessary under the Act, because the Act includes provisions for personal liability and the FLSA does not.[17]

There was no evidence that Kowa violated section 13 by knowingly permitting Kowa Printing to avoid paying the vacation or severance pay due the employees.[18] The failure to pay final

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5. *Id.*
6. *Id.* at 104–05, 838 N.E.2d at 897.
7. *Id.*
8. *Id.*
9. *Id.* at 106, 838 N.E.2d at 898.
10. 820 ILL. COMP. STAT. ANN. 115/1–115/16 (West 2002).
11. *Andrews*, 217 Ill. 2d at 107, 838 N.E.2d at 898, 820 ILL. COMP. STAT. ANN. 115/2 (West 2002).
12. *Andrews*, 217 Ill. 2d at 107–08, 838 N.E.2d at 898–99.
13. *Id.* at 108–09, 838 N.E.2d at 899.
14. *Id.* at 109, 838 N.E.2d at 899.
15. *Id.*, 820 ILL. COMP. STAT. ANN. 115/13 (West 2002).
16. 29 U.S.C. §§ 201–19 (1998).
17. *Andrews*, 217 Ill. 2d at 110–11, 838 N.E.2d at 900–01.
18. *Id.* at 112, 838 N.E.2d at 901.

compensation pursuant to section 5 of the Act, as claimed by the plaintiffs, did not occur until after BankIllinois seized the assets of Kowa Printing.[19] Kowa did not have the control necessary to violate section 5 of the Act.[20] In fact, the evidence showed Kowa tried to ensure continued employment by working with BankIllinois and to seek a willing buyer.[21]

The plaintiffs next argued that Hutson-Patterson was a joint employer under the U.S. Department of Labor regulations, specifically, 29 C.F.R. §791.2(b)(2), (3).[22] These regulations were enacted for purposes of the federal FLSA not the Act.[23] The Illinois Department of Labor issued the regulations providing guidance to the Act and such regulations do not provide for joint employer liability.[24] The supreme court concluded section 5 allows for joint employer liability, however, it followed the standard set forth in *Village of Winfield v. Illinois State Labor Relations Board*[25] to conclude that Hutson-Patterson was not a joint employer.[26]

Judge Kilbride agreed with the majority regarding Hutson-Patterson, but dissented as to Kowa. In his opinion, the court did not defer to the trial court's factual findings as to Kowa's liability which was contrary to the standard of review.[27]

B. Unemployment Compensation Benefits

Another case answering whether there should be an award of unemployment compensation benefits is *International Union of Operating Engineers v. Illinois Department of Employment Security*.[28] As background, two unions represented the employees of Central Public Service Company ("CIPS"), Local 148 ("Engineers' Union"), and Local 702; two separate collective bargaining agreements expired.[29] CIPS locked

19. *Id*. at 112–13, 838 N.E.2d at 901.
20. *Id.*
21. *Id.* at 113, 838 N.E.2d at 902.
22. *Id*. at 114–15, 838 N.E.2d at 902.
23. *Id*. at 115, 838 N.E.2d at 903.
24. *Id.*
25. Vill. of Winfield v. Ill. State Labor Relations Bd., 176 Ill. 2d 54, 678 N.E.2d 1041 (1997).
26. *Andrews*, 217 Ill. 2d at 117–18, 838 N.E.2d at 904–05.
27. *Id*. at 119–22, 838 N.E.2d at 905–07.
28. 215 Ill. 2d. 37, 828 N.E.2d 1104 (2005), *reh'g denied*, May 23, 2005.
29. *Id*. at 40, 828 N.E.2d at 1107.

out both unions during contract negotiations.[30] A contract was reached with the Engineers' Union, however, the members of the Engineers' Union did not cross the picket lines of Local 702 which continued for two months.[31] The Director of the Illinois Department of Employment Security ("IDES") determined the Engineers' Union members were not eligible for benefits because they were unemployed due to a work stoppage and had a direct interest in the dispute between Local 702 and CIPS.[32] The circuit court found the Engineers' Union members did not have an interest in the dispute and they were of the same grade or class of Local 702; the court concluded Engineers' Union members were eligible for benefits.[33]

Before addressing the merits of the case, the supreme court discusses at length whether the Engineers' Union lacked standing. Applying the three-part test used in *Hunt v. Washington State Apple Advertising Commission*,[34] the supreme court found the doctrine of associational standing firmly established in federal law and ruled it was desirable in this case.[35] The Engineers' Union members individually had standing to appeal the denial of their benefits; under the first prong of the *Hunt* test, the Engineers' Union had associational standing.[36] The Engineers' Union was the exclusive representative of the members and the individual participation by the members was not necessary. Therefore, consequently, the second and third prongs of the *Hunt* test were met.[37] Among other support for associational representation, the supreme court also discussed the specific expectation of representation by a union in section 806 of the Unemployment Compensation Act ("Act").[38] The court held the Engineers' Union had standing to represent its members in a proceeding to appeal the IDES's denial of unemployment compensation benefits.[39]

Moving to the merits of the case, the supreme court reviewed whether the Engineers' Union members were eligible for benefits using

30. *Id.* at 41, 828 N.E.2d at 1107.
31. *Id.*
32. *Id.* at 43, 828 N.E.2d at 1109.
33. *Id.* at 44, 828 N.E.2d at 1109.
34. 432 U.S. 333 (1977).
35. *International*, 215 Ill. 2d at 48–51, 828 N.E.2d at 1111–13.
36. *Id*. at 51, 828 N.E.2d at 1113.
37. *Id*. at 52, 828 N.E.2d at 1114.
38. 820 ILL. COMP. STAT. ANN. 405/806 (West 2002), 215 Ill. 2d at 57, 828 N.E.2d at 1117.
39. *International*, 215 Ill. 2d at 61, 828 N.E.2d at 1119.

the de novo standard.[40] Analyzing section 604 of the Act,[41] which provides an individual is ineligible for benefits due to a work stoppage, unless the individual is not financing, participating in, or directly interested in the labor dispute and does not belong to a grade or class of workers that are participating in the labor dispute,[42] the IDES found the Engineers' Union had a direct interest because of the link between the increased contributions that CIPS made toward the premiums as a result of the negotiations with Local 702.[43] The appellate court reversed the IDES's reasoning that Local 702's choice of leaving Salaried Plan B would be decided based on what was best for its members, not how it might benefit the membership of the Engineers' Union.[44] Therefore, there was no direct interest. The supreme court disagreed and ruled there was a direct interest in removing the members of the Engineers' Union from the relieving proviso of section 604.[45] The IDES's denial of unemployment compensation benefits was confirmed.[46]

C. Pension

In a case of first impression, *Taddeo v. Board of Trustees of the Illinois Municipal Retirement Fund*,[47] the supreme court ruled whether an individual, who holds concurrent positions with two different municipalities, both of which participate in the Illinois Municipal Retirement Fund ("IMRF"), loses pension benefits earned in both positions if he is convicted of a crime in connection with only one of the participating municipalities.[48] Taddeo was both the township supervisor for Proviso Township and the mayor of Melrose Park earning concurrent service credits.[49] In 1999, Taddeo pled guilty and was convicted of two felony offenses.[50] IMRF notified him that

40. *Id.* at 62, 828 N.E.2d at 1119.
41. 820 ILL. COMP. STAT. ANN. 405/604.
42. *International*, 215 Ill. 2d at 62–63, 828 N.E.2d at 1120.
43. *Id.* at 65, 828 N.E.2d at 1121.
44. *Id*. at 65–66, 828 N.E.2d at 1121–22.
45. *Id*. at 70, 828 N.E.2d at 1104.
46. *Id.*
47. 216 Ill. 2d 590, 837 N.E.2d 876 (2005).
48. *Id.* at 592, 837 N.E.2d at 877.
49. *Id.*
50. *Id.*, 837 N.E.2d at 878.

pursuant to section 7–219 of the Pension Code ("Code"),[51] his pension benefits were being terminated due to the felony convictions.[52] Taddeo admitted the felony convictions were related to his mayoral position with Melrose Park but contended he was still entitled to the pension benefits from the Proviso Township supervisor position.[53] The Pension Board ("Board") issued a decision that he was disqualified from all IMRF benefits, the circuit court set aside the Board's decision and reinstated his pension benefits for township supervisor position only, and the appellate court affirmed.[54] The Board appealed arguing the plain language of section 7–219[55] requires a broad interpretation to mean no benefits will be paid to Taddeo because he was convicted of a felony related to or arising out of or in connection with his service as an employee of any IMRF employer.[56] Following the reasoning in *Devoney v. Retirement Board of the Policemen's Annuity & Benefit Fund*,[57] the supreme court held Taddeo is entitled to his IMRF pension from his service as the township supervisor of Proviso.[58] Taddeo earned two completely separate pensions for the concurrent service credits.[59] Also, section 7–204 provides that each participating municipality shall be treated as an independent unit, so Proviso Township and Melrose Park are not the same employer for purposes of the IMRF.[60] The court also reasoned that the IMRF can pay Taddeo his pension he earned as the township supervisor without violating section 7–219. Further, the court reasoned Taddeo will suffer financial consequences by receiving a lower pension due to the forfeiture of benefits related to the mayoral position.[61]

D. Union Certification and Unfair Labor Practice

The American Federation of State, County and Municipality Employees, Council 31, ("AFSCME") represented employees of

51. 40 ILL. COMP. STAT. ANN. 5/7–219 (West 1998).
52. *Taddeo*, 216 Ill. 2d at 594, 837 N.E.2d at 878.
53. *Id.*, 837 N.E.2d at 878.
54. *Id.*
55. 40 ILL. COMP. STAT. ANN. 5/7–219 (West 1998).
56. *Taddeo*, 216 Ill. 2d at 596, 837 N.E.2d at 879.
57. 199 Ill. 2d 414, 769 N.E.2d 932 (2002).
58. *Taddeo*, 216 Ill. 2d at 597–98, 837 N.E.2d at 880.
59. *Id*. at 598, 837 N.E.2d at 880–81.
60. *Id*. at 598–99, 837 N.E.2d at 880–81.
61. *Id*. at 599–600, 837 N.E.2d at 881.

Wexford, a company providing health-care workers to many employers, including the Illinois Department of Corrections ("DOC").[62] AFSCME negotiated a contract with Wexford.[63] AFSCME also filed a representation/certification petition with the Illinois Labor Relations Board ("Board") seeking to represent the employees of Wexford and to negotiate with the DOC on their behalf.[64] In *American Federation of State, County & Municipal Employees Council 31 v. Illinois State Labor Relation Board*,[65] the court reviewed whether the DOC is a joint employer of the Wexford employees, and, therefore, would be subject to bargaining with AFSCME under both the National Labor Relation Act and the Illinois Public Labor Relations Act. Reviewing this question using the clearly erroneous standard, the supreme court confirmed the decision of the Board that the DOC was not a joint employer subject to bargaining over terms and conditions of employment with AFSCME for the contractual employees of Wexford.[66] The test for joint employer articulated in *Village of Winfield v. Illinois State Labor Relations Board*,[67] was whether "two or more employers exert significant control over the same employees . . . [and] co-determine matters governing essential terms and conditions of employment."[68] The supreme court determined the Board used the correct legal standard to reach the conclusion that DOC was not a joint employer.[69] Therefore, it only had to answer whether the Board's conclusion was clearly erroneous.[70] Reviewing the factors set forth in *Orenic v. Ill. State Labor Relations Bd.*,[71] the court found Wexford maintained control of recruitment, hiring, firing, payment of wages, paid time off, performance evaluations, and discipline which are all indicators of an employer's role.[72] The court also disagreed with AFSCME that the warden's authority to issue a stop-order to prevent a Wexford employee from entering the facility was the same as

62. Am. Fed'n of State, County & Mun. Employees v. Ill. Labor Relations Bd., 216 Ill. 2d 569, 571–72, 839 N.E.2d 479, 481–82 (2005).
63. *Id.* at 572, 839 N.E.2d at 482.
64. *Id.*
65. 216 Ill. 2d 569, 571–72, 839 N.E.2d 479, 481–82.
66. *Id.* at 578, 590, 839 N.E.2d at 485, 492.
67. 176 Ill. 2d 54, 678 N.E.2d 1041 (1997).
68. *American*, 216 Ill. 2d at 578–79, 839 N.E.2d at 486–87 (quoting Orenic v. Ill. State Labor Relations Bd., 127 Ill. 2d 453, 474, 537 N.E.2d 784, 794 (1989).
69. *Id.* at 581, 839 N.E.2d at 487.
70. *Id.*
71. 127 Ill. 2d 453, 537 N.E.2d 784 (1989).
72. *American*, 216 Ill. 2d at 582–84. 839 N.E.2d at 487–89.

terminating the employee, but rather was issued for safety reasons.[73] The supreme court reversed the appellate court and confirmed the Board's holding that the DOC was not a joint employer.[74]

III. ILLINOIS APPELLATE COURT DECISIONS

A. Compensation and Benefits

1. Unemployment

The question of whether individuals are independent contractors or employees is again addressed by the court in *Chicago Messenger Service v. Jordan*[75] with a focus on section 212(B) of the Unemployment Insurance Act (the "Act").[76] Chicago Messenger Service ("CMS") was a messenger delivery service company.[77] The couriers that delivered packages for CMS were determined to be employees by the Illinois Department of Employment Security in 1992.[78] After CMS filed a protest of the determination, a hearing was conducted which resulted in the Director adopting the earlier determination that the couriers were employees.[79] The Director followed the reasoning of the 1942 decision of *Rozran v. Durkin*.[80] CMS sought review by the circuit court of both the initial determination and a supplemental determination.[81] The court upheld the Director's supplemental determination that concluded CMS failed to prove the couriers were exempt as employees under sections 212(B) or 212(C).[82] Reviewing the determination under the clearly erroneous standard the court examined section 212(B) first. Section 212(B) has two factors which must be considered: (1) is such service "outside the usual course of business for which such service is

