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NOTES

TORT REMEDY FOR RETALIATORY DISCHARGE: ILLINOIS WORKMEN'S COMPENSATION ACT LIMITS EMPLOYER'S POWER TO DISCHARGE EMPLOYEES TERMINABLE-AT-WILL— *KELSAY V. MOTOROLA, INC.*

The long-standing rule that an employer may discharge a terminable-at-will employee¹ for just cause, no cause, or even a "cause [that is] morally wrong"² has been examined with increasing frequency by courts³ and commentators.⁴ Confronted with a particularly harsh application of this rule in *Kelsay v. Motorola, Inc.*,⁵ the Illinois Supreme Court held that the retaliatory discharge of an employee for pursuing a workmen's compensation claim offended the public policy of Illinois⁶ as manifested in the Workmen's Compensation Act.⁷ The court also held that such a discharge constituted a tort⁸ and gave rise to compensatory and punitive damages. By limiting an

1. "In [Illinois] the rule has long been established that a hiring at a monthly or annual salary, if no duration is specified in the contract, is presumed to be at will and either party may terminate the hiring at his pleasure without liability." *Long v. Arthur Rubloff & Co.*, 27 Ill. App. 3d 1013, 1023, 327 N.E.2d 346, 353 (1st Dist. 1975). See, e.g., *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977); *Buian v. J.L. Jacobs & Co.*, 428 F.2d 531 (7th Cir. 1970); *Roemer v. Zurich Insurance Co.*, 25 Ill. App. 3d 606, 323 N.E.2d 582 (1st Dist. 1975); *Atwood v. Curtis Candy Co.*, 22 Ill. App. 2d 369, 161 N.E.2d 355 (1st Dist. 1959).

2. *Payne v. Western & A.R.R.*, 81 Tenn. 507, 520 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). One Illinois decision has expressed the at-will rule in similarly extreme terms. See *Fidelity & Cas. Co. v. Gibson*, 135 Ill. App. 290 (1st Dist.), *aff'd*, 232 Ill. 49, 83 N.E. 539 (1907) (employer has lawful right to discharge employee with or without cause, for any reason, however capricious and unfounded it might be).

3. See notes 22 and 55 *infra*.

4. The at-will rule has been the subject of considerable criticism in the last 15 years. See *Blades Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) (comprehensive examination of the nature and effect of the at-will rule, its history, and the employee's need for a personal damage remedy as a protection from abuse of the rule by employers) [hereinafter cited as *Blades*]; *Feinman, The Development of the Employment At Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976) (historical evolution of the at-will rule traced and its relation to the development of advanced capitalism discussed) [hereinafter cited as *Feinman*]; *Peck, Some Kind of Hearing for Persons Discharged from Private Employment*, 16 SAN DIEGO L. REV. 313 (1979) (judicial activism in extending protection against improper termination of private sector employees urged) [hereinafter cited as *Some Kind of Hearing*]; *Summers, Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (American statutes' piecemeal modification of the employer's common law discharge power compared to the more comprehensive legal protection against unjust dismissals provided in other industrial countries) [hereinafter cited as *Summers*].

5. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

6. *Id.* at 185, 384 N.E.2d at 358.

7. ILL. REV. STAT. ch. 48, § 138.1 to .28 (1977).

8. 74 Ill. 2d at 185, 384 N.E.2d at 358-59.

employer's "otherwise absolute"⁹ power to terminate at-will employees, the *Kelsay* court demonstrated a clear understanding of the potential for abuse of this power and indicated a willingness to intervene when an employer's discharge actions contravene important public policy considerations.¹⁰

This Note examines the reasoning in *Kelsay* and criticizes its analysis of prior case law. A legislative alternative expanding the protection afforded employees by *Kelsay* is suggested and a sample statute designed to achieve this expansion is presented. Finally, the *Kelsay* decision's impact on the employer-employee relationship is discussed and a hypothetical that demonstrates a possible extension of the *Kelsay* public policy considerations is analyzed.

THE TERMINABLE-AT-WILL RULE

The unqualified American rule empowering an employer to terminate an at-will employee¹¹ originated approximately 100 years ago¹² and remains the law today in most states.¹³ The rule first was expressed in a treatise¹⁴ and

9. *Id.* at 181, 384 N.E.2d at 357.

10. *Id.* at 185, 384 N.E.2d at 358.

11. France, Germany, England, and Sweden protect against unjust dismissals by legislation, thus avoiding the harshness of the American rule. See Summers, *supra* note 4, at 508-19. France statutorily adopted a principle known as "abus de droit," which makes abusive termination a tort if the employer acted with malicious intent, culpable negligence, or capriciousness. *Id.* at 510. Germany prohibits dismissals that are "anti-social" in character, and requires a minimum notice period of four weeks before a discharge can be effective, except in cases of serious employee misconduct. *Id.* at 511. In 1971, England adopted a statute providing comprehensive protection against unjust dismissal. *Id.* at 513. Sweden also has a fairly comprehensive unjust-dismissal statute requiring written notice of the dismissal at least one month in advance. The Swedish statute also requires that the dismissal be for "an objective cause" that must be proven by the employer. *Id.* at 517. These four countries had harsh common law discharge rules similar to the American rule, but all have softened the rule's impact by comprehensive statutes.

12. See note 14 *infra*.

13. 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 1017 (3d ed. 1967); 53 AM. JUR. 2d *Master and Servant* § 43 (1970). One jurisdiction has abandoned the rule. See *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). The court in *Monge* held that an employer's termination of an at-will employment contract is not in the best interests of the economic system or the public good where the termination is motivated by bad faith, malice, or retaliation and that such a termination constitutes a breach of the employment contract. This decision has evoked considerable commentary but has not been followed by other jurisdictions. See Note, *A Remedy for Malicious Discharge of the At-Will Employee: Monge v. Beebe Rubber Co.*, 7 CONN. L. REV. 758 (1975) (*Monge* court's reasoning examined and some implications of the decision suggested); Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435 (1975) (tort remedy proposed as alternative to contract analysis in *Monge*) [hereinafter cited as *A Common Law Action*]; Comment, *Employment Contracts Terminable At Will: Monge v. Beebe Rubber Co. and Bad Faith Discharges*, 63 KY. L.J. 513 (1975) (contract theory underlying at-will rule explored and the effect of *Monge* discussed). Like *Monge*, the *Kelsay* decision also has triggered commentary. See Filippi and Popko, *Workmen's Compensation: New Cause of Action for Retaliatory Discharge*, 68 ILL. B.J. 329 (1980); Note, *Kelsay v. Motorola, Inc.—Tort Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claims*, 12 J. MAR. J. PRAC. & PROC. 659 (1979); *Recent Decisions*, 68 ILL. B.J. 287 (1979).

14. The rule's origin generally is traced to the following statement by H.G. Wood:

With us the rule is inflexible, that a general or indefinite hiring is *prima facie* a

later was declared a constitutional right in a series of United States Supreme Court decisions based on extreme notions of laissez-faire economics.¹⁵ Although the treatise has been proven erroneous¹⁶ and the Supreme Court has abandoned its early laissez-faire position,¹⁷ the rule remains. In fact, the rule is so firmly entrenched in American jurisprudence that courts frequently accept it without serious analysis and occasionally without citation.¹⁸

While the employer's power to terminate an at-will employee generally is considered absolute under the common law, statutory exceptions are found in federal¹⁹ and state²⁰ legislation that prohibit discharges based on the

hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed or whatever time the party may serve.

H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). For a discussion focusing primarily on the at-will rule's historical development, see generally Feinman, *supra* note 4. A comparison of the Illinois rule, *supra* note 1, with Wood's rule indicates that the rule has changed little in approximately 100 years, with only a few laudable exceptions such as the *Kelsay* and *Monge* decisions.

15. The cases best representing this laissez-faire approach are *Adair v. United States*, 208 U.S. 161 (1908), and *Coppage v. Kansas*, 236 U.S. 1 (1915). In both cases the Supreme Court invalidated legislation forbidding yellow-dog (anti-union) contracts. The reasoning supporting these decisions was that both parties to the employment contract should be free to leave at any time and, therefore, legislation forbidding the discharge of employees for their refusal to sign yellow-dog contracts was unconstitutional. The challenged statutes forced employers to retain the services of unwanted employees when the employers should have been free to discharge. One author has explained that the Supreme Court's extreme laissez-faire position was representative of the prevalent 19th century belief that rapid economic growth was socially desirable because, theoretically, all society would enjoy the benefits of such growth. See *A Common Law Action*, *supra* note 13, at 1441. Another reason advanced for these laissez-faire beliefs was that the late 19th century was a period when business failure was common and the courts consequently felt compelled to protect industry and the employer. The terminable-at-will rule was formulated to this end. *Id.* at 1440.

16. One writer has shown that the four cases Wood cited as authority for his rule, *supra* note 14, did not support his position. See Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335, 341-42 (1974) [hereinafter cited as *Job Security*]. See also, Blumrosen, *Employer Discipline: U.S. Report*, 18 RUTGERS L. REV. 428, 432-33 (1964) (after Wood's treatise, application of the at-will rule spread rapidly throughout the country and the rule remains the standard text statement of the common law).