73. *Id*. at 585–88, 839 N.E.2d at 489–91.
74. *Id.* at 589–90, 839 N.E.2d at 491–92.
75. 356 Ill. App. 3d 101, 825 N.E.2d 315 (Ill. App. Ct. 2005), *appeal denied*, 215 Ill. 2d 594, 833 N.E.2d 1 (May 25, 2005).
76. 820 ILL. COMP. STAT. ANN. 405/212 (West 2002).
77. *Chicago*, 356 Ill. App. 3d at 103, 825 N.E.2d at 317.
78. *Id.*
79. *Id.* at 104, 825 N.E.2d at 318.
80. *Id*., Rozran v. Durkin, 381 Ill. 97, 45 N.E.2d 180 (1942).
81. *Chicago*, 356 Ill. App. 3d at 104, 825 N.E.2d at 318.
82. *Id.*

performed" or (2) is such service performed "outside of all places of business of the enterprise for which [the] service is performed."[83] CMS' argument was based on the second part of section 212(B). It was that the services performed by the couriers was outside all places of business of CMS.[84] This argument was based on its assertion that the court is governed by the decision in *United Delivery Service, Ltd. v. Didrickinson*.[85] The hearings revealed that CMS dispatched orders to the couriers who physically picked up and delivered packages.[86] The couriers were not required to accept the assignment, attend meetings, fulfill quotas, work specific hours, or report to the office of CMS.[87] The couriers presented invoices for the dispatches on a weekly basis either in person or by mail.[88] Some couriers used bicycles, but others used a car which required a lease agreement with CMS.[89] All couriers were required to enter into a written agreement with CMS requiring them to wear identifying colors and patches and display an identification badge.[90] Cars used for courier purposes had to display a placard identifying CMS.[91]

Instead of following *United Delivery Service* as contended by CMS, the court found other cases indistinguishable for purposes of this case. Rather than focusing only on the case extensively relied upon by CMS, the court examined the following relevant cases: *Rozran v. Durkin*,[92] *Zelney v. Murphy*,[93] *O'Hare-Midway Limousine Service, Inc. v. Baker*,[94] *AFM Messenger Service, Inc. v. Department of Employment Security*,[95] and *Carpetland USA, Inc. v. Illinois Department of Employment Security*[96] finding the facts to be as similar or more similar than *United Delivery Service*. The court was unable to find a clear error in the Director's finding that

83. 820 ILL. COMP. STAT. ANN. 405/212(B) (West 2002).
84. *Chicago*, 356 Ill. App. 3d at 107, 825 N.E.2d 107.
85. 273 Ill. App. 3d 584, 659 N.E.2d 82 (Ill. App. 1995).
86. *Chicago*, 356 Ill. App. 3d at 103, 825 N.E.2d at 318.
87. *Id*.
88. *Id.*
89. *Id.*
90. *Id.* at 103–04, 825 N.E.2d at 318.
91. *Id.*
92. 381 Ill. 97, 45 N.E.2d 180 (1942).
93. 387 Ill. 492, 56 N.E.2d 754 (1944).
94. 232 Ill. App. 3d. 108, 596 N.E.2d 795 (Ill. App. Ct. 1992).
95. 198 Ill. 2d 380, 763 N.E.2d 272 (2001).
96. 201 Ill. 2d 351, 776 N.E.2d 166 (2002).

the couriers were employees.[97] Finding no exemption under section 212(B), the court did not address the exemption under 212(C).[98]

Another case examined the opportunity for some college students to receive unemployment compensation benefits even though they are full-time students.[99] Tamara Moss ("Moss") was a full-time security guard for Titan Security Services.[100] Her hours were reduced.[101] She applied unemployment benefits.[102] In an interview with the Illinois Department of Employment Security, Moss stated she would not seek full-time employment until her medical assistant program was completed in December 2003.[103] A determination was made that Moss' principal occupation was that of a student and she was ineligible for unemployment benefits.[104] Moss appealed. A telephone hearing was conducted. Moss told the referee she was working reduced hours for Titan when she filed for unemployment benefits.[105] She was subsequently terminated.[106] She was willing to work full-time or part-time.[107] The referee asked her, "If somebody offered you a full-time job, would you drop school?"[108] Moss told the referee she could not drop school because she needed to pay her student loans.[109] The referee affirmed the earlier determination that Moss was ineligible for benefits for the same reason.[110] Moss appealed to the Board of Review which again affirmed the decision.[111] Moss sought review by the circuit court which entered an order affirming the Board of Review's denial of unemployment benefits. Moss appealed.[112] The appellate court examined whether Moss' principal occupation was that of a student under section 500(C)(4) of the Unemployment Compensation Act.[113] The appellate court took issue with the way a question was posed to

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97. Chicago Messenger Serv. v. Jordan, 356 Ill. App. 3d 101, 116, 825 N.E.2d 315, 328 (2005).
98. *Id.*
99. Moss v. Ill. Dep't of Employment Sec., 357 Ill. App. 3d 980, 830 N.E.2d 663 (1st Dist. 2005).
100. *Id.* at 982, 830 N.E.2d at 665.
101. *Id.*
102. *Id.*
103. *Id*., 830 N.E.2d at 666.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id*. at 983, 830 N.E.2d at 666.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id*. at 984, 830 N.E.2d at 667.
112. *Id.*
113. *Id.*, 820 ILL. COMP. STAT. ANN. 405/500 (West 2002).

Moss during the initial telephone hearing and later interpreted by the Board.[114] It reasoned that whether she would drop school to work was not the correct focus. Rather, the focus should be whether she would make subordinate to school only seeking employment that fit into her school schedule and whether she would be available for full-time work.[115] The court's reasoning came from its analysis of two cases, *Miller v. Illinois Department of Employment Security*[116] and *James v. Illinois Department of Labor*,[117] in which Miller and James both had limited their job searches due to their studies.[118] Moss had testified her classes were scheduled around work and she was willing to change her classes to accommodate full-time work.[119] Further, work in the security field was generally during hours that would still allow her to be a student and work full-time.[120] The case was reversed and remanded for further hearing on whether Moss was unavailable for full-time work.[121] The court cautioned this decision was not meant to make all students eligible for unemployment benefits.[122] However, full-time employees who also go to school may be eligible for benefits if they find themselves unemployed.

2. Wage Payment and Collection Act

In *Landers-Scelfo v. Corporate Office Systems*,[123] the court examined the sufficiency of a pleading under the Wage Payment and Collection Act ("Act").[124] The court held that if a plaintiff's pleading is sufficient to raise an inference that an employment agreement exists, then the plaintiff is not required to separately plead that the defendant exercised control over her work to successfully plead defendant was an employer under the Act.[125] The court explained the Act only requires an agreement between parties not a contract requiring formal legal

114. *Moss*, 357 Ill. App. 3d at 985–86, 830 N.E.2d at 668.
115. *Id*. at 986, 830 N.E.2d at 668.
116. 245 Ill. App. 3d 520, 615 N.E.2d 35 (Ill. App. Ct. 1993).
117. 119 Ill. App. 3d 524, 456 N.E.2d 879 (Ill. App. Ct. 1983).
118. *Moss*, 357 Ill. App. 3d at 986–87, 830 N.E.2d at 668–69.
119. *Id*. at 987, 830 N.E.2d at 669.
120. *Id.*, 830 N.E.2d at 669–70.
121. *Id.* at 988, 830 N.E.2d at 670.
122. *Id*. at 987, 830 N.E.2d at 670.
123. 356 Ill. App. 3d 1060, 827 N.E.2d 1051 (2d Dist. 2005).
124. 820 ILL. COMP. STAT. ANN. 115/1–115/16 (West 2002).
125. *Landers-Scelfo*, 356 Ill. App. 3d at 1067, 827 N.E.2d at 1058.

elements.[126] Therefore, plaintiff was not required to plead all contract elements.[127] By pleading that she worked and Synergy had paid her, she adequately pled she and Synergy had an agreement.[128] Next, the court examined whether plaintiff needed to plead more to show Synergy was her employer.[129] The Act provides that the term employer may include employment agencies that make payments for work done for others.[130] However, while disagreeing with the reasoning of *Andrews v. Kowa Printing Corp.*,[131] the appellate court opened the door for Synergy to show that it may not qualify as plaintiff's employer by raising an affirmative matter.[132]

In *Catania v. Local 4250/5050 of the Communications Workers of America*,[133] Catania alleges Local 4250 and Steven Tisza, President of Local 4250, violated the Wage Payment and Collection Act ("Act") among other claims.[134] The trial jury found against Local 4250 and Tisza, individually, in the amount of $81,000 for failure to pay final compensation.[135] Local 4250 and Tisza filed a post-trial motion arguing there was no credible evidence to support a verdict of $81,000 on each of two counts allowing Catania "to recover twice for the same wrong" and there was no evidence that Tisza willfully violated the Act.[136] Further, it is argued there is no right to a jury trial on the counts of failure to pay final compensation under the Act.[137] The post-trial motion was denied.[138] Catania then filed a claim for attorneys' fees and costs were awarded.[139] The appellate court first analyzed the right to a jury trial by examining the Act which does not provide for the right.[140] The court then examined any rights Catania may have under a common law breach of contract.[141] It concluded the legislature provided rights

126. *Id.* at 1068–69, 827 N.E.2d at 1059.
127. *Id.*
128. *Id*., 827 N.E.2d at 1059–60.
129. *Id.* at 1069, 827 N.E.2d at 1060.
130. *Id.*, 820 ILL. COMP. STAT. ANN. 115/2 (West 2002)
131. 351 Ill. App. 3d. 668, 814 N.E.2d 198 (Ill. App. Ct. 2004).
132. *Landers-Scelfo*, 356 Ill. App. 3d at 1070–71, 827 N.E.2d at 1061
133. 359 Ill. App. 3d 718, 834 N.E.2d 966 (Ill. App. Ct. 2005).
134. *Id.*
135. *Id*. at 721, 834 N.E.2d at 969.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 722, 834 N.E.2d at 970.
141. *Id.* at 723, 834 N.E.2d at 971.

under the Act creating a cause of action distinct from common law breach of contract.[142] Therefore, it held the Illinois Constitution does not confer a right to a jury trial for Catania's action under the Act.[143] The appellate court reversed the trial court and remanded for a bench trial.[144] It further vacated the award of attorneys' fees and costs, because the award was the result of Catania's favorable judgment which was reversed and remanded.[145] The court provided lengthy guidance to the trial court regarding the statutory requirements of the Attorney Fees in Wage Actions Act[146] as it related to Catania's demand and its lack of a specific amount due and owing to her.[147] The second issue on which the appellate court provided guidance was the verdict against both Local 4250 and Tisza for the same injury, the failure to pay termination benefits.[148] The guidance provided to the trial court was that Local 4250 and Tisza represented a single, unified employer and Catania could not recover from both of them for the same injury.[149]

3. Unpaid Vacation

In a case of first impression, the court in *Walters v. Department of Labor*[150] clarified the Illinois Department of Labor's ("Department") adjudicatory powers. "Walters was the president, chief executive officer, and 100% shareholder of FGI Print Management."[151] After ceasing its business, nine employees filed wage claims for unpaid vacation.[152] A hearing officer determined Walters had control over management and pursuant to Section 300.620 the Illinois Administrative Code ("Code"), interpreting section 13 of the Wage Payment and Collection Act ("Act"),[153] and was personally liable to the employees for the unpaid vacation.[154] The Department issued a wage payment demand upon Walters that there had been "apparent"

142. *Id.* at 725, 834 N.E.2d at 973.
143. *Id.*
144. *Id.*
145. *Id.*
146. 705 ILL. COMP. STAT. ANN. 225/0.01 et seq. (West 2002).
147. 359 Ill. App. 3d at 726–28, 834 N.E.2d at 973–75.
148. *Id.* at 728–29, 834 N.E.2d at 975–76.
149. *Id.*
150. 356 Ill. App. 3d 785, 826 N.E.2d 979 (Ill. App. Ct. 2005).
151. *Id.* at 786, 826 N.E.2d at 981.
152. *Id.*
153. 820 ILL. COMP. STAT. ANN. 115/1–115/16 (West 2002).
154. 356 Ill. App. 3d at 787, 826 N.E.2d at 981.

violations of the Act and notified him of the penalties for a conviction under the Act.[155] Walters filed a timely request for review which was denied.[156] In its denial, the Department "requested" Walters comply with the demand for payment of the unpaid vacation and advised him that his failure would result in referral to the Attorney General or State's Attorney for prosecution.[157] Walters paid the amount requested.[158] Walters sought administrative review of his personal liability and the court treated it as a request for common law writ of *certiorari* and granted the writ.[159] The court first examined whether the Act provides for review of any action by the Department. It found that the Act does not expressly provide for review, so the Department's finding of personal liability was not reviewable under the provisions of Administrative Review Law.[160] Without express statutory provisions and without judicial review under the Administrative Review Law, a common law of writ of *certiorari* is another means of obtaining review.[161] However, a common law writ of *certiorari* is for limited review of an action by a court or other tribunal exercising quasi-judicial functions.[162] The court determined the Department only assisted the employees by gathering information and attempting to resolve the matter, but it did not adjudicate the rights of the parties.[163] Had the Department or the Attorney General pursued actual liability in the courts, Walters could have sought appellate review.[164] Because Walters paid the amounts "requested," and no court enforcement action was necessary by the Department, Attorney General, or State's Attorney, the demand was not subject to administrative review under the common law writ of *certiorari*.[165] Walters continued his pursuit of administrative review arguing that he was immediately subject to civil and criminal penalties, if he did not pay the demanded amount.[166]

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155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 787–88, 826 N.E.2d at 981–82.
160. 356 Ill. App. 3d at 788–89, 826 N.E.2d at 982, 735 ILL. COMP. STAT. ANN. 5/3–101 et seq. (West 2002).
161. *Walters*, 356 Ill. App. 3d at 789, 826 N.E.2d at 982–83.
162. *Id.* at 789, 826 N.E.2d at 983.
163. *Id.* at 789–90, 826 N.E.2d at 983–84.
164. *Id.* at 791–92, 826 N.E.2d at 985.
165. *Id.* at 792, 826 N.E.2d at 985.
166. *Id.*

However, the court interpreted section 14(a) and 14(c) of the Act[167] as requiring prosecution in the trial court which would entitle Walters to appeal or an order be issued pursuant to section 14(b)[168] which the appellate court determined the Department has no authority to issue under the Act under section 14.[169] Neither of these occurred. The court expressly explained section 9 of the Act was inapplicable to its analysis, because no deductions were made from the employees' wages or final compensation.[170] The court examined three other cases implying the Department may have authority to issue orders under section 14.[171] Following its own logic, the appellate court holds the Department has no authority to issue orders, except as provided explicitly in section 9 of the Act.[172] The grant of a writ of *certiorari* was vacated because the circuit court lacked jurisdiction.[173]

4. Pensions

a. Line-of-Duty (Firefighter)

In *Jensen v. East Dundee*,[174] Jensen applied for a line-of-duty pension under section 4–110 of the Pension Code[175] for a disability resulting from his job as a firefighter.[176] During his employment as a firefighter/paramedic, plaintiff suffered multiple injuries to his left knee.[177] Jensen had to be examined by three physicians to determine whether a disability existed.[178] Each physician was sent a letter from the Pension Fund Board ("Board") providing them with language from section 4–110 regarding when a firefighter is entitled to a line-of-duty pension.[179] The letter posed two specific questions for the physicians

167. 820 ILL. COMP. STAT. ANN. 115/14(a), (c) (West 2002).
168. 820 ILL. COMP. STAT. ANN. 115/14(b) (West 2002).
169. *Walters*, 356 Ill. App. 3d at 792–93, 826 N.E.2d at 985–86.
170. *Id.* at 793–94, 826 N.E.2d at 986.
171. *Id*. at 794, 826 N.E.2d at 986–87 (*See also*, Stafford v. Bowling, 85 Ill. App. 3d 978, 407 N.E.2d 771 (Ill. App. Ct. 1980), Miller v. J.M. Jones Co., 198 Ill. App. 3d. 151, 555 N.E.2d 820 (Ill. App. Ct. 1990), Rekhi v. Wildwood Indus., Inc., 61 F.3d 1313 (7th Cir. 1995).
172. 356 Ill. App. 3d at 794, 826 N.E.2d at 987.
173. *Id.* at 794, 826 N.E.2d at 987.
174. 362 Ill. App. 3d 197, 839 N.E.2d 670 (Ill. App. Ct. 2005).
175. 40 ILL. COMP. STAT. ANN. 5/4–110 (West 2002).
176. 362 Ill. App. 3d at 199, 839 N.E.2d at 672.
177. *Id*. at 199, 839 N.E.2d at 672.
178. *Id*., 839 N.E.2d at 673.
179. *Id.* at 199–200, 839 N.E.2d at 673.

regarding Jensen's ability to perform his duties and whether it was medically possible that Jensen's injury/illness was a result of or caused by his line-of-duty or service as a firefighter.[180] Two of the physicians certified Jensen's disability was caused by his line-of-duty or service and that he was disabled.[181] The third physician, Dr. Lanoff, certified Jensen was disabled, but in his opinion his injury/illness was "possibly to a small extent" a result of or caused by his line-of-duty or service as a firefighter.[182] Rather, Dr. Lanoff indicated it was more likely to be degenerative due to aging and genetics.[183] The Board denied the line-of-duty pension because it believed there was no special risk involved in Jensen's act of duty, and the Board found Dr. Lanoff to be more credible.[184]

Using the clearly erroneous standard, the court examined the Board's denial. The court agreed with Jensen that the Board used the wrong definition of act of duty.[185] The Board used section 5–110[186] to define acts of duty of a police officer instead of section 6–110[187] for acts of duty of a firefighter.[188] The appellate court remanded the matter back to the Board to determine whether Jensen's injury/illness was the result of or caused by acts of duty as defined in section 6–110.[189] The Board also argued that even if they used the wrong definition, it still had Dr. Lanoff's report stating the cause of disability was only to a small extent related to Jensen's line-of-duty or service as a firefighter.[190] The appellate court pointed out all three physicians indicated Jensen was disabled and the Board cannot determine whether the disability was the result of or caused by acts of duty without holding a new hearing using the correct definition.[191]

b. Disability Pension (Police)

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180. *Id*. at 200, 839 N.E.2d at 673.
181. *Id*.
182. *Id.*
183. *Id.*
184. *Id*. at 200–01, 839 N.E.2d at 673–74.
185. *Id.* at 202, 839 N.E.2d at 675.
186. 40 ILL. COMP. STAT. ANN. 5/5–110 (West 2004).
187. 40 ILL. COMP. STAT. ANN. 5/6–110 (West 2004).
188. 362 Ill. App. 3d at 203, 839 N.E.2d at 675–76.
189. *Id*. at 204–05, 839 N.E.2d at 677.
190. *Id*. at 205, 839 N.E.2d at 677.
191. *Id.*

Lynnea Stec ("Lynnea"), a second wife to patrol officer Thomas, petitioned for survivor's pension benefits in *Stec v. Board of Trustees of Oak Park Pension Fund*.[192] Thomas was hired in 1977. After almost 11 years of duty, Thomas filed for both a line-of-duty and a non-duty disability related pension.[193] He then resigned reserving his right to the disability pension.[194] Thomas subsequently was awarded a non-duty disability pension.[195] Thomas married Lynnea in 1991. In 1998, Thomas died. Both Thomas' first and second wife requested that the Oak Park Police Pension Board ("Board") award survivor's benefits to Thomas' daughter.[196] Survivor benefits were granted until the child's 18th birthday.[197] In 2003, Lynnea demanded a survivor's benefit as Thomas' survivor.[198] Lynnea's demand was pursuant to sections 3–114.2 and 3–112 of the Pension Code which provided that disability pension shall continue to be paid to the surviving spouse and upon the death of the surviving spouse in equal parts to the unmarried children under 18 years old.[199] The Board denied Lynnea the benefits due to her prior request that survivor benefits be paid to Thomas' daughter and due to her marriage occurring after Thomas had retired.[200]

On appeal, the Board contended that awarding the survivor benefits to Thomas' daughter was an administrative decision requiring any appeals to be filed within thirty-five days from the date Lynnea was served.[201] The court determined the decision being reviewed was Lynnea's denial of survivor benefits, not the grant of survivor benefits to Thomas' daughter.[202] Therefore, Lynnea's appeal was timely filed. The Board also contends that the requestfor payment of survivor benefits to Thomas' daughter was a waiver by Lynnea to those benefits under section 3–117.1.[203] The court determined the letter was not an express waiver nor was it knowing and voluntary.[204]

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192. 355 Ill. App. 3d 974, 824 N.E.2d 1138 (Ill. App. Ct. 2005).
193. *Id.* at 975–76, 824 N.E.2d at 1140.
194. *Id.* at 976, 824 N.E.2d at 1140.
195. *Id.*
196. *Id*.
197. *Id.*
198. *Id.*
199. *Id.*, 40 ILL. COMP. STAT. ANN. 5/3–114.2, 3–112 (West 2002).
200. 355 Ill. App. 3d at 977, 824 N.E.2d at 1141.
201. *Id.*
202. *Id.* at 978, 824 N.E.2d at 1141.
203. *Id*., 824 N.E.2d at 1141–42, 40 ILL. COMP. STAT. ANN. 5/3–117.1 (West 2002).
204. 355 Ill. App. 3d at 978, 824 N.E.2d at 1142.

Deciding under the clearly erroneous standard of review, the appellate court examined whether the second marriage was after Thomas' retirement on his disability related pension.[205] Analyzing section 3–114.2,[206] the appellate court concluded the language of the statute contemplates the officer's suspension or retirement due to the disability.[207] Because Thomas resigned, it was found that he retired.[208] Lynnea argues that while Thomas was receiving a disability pension, he had not retired and was subject to recall in an emergency under section 3–116[209] should an examination find him recovered from the disability.[210] The court disagreed that section 3–116 changes Thomas' employment status, but rather is related to his continuance of benefits.[211] The appellate court upheld the Board's denial of survivor benefits to Lynnea because she married Thomas after his retirement on a disability pension falling squarely within the plain language of section 3–120.[212]

In a second case for disability pension, Anthony Marconi ("Marconi"), requested a duty-related disability pension in 1997 due to his allegations that he had been involved in multiple shootings while on the job.[213] He alleged the shootings contributed to his disability.[214] Marconi also alleged the police department's psychiatrist recommended he not return to work and he was still being treated by the psychiatrist.[215] His temporary benefits were exhausted and he needed a prompt hearing.[216] The Pension Board ("Board") selected two psychiatrists and one psychologist to evaluate Marconi and the reports were admitted into evidence.[217] Marconi filed a declaratory action asserting his due process rights had been violated because he had waited almost five years for a decision on his benefits.[218] The Board

205. *Id*. at 978–79, 824 N.E.2d at 1142.
206. 40 ILL. COMP. STAT. ANN. 5/3–114.2 (West 2002).
207. 355 Ill. App. 3d at 979, 824 N.E.2d at 1142–43.
208. *Id*., 824 N.E.2d at 1143.
209. 40 ILL. COMP. STAT. ANN. 5/3–116 (West 2002).
210. 355 Ill. App. 3d at 979–80, 824 N.E.2d at 1143.
211. *Id.* at 980, 824 N.E.2d at 1143.
212. *Id*. at 980–81, 824 N.E.2d at 1143–44.
213. Marconi v. Chi. Heights Police Pension Bd., 361 Ill. App. 3d 1, 836 N.E.2d 705 (Ill. App. Ct. 2005), *appeal allowed*, 217 Ill. 2d 566, 844 N.E.2d 39 (Dec. 1, 2005).
214. *Id*. at 4, 836 N.E.2d at 710.
215. *Id*.
216. *Id.*
217. *Id.* at 5, 836 N.E.2d at 710.
218. *Id.* at 5–6, 836 N.E.2d at 710–11.

denied Marconi's application for disability pension benefits while the declaratory action was pending.[219] The circuit court affirmed the Board's denial because Marconi failed to submit the three required certificates of disability under section 3–115 of the Pension Code.[220] The court later remanded the matter and allowed Marconi to submit two more certificates of disability to the Board which he did.[221] The Board again denied his disability pension benefits.[222] The circuit court affirmed.[223] There was conflicting non-expert testimony given as to facts of the alleged multiple shootings. Dr. Wahlstrom, Dr. Rubens, Dr. Conroe, and Dr. Ganellen certified Marconi was disabled.[224] However, Dr. Harris certified he was not disabled.[225] The Board found Dr. Harris' report to be the most complete and thorough evaluation and relied upon it to deny the benefits.[226] Both sections 3–114.1 and 3–114.2[227] of the Pension Code provide for the line-of-duty and non-duty disability benefits.[228] Marconi contended that under *Hahn v. Police Pension Fund of Woodstock* [229] and *Knight v. Village of Bartlett*[230] the evaluations near the time of his removal were the reports upon which the Board should have relied.[231] The appellate court agreed that together with the rest of the record, Marconi was disabled at the time of his removal.[232]

The court next examined the requirement under section 3–115 of the Pension Code that required Marconi to submit three certificates from physicians selected by the Board.[233] The Board argued that Dr. Walstrom was not one of the doctors selected by the Board and Dr. Harris certified Marconi was not disabled.[234] The court closely examined *Coyne v. Milan Police Pension Board,*[235] *Wade v. City of North*

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219. *Id.*
220. *Id.* at 6, 836 N.E.2d at 711, 40 ILL. COMP. STAT. ANN. 5/3–115 (West 2002).
221. *Marconi*, 361 Ill. App. 3d at 6, 836 N.E.2d at 711.
222. *Id.*
223. *Id.*
224. *Id.* at 9–13, 836 N.E.2d 714–16.
225. *Id.* at 13, 836 N.E.2d at 716–17.
226. *Id.* at 15, 836 N.E.2d at 718.
227. 40 ILL. COMP. STAT. ANN. 5/3–114.1, 114.2 (West 2002)
228. *Marconi*, 361 Ill. App. 3d at 16–17, 836 N.E.2d at 719–20.
229. 138 Ill. App. 3d 206, 485 N.E.2d 871 (Ill. App. Ct. 1985).
230. 338 Ill. App. 3d 892, 788 N.E.2d 205 (Ill. App. Ct. 2003).
231. *Marconi*, 361 Ill. App. 3d at 17–18, 836 N.E.2d at 720–21.
232. *Id.* at 18–19, 836 N.E.2d at 721.
233. *Id.* at 20, 836 N.E.2d at 722.
234. *Id.*
235. 347 Ill. App. 3d 713, 807 N.E.2d 1276 (Ill. App. Ct. 2004).