17. The cases cited in note 15 *supra* were later "sapped of their authority" by *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), according to Professor Blades. For a more thorough discussion of these Supreme Court decisions, see Blades, *supra* note 4, at 1415-19.

18. The *Kelsay* decision is a good example. The court did not cite authority for the employer's "traditional right to discharge at will," yet a major issue in *Kelsay* was whether the right should be a limited one. Automatic acceptance of the rule without analysis was a common occurrence when the rule first was announced at the beginning of the 20th century. See *Job Security*, *supra* note 16, at 342 nn. 57 & 58.

19. Some examples of federal legislation are: Veterans Preference Act, 5 U.S.C. § 7512(a) (1976) (agency may take adverse action against eligible employee only for such cause as will promote the efficiency of the agency's service); Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (no employer may discharge any employee simply because the employee's earnings have been subjected to garnishment); Labor Management Relations Act, 29 U.S.C. § 148(a) (1976) (employer's power to discharge restricted in certain circumstances); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1976) (unlawful for employer to discharge any employee

race, sex, or age of an employee. Case law also has established exceptions to this "inflexible"²¹ rule, usually on the ground that it violates public policy.²² Many courts, however, have not modified the rule,²³ resulting in a

because such employee has filed a complaint or instituted a proceeding under the Fair Labor Standards Act); Age Discrimination in Employment Act, 29 U.S.C. § 623 (1976) (employer prohibited from discharging employee because of employee's age); Occupational Health & Safety Act of 1970, 29 U.S.C. § 660(c) (1976) (employer prohibited from discharging employee because employee testified in or brought a proceeding under the Occupational Health & Safety Act). See generally Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 13-17 (1979) (comprehensive discussion of federal, state, and local governmental regulation of the employment relationship) [hereinafter cited as *Unjust Employment Discharges*].

20. For examples of state laws limiting the employer's absolute discharge power, see [1979] 1 LAB. L. REP. (State Laws) (CCH) ¶¶ 43045, 43055. See also [1979] GOV'T EMPL. REL. REP. (BNA) 51:501-23. For similar Illinois laws, see note 105 *infra*.

21. See note 14 *supra*.

22. The following courts have recognized a public-policy exception to the terminable-at-will rule: *Peterman v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee's dismissal for refusing to commit perjury violated public policy); *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (employee's dismissal for filing workmen's compensation claim violated public policy); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976) (employee's discharge for filing workmen's compensation claim contravened public policy); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (female employee's firing for refusing foreman's sexual advances was in bad faith and constituted a breach of the at-will employment contract because such bad faith breaches are not in the best interests of society); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee's termination for serving jury duty against employer's directions violated public policy). For a more exhaustive list of related cases, see Comment, *Protecting the Private Sector At Will Employee Who "Blows The Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 WISC. L. REV. 777, 786 [hereinafter cited as *Protecting the Private Sector At Will Employee*]. But see note 57 *infra* for cases that have not embraced the policy response to retaliatory discharge.

An interesting case, *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974), held that bad faith discharges constituted a breach of the at-will employment contract. The discharged female employee in the *Monge* case refused to be sexually "nice" to her foreman in order to secure a promotion. She did not exhaust available union grievance and arbitration remedies before bringing her suit, although she was a union member. The exhaustion of these remedies is required before a union employee may bring a separate wrongful discharge action, unless the union employee can prove the union arbitrarily or discriminatorily settled the employee's claim. See *Vaca v. Sipes*, 386 U.S. 171 (1967). Thus the *Monge* decision does not establish a common law discharge action for union employees, although its reasoning does support a discharge action for non-union employees. For a more detailed discussion of the *Monge* decision's impact on state discharge actions for organized employees, see *A Common Law Action*, *supra* note 13, at 1457-63.

The *Monge* decision was not mentioned by the Illinois Supreme Court in *Kelsay*, although the New Hampshire decision was raised by the appellant. Brief for Appellant at 19. This does not imply that the *Kelsay* court disagrees with the *Monge* court's conclusion that bad faith discharges are not in the best interest of the economic system or the public good. More probably the *Kelsay* majority omitted any reference to the *Monge* decision because no breach of contract allegations were made by the appellant. See note 31 *infra*. But see *Sargent v. Illinois Inst. of Tech.*, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1st Dist. 1979) (retaliatory discharge action based on express and implied contract allegations dismissed for failure to allege tort violation).

23. These courts usually reason that the employer's absolute power to discharge should be modified by the legislature, not the judiciary. See *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977); *Mallard v. Boring*, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).

split of authority.²⁴ This split of authority over the at-will doctrine's status recently arose between two panels of the Illinois Appellate Court and was resolved by the Illinois Supreme Court in *Kelsay*.

THE FACTS

Marilyn Jo Kelsay, a Motorola employee whose employment contract was terminable at-will, was injured²⁵ while working in the defendant's factory. She received the necessary medical attention²⁶ and later filed a workmen's compensation claim based on the injury.²⁷ After receiving notice of the claim, the personnel manager approached Kelsay and told her that she would be "more than adequately compensat[ed]" by Motorola if she did not advance her claim.²⁸ Kelsay also was informed of the company's policy of terminating employees who pursue workmen's compensation claims.²⁹ She

24. See Annot., 63 A.L.R.3d 979, 981-82 (1975).

25. The plaintiff commenced employment with the defendant company on January 3, 1973. On February 28, 1973, while operating an unfamiliar machine, Kelsay cut her thumb. Record at 5-7.

26. The plaintiff's injury apparently was minor. She returned to work the same day she received stitches in her thumb. 74 Ill. 2d at 178, 384 N.E.2d at 355-56. Kelsay eventually was compensated for her injury and her medical expenses were paid. *Kelsay v. Motorola, Inc.*, 51 Ill. App. 3d 1016, 1017, 366 N.E.2d 1141, 1142 (4th Dist. 1977), *rev'd*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

27. Workmen's compensation is a statutory creation. See note 7 *supra*. Prior to the Workmen's Compensation Act, injured employees had considerable difficulty recovering under negligence theory because of the common law defenses of assumption of risk, contributory negligence, and the fellow-servant rule. See 1 T. ANGERSTEIN, *ILLINOIS WORKMEN'S COMPENSATION* § 2 (rev. ed. 1952); 81 AM. JUR. 2d *Workmen's Compensation* § 2 (1976). Unable to work or recover damages, injured workers experienced financial hardship due to medical and family maintenance expenses. The Workmen's Compensation Act was passed to remedy these problems by providing speedy and inexpensive relief. For a recent analysis of the present state of the Illinois workmen's compensation system, see Stevenson, *The Illinois Workmen's Compensation System: A Description and Critique*, 27 DEPAUL L. REV. 675 (1978) [hereinafter cited as Stevenson]. For some comments on the economic impact of Illinois' Workmen's Compensation Act, see Parrish, *Workmen's Compensation Law in Illinois: Some Economic Consequences of Recent Changes*, 27 DEPAUL L. REV. 715 (1978).

28. 74 Ill. 2d at 179, 384 N.E.2d at 356.

29. After being informed of the policy to terminate employees who pursue workmen's compensation claims, Kelsay was told to "think about it." *Id.* at 179, 384 N.E.2d at 356. According to the defendant's personnel manager, no written company policy of terminating such employees existed, nor was he ever actually told of this policy. Record at 64. Motorola's policy of dismissing workmen's compensation claimants apparently was inferred from its awareness of the reason underlying Kelsay's termination. The personnel manager submitted a form to Motorola's divisional office for Kelsay's removal from the payroll. On this form appeared "w/c," indicating a workmen's compensation suit. Record at 61. Thus, future retaliatory discharge plaintiffs should examine company payroll records and employee time cards in addition to questioning company personnel. The existence of written records informally documenting the reasons for discharge could be crucial to establish that the employee's wrongful discharge contention is not just a bald assertion.

proceeded with her claim and later was discharged.³⁰ Although the workmen's compensation action eventually was settled, the plaintiff sought relief for her retaliatory discharge in the circuit court.³¹

The trial court found for Kelsay, awarding \$25,000 punitive damages in addition to \$749 compensatory damages.³² The appellate court reversed and held that an at-will employee had no cause of action against an employer for retaliatory discharge.³³ In another case, however, a different panel of the appellate court heard essentially the same issue but reached an opposite result.³⁴ Thus, a certificate of importance was issued to the Illinois Supreme Court to resolve the conflict.³⁵ The supreme court, in *Kelsay*, held that a cause of action existed for retaliatory discharge. The court stated in dicta that, in the future, punitive damages would be recoverable in similar cases, but denied Kelsay that form of relief.³⁶

THE DECISION

After reviewing the facts, the court stated the three questions presented in *Kelsay*: first, whether the state should recognize a cause of action for retaliatory discharge;³⁷ second, if retaliatory discharge was actionable,

30. The discharge occurred on June 6, 1973, immediately after Kelsay told the personnel manager her decision. The parties had engaged in several conversations on the subject before the June 6 encounter. Record at 10-15.