Chicago Police Pension Board,[236] and *Rizzo v. Board of Trustees of the Village of Evergreen Park Police Pension Fund* [237] to reach the conclusion that the certification requirement of section 3–115 was unconstitutional as applied to Marconi and he is entitled to disability pension benefits and prejudgment interest.[238] The case was remanded to determine if Marconi is to receive line-of-duty pension or a non-duty pension.[239]

c. Widow's Non-Duty-Related Annuity (Firefighter)

Iris Nutter ("Nutter"), Jamie O'Callaghan ("O'Callaghan"), Patricia Jelinek ("Jelinek"), and Kathleen Barry ("Barry") filed separate complaints challenging the Retirement Board of Trustees of the Firemen's Annuity and Benefit Fund of Chicago ("Board") decision to award non-duty benefits rather that duty-related benefits. The cases were consolidated by the circuit court in *Barry v. Retirement Board of Trustees of the Firemen's Annuity & Benefit Fund of Chicago*.[240] This case examined sections 6–141.1 and 6–140 of the Pension Code ("Code").[241]

Nutter was the widow of a parmedic.[242] Her husband suffered a myocardial infarction while at work and was awarded a duty disability.[243] He died about five years later from pulmonary edema due to pancreatic cancer and pneumonia.[244] Nutter received a letter and an application for widow's and children annuity.[245] The application was entitled Surviving Spouse's Affidavit-Application Under Oath and did not identify the types of benefit or refer to specific statutes about such benefits.[246] The letter directed her to mail the application to the office along with her husband's death certificate which she did.[247] The Board granted her an annuity and advised her if she disputed the decision she had thirty-five days to file for a review of the decision.[248] Over six

236. 215 Ill. 2d 620, 828 N.E.2d 282 (Ill. App. Ct. 2004).
237. 338 Ill. App. 3d 490, 788 N.E.2d 1196 (Ill. App. Ct. 2003).
238. *Marconi*, 361 Ill. App. 3d at 20–29, 835 N.E.2d at 720–29.
239. *Id*. at 29, 836 N.E.2d at 729.
240. 357 Ill. App. 3d 749, 828 N.E.2d 1238 (Ill. App. Ct. 2005).
241. 40 ILL. COMP. STAT. ANN. 5/6–141.1, 140 (West 2000).
242. *Barry*, 357 Ill. App. 3d at 752, 828 N.E.2d at 1242.
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id*.
247. *Id.*
248. *Id*. at 753, 828 N.E.2d at 1242.

months later, she filed a complaint for administrative review.[249] The Board filed a motion to dismiss which was granted. Upon reconsideration, the dismissal was vacated and a hearing was held to provide Nutter with her due process rights prior to denying a benefit under section 6–140.[250] After the hearing concluded, the Board entered a written decision denying Nutter's duty-related benefits.[251]

Jelinek was the widow of Ronald who worked for the Chicago fire department from 1956 until he suffered a heart attack while on duty in 1990.[252] He died in 1999 from myocardial infarction with congestive heart failure and diabetes.[253] Jelinek received a letter similar to the one Nutter received and enclosed was the same application.[254] Jelinek filled out the application and attached her husband's death certificate.[255] The Board granted her benefits with notice she had thirty-five days to file for a review of the decision.[256] Fourteen months later she filed a complaint contesting the non-duty death benefit.[257]

Barry was the widow of Edward who worked for the Chicago fire department for approximately twenty-five years when he hurt his neck and back after slipping on a turntable at work.[258] He was granted disability benefits.[259] The record includes a report from Dr. Motto that Edward was permanently disabled.[260] He died in 1998 from multiple injuries due to a fall on stairs.[261] She received a similar letter and an application form.[262] She returned the form and was granted a non-duty benefit, but waited over two years to file a complaint.[263]

Emmett O'Callaghan entered the academy in 1994 and injured his knee in 1995 during a training exercise.[264] He never returned to the

249. *Id.*
250. *Id.* at 754, 828 N.E.2d at 1243.
251. *Id.*
252. *Id.* at 755, 828 N.E.2d at 1244.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 756, 828 N.E.2d at 1244.
259. *Id.*
260. *Id.*
261. *Id.*, 828 N.E.2d at 1244–45.
262. *Id.*, 828 N.E.2d at 1245.
263. *Id.*
264. *Id.*

academy.[265] He was granted duty-related disability benefits.[266] Mr. O'Callaghan died in 2000 from cardiac arrythmia due to hypertension.[267] O'Callaghan applied for a widow's annuity and attached her husband's death certificate.[268] The Board awarded a non-duty benefit, but unlike Nutter, Jelinek, and Barry, she filed her complaint within the thirty-five-day period.[269]

Pursuant to the language in section 6–140 of the Code,[270] the decisions in *Tonkovic v. Retirement Board of the Firemen's Annuity & Benefit Fund*,[271] and *Swoope v. Retirement Board of the Firemen's Annuity & Benefit Fund*,[272] the trial court reversed the Board on Nutter, O'Callaghan, Barry, and Jelinek, remanding with instructions to award a duty death benefit.[273] The trial court also granted the plaintiffs' prejudgment interest from the date of the deaths of their husbands.[274]

On appeal, the Board contested the jurisdiction of the trial court because Nutter, Barry, and Jelinek filed their complaints after the thirty-five-day period required by section 3–103 of the Administrative Review Act ("Act').[275] Applying the findings in *Keller v. Retirement Board of the Firemen's Annuity & Benefit Fund*,[276] the appellate court ruled it had jurisdiction because the letters received by Nutter, Jelinek, and Barry failed to fairly and adequately inform them of what action the Board took.[277] Neither the first letter nor the second letter referred to the type of benefit the widows were receiving. The first letter enclosed an application with instructions which did not explain the different types of benefits available to widows.[278] The second letter advised the widows of the amount of the benefit, and neither letter advised them it was a non-duty related annuity as opposed to a duty-related annuity.[279] The appellate court found the letters misleading and did not provide

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265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at 756–57, 828 N.E.2d at 1245.
270. 40 ILL. COMP. STAT. ANN. 5/6–140 (West 2000).
271. 282 Ill. App. 3d 876, 668 N.E.2d 1126 (Ill. App. Ct. 1996).
272. 323 Ill. App. 3d 526, 752 N.E.2d 505 (Ill. App. Ct. 2001).
273. *Barry*, 357 Ill. App. 3d at 757–59, 828 N.E.2d at 1245–47.
274. *Id.* at 759, 828 N.E.2d at 1248.
275. *Id.*, 735 ILL. COMP. STAT. ANN. 5/3–103 (West 2000).
276. 245 Ill. App. 3d 48, 614 N.E.2d 323 (1st Dist. 1993).
277. *Barry*, 357 Ill. App. 3d at 761–62, 828 N.E.2d at 1248–49.
278. *Id.* at 761, 828 N.E.2d at 1249.
279. *Id.* at 761–62, 828 N.E.2d at 1249–50.

fair and adequate notice of the adverse decision which gave the circuit court jurisdiction to review the Board's decision.[280]

Reviewing the merits of the case under the clearly erroneous standard of review, the appellate court examined whether the duty related death benefits should have been awarded to the widows.[281] Applying *Bertucci v. Retirement Board of the Firemen's Annuity & Benefit Fund*[282] and *Swoope*,[283] the court interpreted section 6–140 to mean the duty-related injury permanently prevents a fire fighter from resuming active duty, therefore, a widow must establish with medical evidence that her husband's injury prevented him from returning to work, not his death.[284] Nutter had produced evidence from Dr. Motto that he was permanently disabled; the appellate court reversed the Board's denial of duty-related annuity.[285]

The Board never conducted hearings on the permanency of the injuries of Barry, O'Callaghan, or Jelinek. Therefore, the appellate court vacated the circuit courts reversal of the denial of benefits and the award of prejudgment interest, vacated the Board's denial, and remanded the matter to allow the widows an evidentiary hearing on the permanency.[286] The appellate court held the circuit court did not err in awarding prejudgment and post-judgment interest to Nutter.[287]

d. Annuitant for Purposes of the Pension Code

In *Gawryk v. Firemen's Annuity and Benefit Fund of Chicago*,[288] the appellate court reviewed the decision of the circuit court as to whether a retired firefighter who was not receiving nor eligible to receive an annuity had rights as an annuitant. The circuit court granted summary judgment to the Firemen's Annuity and Benefit Fund of Chicago ("Fund") that Gawryk was not an annuitant and therefore had no right to vote in the election to fill a vacancy on the Retirement Board.[289]

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280. *Id.* at 764, 828 N.E.2d at 1251.
281. *Id*.
282. 351 Ill. App. 3d 368, 813 N.E.2d 1024 (1st Dist. 2004).
283. *Swoope*, 323 Ill. App. 3d 526, 752 N.E.2d 505 (1st Dist. 2001).
284. *Barry*, 357 Ill. App. 3d at 755–56, 828 N.E.2d at 1253–54.
285. *Id*. at 769–70, 828 N.E.2d at 1255.
286. *Id.* at 770–71, 828 N.E.2d at 1256.
287. *Id.* at 771–80, 828 N.E.2d at 1257–64.
288. 356 Ill. App. 3d 38, 824 N.E.2d 1102 (Ill. App. Ct. 2005), *appeal denied*, 215 Ill. 2d 596, 833 N.E.2d 2 (May 25, 2005).
289. *Id*. at 40–41, 824 N.E.2d at 1104–05.

Gawyrk retired at age 41, but was not eligible to begin receiving annuity payments until he was fifty years old in June 2008.[290] In 2001, an election was held to fill a vacancy for the office of the annuitant or pensioner member.[291] After requesting a ballot, Gawyrk received a letter advising him he was ineligible to vote because he was not an annuitant or pensioner.[292] Gawyrk filed a declaratory action and sought a temporary restraining order ("TRO") to prevent certification of the election.[293] The circuit court denied the TRO.[294] Cross motions for summary judgments were filed.[295] The court granted the Fund's motion and denied Gawyrk's cross-motion.[296] Section 6–175 of the Pension Code[297] provides all annuitants and pensioners shall have a right to vote.[298] Article 6 of the Pension Code ("Code") does not define annuitant.[299] Based on the language of section 6-175 and the legislature's consistent definition as one who actually is receiving an annuity, the appellate court affirmed the circuit court's decision that Gawryk was not an annuitant.[300]

5. *Prevailing Wage Act*

May a subcontractor's employees seek reimbursement for wages under the Prevailing Wage Act? The court in *Cement Masons Pension Fund v. William A. Randolph, Inc.*,[301] had to decide the issue of first impression before it could rule on whether plaintiff's complaint was preempted by ERISA.[302]

The Prevailing Wage Act ("Act")[303] requires certain legal entities to pay prevailing wages on public projects.[304] Section 4 of the Act requires a stipulation in the contract and a bond from the contractor to

290. *Id.* at 40, 824 N.E.2d at 1104.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 40–41, 824 N.E.2d at 1105.
296. *Id.* at 41, 824 N.E.2d at 1105.
297. 40 ILL. COMP. STAT. ANN. 5/6–175 (West 2002).
298. 356 Ill. App. 3d at 40–41, 824 N.E.2d at 1105.
299. *Id.*
300. *Id.* at 45, 824 N.E.2d at 1108.
301. 358 Ill. App. 3d 638, 832 N.E.2d 228 (Ill. App. Ct. 2005).
302. *Id.* at 639, 832 N.E.2d at 229.
303. 820 ILL. COMP. STAT. ANN. 130/1 et seq. (West 2002).
304. *Id.* at 642, 832 N.E.2d at 231.

pay the prevailing wages as determined by the Department of Labor.[305] Plaintiffs wanted the court to interpret this to mean the subcontractor's employees were guaranteed by the general contractor.[306] The court refused to read such interpretation into the statute.[307]

Because the court found the subcontractor's employees did not have a cause of action under the Act, it did not address the issue of preemption of the Act by ERISA.[308]

B. Retaliatory Discharge

In *Sutherland v. Norfolk Southern Railway Co.*,[309] a railroad employee was injured when he sat in a chair at work which broke causing him to fall on the floor.[310] The employee was terminated about two and a half months later.[311] In 2003, he filed a lawsuit alleging retaliatory discharge which was dismissed by the circuit court.[312] This case analyzed whether a discharge in anticipation of or as a result of filing a claim under the Federal Employers' Liability Act ("FELA")[313] and/or under the Federal Boiler Inspection Act ("FBIA")[314] is retaliatory and whether the employee has a right of action for the same.[315] The FELA is the exclusive remedy for injuries sustained by railroad employees in the workplace.[316] The Workers' Compensation Act[317] does not apply.[318] Unlike the Workers' Compensation Act, the FELA has no express provisions prohibiting discharge for exercising rights under the Act.[319] Until *Hawaiian Airlines, Inc. v. Norris*,[320] the exclusive remedies available to railroad employees for discharge claims were under the grievance and arbitration procedures of the

305. *Id.* at 642, 832 N.E.2d at 231–32, 820 ILL. COMP. STAT. ANN. 130/4 (West 2002).
306. *Id*. at 642, 832 N.E.2d at 232.
307. *Id.* at 643–48, 832 N.E.2d at 232–36.
308. *Id.* at 648, 832 N.E.2d at 236.
309. 356 Ill. App. 3d 620, 826 N.E.2d 1021 (Ill. App. Ct. 2005).
310. *Id.* at 621, 826 N.E.2d at 1023.
311. *Id.*
312. *Id.*
313. 45 U.S.C. § 51 et seq. (2000).
314. 49 U.S.C. § 20701 et seq. (2000).
315. 356 Ill. App. 3d at 622, 826 N.E.2d at 1023.
316. *Id*., 826 N.E.2d at 1024.
317. 820 ILL. COMP. STAT. ANN. 305/1 et seq. (West 2002).
318. 356 Ill. App. 3d at 622–23, 826 N.E.2d at 1024.
319. *Id.* at 623, 826 N.E.2d at 1024.
320. 512 U.S. 246 (1994).