31. The plaintiff's complaint was framed solely in tort. *Kelsay v. Motorola, Inc.*, 51 Ill. App. 3d at 1016, 366 N.E.2d at 1142. In paragraph 10 of plaintiff's second amended complaint the following allegation appeared: "The discharge of the Plaintiff by the Defendant was for no cause other than the fact that she had filed an application for adjustment of her claim arising under the Workmen's Compensation Act and had refused to withdraw that claim after Defendant's threats and intimidation." Plaintiff's Second Amended Complaint at 2. By framing the complaint solely in tort, the plaintiff avoided the problems of establishing retaliatory or abusive discharge as a contract action. For analysis of the problems with contract theory as a basis for retaliatory discharge, see *Blades and Summers*, *supra* note 4, and note 66 *infra*. See also *Job Security*, *supra* note 16.

32. The jury originally awarded \$1000 compensatory damages, but the trial court remitted the amount to \$749. 74 Ill. 2d at 178, 384 N.E.2d at 355.

33. 51 Ill. App. 3d at 1020, 366 N.E.2d at 1144-45. The appellate court reviewed other employment legislation and concluded the legislature's omission of a civil remedy was intentional; therefore, any change had to be effected by the legislature.

34. *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (4th Dist. 1977) (retaliatory discharge for pursuing workmen's compensation held actionable). Justice Craven, dissenting in *Kelsay v. Motorola, Inc.*, 51 Ill. App. 3d at 1021, 366 N.E.2d at 1145, noted that the *Blades* article, *supra* note 4, was "most persuasive." He cited the article again in the *Leach* decision, which he authored for the majority. 51 Ill. App. 3d at 1025, 366 N.E.2d at 1147.

35. 58 Ill. 2d R. 316. Illinois Supreme Court Rule 316 states: "Appeals from the Appellate Court shall lie to the Supreme Court upon certification by a division of the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court."

36. 74 Ill. 2d at 189, 384 N.E.2d at 361.

37. *Id.* at 179, 384 N.E.2d at 356.

whether punitive damages were recoverable;³⁸ and if so, whether the punitive damages award was proper in the instant case.³⁹

Arguing the first issue, Motorola urged that no cause of action should be recognized because at the time Kelsay was injured the Workmen's Compensation Act (Act) contained no limitation on the employer's right to discharge.⁴⁰ Motorola also contended that the exclusivity provision of the Act,⁴¹ limiting the employer's responsibility for compensation to certain enumerated situations, indicated the legislature's intention that the Act should be the sole measure of employee rights and remedies.⁴² This provision, it argued, barred the implication of additional rights or remedies. The defendant's final contention was that the Act's 1975 amendment criminalizing retaliatory discharge⁴³ demonstrated the General Assembly's intention to exclude civil actions because they were not considered an appropriate remedy.⁴⁴

The Illinois Supreme Court rejected all of Motorola's contentions and allowed a private cause of action for retaliatory discharge.⁴⁵ The court explained that the Act's purpose was to provide automatic recovery to employees for injuries arising out of and in the course of employment.⁴⁶ Efficient remedies for the protection of injured employees were found to promote the general welfare and, consequently, were in furtherance of sound public policy.⁴⁷ In view of the Act's purpose and the public policy it

38. *Id.*

39. *Id.*

40. *Id.* Plaintiff's injury occurred in February, 1973, and her discharge was on June 6, 1973. The Workmen's Compensation Act amendment prohibiting retaliatory discharge was not effective until 1975. See ILL. REV. STAT. ch. 48, § 138.4(h) (1975). For this provision's text, see note 43 *infra*.

41. ILL. REV. STAT. ch. 48, § 138.11 (1973) provides: "The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act. . . ."

42. 74 Ill. 2d at 184, 384 N.E.2d at 358.

43. ILL. REV. STAT. ch. 48, § 138.4(h) (1975) provides:

It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him by this Act. . . .

It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his rights or remedies granted to him by this Act.

44. 74 Ill. 2d at 184-85, 384 N.E.2d at 358.

45. *Id.* at 185, 384 N.E.2d at 358-59.

46. *Id.* at 180-81, 384 N.E.2d at 356.

47. *Id.* at 181, 384 N.E.2d at 357. See *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, 104 N.E. 211 (1914) (the Workmen's Compensation Act is a declaration by the legislature of the public policy of the state). Although the court relied on the public policy declared by the legislature, see note 48 *infra*, other factors can be considered when determining the public policy. One authority states:

There are formal expressions and manifestations of public policy in the mandates, norms, and guidelines declared in federal and state constitutions, statutes, judicial

expressed,⁴⁸ the majority reasoned that allowing employers to exercise their unlimited discharge power could force employees to choose between employment and rights under the Act.⁴⁹ This result was considered untenable. The court therefore concluded that this result could not have been intended by the legislature, even in the absence of an explicit proscription against such employer conduct.⁵⁰

To support its conclusion that a cause of action existed prior to the 1975 amendment criminalizing retaliatory discharge, the *Kelsay* court examined relevant case law. The supreme court rejected a Seventh Circuit Court of Appeals decision that denied a cause of action for retaliatory discharge, *Loucks v. Star City Glass Co.*⁵¹ The *Loucks* court reasoned that no cause of action should exist because the Act contained no limitation on the employer's traditional right to discharge at the time of Loucks' dismissal.⁵² In rejecting *Loucks*, the *Kelsay* majority noted that the *Loucks* court lacked the guidance of Illinois precedent in its interpretation of the Act.⁵³ The supreme court also noted that federal decisions construing state statutes were not binding on state courts, concluding that the *Loucks* court's construction of the Act contravened Illinois public policy.⁵⁴

decisions, and sundry other avenues through which the official decisions and actions of organized society are registered. In a larger and less formalized sense, countless manifestations of public mores, attitudes, and sentiments may be, in effect, judicially noticed as sources on the basis of which to declare public policy. Policy directives may be perceived, moreover, as imperatives derived from modern economic, social and political conditions.

2A. J. SUTHERLAND, STATUTORY CONSTRUCTION § 56.01, at 401 (4th ed. 1973). See also *Marchlik v. Cornet Ins. Co.*, 40 Ill. 2d 327, 239 N.E.2d 799 (1968) (public policy includes judicial decisions, legislation, constitutions, customs, morals, and notions of justice prevailing within the state). Based on the factors enumerated by Professor Sutherland, the *Kelsay* court's realistic appraisal of the injured employee's plight, that of having to choose between employment and rights under the Act, was a legitimate consideration because such a plight is a modern economic condition.

48. *Id.* The Act's preamble expresses the public policy that compensation should be available to injured workers. The preamble declares the Workmen's Compensation Act to be "[a]n Act to promote the general welfare of the People of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State. . . ." ILL. REV. STAT. ch. 48, § 138 (1977).

49. 74 Ill. 2d at 182, 384 N.E.2d at 357.

50. *Id.*

51. 551 F.2d 745 (7th Cir. 1977) (court of appeals, construing the Illinois Workmen's Compensation Act, held that a civil cause of action for retaliatory discharge would not have been omitted from such comprehensive and integrated legislation if intended and that its omission therefore precluded a civil action). *Accord*, *Green v. Armerada-Hess Corp.*, 612 F.2d 212, 214 (5th Cir. 1980) (court of appeals construed the Mississippi Workmen's Compensation Law and held that the absence of an explicit statutory provision of a civil remedy argued against recognition of a cause of action for retaliatory discharge).

52. 551 F.2d at 748.

53. 74 Ill. 2d at 182, 384 N.E.2d at 357.

54. *Id.* Referring to the plaintiff, the *Loucks* court stated that though his "claims have a certain appeal to notions of fairness," the matter was a legislative determination against Loucks. The *Loucks* court was urged to consider *Kelsay*, but declined as *Kelsay* was then only a trial decision and therefore not necessarily the law of Illinois. 551 F.2d at 746.

The *Kelsay* court also examined opinions by the Indiana and Michigan state courts, *Frampton v. Central Indiana Gas Co.*⁵⁵ and *Sventko v. Kroger Co.*⁵⁶ Without analyzing these decisions in depth,⁵⁷ the *Kelsay* court mentioned that both state courts relied on public policy in recognizing retaliatory discharge.⁵⁸ The majority in *Kelsay* explained that “the overriding principle

55. 260 Ind. 249, 297 N.E.2d 425 (1973) (retaliatory discharge resulting from filing of workmen's compensation claim held to be a prohibited “device” within the meaning of the Indiana Workmen's Compensation Act and therefore actionable). The *Frampton* decision has received considerable attention in decisions throughout the United States. *Accord*, *Raden v. City of Azusa*, 97 Cal. App. 3d 336, 158 Cal. Rptr. 689 (1979); *Fortune v. National Cash Register Co.*, 364 N.E.2d 1251 (Mass. 1977); *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976); *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1976); *Reuther v. Fowler & Williams, Inc.*, 255 Pa. Super. 28, 386 A.2d 119 (1978); *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W. Va. Sup. Ct. App. 1978). *Contra*, *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977); *Percival v. General Motors Corp.*, 529 F.2d 1126 (8th Cir. 1976); *Wehr v. Burroughs Corp.*, 438 F. Supp. 1052 (E.D. Penn. 1977); *Keddie v. Pennsylvania State Univ.*, 412 F. Supp. 1264 (M.D. Penn. 1976); *Larsen v. Motor Supply Co.*, 117 Ariz. 507, 573 P.2d 907 (App. Ct. 1977); *Segal v. Arrow Indus. Corp.*, 364 So. 2d 89 (Fla. Dist. Ct. App. 1978); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *petition for discretionary review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978); *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974).