Railway Labor Act ("RLA").[321] After *Hawaiian*, a state-law claim is not preempted by federal law if it involves rights and obligations that exist independent of a collective bargaining agreement.[322] This case does not involve a claim pursuant to a collective bargaining agreement, and, therefore, is subject to analysis under Illinois law.[323]

The court followed the precedent that retaliatory discharge is only recognized in Illinois in two situations: (1) exercising rights under the Workers' Compensation Act and (2) whistleblowing activities.[324] Sutherland does not fall within either situation. He is not a whistleblower by reporting his own injury.[325] Instead, an employee must allege that the discharge violated public policy and the reported unsafe or wrongful conduct affected the health, safety, or welfare of Illinois residents.[326] Neither of which was alleged by Sutherland. In a footnote, the court does raise possible protection for Sutherland under the Railroad Safety Authorization Act of 1994.[327] The court also found Sutherland's argument for relief under the FELA without merit.[328] After discussing the factors examined in past cases and because Sutherland had a remedy under the RLA's grievance and arbitration procedures, the appellate court refused to imply a private right of action under the FELA thereby refusing to expand the retaliatory discharge law.[329] The court did not examine the FBIA aspect of the original complaint because Sutherland appeared to have abandoned that claim in his appeal.[330] However, in dicta, the court states it believes the same reasoning would apply to the FBIA claim.[331]

C. Tort Immunity

In a case of first impression, *Hood v. Illinois High School Ass'n*,[332] the court determined the Illinois High School Association ("IHSA") is not

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321. 45 U.S.C. § 151 et seq., 356 Ill. App. 3d at 623–24, 826 N.E.2d at 1024–25.
322. 356 Ill. App. 3d at 624, 826 N.E.2d at 1025.
323. *Id.*
324. *Id.* at 626, 826 N.E.2d at 1026.
325. *Id.* at 627, 826 N.E.2d at 1027.
326. *Id.*
327. *Id.* at 627, n.8, 826 N.E.2d at 1028.
328. *Id.* at 628, 826 N.E.2d at 1028.
329. *Id.* at 629, 826 N.E.2d at 1029.
330. *Id.* at 621, n.1, 826 N.E.2d at 1023.
331. *Id.*
332. 359 Ill. App. 3d 1065, 835 N.E.2d 938 (Ill. App. Ct. 2005).

a local public entity under the Local Governmental and Governmental Employees Tort Immunity Act ("Act").[333] Relying on *Carroll v. Paddock*,[334] the IHSA argued it is organized for the purpose of conducting public business and it is tightly enmeshed with governmental ownership or control because of its control by local public officials.[335] However, the appellate court strictly construed the Act.[336] Section 1–206 of the Act provides the definition of a local public entity which includes a catch-all of "any not-for-profit corporation organized for the purpose of conducting public business."[337] While the ISHA made arguments in reliance on *Carroll*, the appellate court agreed with plaintiffs that the IHSA is not a not-for-profit corporation as unambiguously provided in section 1–206 of the Act.[338] The appellate court refused to go outside the plain language of the Act and reversed the trial court and remanded the cause.[339]

A firefighter's wife filed a lawsuit, *Frayne v. Dacor Corp.*[340] to recover damages after her husband, Kenneth Frayne ("Frayne"), drowned in a lake while training to rescue others.[341] The defendants claim under section 3–110 of the Local Governmental and Governmental Employees Tort Immunity Act ("Act')[342] they were immune from liability for the drowning in a body of water over which they had no control.[343] Section 3–110 specifies six activities that would allow liability to attach: own, supervise, maintain, operate, manage, or control.[344] The trial court found that supervising the dive was not the same as controlling the lake.[345] The appellate court affirmed the trial court's holding that the defendants did not control, maintain, or supervise the lake and, therefore, are immune under the protection of the Act.[346]

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333. *Id.* at 1068, 835 N.E.2d at 941.
334. 199 Ill. 2d 16, 764 N.E.2d 1118 (2002).
335. *Hood*, 359 Ill. App. 3d at 1068–69, 835 N.E.2d at 940–41.
336. *Id.* at 1069, 835 N.E.2d at 942.
337. *Id.* at 1068, 835 N.E.2d at 940, 745 ILL. COMP. STAT. ANN. 10/1–206 (West 2002).
338. *Hood*, 359 Ill. App. 3d at 1069–70, 835 N.E.2d at 942, 745 ILL. COMP. STAT. ANN. 10/1–206 (West 2002).
339. *Hood*, 359 Ill. App. 3d at 1070, 835 N.E.2d at 942.
340. 362 Ill. App. 3d 575, 840 N.E.2d 294 (Ill. App. Ct. 2005).
341. *Id.* at 576, 840 N.E.2d at 295.
342. 745 ILL. COMP. STAT. ANN. 10/3–110 (West 2000).
343. *Frayne*, 362 Ill. App. 3d at 577, 840 N.E.2d at 296.
344. 745 ILL. COMP. STAT. ANN. 10/3–110 (West 2000).
345. *Frayne*, 362 Ill. App. 3d. at 580, 840 N.E.2d at 298.
346. *Id.* at 581–82, 840 N.E.2d at 299–300.

A third tort immunity case, *McMeel v. Village of Hoffman Estates*,[347] analyzed the tort immunity defense when a police officer, Catherine Bloss, went the scene of a stranded motorist.[348] Officer Bloss stopped the traffic for a tow truck to pull the minivan out of the snowy ditch.[349] The lights were flashing on the top of her car, but she did not place any flares on the highway to warn motorists a stop was imminent.[350] While the plaintiffs' car was stopped, another car driven by a driver under the influence of alcohol, rear-ended the plaintiffs' car killing McMeel and severely injuring his brother and another passenger.[351] Plaintiffs sued the Village and Officer Bloss for willful and wanton conduct.[352] The trial court dismissed the action holding the Village and Officer Bloss were immune under the Local Governmental and Governmental Employee Tort Immunity Act ("Act").[353] Differentiating sections 4–102[354] and 2–202[355] of the Act by examining *Doe v. Calumet City*,[356] *Long v. Soderquist*,[357] and *Kavanaugh v. Midwest Club, Inc.*[358] the appellate court concluded Officer Bloss was providing police service rather than executing or enforcing the law and was immunized by section 4–102 and affirmed the circuit court's judgment.[359]

D. Illinois Human Rights Act

1. Good Cause

In *Denny's v. Department of Human Rights*,[360] the appellate court disagreed with the Department of Human Rights, the Department's Chief Legal Counsel, the Administrative Law Judge, and a three-member panel of the Human Rights Commission in their interpretation

347. 359 Ill. App. 3d 824, 835 N.E.2d 183 (Ill. App. Ct. 2005).
348. *Id*. at 825, 835 N.E.2d at 184.
349. *Id.*
350. *Id.*
351. *Id*. at 825, 835 N.E.2d at 184.
352. *Id*. at 826, 835 N.E.2d at 184.
353. *Id.* at 826, 835 N.E.2d at 185, 745 ILL. COMP. STAT. ANN. 10/1–101 et seq. (West 2000).
354. 745 ILL. COMP. STAT. ANN. 10/4–102 (West 2000).
355. 745 ILL. COMP. STAT. ANN. 10/2–202 (West 2000).
356. 161 Ill. 2d 374, 641 N.E.2d 498 (Ill. App. Ct. 1994).
357. 126 Ill. App. 3d 1059, 467 N.E.2d 1153 (Ill. App. Ct. 1984).
358. 164 Ill. App. 3d 213, 517 N.E.2d 656 (Ill. App. Ct. 1987).
359. 359 Ill. App. 3d at 827–30, 835 N.E.2d at 185–87.
360. *McMeel*, 363 Ill. App. 3d. 1, 841 N.E.2d 438 (Ill. App. Ct. 2005).

of section 7A–102(C)(4) of the Illinois Human Rights Act ("Act") and specifically their interpretation of the amendment to section 7A–102(C)(4) changing the word "may" to "shall."[361] The court analyzed the arguments asserted by the Department by reviewing two cases: *Chicago Transit Authority v. Department of Human Rights*[362] and *Coleman v. Methodist Youth Services, Inc.*[363] While the amendment mandated a default be entered by the Department if no good cause was shown, the amendment did not authorize the Department to expand the definition of good cause to include negligence.[364] However, the court further expanded its analysis and stated the *Coleman* decision was wrongly decided.[365] The *Chicago Transit Authority's* standard of deliberate, contumacious, and unwarranted disregard of the Department's investigatory authority is to be used.[366]

The court then moved on to decide whether Denny's in fact showed good cause for not attending the fact finding conference. The appellate court found the findings were against the manifest weight of the evidence.[367] The record shows Denny's cooperated with the investigation, submitted written responses, participated in a telephone conversation with the investigator, and retained a local attorney.[368] Further, Denny's attorney rushed to a fact finding conference as soon as he found out about the conference, requested a continuance, and later provided affidavits of two employees whom the Department wanted produced for questioning.[369] All of these are contrary to a finding that Denny's deliberately and contumaciously disregarded the Department's authority.[370] The appellate court reversed the default, vacated the order for damages, attorneys' fees, and costs, and remanded the cause for further proceedings.[371]

2. Arrest or Criminal History Ordered Expunged, Sealed or Impounded

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361. 775 ILL. COMP. STAT. ANN. 5/7–102(C)(4) (West 1998)
362. 169 Ill. App. 3d 749, 523 N.E.2d 1108 (Ill. App. Ct. 1988)
363. ILL. HUM. RTS. COMM'N REP. 1993CF3122 (December 10, 1997).
364. *McMeel*, 363 Ill. App. 3d at 4–5, 841 N.E.2d at 442–43.
365. *Id.*
366. *Id.*
367. *Id.* at 6, 841 N.E.2d at 443–44.
368. *Id.* at 8, 841 N.E.2d at 446.
369. *Id.*
370. *Id.*
371. *Id.* at 9, 841 N.E.2d at 447.

In *Sroga v. Personnel Board of the Chicago*,[372] Sroga applied for a police officer position.[373] The application required him to report any past criminal convictions or guilty pleas.[374] After considering Sroga's criminal background, the Personnel Board upheld a hearing officer's ruling to remove Sroga's name from the list of eligible candidates.[375] Sroga appealed to court by a writ of *certiorari*. The appellate court did not find the Personnel Board's decision was against the manifest weight of the evidence, because it was undisputed that he had pled guilty to criminal damage to property and the Personnel Board had found his role in the theft of a snowmobile was enough to disqualify him.[376] The court accepted the Personnel Board's judgment and was unable to say the disqualification was contrary to the evidence.[377] Sroga argues three statutes prohibited the Personnel Board from considering the snowmobile incident: section 5–6–3.1(f) of the Unified Code of Corrections,[378] section 5 of the Criminal Identification Act,[379] and section 2–103 of the Illinois Human Rights Act.[380] However, the standards of criminal conduct used by the police department examine the person's real conduct not whether he was ultimately convicted for the conduct.[381]

In a second case alleging a violation of section 2–103 of the Illinois Human Right Act ("IHRA"), the court held the employer did not violate the act. In *Beard v. Sprint Spectrum, LP*,[382] Sprint discharged an employee for falsely answering a question on his application. The application posed the following question: "Have you ever been charged with a crime (including misdemeanors but not minor traffic violations) which resulted in a conviction?"[383] The application defined what Sprint meant by conviction which included guilty pleas.[384] The application also explained that failure to disclose the information may result in

372. 359 Ill. App. 3d 107, 833 N.E.2d 1001 (Ill. App. Ct. 2005).
373. *Id.* at 108, 833 N.E.2d at 1003.
374. *Id.*
375. *Id.* at 109, 833 N.E.2d at 1004.
376. *Id.* at 111, 833 N.E.2d at 1005.
377. *Id*. at 111, 833 N.E.2d at 1005–06.
378. 730 ILL. COMP. STAT. ANN. 5/5–6–3.1(f) (West 2002).
379. 20 ILL. COMP. STAT. ANN. 2630/5 (West 2002).
380. 775 ILL. COMP. STAT. ANN. 5/2–103(A) (West 2002).
381. *Sroga*, 359 Ill. App. 3d at 112, 833 N.E.2d at 1006.
382. 359 Ill. App. 3d 315, 833 N.E.2d 449 (Ill. App. Ct. 2005).
383. *Id*. at 316, 833 N.E.2d at 450.
384. *Id*.

disqualification or termination.[385] Beard answered no. With his signature on the application, he certified his answers as true and correct and acknowledged any misstatement or omission would be grounds for not being hired or grounds for termination.[386] Sprint, with authorization from Beard, initiated a background check.[387] The background check disclosed Beard was found guilty in July 1998 on a public morals charge, was fined $25, and had one month's court supervision. Beard was terminated.[388] He quickly filed a Charge of Discrimination alleging Spring violated the IHRA by terminating him based on his arrest record not a conviction.[389] Sprint's position was that Beard was terminated for failing to reveal a conviction as it was defined on its application.[390] The Illinois Department of Human Rights dismissed the Charge for lack of substantial evidence.[391] The Chief Legal Counsel denied Beard's Request for Review.[392] Beard relied upon section 5–6–3.1 of the Unified Code of Corrections[393] ("Code") that his guilty plea and sentence cannot be considered.[394] Following *People v. Hightower*,[395] it was the court's opinion that being denied private employment is not within the category of disqualifications and disabilities imposed by law referred to in section 5–6–3.1(f) of the Code.[396] The court further examined section 2–103(B) of the Act[397] which provides an employer is not prohibited from obtaining or using other information that a person engaged in the conduct for which he or she was arrested.[398] Nothing in the Act prohibited Sprint from defining conviction as it did.[399] No inquiry of arrest was made by Sprint. Beard's conviction was still on the court record even though he may have had a right to have it sealed or expunged under section 5–6–3.1(e)

385. *Id.*
386. *Id.*
387. *Id.* at 317, 833 N.E.2d at 450.
388. *Id.*
389. *Id.*
390. *Id*. at 317, 833 N.E.2d at 451.
391. *Id.*
392. *Id.* at 318, 833 N.E.2d at 451.
393. 730 ILL. COMP. STAT. ANN. 5/5–6–3.1 (West 2002).
394. *Beard*, 359 Ill. App. 3d at 319, 833 N.E.2d at 452.
395. 138 Ill. App. 3d 5, 485 N.E.2d at 452 (Ill. App. Ct. 1985).
396. *Beard*, 359 Ill. App. 3d at 319, 833 N.E.2d at 452.
397. 775 ILL. COMP. STAT. ANN. 5/2–103(B) (West 2002).
398. *Beard*, 359 Ill. App. 3d at 319, 833 N.E.2d at 453.
399. *Id*.

and (f) of the Code.[400] The appellate court affirmed the Chief Legal Counsel's order dismissing Beard's Charge of Discrimination.[401]

3. Reasonable Accommodation

Does the reasonable accommodation requirement under the Illinois Human Rights Act ("Act") require an employer to accommodate commuting problems? The answer is no according to the appellate court in *Owens v. Illinois Department of Human Rights*.[402] Marla Owens had been transferred to a different location due to a work imbalance.[403] She requested a transfer back to a Chicago location due to a medical condition and subsequently took two disability leaves.[404] Owens was released to return to work by her physician after a disability leave.[405] Owens advised her employer she would not be returning because she could not drive the distance required to reach her new location.[406] A letter was sent to Owens notifying her that if she did not return to work by June 21, 2002, AT&T would assume she did not want the job.[407] Owens did not return and was sent a letter that she was "let go" for her failure to return as scheduled.[408] Owens filed a Charge of Discrimination alleging her employer, AT & T, terminated her because of her handicap. The Illinois Department of Human Rights ("Department") investigated Owens' charge by examining two separate allegations: (1) Owens was discharged instead of providing accommodation for physical handicaps, congestive heart disease, hypertension, and sleep apnea and (2) Owens was discharged instead of providing accommodation for chronic obstructive pulmonary disease.[409] The investigator determined there was a lack of substantial evidence as to the congestive heart disease, hypertension, and sleep apnea and the Department lacked jurisdiction over the obstructive pulmonary disease because no medical documentation for the disease

400. 730 ILL. COMP. STAT. ANN. 5/5–6–3.1(e),(f) (West 2002), 359 Ill. App. 3d at 319, 833 N.E.2d at 453.
401. *Beard*, 359 Ill. App. 3d at 319, 833 N.E.2d at 453.
402. 356 Ill. App. 3d 46, 826 N.E.2d 539 (Ill. App. Ct. 2005).
403. *Id.* at 48, 826 N.E.2d at 541.
404. *Id.*
405. *Id*.
406. *Id*. at 48, 826 N.E.2d at 542.
407. *Id*. at 48–49, 826 N.E.2d at 542.
408. *Id.* at 49, 826 N.E.2d at 542.
409. *Id*. at 50, 826 N.E.2d at 542–43.

was provided.[410] Pursuant to a Request for Review, the chief legal counsel of the Department upheld the dismissal of her charge for lack of substantial evidence and lack of jurisdiction.[411]

The appellate court confirmed the chief legal counsel's ruling. The evidence indicated that Owens was able to perform her job and there were no open positions in her job title at a Chicago location.[412] Even though her physician provided a report that Owens could not safely drive the fifty mile commute, she could perform her regular duties and was released to return to work.[413] Her failure to return to work was a nondiscriminatory reason for her termination. The court also discussed the difference between an employer's obligation to reasonably accommodate an employee in the workplace, as opposed to those arising outside the workplace such as commuting.[414]

E. Non–Compete Agreements and Restrictive Covenants

The Illinois appellate court reviewed three cases involving covenants not to compete. In *Scheffel & Co. v. Fessler*,[415] Fessler was a partner in an accounting firm who signed a partnership agreement, a supplemental partnership agreement, and a Preincorporation Agreement allowing involuntary retirement; all agreements contained a covenant not to compete.[416] The covenant not to compete was for five years following the date Fessler ceased being a partner or shareholder, and for as long as he received deferred compensation.[417] The covenant prohibited Fessler from directly or indirectly rendering public accountant services to any clients serviced by Scheffel during the two years prior to the date of his withdrawal or practice public accounting within fifty miles of any city in which Scheffel maintained an office on the date he ceased being a shareholder.[418] Fessel was involuntarily retired.[419] Fessler filed a declaratory judgment action asking that the

410. *Id.* at 50, 826 N.E.2d at 543.
411. *Id.* at 51, 826 N.E.2d at 543.
412. *Id.* at 53, 826 N.E.2d at 545.
413. *Id.*
414. *Id.* at 55–56, 826 N.E.2d at 546–47.
415. 356 Ill. App. 3d 308, 827 N.E.2d 1 (Ill. App. Ct. 2005).
416. *Id.* at 310, 827 N.E.2d at 3.
417. *Id.*
418. *Id.*
419. *Id.*

covenant not to compete be found invalid.[420] He also filed a motion for a preliminary injunction to stop Scheffel from enforcing the covenant not to complete until after the court ruled on his declaratory judgment action.[421] The trial court denied the motion for preliminary injunction, but limited the scope of the covenant not to compete to two years and only in the counties Scheffel maintained offices.[422] The appellate court affirmed the validity of the covenant and the limitations imposed by the trial court.[423] Sheffel filed a motion for preliminary injunction requesting the trial court to extend the covenant not to compete for as long as Fessler received deferred compensation.[424] The motion was granted and went further to order Fessler could not provide accounting services *at any time in the future* for any person or entity that was a client of Scheffel during the two year period prior to his involuntary retirement.[425] This was an expansion of the original non–compete language. On appeal, Fessler argued the trial court violated the law–of–the–case by reversing its earlier ruling reducing the covenant not to compete from five years to two years.[426] The appellate court found a different issue was before the trial court and it was not bound by the two year limitation.[427] The appellate court affirmed the trial court's issuance of the preliminary injunction restricting Fessler, but modified it to track the language of the covenant not to compete by amending the scope of the restriction to be only for as long as Fessler received deferred compensation.[428] This case also examined three of the five factors necessary for the issuance of a preliminary injunction. It found Scheffel had established a protectible interest, an inadequate remedy at law, and a likelihood of success on the merits.[429]

Applebaum v. Applebaum[430] involved a counterclaim to enforce a restrictive covenant signed by a former employee who left the defendant's family–owned company, Penguin Foods, to form a competing shrimp distribution company. The covenant covered J.W.

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420. *Id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id*
425. *Id.* at 311, 827 N.E.2d at 4.
426. *Id.* at 312, 827 N.E.2d at 4.
427. *Id.* at 313, 827 N.E.2d at 5.
428. *Id.* at 314–15, 827 N.E.2d at 6.
429. *Id.* at 313–15, 827 N.E.2d at 5–6.
430. 355 Ill. App. 3d 926, 823 N.E.2d 1074 (Ill. App. Ct. 2005).

Applebaum only, but the defendants sought to apply it to William Applebaum as well, who also left Penguin Foods to join the competing business.[431] The covenant restricted J.W.'s dealings with Penguin Foods' customers and suppliers. The counterclaim sought a preliminary injunction to prevent J.W. and William from contacting any of these customers or suppliers. The court ultimately reversed and remanded the trial court's decision granting the preliminary injunction. The court's decision was based on the defendant's failure to show a protectible business interest.[432] The court rejected the defendant's argument that J.W. had special knowledge regarding the shipping and product needs of Penguin Foods' customers, and that this information constituted confidential information.[433] The court also rejected Defendants' arguments that a near–permanent relationship existed under both the "nature of the business" test and the *McRand*[434] seven–factor test. The court decided that the "nature of the business" test weighed against enforcing the covenant because the shrimp distribution business is engaged in the sales of a non–unique product, its customers commonly do business with its competitors, and its competitors are easily ascertainable.[435] The court also decided that the *McRand* seven–factor test weighed against enforcing the covenant due to the lack of evidence that Penguin Foods satisfied five of the seven factors.[436] The court also specifically rejected Penguin Foods' argument that the service it offers its customers is a unique product, and instead held that service provided ancillary to sales cannot be considered a unique product.[437] The court also noted that Penguin

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431. *Id.* at 940, 823 N.E.2d at 1086.
432. *Id.* at 933, 823 N.E.2d at 1081.
433. *Id.* at 934–35, 823 N.E.2d at 1082.
434. McRand v. Van Beelen, 138 Ill. App. 3d 1045, 486 N.E.2d 1306 (Ill. App. Ct. 1985). The seven factors are, "(1) the number of years it takes the employer to develop its clientele; (2) the money it invested to acquire its customers; (3) the difficulty it faced when acquiring customers; (4) the extent of the employee's personal contact with the customer; (5) the employee's knowledge of the customers; (6) the length of time the customers have been associated with the employer; and (7) the continuity of the customer relationships." *Appelbaum*, 355 Ill. App. 3d at 935–36, 823 N.E.2d at 1083.
435. *Appelbaum*, 355 Ill. App. 3d at 935, 823 N.E.2d at 1083 (citing Springfield Rare Coin Galleries v. Mileham, 250 Ill. App. 3d 922, 935, 620 N.E.2d 479 (Ill. App. Ct. 1993)).
436. *Id.* at 936–39, 823 N.E.2d at 1083–86 (stating there was little evidence that Penguin Foods put forth any significant time, expense, or hardship in acquiring customers, that J.W.'s knowledge of Penguin Foods' customers strengthened the relationship between the companies or that he had personal contact with customers while working for Penguin Foods).
437. *Id.* at 937, 823 N.E.2d at 1084.

Foods gained and lost a number of customers each year.[438] With respect to the applicability of J.W.'s restrictive covenant to William, the court held that the two could not have effectively created a "Chinese Wall" to shield J.W. from William's dealings.[439] The newly formed company was small, and J.W. and William ran the company together.[440] Furthermore, J.W. would have benefitted financially from William's dealings with customers and suppliers. Therefore, William was enjoined from doing business with Penguin Foods' suppliers and customers to the same extent as J.W.[441]

The Agency, Inc. v. Grove[442] also involved a covenant not to compete. In *Grove*, the plaintiff, an employment agency, sued its former employee, Grove, and Grove's current employer, Accurate AJM., Inc. The suit alleged violations of the Illinois Trade Secrets Act[443] and violations of a covenant not to compete signed by Grove.[444] The plaintiff sought preliminary and permanent injunctions to enforce two provisions in the covenant. The first was a confidentiality provision and the second prohibited Grove from competing with plaintiff within a set geographic area for fourteen months.[445] The trial court determined that the covenant was unenforceable. On appeal, the court decided that the dispute over the non–competition clause was moot because more than fourteen months had passed since Grove's last day of employment, and it reversed the trial court's decision with respect to the confidentiality provision.[446] Just as in *Appelbaum*, the court reviewed the covenant not to compete to determine whether a near–permanent relationship existed between the plaintiff and its clients.[447] The court also clarified the standard of review for appeals involving covenants not to compete. The court stated "We hold that, where the existence of a legitimate business interest turns on an issue of disputed fact, such issue is reviewed under the manifest–weight standard, but the question of whether a covenant is enforceable under

438. *Id.* at 937–38, 823 N.E.2d at 1084.
439. *Id.* at 940–41, 823 N.E.2d at 1086–87.
440. *Id.*
441. *Id.*
442. 362 Ill. App. 3d 206, 839 N.E.2d 606 (Ill. App. Ct. 2005).
443. 765 ILL. COMP. STAT. ANN. 1065/1 *et seq.* (West 2002).
444. 362 Ill. App. 3d at 207, 839 N.E.2d at 608.
445. *Id.* at 208, 839 N.E.2d at 609.
446. *Id.* at 208–09, 839 N.E.2d at 609–10.
447. *Id.* at 214, 839 N.E.2d at 613–14.

the facts is a legal question subject to *de novo* review. . . ."[448] The plaintiff alleged that Grove, who worked as a sales representative for the plaintiff, had access to databases of profiles of plaintiff's clients. In contrast to *Appelbaum*, The Agency put forth a great deal of evidence that the profiles contained information about the personal and idiosyncratic preferences of the clients that was gathered by virtue of the company's close relations with its clients, and that The Agency used this unique information to retain clients.[449]

Restrictive covenants in the medical profession were examined again in *Mohanty v. St. John Heart Clinic*.[450] Drs. Mohanty and Ramadural filed a declaratory action against St. John Heart Clinic ("Clinic") alleging a breach of their employment contracts.[451] The Clinic filed a counter complaint alleging the doctors breached their restrictive covenants and sought a temporary restraining order which was granted.[452] However, the circuit court denied the preliminary injunction.[453]

On interlocutory appeal the court reviewed whether the restrictive covenants were overly broad and unreasonable.[454] The restrictive covenants prohibited Dr. Mohanty for five years and Dr. Ramadurai for three years within a radius of five miles from any of the Clinic's offices in Illinois from being connected, directly or indirectly, in any manner with any office established for the practice of medicine.[455] It also prohibited them from practicing for the same time periods at any other hospital with which any member of the Clinic was affiliated.[456]

The circuit court did not find the geographical or time period unreasonable, but found the practice of medicine to be overly broad, because the doctors specialized in cardiology and internal medicine.[457] The appellate court found the restriction was not unreasonable because they were free to practice outside the five–mile limit and there were many opportunities in the Chicago metropolitan area to do so and the

448. *Id.* at 215–16, 839 N.E.2d at 615.
449. *Id.* at 209–13, 216–19, 839 N.E.2d at 610–13, 615–19.
450. 358 Ill. App. 3d 902, 832 N.E.2d 940 (Ill. App. Ct. 2005), *appeal denied*, 217 Ill. 2d 567, 844 N.E.2d 39 (Dec. 1, 2005).
451. *Id.* at 903–04, 832 N.E.2d at 941–42.
452. *Id.* at 904, 832 N.E.2d at 942.
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.*
457. *Id.* at 906–07, 832 N.E.2d at 943.

specialities did not prevent them from practicing as doctors in other disciplines.[458] Nor was there any evidence that the restrictive covenants would cause a shortage of doctors or result in injury to the public.[459] Following *Prairie Eye Center, Ltd.*,[460] the court noted that Illinois courts have consistently upheld non–competition agreements with physicians.[461] The circuit court was reversed and the matter was remanded with directions.[462]

F. Labor

1. Majority Interest Petition

In *County of DuPage v. Illinois Labor Relations Board*,[463] the Illinois Labor Relations Board ("Board") promulgated some emergency rules for processing majority interest petitions. The issues were whether the county and sheriff had standing to challenge the emergency rules and whether the emergency rules were valid.

On August 5, 2003, the governor signed an amendment to the Illinois Public Labor Relations Act[464] to include a majority interest petition procedure in the certification process.[465] The Board promulgated emergency rules which were adopted September 22, 2003.[466] The Metropolitan Alliance of Police, DuPage County Sheriff's Police Chapter No. 126 ("MAP"), filed a majority interest petition on December 18, 2003, to represent some of the deputies.[467] The Board certified MAP as the exclusive bargaining representative of deputies in certain units.[468] The County and the Sheriff filed a petition for administrative review contending the emergency rules were improperly enacted.[469] The American Federation of State, County, and Municipal Employees ("AFSCME"), as *amicus curiae*, argued the County and

458. *Id*. at 907–08, 832 N.E.2d at 944–45.
459. *Id.*
460. 329 Ill. App. 3d 293, 768 N.E.2d 414 (Ill. App. Ct. 2002).
461. 358 Ill. App. 3d at 911, 832 N.E.2d at 947.
462. *Id.*
463. 358 Ill. App. 3d 174, 830 N.E.2d 709 (2d Dist. 2005).
464. 5 ILL. COMP. STAT. ANN. 315/1 et seq. (West 2002).
465. 358 Ill. App. 3d at 177, 830 N.E.2d at 712.
466. *Id.*
467. *Id.*
468. *Id.*
469. *Id*. at 178, 830 N.E.2d at 712.