56. 69 Mich. App. 644, 245 N.W.2d 151 (1976) (discharge of employee in retaliation for filing workmen's compensation claim violated public policy even though the Michigan Workmen's Compensation Act did not prohibit retaliatory discharge).

57. The court probably discussed the *Frampton* and *Sventko* decisions because they were the only workmen's compensation cases supporting the court's position. Several decisions, however, do not favor the court's reasoning in *Kelsay*. See *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (Missouri Workmen's Compensation Act was considered so comprehensive that the inclusion of criminal penalties for discharge was construed to mean civil remedies were intentionally omitted); *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272 (1978) (North Carolina has rejected retaliatory eviction doctrine, so the *Frampton* decision's analogy between retaliatory eviction and retaliatory discharge was rejected); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950) (employee's discharge for pursuing workmen's compensation claim was rejected because the employee failed to properly allege facts sufficient to constitute a cause of action and because the employee was terminable at-will and therefore subject to discharge at any time).

58. 74 Ill. 2d at 181-84, 384 N.E.2d at 357-58. The *Frampton* case involved a woman employee who was injured on the job, but returned to work apparently recovered. Nineteen months after her return, she discovered she had lost 30% use of her injured arm. 260 Ind. at 250, 297 N.E.2d at 426. One month after she received a settlement for her subsequent arm problem, *Frampton* was dismissed with no reason given for her termination. *Id.* After noting that the Workmen's Compensation Act should be construed liberally, the Indiana Supreme Court interpreted the statutory prohibition against “devices” relieving the employer of its obligation to compensate injured employees to include retaliatory discharges. *Id.* at 252, 297 N.E.2d at 427-28. For the text of the Indiana statute, see note 60 *infra*. The *Frampton* court analogized retaliatory discharge to retaliatory eviction because there was no case law recognizing retaliatory discharge. The court reasoned that “[t]he fear of retaliation for reporting [housing] violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy [that of compensating injured workers].” *Id.* at 253, 297 N.E.2d at 428. Retaliatory discharge therefore was recognized as an exception to the at-will rule. *Id.* *Frampton* is the landmark case establishing retaliatory discharge as an exception to the at-will rule. See 2A A. LARSON, WORKMEN'S COMPENSATION § 68.36 (Supp. 1979) [hereinafter cited as LARSON].

. . . that compensation should be available to injured workers"⁵⁹ was the critical aspect of the *Frampton* decision, not the Indiana court's express reliance on the statutory language prohibiting employer devices for avoiding liability.⁶⁰ The *Kelsay* court reasoned that the absence of a similar prohibition in the Illinois Act did not mean that retaliatory discharge was any less offensive to the public policy of Illinois.⁶¹ The supreme court therefore held that the public policy underlying the Act limited the employer's absolute power to discharge at-will employees.⁶²

Having determined that the employer's discharge power was not absolute, the court considered the effects of both the Act's exclusivity provision and the 1975 amendment on the availability of a civil remedy.⁶³ The majority decided that neither precluded the implication of a civil remedy.⁶⁴ The exclusivity provision, although limiting the employer's compensation responsibility arising under the Act,⁶⁵ was held to apply only to work-related injuries, not to independent torts such as retaliatory discharge.⁶⁶

The *Sventko* case arose three years after the *Frampton* decision. Judge Allen, concurring in *Sventko*, cited *Frampton*, *Monge*, and *Peterman v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee's dismissal for refusing to commit perjury violated public policy). 69 Mich. App. at 651, 245 N.W.2d at 155. *Sventko* suffered a back injury, received compensation, and later was terminated. *Sventko* alleged her discharge was solely because she filed a workmen's compensation claim. *Id.* at 649, 245 N.W.2d at 154. For the similar complaint filed by the plaintiff in *Kelsay*, see note 31 *supra*.

The *Sventko* court declared that it was impossible to retaliatorily discharge an employee and not contravene the public policy, reasoning that "[a]n employer cannot accept that benefit [freedom from common law liability provided by the Act] for himself and yet attempt to prevent the application of the act to the work-related injuries of his employees without acting in direct contravention of public policy." *Id.* at 648, 245 N.W.2d at 153-54. The Illinois Supreme Court adopted similar reasoning in *Kelsay*. 74 Ill. 2d at 182, 384 N.E.2d at 357.

59. 74 Ill. 2d at 184, 384 N.E.2d at 358.

60. IND. CODE ANN. § 22-3-2-15 (Burns 1974) provides: "[N]o contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this act." (Emphasis added).

61. 74 Ill. 2d at 184, 384 N.E.2d at 358.

62. *Id.* at 185, 384 N.E.2d at 357-58.

63. See notes 41 and 43 *supra*.

64. 74 Ill. 2d at 184-85, 384 N.E.2d at 358-59.

65. See note 41 *supra*.

66. 74 Ill. 2d at 184, 384 N.E.2d at 358. By characterizing retaliatory discharge as an independent tort, the *Kelsay* court not only avoided the Act's exclusivity provision, but also the problems involved in a contract analysis. The contract concepts of mutuality of obligation and consideration inhibit the modification of the harsh at-will rule, the major obstacle to recognizing retaliatory discharge. Mutuality of obligation requires that the employer be free to fire at any time for any reason because the employee is free to quit at any time for any reason. See *Blades*, *supra* note 4, at 1419. See, e.g., *Meadows v. Radio Indus.*, 222 F.2d 347 (7th Cir. 1955). Illinois, however, recognizes that mutuality of obligation is not essential to the validity of a contract. See *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 133 N.E. 711 (1921) (consideration is essential to the validity of a contract but mutuality of obligation is not).

While mutuality of obligation can be overcome, separate consideration is needed to support a promise of continued employment because the employee's wages are regarded as full compensation for his or her efforts. See generally *Blades*, *supra* note 4, at 1419-21; Note, *Employment*

The *Kelsay* majority similarly concluded that the 1975 amendment providing criminal penalties for retaliatory discharge⁶⁷ does not prevent the implication of a civil remedy.⁶⁸ The court reasoned that the omission of a civil remedy does not reflect a conscious decision by the legislature that no such remedy should exist.⁶⁹ Rather, the criminal sanctions were considered insufficient to deter unscrupulous employers from risking the small statutory fine in order to escape their responsibility under the Act.⁷⁰ The court also pointed out that a small state fine does not alleviate the plight of employees threatened with retaliatory discharge for pursuing their rights.⁷¹ In addition, the supreme court stated that where a statute is enacted for the benefit of a particular class of individuals, the mere provision of criminal penalties does not necessarily bar the implication of civil remedies, even where civil remedies are not expressly mentioned in the statute.⁷² The *Kelsay* majority thus determined that the absence of a civil remedy in the Workmen's Compensation Act did not preclude the court from creating such a remedy.⁷³

Addressing the two remaining issues, the *Kelsay* court stated that although punitive damages would be appropriate⁷⁴ in future⁷⁵ retaliatory discharge

Contracts of Unspecified Duration, 42 COLUM. L. REV. 107, 121 (1942). Thus the discharge power remains absolute absent separate consideration.

The tort approach used by the *Kelsay* court is more flexible than the contract approach because the rigid requirement of consideration is not present. See generally *A Common Law Action*, *supra* note 13, at 1454-56.

67. See note 43 *supra*.

68. 74 Ill. 2d at 185, 384 N.E.2d at 358. For a general discussion of the implied action problem, see notes 103-13 and accompanying text *infra*.

69. 74 Ill. 2d at 185, 384 N.E.2d at 358.

70. *Id.* at 185, 187, 384 N.E.2d at 359.

71. *Id.* at 185, 384 N.E.2d at 359.

72. *Id.* The court relied on *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 128 N.E.2d 691 (1955), as authority for this proposition. In *Heimgaertner* the court recognized that civil actions could be implied from statutes that were penal in nature. *Id.* at 155, 128 N.E.2d at 693. On the facts, however, the *Heimgaertner* court held unconstitutional a statute that allowed employees to collect their daily salary while voting on election day. *Id.* at 167, 128 N.E.2d at 699. For a detailed discussion of when courts should imply civil remedies from statutes that are penal in nature, see notes 103-13 and accompanying text *infra*.

73. 74 Ill. 2d at 184-85, 384 N.E.2d at 358-59.