Sheriff did not have standing to challenge the emergency rules.[470] The court rejected AFSCME's arguments that the County and Sheriff lacked a cognizable legal interest and that the legislative intent of section 9(a–5) was to exclude employers from the representation proceedings and held the County and Sheriff had standing.[471] The opinion of this case explains the need for emergency rules and what justifies implementing such rules. The County and Sheriff took the position that under the Administrative Procedure Act (Act)[472] there was no need for the Board to promulgate emergency rules.[473] Section 5–45(a) of the Act defines "emergency" as "the existence of any situation that any agency finds reasonably constitutes a threat to the public interest, safety or welfare."[474] Determining *Champaign–Urbana Public Health District*[475] was on point to the question in this case, the court held that the adoption of the emergency rules was invalid because there was no threat to the public interest, safety, or welfare, and further because the reasons given AFSCME and the Board evidenced more of an administrative convenience than an emergency.[476]

This opinion was later supplemented awarding attorneys' fees and costs to the County and Sheriff in the amount of $62,493.75 pursuant to section 10–55(c) of the Act.[477] Section 10–55(c) of the Act provides for attorneys' fees for parties of any case if the party succeeds in invalidating any administrative rule.[478] The court distinguished the two cases argued by the Board and MAP, *Hansen*, and *Sutton.*[479] Unlike the parties in *Champaign–Urbana*, the courts in *Hansen* and *Sutton* actually awarded attorneys' fees because the rule was invalidated and because the parties did not continue to maintain the validity of the rule, respectively.[480] The Board's and MAP's continued position that the emergency rules were valid for purposes of allowing the exclusive

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470. *Id.*, 830 N.E.2d at 713.
471. *Id.* at 178–79, 830 N.E.2d at 713.
472. 5 ILL. COMP. STAT. ANN. 100/1 *et seq*. (West 2002).
473. 358 Ill. App. 3d at 179, 830 N.E.2d at 714.
474. *Id.;* 5 ILL. COMP. STAT. ANN. 100/5–45(a) (West 2002).
475. Champaign–Urbana Public Health Dist. V. Ill. Labor Relations Bd., 354 Ill. App. 3d 482, 821 N.E.2d 691 (Ill. App. Ct. 2004).
476. *DuPage*, 358 Ill. App. 3d at 181, 830 N.E.2d at 715.
477. 359 Ill. App. 3d 577, 834 N.E.2d 976 (Ill. App. Ct. 2005), *appeal denied*, 844 N.E.2d 36 (Sept. 29, 2005).
478. *Id.* at 579, 834 N.E.2d at 978; 5 ILL. COMP. STAT. ANN. 100/10–55(c).
479. Hanson v. Ill. Racing Bd., 179 Ill. App. 3d 353, 534 N.E.2d 658 (Ill. App. Ct. 1989), Sutton v. Edgar, 147 Ill. App. 3d 723, 498 N.E.2d 295 (Ill. App. Ct. 1986).
480. *Id.* at 579–80, 834 N.E.2d at 978–79.

representation of MAP by way of the majority interest petition, but were previously invalidated by *Champaign–Urbana* for purposes of denying attorneys' fees to the County and Sheriff was considered fundamentally unfair.[481]

2. Arbitration

In *City of Highland Park v. Teamster Local No. 714*,[482] the appellate court reversed the trial court and reinstated the arbitrator's decision.[483] Although the facts are disputed as related to the incident, Officer Martin Stumpf ("Stumpf") was convicted of a Class A misdemeanor, criminal trespass to a vehicle.[484] Prior to his conviction, Stumpf had been suspended for eighteen days without pay for violating numerous department regulations.[485] After his conviction, Stumpf was terminated.[486] Stumpf filed a grievance that the City did not have cause to terminate him.[487] An arbitration hearing was held.[488] Reasoning that the City had already suspended him for the same conduct, that he could be rehabilitated, that he had no disciplinary action in his thirteen years of service, that suspension was sufficient discipline, and that Stumpf would submit to evaluation with an emphasis on anger management, the arbitrator held Stumpf had not been terminated for just cause and ordered his reinstatement.[489] The trial court disagreed with the arbitrator that the City could not both suspend Stumpf and terminate him for the same conduct.[490] However, misapplication of the double jeopardy doctrine by the arbitrator was not sufficient to overturn the arbitrator's award.[491] The trial court did hold that public policy of providing safe and effective law enforcement would be violated if the arbitrator's interpretation of the collective bargaining agreement was upheld, so it vacated the arbitrator's award.[492] Applying *AFSCME*[493]and

481. *Id.* at 580–81, 834 N.E.2d at 979–80.
482. 357 Ill. App. 3d 453, 828 N.E.2d 311 (Ill. App. Ct. 2005).
483. *Id.* at 454, 828 N.E.2d at 312.
484. *Id.*
485. *Id.* at 456, 828 N.E.2d at 313.
486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.* at 457, 828 N.E.2d at 315.
490. *Id.* at 458, 828 N.E.2d at 315.
491. *Id.*
492. *Id.*
493. *AFSCME*, 124 Ill. 2d 246, 529 N.E.2d 534 (Ill. 1988).

DuBose,[494] the appellate court concluded the trial court erred in its holding because there was no explicit public policy governing this case, there was no reason to believe that Stumpf would exhibit the same conduct in the future and the record showed had Stumpf not been convicted, he would have returned to work after the 18–day suspension.[495] The arbitrator's award was reinstated.[496]

3. Union Certification and Unfair Labor Practice

The Metropolitan Alliance of Police, Village of Woodridge Police Sergeants ("MAP") filed a lawsuit seeking administrative review of the Illinois Labor Relations Board's ("Board") denial of a petition for certification as the sole bargaining of all police sergeants employed by the Village of Woodridge ("Village") in *Metropolitan Alliance of Police v. Illinois Labor Relations Board*.[497] The Board found the sergeants were supervisors as defined in the Illinois Public Labor Relations Act ("Act")[498] and were not able to form a bargaining unit.[499] The sergeants assigned the beats, could call in an off–duty officer, reviewed and required redrafting of reports, performed evaluations for promotion purposes, managed vacation and overtime, had power to grant or deny grievances, had power to orally discipline and to recommend more severe discipline, coordinated special police activities, oversaw special training, and were involved in setting department policy.[500] Under the provisions of section 3(r) of the Act, it was apparent that the sergeant's work was substantially different in nature and essence than those of the officers.[501] The appellate court concluded the sergeants were supervisors as defined in section 3(r).[502] Further, the sergeants exercised independent judgment when orally disciplining the officers and addressing grievances also bringing them within the provisions of

494. *DuBose*, 173 Ill. 2d 299, 671 N.E.2d 668 (Ill. 1996).
495. 357 Ill. App. 3d at 461–66, 828 N.E.2d at 317–22.
496. *Id*. at 467, 828 N.E.2d at 322.
497. 362 Ill. App. 3d 469, 839 N.E.2d 1073 (Ill. App. Ct. 2005).
498. 5 ILL. COMP. STAT. ANN. 315/1 *et seq*. (West 2000).
499. 362 Ill. App. 3d at 471, 839 N.E.2d at 1076.
500. *Id*. at 474, 839 N.E.2d at1078.
501. *Id*. at 475–76, 839 N.E.2d at 1079–80.
502. *Id.* at 477, 839 N.E.2d at 1081.

3(r).[503] The Board's decision to deny MAP's petition for certification was confirmed.[504]

4. *Statutory Interest*

Under section 14(k) of the Illinois Public Labor Relations Act ("Act"),[505]
the court in *County of Cook v. Illinois Fraternal Order of Police Labor Council*[506] clarified what is meant by "award of money" and the "effective retroactive date" in the specific language of the section. "If said court's decision affirms the award of money, such award, if retroactive, shall bear interest at the rate of 12% per annum from the effective retroactive date."[507] In a series of proceedings, the County implemented its proposed wage increase of 16.5% to Union employees, even though the Union contended it should be the full amount awarded by the arbitrator which was 23%.[508] The arbitrator's award of the full 23% wage increase was later confirmed by the circuit court, but the court held, after reconsideration, that the County only had to pay the statutory interest of 12% on the difference of what the County had been paying (16.5%) and the full amount of the arbitrator's award (23%).[509] The court also held there was no reason to delay enforcement or appeal.[510]

The Union contended the "award of money" was the entire arbitration award which was 23%. However, the County argued it meant only the amount in dispute or 6.5% which was the difference. The appellate court found the statutory language to be clear and unambiguous in favor of the Union. The court borrowed the definition from the Uniform Arbitration Act[511] that an "award of money shall be in writing and signed by the arbitrators joining in the award."[512] Here, the arbitrator signed a written order providing for an award of a 23%

503. *Id.* at 477–78, 839 N.E.2d at 1081.
504. *Id.* at 480, 839 N.E.2d at 1083.
505. 5 ILL. COMP. STAT. ANN. 315/14(k) (West 2002).
506. 358 Ill. App. 3d 667, 832 N.E.2d 395 (Ill. App. Ct. 2005).
507. *Id.* at 672, 832 N.E.2d at 401.
508. *Id.* at 669–70, 832 N.E.2d at 398–99.
509. *Id.*
510. *Id.* at 670, 832 N.E.2d at 399.
511. 710 ILL. COMP. STAT. ANN. 5/1 *et seq.* (West 2002).
512. 358 Ill. App. 3d at 674, 832 N.E.2d at 402; 710 ILL. COMP. STAT. ANN. 5/8 (West 2002).

wage increase.[513] The appellate court reversed the circuit court's holding.[514]

According to the Union, the meaning of "effective retroactive date" was that statutory interest must be paid from the date of the arbitration award.[515] The County's position was that it had two interpretations: (1) date of the arbitration agreement or (2) period of retroactivity arising from judicial review proceedings.[516] The appellate court rejected the County's position.[517] The court again found the statute clear and unambiguous as meaning the date of the award of money which was the effective date of the pay increases.[518]

G. Fraud

The court examined the termination, resignation and reappointments of Mary Ann Rohrback ("Rohrback") and Virginia Wood ("Wood") in *Rohrback v. Illinois Department of Employment Security*.[519] Rohrback and Wood were terminated for obtaining reappointment to a new term through fraud.[520] The Civil Service Commission ("Commission") overturned the terminations but suspended them for ninety days for improperly trying to extend their employment terms.[521] The Commission also held the four–year reappointments were invalid because neither of them had effectively resigned from their unexpired terms.[522] Rohrback and Wood filed a lawsuit for administrative review.[523] The circuit court reversed the Commission and ordered Rohrback and Wood restored to their appointments with no discipline.[524] The appellate court agreed.

Rohrback and Wood resigned their positions prior to the expiration of the current four–year term, accepted interim positions, resigned the interim positions, and were reappointed to their original

513. 358 Ill. App. 3d at 674, 832 N.E.2d at 402.
514. *Id.*
515. *Id*.
516. *Id.*
517. *Id*. at 675, 832 N.E.2d at 403.
518. *Id.*
519. 361 Ill. App. 3d 298, 835 N.E.2d 955 (Ill. App. Ct. 2005).
520. *Id.* at 299, 835 N.E.2d at 957.
521. *Id.*
522. *Id.*
523. *Id*.
524. *Id.*

positions for new four–year terms.[525] Both Rohrback and Wood had received calls from human resources employees in their respective departments instructing them how to obtain reappointment.[526] Both women testified their duties or location did not change through this process.[527] The Commission held the women could not be reappointed because they never effectively resigned their position and they knowingly attempted to improperly extend the terms of their employment.[528] On appeal the court pointed out that case law holds when a public officer submits a resignation it is irrevocable and may be effective immediately or on a future date as drafted.[529] The letters drafted by Rohrback were dated August 30, 2002, and September 12, 2002, although it appeared she did not fax them until September 18, 2002.[530] The defendants argued that because the letters were sent after the dates of the letters and they kept working, they did not resign and could not be reappointed.[531] The court found that the State processed the transactions through its Department of Central Management Services ("CMS") and could not now dispute the resignation occurred.[532] The court also found no evidence that Rohrback backdated the letters.[533] The fact that the letters were not transmitted until September 18 did not mean they were falsified.[534] The resignation took place when communicated, not on the date of the letter.[535] Last, the court found that the State, through the human resources manager, induced Rohrback to do the things she did and the transactions were not criminal.[536]

Likewise with Wood, the court concluded that continuing to work did not negate the resignation, which, by operation of law, was effective when she communicated it.[537] Defendants also argued Wood was not entitled to the compensation she accepted after she officially

525. *Id*. at 300–04, 835 N.E.2d 958–60.
526. *Id.*
527. *Id.*
528. *Id.*
529. *Id*. at 305, 835 N.E.2d at 962.
530. *Id.* at 306, 835 N.E.2d at 962.
531. *Id.*
532. *Id.*
533. *Id.* at 306–07, 835 N.E.2d at 962.
534. *Id.* at 306, 835 N.E.2d at 962.
535. *Id.*
536. *Id*. at 307, 835 N.E.2d at 963.
537. *Id.* at 307–08, 835 N.E.2d at 963.

resigned the position.[538] However, Wood was working and did not know the interim position was not the same rate of pay.[539] Further, defendants did not charge her with accepting unearned compensation.[540] Last, defendants argued that Wood committed fraud by resigning from the interim position which she never had.[541] There was no evidence that she committed fraud just because she did not know what interim job from which she was resigning.[542] The circuit court was affirmed and the women's reappointments were effective.