74. *Id.* at 189, 384 N.E.2d at 361. Professor Blades also believes that punitive damages are appropriate in retaliatory discharge actions. See *Blades, supra* note 4, at 1427. For a detailed discussion of the appropriateness of punitive damages in retaliatory discharge actions under the Illinois Workmen's Compensation Act, see *Recent Decisions*, 68 ILL. B.J. 287, 290-91 (1979). For a general discussion of punitive damages in Illinois, see *McKillup, Punitive Damages in Illinois: Review and Reappraisal*, 27 DEPAUL L. REV. 571 (1978).

The importance of recognizing retaliatory discharge as a tort, rather than a contract action, *supra* note 66, is evident in the awarding of damages. Punitive damages are not recoverable for wrongful discharge when the cause of action is based on breach of contract because breach of contract actions generally do not give rise to punitive damages. 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1340 (3d ed. 1968). See also 56 C.J.S. *Master and Servant* § 58(c) (1948); 53 AM. JUR. 2d *Master and Servant* § 63 (1970). Compare *Brandwen, Punitive-Exemplary Damages in Labor Relations Litigation*, 29 U. CHI. L. REV. 460, 465-67 (1962), where the author questions whether punitive damages actually deter conduct.

75. The technique the supreme court utilized in *Kelsay* to allow punitive damages in future retaliatory discharge actions while denying them in the instant case is known as prospective

actions, punitive damages were not proper in the instant case.⁷⁶ The supreme court considered punitive damages a form of punishment, serving as a warning to deter others from engaging in proscribed conduct. The function of dissuading employers from attempting such discharges⁷⁷ in the future was not served in *Kelsay* because Illinois lacked precedent warning the defendant that retaliatory discharge practices were actionable. In fact, precedent in other states indicated such practices were legitimate.⁷⁸ The supreme court therefore concluded that allowing punitive damages in *Kelsay* would be unfair because the cause of action was novel, but stated that punitive damages would be proper in similar cases in the future.⁷⁹

overruling. At common law, new decisions were given retroactive effect based on the theory that the new decision announced or discovered the preexisting law. The overruled decision was not the law at all; therefore, the overruling decision was applied to past cases. See Note, *Retroactivity in Civil Suits: Linkletter Modified*, 42 *FORDHAM L. REV.* 653, 655 (1974). For the historical development of retroactivity in judicial decisions, see generally Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 *YALE L.J.* 907, 907-12 (1962).

In contrast, the objective of prospective overruling is "to rid the law of an unsound rule and at the same time preclude undue hardship to a party that has justifiably relied on it." See Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *HASTINGS L.J.* 533, 543 (1977). This was the case in *Kelsay* because the defendant relied on the terminable at-will rule conferring absolute discharge power upon the employer. The *Kelsay* court concluded that imposing punitive damages on the defendant would be "extremely unfair" because the defendant reasonably could have believed that firing *Kelsay* was a legitimate exercise of its termination power. 74 Ill. 2d at 189, 384 N.E.2d at 361.

76. The supreme court recently explained that "[e]xcepting the cause in which the decision is rendered has consistently been the practice [of the Illinois Supreme Court] in cases involving [the recognition of new] torts." *Silver Mfg. Co. v. General Box Co.*, 76 Ill. 2d 413, 416, 392 N.E.2d 1343, 1344 (1979). After citing several cases, the *Silver Mfg.* court discussed the *Kelsay* decision. The *Silver Mfg.* court noted that the reason for prospective application in *Kelsay* and the other tort decisions cited was that those awards were penal in nature. In *Silver Mfg.* the defendants sought an exemption from the prospective application of the rule of contribution announced in *Skinner v. Reed-Prentice Packaging Co.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1978). The *Silver Mfg.* court distinguished *Skinner* from *Kelsay*, stating that the contribution involved in *Skinner* was not penal in nature. 76 Ill. 2d at 417, 392 N.E.2d at 1345. The *Silver Mfg.* court therefore concluded the defendant was not exempted as the award against the defendant was civil in nature. *Id.* For other Illinois decisions prospectively applying new torts and exempting the parties involved in the case establishing the new tort see *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (tort recognized for pre-natal injuries brought on behalf of infant); *Darling v. Charleston Community Memorial Hosp.*, 33 Ill. 2d 326, 211 N.E.2d 253 (1965) (tort responsibility for hospital beyond its liability insurance coverage was recognized); *Molitor v. Kaneland Community Unit Dist. No. 302*, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (recognized that school district would be liable in tort for negligence of its employee).

77. Dissenting in *Churchill v. Norfolk & Western Ry. Co.*, 73 Ill. 2d 127, 150, 383 N.E.2d 929, 939 (1978), Justice Ryan explained his view of punitive damages in the *Kelsay* decision:

In *Kelsay v. Motorola, Inc.*, [citation omitted] I authored an opinion which created a cause of action for punitive damages in a factual situation wherein I felt they were required. In situations where conduct is reprehensible and the penalties otherwise provided are inadequate to either deter or to punish, punitive damages may serve a useful public purpose.

Id. at 159, 383 N.E.2d at 943 (emphasis added).

78. 74 Ill. 2d at 188-89, 384 N.E.2d at 360-61.

79. *Id.* at 189-90, 384 N.E.2d at 361.

CRITICISM

Although *Kelsay* establishes an important and necessary cause of action, several aspects of the decision appear questionable because of the majority's inadequate reasoning. For example, the dissent's concern that employees may abuse this new tort⁸⁰ is not even discussed by the majority. Further, the majority's single-sentence rejection of contrary decisions by some state courts⁸¹ is unpersuasive in light of the court's reliance on other state court decisions.⁸² Moreover, the dissent's accusation that the legislature's function is usurped by the majority is left unanswered.⁸³ The final flaw in *Kelsay* is the court's failure to articulate factors to be considered by Illinois courts when implying civil remedies.⁸⁴

Employee abuse of a common law discharge action is not a new concern. In addition to the dissenting opinion,⁸⁵ the problem also was raised in two cases reviewed by the majority, *Loucks*⁸⁶ and *Sventko*.⁸⁷ This recurring concern over potential employee abuse reflects an unwarranted assumption that courts cannot distinguish spurious allegations from valid claims.⁸⁸ Such

80. 74 Ill. 2d at 192, 384 N.E.2d at 362 (Underwood, J., concurring in part and dissenting in part). See notes 85-90 and accompanying text *infra*.

81. 74 Ill. 2d at 183, 384 N.E.2d at 358.

82. See notes 91-97 and accompanying text *infra*.

83. 74 Ill. 2d at 193, 384 N.E.2d at 362-63 (Underwood, J., concurring in part and dissenting in part).

84. See notes 103-13 and accompanying text *infra*.

85. 74 Ill. 2d at 192, 384 N.E.2d at 362 (Underwood, J., concurring in part and dissenting in part). Justice Underwood argued that one potential negative effect of this new cause of action allowing punitive damages was that small businesses might retain unqualified employees rather than risk punitive damages. He speculated that these unqualified employees merely have to file workmen's compensation claims to secure tenured employment during the time the claim is pending. *Id.*

86. 551 F.2d at 745, 746-47 (7th Cir. 1977).

87. 69 Mich. App. at 649-52, 245 N.W.2d at 151 (Allen, J., concurring). After noting that spurious allegations could lead to trials before sympathetic juries, Judge Allen suggested that a possible solution may be for the employer to set forth, at the time of discharge, the reasons supporting the discharge. These reasons would demonstrate that the discharge was not intended to discourage the employee from filing a claim and was in no way retaliatory. *Id.* at 650-51, 245 N.W.2d at 154-55.

88. This fear of fictitious claims was a reason one court refused to abrogate the at-will rule. See *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (court refused to allow a private cause of action for wrongful discharge, but indicated it might modify the at-will rule where some recognized facet of public policy was threatened). For thorough discussions of *Geary*, see Summers, *supra* note 4, at 481-84, and *A Common Law Action*, *supra* note 13, at 1451-54.

The fear of groundless claims has been raised as a reason for not recognizing the tort of intentional infliction of mental distress. Dean Prosser's response to such reasoning in mental distress cases is applicable to retaliatory discharge:

So far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trifling injuries in other fields of law.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 12, at 51 (4th ed. 1971).

an assumption overlooks the complex evidentiary rules and procedural practices that courts have developed to discern the truth.⁸⁹ Indeed, courts are expert at separating real from imagined wrongs. The possibility of employees successfully advancing unsupported discharge claims is therefore minimal,⁹⁰ a fact the majority should have emphasized.