H. Jurisdiction

In *Allen v. Lieberman*,[543] the plaintiff, a Southern Illinois University ("SIU") employee, appealed the decision of the chief legal counsel designee of the Illinois Department of Human Rights ("IDHR") which dismissed his charge of discrimination based on a lack of jurisdiction. The court affirmed in part and reversed in part. On December 18, 2001, SIU notified the plaintiff that his continuous appointment would not be renewed, and that he would be given a twelve–month appointment.[544] On December 2, 2002, the plaintiff asked whether SIU intended to renew his twelve–month contract.[545] SIU informed the plaintiff that his contract would not be renewed, and that his employment was essentially terminated, on December 12, 2002. Plaintiff's last day of employment was December 31, 2002.[546] The plaintiff filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") on April 4, 2002, alleging that he was discriminated against on the basis of age, sex, and disability.[547] Plaintiff also checked a box on the Charge form indicating that he wanted his Charge concurrently filed with both the EEOC and the IDHR.[548] After approximately one year, the plaintiff discovered that the IDHR never assigned a Charge number to his file because he did

538. *Id.* at 308, 835 N.E.2d at 964.
539. *Id*.
540. *Id*. at 309, 835 N.E.2d at 964.
541. *Id.*
542. *Id.* at 310, 835 N.E.2d at 965.
543. 359 Ill. App. 3d 1170, 836 N.E.2d 64 (Ill. App. Ct. 2005).
544. *Id.* at 1172, 836 N.E.2d at 65–66.
545. *Id.* at 1172–73, 836 N.E.2d at 66.
546. *Id.* at 1173, 836 N.E.2d at 66.
547. *Id.*
548. *Id.*

not file the Charge directly with the IDHR.[549] The plaintiff re–filed his Charge directly with the IDHR on June 5, 2003.[550] The Department found that it lacked jurisdiction for two reasons. First, it held that the plaintiff's charge was technically filed on June 5, 2003, not on April 4, 2002.[551] Second, it argued that the date of the alleged harm was December 18, 2001, the date he learned that his continuous appointment was not renewed.[552] With these two dates, the Department held that the plaintiff filed his charge more than 180 days after the adverse action. Therefore the Department lacked jurisdiction to hear the Charge.[553] The court agreed with the Department's first conclusion.[554] However, the court rejected the Department's second conclusion. Instead, the court held that the language on the pre–printed Charge form, which the plaintiff specifically checked, indicated the plaintiff's intent that his April 4, 2003, Charge be filed with the EEOC *and* the IDHR.[555] In doing so, the court declined to follow the decision in *In re Polewaczyk*,[556] which reached the opposite conclusion.[557] Therefore, the court held that the April 4, 2002, Charge was filed within 180 days of the December 18, 2001, adverse action, and that the Department had jurisdiction to hear the Charge.[558]

I. Sovereign Immunity

In *Kawaguchi v. Gainer*,[559] a state trooper collided with the plaintiff on an interstate. The plaintiff sued the trooper, the driver of another car involved in the accident and the Illinois State Toll Highway Authority ("Authority"). The trooper filed a motion to dismiss pursuant to section 2–619 of the Illinois Code of Civil Procedure[560] arguing that due to sovereign immunity, the suit must be brought in the Court of

549. *Id.* at 1174, 836 N.E.2d at 67.
550. *Id.*
551. *Id.* at 1176, 836 N.E.2d at 68–9.
552. *Id.*
553. *Id.*
554. *Id.* at 1179, 836 N.E.2d at 70 (quoting Del. State Coll. v. Ricks, 449 U.S. 250, 57 (1980)).
555. *Id.* at 1182, 836 N.E.2d at 73.
556. Ill. Hum. Rts. Comm'n Rep. 1994CA2261 (Apr. 25, 2001).
557. 359 Ill. App. 3d at 1181, 836 N.E.2d at 72.
558. *Id.* at 1182–83, 836 N.E.2d at 73–74. (It should be noted that the court based it opinion, in part, on the fact that the IDHR and EEOC work sharing agreement was not part of the record in this case.).
559. 361 Ill. App. 3d 229, 835 N.E.2d 435 (2d Dist 2005).
560. 735 ILL COMP. STAT. ANN. 5/2–619.

Claims.[561] The Authority argued that, because the trooper was a State Police employee, the Authority could not be held vicariously liable for her negligence.[562] The Second District affirmed the trial court's decision granting the defendants' motions to dismiss.[563] At the time of the accident, the trooper was responding to an accident at a tollway. She was assigned to a district specifically authorized to police tollways pursuant to a contract between the Authority and the State Police.[564] The contract also provided that the State Police directs and controls the officers patrolling the tollways.[565] The first dispute involved whether the trooper was a borrowed employee of the Authority. The court ultimately held that the plaintiff was not a borrowed employee because, among other reasons, the State Police and not the Authority had the right to control the trooper.[566] Therefore, the Authority could not be vicariously liable for the trooper's negligence.[567] The second dispute involved the trooper's sovereign immunity claims. The court first held that, at the time of the accident, the trooper was acting in a manner unique to her employment because she was operating her vehicle in a manner authorized only for state police.[568] In doing so, the court distinguished the decision in *Currie v. Lao*.[569] The court ultimately held that sovereign immunity applied because the trooper was responding to an emergency call at the time of the accident, "which was part of her normal and official duties, and therefore was acting in a way unique to her position."[570] Therefore, the court lacked jurisdiction to hear the case.[571]

A second case finding sovereign immunity protection involved a state hospital employee in an action against her for the death of a patient. In *Jackson v. Alvarez*,[572] Jackson was a patient at Lincoln Development Center ("Center") diagnosed with profound mental retardation and impulse control disorder.[573] Carolyn Goforth

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561. 361 Ill. App. 3d at 231, 835 N.E.2d at 437.
562. *Id.*
563. *Id.*
564. *Id.* at 232, 835 N.E.2d at 438; 20 ILL. COMP. STAT. ANN. 2610/20 (West 2002).
565. *Id.*
566. *Id.* at 446, 835 N.E.2d at 242.
567. *Id.*
568. *Id.* at 245, 835 N.E.2d at 448.
569. 148 Ill. 2d 151, 592 N.E.2d 977 (Ill. 1992).
570. 361 Ill. App. 3d at 452, 835 N.E.2d at 249.
571. *Id.*
572. 358 Ill. App. 3d 555, 831 N.E.2d 1159 (III. App. 2005) *reh'g denied,* Aug. 1, 2005.
573. *Id.* at 556, 831 N.E.2d at 1160.

("Goforth") and Arcoli Alvarez ("Alvarez") were to monitor Jackson every fifteen minutes. One day, Alvarez brought 100 Darvocet pills in her purse and did not lock it up as the rules of the Center required.[574] Alvarez and Goforth did not check on Jackson and he swallowed a lethal amount of the Darvocet.[575] The court dismissed the actions against Goforth and Alvarez.[576] Goforth's dismissal was not appealable and was affirmed.[577]

Applying *Robb v. Sutton*,[578] the court examined the three criteria of sovereign immunity that must exist to protect Alvarez: (1) there are no allegations that an agent or employee of the state acted beyond the scope of his authority through wrongful act, (2) the duty alleged to have been breached is not owed to the public generally and (3) the actions complained of involve matters within the employee's normal and official functions of the state.[579] Alvarez's lack of supervision was careless, but supervision was still within the scope of her authority and was within her duties as a state employee, so numbers (1) and (3) were met. Plaintiff failed to allege and independent duty outside of Alvarez's employment, so number (2) was met. The appellate court affirmed the trial court's dismissal.[580]

J. School Law

A tenured teacher, Charlene Raitzik ("Raitzik"), appealed the decision of her termination in *Raitzik v. Board of Education of Chicago*.[581] Over the years, her ratings had varied up and down.[582] The principal, Robert Alexander, ("Alexander") observed and evaluated Raitzik on two classroom visits.[583] Alexander listed seven reasons supporting his issuance of an E–3 notice for her unsatisfactory teaching performance.[584] Raitzik and Alexander met and implemented a remediation plan that included over fifty bullet points of suggestions to

574. *Id.*
575. *Id.* at 557, 831 N.E.2d at 1161.
576. *Id.* at 559, 831 N.E.2d at 1162.
577. *Id.*
578. 147 Ill. App. 3d 710, 498 N.E.2d 267 (Ill. App. Ct. 1986).
579. *Id.* at 560, 831 N.E.2d at 1163–64.
580. *Id.* at 562, 831 N.E.2d at 1165.
581. 356 Ill. App. 3d 813, 826 N.E.2d 568 (Ill. App. 2005).
582. *Id.* at 814–15, 826 N.E.2d at 572.
583. *Id.* at 815–16, 826 N.E.2d at 572–73.
584. *Id.* at 816, 826 N.E.2d at 573.

address her five primary deficiencies.[585] Alexander would conduct her final evaluation and Serena Peterson ("Peterson") would be Raitzik's consulting teacher.[586] Raitzik signed the plan which would be completed within ninety school days concluding on September 26, 2001.[587] She was warned that an unsatisfactory rating at the end could result in her termination.[588] Peterson not only made herself available to Raitzik, but also provided much guidance during the remediation period.[589] Likewise, Alexander observed her classroom many times and Raitzik signed each observation form.[590] Neither Peterson or Alexander saw the necessary improvement. Alexander sent Raitzik a letter that she had failed to complete her remediation plan with a satisfactory rating and he would be recommending her termination.[591] The Board of Education approved the dismissal for cause.[592] Raitzik sought review of a hearing officer who recommended she be reinstated.[593] The Board confirmed the dismissal.[594] Raitzik sought administrative review and the court affirmed the Board's decision.[595]

The appellate court found that Alexander followed the School Code meticulously and Raitzik's due process rights were not denied.[596] The court also points out that it was not its function to address the issuance of the E–3 notice, but gave its opinion that the E–3 notice was warranted.[597] The record supports the determination that the remediation plan was not completed within the designated period.[598] Pursuant to section 24A–5 of the School Code,[599] the failure to complete a remediation plan with a satisfactory or better rating is cause for dismissal.[600] The appellate court found an overwhelming amount

585. *Id*. at 816–17, 826 N.E.2d at 573–74.
586. *Id*. at 817, 826 N.E.2d at 574.
587. *Id.*
588. *Id.*
589. *Id*. at 817–18, 826 N.E.2d at 574
590. *Id.* at 818–19, 826 N.E.2d at 575.
591. *Id.* at 820, 826 N.E.2d at 576.
592. *Id.* at 821, 826 N.E.2d at 577.
593. *Id.*
594. *Id.* at 822, 826 N.E.2d at 577.
595. *Id*., 826 N.E.2d at 578.
596. *Id.* at 825–26, 826 N.E.2d at 580.
597. *Id.* at 828–29, 826 N.E.2d at 582–83.
598. *Id.* at 829–30, 826 N.E.2d at 583–84.
599. 105 ILL. COMP. STAT. ANN. 5/14–5 (West 2000).
600. *Id.* at 831, 826 N.E.2d at 585.

of evidence in the record that Raitzik failed to complete the remediation plan and cause for dismissal existed.[601]

K. Miscellaneous

In *Kostecki v. Dominick's Finer Foods, Inc. of Illinois*,[602] the plaintiff filed a class action against the defendant alleging violations of the Minimum Wage Law,[603] the Illinois Wage Payment and Collection Act,[604] and the One Day Rest in Seven Act.[605] The court affirmed the trial court's decision granting the defendant's motion to dismiss under section 2–619 of the Illinois Code of Civil Procedure,[606] denied the plaintiff's motion for leave to file a second amended complaint, and struck the defendant's motion to enforce a settlement offer. The court first rejected plaintiff's argument that her state wage claims were analogous to the federal Fair Labor Standards Act, which may be brought in court even after unsuccessfully pursuing the claim under a collective bargaining agreement.[607] Because the claims were covered by the plaintiff's collective bargaining agreement, the court held that the plaintiff must exhaust her remedies under the agreement before seeking judicial relief.[608] Next, the court held that the Plaintiff failed to carry her burden to establish that the One Day Rest in Seven Act contains an implied private cause of action.[609] The court also denied the plaintiff's motion to file a second amended complaint, stating that the trial court's decision was final because it did not provide leave to amend, and that an amended complaint filed after a final adjudication would be untimely and prejudicial to the defendants.[610] The court found that the trial court correctly decided that it lacked jurisdiction to hear the plaintiff's motion to enforce a settlement offer that plaintiff purportedly accepted.[611] Because the plaintiff filed her first notice of appeal while her motion was pending, the notice divested the trial court

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601. *Id.*
602. 361 Ill. App. 3d 362, 836 N.E.2d 837 (Ill. App. Ct. 2005).
603. 820 ILL COMP. STAT. ANN. 105/1 *et. seq.* (West 2002).
604. 820 ILL COMP. STAT. ANN. 115/1 *et. seq.* (West 2002).
605. 820 ILL COMP. STAT. ANN. 140/1 *et. seq.* (West 2002).
606. 735 ILL COMP. STAT. ANN. 5/2–619 (West 2002).
607. 361 Ill. App. 3d at 368–69, 836 N.E.2d at 842–43.
608. *Id.* at 368–71, 836 N.E.2d at 842–45.
609. *Id.* at 371–72, 836 N.E.2d at 845.
610. *Id.* at 373–74, 836 N.E.2d at 846–47.
611. *Id.* at 375–76, 836 N.E.2d at 848–49.

of jurisdiction. Finally, in responding to the plaintiff's argument that the trial court was obligated to rule on its Motion for Class Certification prior to dismissing her complaint, the court distinguished *Hillenbrand v. Meyer Medical Group, S.C.*,[612] and stated that, because the trial court did not rule on any motions based on mootness, "the trial court was not obligated to rule on plaintiff's pending motion for class certification."[613]

CONCLUSION

Yet another decision has found that individuals were employees rather than independent contractors. An employer believing it has a working relationship with an independent contractor rather than an employee must be aware of the likelihood of such individual being classified as employee and the risks associated with such erroneous classification. While non-compete agreements are generally disfavored in Illinois, they will be upheld to protect legitimate business interests, if the agreements or restrictive covenants are not drafted too broadly in time and scope. Pensions continue to be construed strictly within the statutes and Section 2-103 (Arrest Record) of the Illinois Human Rights Act was further clarified by distinguishing the employer's focus on the person's actual conduct rather than the arrest.

612. 308 Ill. App. 3d 381, 392, 720 N.E.2d 287 (Ill. 1999).
613. 361 Ill. App. 3d at 377, 836 N.E.2d at 849.