The *Kelsay* court's summary rejection of contrary holdings by other state courts is another shortcoming of the Illinois decision.⁹¹ One of these cases, *Christy v. Petrus*,⁹² is factually identical to *Kelsay* but reaches an opposite result.⁹³ The Missouri Supreme Court in *Christy* refused to imply a civil cause of action for retaliatory discharge because the Missouri's Workmen's Compensation Act included criminal penalties for such practices.⁹⁴ One

89. The same conclusion is reached in *A Common Law Action*, *supra* note 13, at 1452-53. See also *Blades*, *supra* note 4, at 1427-31, where the problem of proof is carefully analyzed. Professor *Blades* concludes that, although there is the possible problem of juries sympathizing with employees who make fictitious claims, "[t]he problem of proof is not insurmountable, for there are a number of evidentiary techniques available to the courts by which the genuineness of a claim might be reasonably guaranteed and serious infringement of the employer's normal right of discharge avoided." *Id.* at 1429. He recommends a high burden of proof for the employee as an example of such evidentiary techniques. *Id.*

90. Other factors which tend to prevent fictitious claims are court delays and attorney's fees. The more unsupported the discharge claim, the less likely an attorney would accept the case on a contingency fee basis. Because most unemployed workers would face financial limitations resulting from their reduced income after their discharge, few would waste money on litigation they have little or no hope of winning.

91. 74 Ill. 2d at 183, 384 N.E.2d at 358. Several of these cases were noted by the dissent. 74 Ill. 2d at 197, 384 N.E.2d at 364 (Underwood, J., concurring in part and dissenting in part), citing *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977) (retaliatory discharge not actionable); *Narens v. Campbell Sixty-Six Express, Inc.*, 347 S.W.2d 204 (Mo. 1961) (retaliatory discharge not actionable); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (retaliatory discharge not actionable); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950) (retaliatory discharge not actionable). The dissent did not cite two other recent cases holding that retaliatory discharge is not actionable: *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978), and *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *petition for discretionary review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). In all six of the above cases the plaintiffs sought relief for their retaliatory discharge after filing a workmen's compensation claim, but were denied relief.

92. 295 S.W.2d 122 (Mo. 1956).

93. The *Christy* court concluded that the absence of a civil remedy for wrongful discharge was an intentional omission by the Missouri legislature because it carefully provided for the rights and compensation of injured employees covered by the Missouri Act. 295 S.W.2d at 126. The plaintiff in *Christy* sought to recover actual and punitive damages for his alleged wrongful discharge, purportedly a direct result of plaintiff filing a workmen's compensation claim. *Id.* at 123. For the plaintiff's allegation in *Kelsay*, see note 31 *supra*.

94. MO. ANN. STAT. § 287.780 (Vernon 1949) provided:

Every employer, his director, officer or agent, who discharges or in any way discriminates against an employee for exercising any of his rights under this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment.

Quoted in 295 S.W.2d at 126. The *Christy* court reasoned that the criminal penalties listed above only dealt with the consequences of wrongful discharge and placed no affirmative duty upon the employer to refrain from such discharges. *Id.*

scholar, however, has demonstrated that *Christy* is analytically unsound.⁹⁵ Moreover, the *Christy* decision was delivered 23 years ago and no longer is an accurate reflection of the Missouri Legislature's intention to omit a civil remedy, if that ever was the legislature's intention. The Missouri Act was subsequently amended to provide a civil cause of action for the wrongful discharge of an employee who files a workmen's compensation claim.⁹⁶ By noting this significant change in the Missouri statute and the *Christy* court's unsound analysis of case law, the *Kelsay* majority could have demonstrated convincingly that the *Christy* holding is obsolete. In contrast, *Kelsay* represents the progressive view that a civil action is necessary to prevent retaliatory discharges.⁹⁷

An argument more vigorously asserted by the dissent is that the majority usurped the legislature's function when it implied a civil remedy.⁹⁸ The dissent's basic premise that "the law-making function is vested in the legislative branch"⁹⁹ is inaccurate. This argument overlooks the well-established common law power of the judiciary to create the law.¹⁰⁰ The late Justice

Since the Missouri Workmen's Compensation Act did not expressly provide a civil remedy, the remaining issue was whether a civil remedy could be implied. The Missouri court relied on the rule "that a statute which creates a criminal offense and provides a penalty for its violation [should not] be construed as creating a new civil cause of action independently of the common law, unless such appears by express terms or by clear implication [from] the legislative intent." *Id.*, citing *Everett v. Littleton Const. Co.*, 94 N.H. 43, 46 A.2d 317 (1946). Illinois, however, follows a different, more liberal rule when implying civil actions. The *Kelsay* court relied on the Illinois rule stated in *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 128 N.E.2d 691 (1955), that:

[t]he fact that an act is penal in nature does not bar a civil remedy, and where a statute is enacted for the benefit of a particular class of individuals a violation of its terms may result in civil as well as criminal liability, *even though the former remedy is not specifically mentioned* (emphasis added).

Quoted in 74 Ill. 2d at 185, 384 N.E.2d at 359. Because Illinois follows a different implied action rule, *Kelsay* is distinguishable from *Christy*.

95. See Gamm, *The Implied Rights Doctrine*, 41 U. MO. KAN. CITY L. REV. 292, 302-06 (1972) [hereinafter cited as Gamm].

96. MO. ANN. STAT. § 287.780 (Vernon Cum. Supp. 1979) now provides: "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under [the Workmen's Compensation Act]. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer."

97. See generally Comment, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081 (1973), Note, *A Right to Workmen's Compensation—A Dangling of the Economic Apple?*, 6 MEM. ST. U. L. REV. 465 (1976) [hereinafter cited as *A Dangling of the Economic Apple*]; Note, *Non-statutory Causes of Action for an Employer's Termination of an "At Will" Employment Relationship: A Possible Solution to the Economic Imbalance in the Employer-Employee Relationship*, 24 N.Y.L. Sch. L. REV. 743 (1979); Note, *Workmen's Compensation—No Private Right of Action for Retaliatory Discharge in North Carolina*, 15 WAKE FOREST L. REV. 139 (1979).

98. 74 Ill. 2d at 193, 384 N.E.2d at 362-63.

99. *Id.* at 190-91, 384 N.E.2d at 361.

100. This topic was analyzed extensively by former Illinois Supreme Court Justice Walter V. Schaefer, who authored the *Teale* decision, discussed in notes 103-13 and accompanying text *infra*. See Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3 (1966) (common law adopted by reception statute enables courts to utilize the common law system's capacity for growth and its ability to abandon outmoded precedents). Dean Prosser's comment is particularly appropriate

Dooley expressed precisely this point when he stated that "[o]bviously courts create law. If it were otherwise the common law would be as out of touch with life as a corpse."¹⁰¹ Thus, the dissent's sweeping generalization about the law-making function of the legislative branch should have been countered by the majority with comments regarding the court's common law heritage, particularly because *Kelsay* creates a common law tort independent of the Act.¹⁰²

Perhaps the most justified criticism of the *Kelsay* decision is the supreme court's superficial analysis of *Teale v. Sears, Roebuck and Co.*¹⁰³ In *Teale*, the court refused to imply a private civil cause of action for discharge under the Illinois Age Discrimination Act,¹⁰⁴ reasoning that the language adopted by the legislature indicated an intentional omission of a civil remedy.¹⁰⁵ Strongly

here: "New . . . torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which [courts have] struck out boldly to create a new cause of action, where none had been recognized before." W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 3 (4th ed. 1971).

Schaefer and Prosser's view of the law-making function of the courts is shared by many legal scholars. See generally B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 129 (1932); Bishchoff, *The Dynamics of Tort Law: Court or Legislature?*, 4 VT. L. REV. 35 (1979); Day, *Why Judges Must Make Law*, 26 CASE W. RES. L. REV. 563 (1976) [hereinafter cited as Day]; Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265 (1963); Traynor, *The Limits of Judicial Creativity*, 29 HASTINGS L.J. 1025 (1978). This list is not exhaustive but does indicate that ample authority exists for the exercise of judicial law-making power by the *Kelsay* court.

101. *Renslow v. Mennonite Hosp.*, 67 Ill. 2d at 361, 367 N.E.2d at 1257. Justice Benjamin Cardozo shared a similar view concerning the nature of the judicial function:

A rule which in its origin was made the creation of the courts themselves, and was supposed in the making to express the *mores* of the day, may be abrogated by courts when the *mores* have so changed that perpetuation of the rule would do violence to the social conscience. . . . *This is not usurpation*. It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.

B. CARDOZO, THE GROWTH OF THE LAW 136-37 (Greenwood Press Reprint 1973) (emphasis added).

102. 74 Ill. 2d at 187, 384 N.E.2d at 360.

103. 66 Ill. 2d 1, 359 N.E.2d 473 (1976).

104. ILL. REV. STAT. ch. 48, §§ 881-87 (1975).

105. 66 Ill. 2d at 5, 359 N.E.2d at 474-75. In the *Teale* case a discharged employee brought an action for alleged age discrimination in his discharge under the Illinois Age Discrimination Act, ILL. REV. STAT. ch. 48, §§ 881-87 (1975). The statute provided no civil remedy, so the plaintiff urged the Illinois Supreme Court to imply one. The court refused, citing various other employment acts that included civil remedies, then noting that the Age Discrimination Act made no such provision. Further, the *Teale* court noted that the statute stated that the right it created "shall be protected as provided herein." 66 Ill. 2d at 5, 359 N.E.2d at 474, quoting ILL. REV. STAT. ch. 48, § 881(c) (1975). The *Teale* court concluded this provision "strongly militate[d] against, if indeed [did] not preclude, expansion of the statutory sanction by implication." 66 Ill. 2d at 5, 359 N.E.2d at 474.

To be consistent, the *Kelsay* majority should have examined the relevant employment statutes concerning discharges noted in the *Teale* decision. See ILL. REV. STAT. ch. 48, §§ 884, 886 (1977) (unlawful to discharge employee because of age or for exercising employee rights under

relying on the *Teale* decision, the *Kelsay* dissent concluded that the absence of a civil remedy in the 1975 amendment to the Workmen's Compensation Act also indicated a deliberate omission by the legislature, precluding the civil remedy sought by *Kelsay*.¹⁰⁶ In view of the *Teale* court's comprehensive examination of relevant employment statutes providing or omitting civil remedies, the factual similarity of the *Kelsay* and *Teale* decisions warranted more than the majority's brief conclusion that the *Teale* case involved a different statute.¹⁰⁷

The *Kelsay-Teale* dichotomy demonstrates the need for the Illinois Supreme Court to establish a consistent approach to the implied action problem.¹⁰⁸ The court should have articulated what factors need to be considered when determining whether a cause of action may be implied, and the relative importance of these factors.¹⁰⁹ The court could consider, for exam-

the age discrimination law); ILL. REV. STAT. ch. 48, § 39.11 (1977) (unlawful to discharge employee for indebtedness that results in wage demands upon employer); ILL. REV. STAT. ch. 62, § 88 (1977) (unlawful to discharge employee because of his garnished wages); ILL. REV. STAT. ch. 48, § 65-23 (1977) (unlawful to discharge handicapped employee if the handicap is unrelated to job performance). The *Kelsay* court should have explained why the Act's 1975 amendment and exclusivity provision were free from the internal, militating restriction found in the *Teale* opinion.

A subsequent case distinguished the *Teale* decision and implied a civil remedy from a silent statute. *Walinski v. Morrison & Morrison*, 60 Ill. App. 3d 616, 377 N.E.2d 242 (1st Dist. 1978). In *Walinski* no specific penalty clause was present as in the *Teale* and *Kelsay* decisions. In fact, there was clear evidence that the authors of the Illinois Constitution did not intend to exclude civil remedies. See Note, *State Constitutional Right to Damages For Private Discrimination in Employment—Walinski v. Morrison & Morrison*, 28 DEPAUL L. REV. 229 (1978).

106. 74 Ill. 2d at 194-96, 384 N.E.2d at 363-64.

107. *Id.* at 185-86, 384 N.E.2d at 359.

108. The problem is not unique to the Illinois Supreme Court. The problem of state supreme courts failing to establish or adhere to any particular standards when implying civil actions is prevalent throughout the United States. See Note, *Implied Causes of Action in State Courts*, 30 STAN. L. REV. 1243 (1978) [hereinafter cited as *Implied Actions*]. The author presents an overview of the implied action problem, contrasts the developed technique for implying actions in the federal courts with the unsystematic method used in state courts, and then recommends some approaches to the various factual situations in which the implied cause of action issue arises. Interestingly, the *Implied Actions* author noted the case underpinning the *Kelsay-Teale* division, *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 128 N.E.2d 691 (1955). *Implied Actions* at 1244 n.8. Although he did not mention *Heimgaertner*, Justice Schaefer also was aware of the implied action problem. See Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 21-22 (1966).

109. Because the *Kelsay* court analyzed different factors than the *Teale* court the *Kelsay* decision appears to overrule the *Teale* decision, as the dissent noted. 74 Ill. 2d at 194, 384 N.E.2d at 363. Yet this appearance is misleading because in reality the court was simply adopting a different approach to the implied action dilemma. In the *Teale* decision, the court exclusively relied on statutory language for guidance in deriving the legislature's intent behind the Age Discrimination Act. In the *Kelsay* decision, however, the court examined not only the statutory language of the Workmen's Compensation Act, but also that statute's long history, beneficent purpose, and the public policy it embodied. These are clearly legitimate considerations, as note 47 *supra* demonstrates. The *Teale* approach shows that statutory language is an important factor when implying or refusing to imply a civil action, but the *Kelsay* analysis indicates that language alone is not determinative of legislative intent. Thus, because the Age Discrimination Act is newer and less litigated, the narrow approach of the *Teale* court was appropriate. The Work-

ple, the statute's language, purpose, legislative history,¹¹⁰ and remedies.¹¹¹ Employing some of these factors, the *Kelsay* court could have reasoned that the purpose of and voluminous litigation under the Workmen's Compensation Act¹¹² enabled the court to perceive more clearly the intent underlying the Act's 1975 amendment than the intent behind the newer, less litigated Age Discrimination Act construed in the *Teale* decision. Absent articulated guidelines, implied action cases such as *Kelsay* and *Teale* appear to be inconsistent, ad hoc decisions.¹¹³

men's Compensation Act, on the other hand, is heavily litigated and its purpose is sufficiently clear to merit the more liberal approach of the *Kelsay* court.

110. The legislative history of the 1975 amendment to the Workmen's Compensation Act is scant and inconclusive. The amendment did not delete any pre-existing civil action. See Workmen's Compensation Act, Pub. Act No. 79-79, 1975 Ill. Laws 224. In fact, the entire provision appearing in note 44, *supra*, was new in 1975. Further, the legislative debates on Senate Bill 235 (the 1975 Workmen's Compensation Act amendment) never concerned the provision construed in *Kelsay*. See Senate Debates (available on microfiche at the DePaul University College of Law Library, 1975 Senate Debates, Index Card Numbers 38, 53, 55, 58, 75, 77, 123, 139 and 142). It is noteworthy that all previous amendments to the Workmen's Compensation Act were formulated by an agreed bill process, wherein members of the legislature representing both industry and labor arrived at compromise legislation. See Stevenson, *supra* note 27, at 709-13. In 1975 the agreed bill process was abandoned, apparently because labor-oriented Democrats controlled both houses of the legislature and the executive branch. *Id.* Thus, the absence of a civil action in the 1975 amendment may have been an oversight. See *Recent Decisions*, 68 ILL. BAR J. 287, 290 (1979). This inference, however, is contrary to the *Kelsay* dissent's conclusion that "it is unrealistic to suppose that . . . the members of the General Assembly . . . simply ignored the question of civil remedies. . . ." 74 Ill. 2d at 193, 384 N.E.2d at 362.

111. The federal courts consider similar factors when implying civil actions from complex regulatory schemes created by federal statutes. See *Implied Actions*, *supra* note 108, at 1245-51. See generally Gamm, *supra* note 95 (general discussion of implied actions and the need for the Missouri courts to liberalize their approach to this doctrine); McMahon and Rodos, *Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment*, 80 DICK. L. REV. 167 (1976) (history of judicial implication of private causes of action traced and trend away from liberal implication under present United States Supreme Court discussed); Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285 (1963) (comprehensive examination of the implied action doctrine in the federal courts).

112. See Stevenson, *supra* note 27, at 678-85. Mr. Stevenson states that the number of cases filed at the Illinois Industrial Commission has nearly quadrupled since 1950, from 15,000 in that year to 57,500 in 1977. *Id.* at 676. This increase in litigation has been of particular concern to insurance companies writing workmen's compensation insurance in Illinois, as evidenced by the 88% premium increase sought and received by insurers filing with the Illinois Department of Insurance in 1976. *Id.* at 711. The *Kelsay* decision, however, will probably have little or no effect on workmen's compensation premiums because the tort is separate and independent of the Act. 74 Ill. 2d at 184, 187, 384 N.E.2d at 358, 360. The tort of retaliatory discharge necessarily involves willful and wanton conduct, because it would be impossible to negligently terminate an employee. Torts involving willful and wanton conduct, or in this case, illegal conduct due to the 1975 amendment, cannot be insured against because insurance policies covering the commission of an illegal act are void as against public policy. See London Guar. & Accident Co. v. Morris, 156 Ill. App. 533 (1st Dist. 1910).

113. A recent Illinois Appellate Court decision addressed the problem of the supreme court's inconsistent approach to implying actions. *Sherman v. Field Clinic*, 74 Ill. App. 3d 21, 392 N.E.2d 154 (1st Dist. 1979). The *Sherman* court cited six supreme and appellate court deci-

BROAD STATUTORY PROTECTION AS AN ALTERNATIVE
TO A COMMON LAW TORT REMEDY

Now that the Illinois Supreme Court has recognized that in the workmen's compensation context retaliatory discharge contravenes public policy,¹¹⁴ it is possible that the courts will find other abuses of the discharge power actionable in the presence of similar public policy considerations.¹¹⁵ Legislation, however, may be a more optimal approach to limiting the employer's power to discharge employees. The problems of inconsistent judicial interpretations and overwhelming case loads can be reduced by comprehensive legislation.¹¹⁶ Further, a general definition of the employer's duty not to discharge employees abusively would make the application of this newly created common law tort more predictable. Courts and litigants could focus their discussions on the statute rather than on broad public policy notions.¹¹⁷

Numerous scholars have suggested various legislative alternatives for abusive discharges, such as expanding the authority of agencies already hearing discharge disputes to include at-will employee terminations.¹¹⁸ A simpler

sions; *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Boyer v. Atchison, Topeka & Santa Fe Ry.*, 38 Ill. 2d 31, 230 N.E.2d 173 (1967), *cert. denied*, 390 U.S. 949 (1968); *Heimgaertner v. Benjamin Elec. Mfg. Co.*, 6 Ill. 2d 152, 128 N.E.2d 691 (1955); *Hoover v. May Dep't Stores Co.*, 62 Ill. App. 3d 106, 378 N.E.2d 762 (5th Dist. 1978); *Walinski v. Morrison & Morrison*, 60 Ill. App. 3d 616, 377 N.E.2d 242 (1st Dist. 1978); and *Rice v. Snarlin, Inc.*, 131 Ill. App. 2d 434, 266 N.E.2d 183 (1st Dist. 1970). From the above cases, the *Sherman* court determined that five factors should be considered when implying a cause of action from statutes: (1) whether the alleged conduct contravenes the public policy of Illinois; (2) whether the plaintiffs are within the class of persons the statute is designed to protect; (3) whether the alleged injury suffered by the plaintiff is within the range of injuries the statute was designed to prevent; (4) whether the need for a civil action is clear; and (5) whether anything in the statute indicates an intent to limit the remedies available to those provided by the statute. 74 Ill. App. 3d at 29-30, 392 N.E.2d at 160-61. For factors to be considered when implying actions that are similar to those announced in *Sherman* see *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977), and *Gamm, supra* note 99, at 296. See also *Montague v. George London Memorial Hosp.*, 78 Ill. App. 3d 298, 396 N.E.2d 1289 (1st Dist. 1979).

114. 74 Ill. 2d at 182, 384 N.E.2d at 357.

115. For one possible extension, see text accompanying notes 132-36 *infra*.

116. *Blades, supra* note 4, at 1431-34, discusses the advantages legislation offers compared to the judicial development of abusive discharge actions. One advantage is that the legislature can prohibit a broader range of conduct. For example, compromising professional ethics could be prohibited by statute, but probably not by courts acting without a statute. For a thorough discussion of the at-will rule and professional ethics, see Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1975) [hereinafter cited as *Professional Ethics*].

117. This was recommended by Professor *Blades, supra* note 4, at 1432-33. For some factors courts consider when formulating public policy, see note 47 *supra*.

118. Professor *Summers* suggests a statute that makes the present labor law arbitration system available to all employees. *Summers, supra* note 4, at 519-32. The author of *Professional Ethics* recommends a statute that includes prohibitions against compromising a professional employee's ethics. *Professional Ethics, supra* note 116, at 829. Professor *Peck* proposes the enlargement of the jurisdiction of federal and state agencies presently hearing improper discharge claims. *Some Kind of Hearing, supra* note 4, at 323. Professor *Blades* also proposed the utilization of existing commissions that hear discharge claims. *Blades, supra* note 4, at 1433.

solution would be to amend the Workmen's Compensation Act to include civil remedies for retaliatory discharge,¹¹⁹ although such a change has been rendered unnecessary in Illinois by the *Kelsay* decision. A more comprehensive approach, however, might be more suitable in order to prevent retaliatory discharges in other contexts. A statute might contain the following broad language:

Section 1: Definition—Retaliatory discharge includes, but is not limited to, any discharge intended to discourage or prevent an employee from pursuing a right or remedy authorized by the laws of Illinois or to penalize an employee who has initiated any action in pursuit of such right or remedy. The burden of proof shall be on the employee.

Section 2: Remedies and Sanctions—(a) An employee shall have a civil action for compensatory and exemplary damages for any discharge as defined in Section 1; (b) an employee shall have the right to be reinstated with back pay from the date of the discharge as defined in Section 1; (c) an employer shall be subject to a \$10,000 fine for each discharge defined in Section 1, to be enforced in a criminal proceeding brought by the Attorney General or State's Attorney, or by any other agency empowered to bring such action.

Section 3: Statutory Construction—Sections 1 and 2 shall be liberally construed to effectuate the policy of employee protection from retaliatory discharge.

By adopting such a general statute,¹²⁰ Illinois would extend vital protection to an area of increasing importance, the employee's need to be free from arbitrary or unlawful dismissal. The employee has the burden of proof in order to shield employers from fraudulent claims.¹²¹ Except for the burden of proof, the employee is afforded considerable protection because the sample statute provides private civil remedies capable of enforcement independent of any executive agency action.¹²² The employee also has job

119. Missouri has taken this step. See note 96 *supra*.

120. Texas has a similar statute, which provides:

Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

TEX. REV. CIV. STAT. ANN. art. 8307c (Vernon Cum. Supp. 1978).

121. See notes 85-90 and accompanying text *supra*.

122. See Gamm, *supra* note 95, at 298; *Implied Actions*, *supra* note 108, at 1260. Both articles discuss the problem of executive agency inaction and unresponsiveness. The inaction of an executive agency effectively deprives an injured citizen of a remedy. Agency inaction therefore is a reason for courts to imply a private cause of action.

security through the provision for reinstatement with back pay.¹²³ More importantly, the statutory definition covers a broad spectrum of employer misconduct in terminating employees, rather than just objectionable practices occurring in the workmen's compensation context.¹²⁴ The mounting scholarly attack on the employer's right to discharge,¹²⁵ the proliferation of lawsuits challenging unjust dismissals in recent years,¹²⁶ and the volume of legislation regulating employment practices¹²⁷ are compelling evidence that the time has come for a comprehensive statute protecting the employee's right to seek redress without fear of employer reprisal.¹²⁸

IMPACT OF KELSAY

The *Kelsay* decision obviously modifies prior law by creating an exception to the old Illinois rule that an employer's power to discharge an at-will employee is absolute. The new rule limits an employer's otherwise absolute power to discharge at-will employees where its exercise contravenes the public policy of the Workmen's Compensation Act.¹²⁹ It seems logical that the supreme court will advance the public policy theory to other instances of retaliatory discharge if an applicable statute evinces strong public policy considerations.¹³⁰ Further, it is possible that the court will extend the public policy exception to situations not covered by legislation if the court is convinced that some established public policy is undermined by an employer's discharge practices.¹³¹

An example of a logical extension based on a statute would be the discharge of a white-collar employee for refusing to commit a criminal act.¹³²

123. Reinstatement with back pay is a remedy commonly provided by collective bargaining agreements and is authorized by the National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976). Professor Blades also suggested reinstatement with back pay as a remedy for abusive discharge. See *Blades, supra* note 4, at 1414.

124. See *Blades, supra* note 4, at 1432.

125. See articles cited in notes 4, 13, 16, 22, and 97 *supra*.

126. See cases cited in notes 22 and 55 *supra*.

127. See legislation cited in notes 19, 20, and 105 *supra*.

128. See generally *Summers, supra* note 4, at 519-31.

129. See note 1 *supra*.

130. The most obvious example of a statute evincing clear public policy considerations is the criminal code, ILL. REV. STAT. ch. 38 (1977). The key will be the clarity of the public policy, not its source. One author persuasively argues that the public policy exception will be expanded only in areas concerning the public interest, largely because of the prevailing judicial attitude that the economic freedom of both the employer and employee is fundamental in our society. See *Protecting the Private Sector At Will Employee, supra* note 22, at 777-806. One Illinois judge, however, already has called for the extension of the *Kelsay* public policy exception. See *Collier v. Wagner Castings Co.*, 70 Ill. App. 3d 233, 244-45, 388 N.E.2d 265, 273 (4th Dist. 1979) (Craven, J., dissenting). Another appellate court decision recognized that retaliatory discharges are actionable, but refused relief because the plaintiff alleged violations of express and implied contracts, rather than the commission of a tort. See *Sargent v. Illinios Inst. of Technology*, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1st Dist. 1979).

131. See notes 137-39 and accompanying text *infra*.

132. See *Peterman v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (dismissal of employee for refusing to commit perjury violated public policy).

Before the *Kelsay* decision, an honest accountant whose employer demanded falsification of financial records would have the unenviable choice of either risking his or her job for objecting to the request or engaging in criminal activities.¹³³ After the *Kelsay* decision, the same accountant could comply with the law without suffering the same extreme economic burdens following termination. The employee could recover compensatory damages against the former employer, assuming the discharge resulted from the accountant's refusal to alter the financial records as directed.

In addition to compensatory damages, the accountant could seek punitive damages for his or her retaliatory discharge, as per the *Kelsay* majority's dicta.¹³⁴ Punitive damages would be particularly appropriate in this example because they would punish and deter this outrageous employer conduct, as well as encourage employees to reveal to prosecutors criminal evidence that otherwise may be unobtainable.¹³⁵ These salutary effects are made possible by the economic incentives of compensatory and punitive damages authorized in the *Kelsay* decision. As this hypothetical demonstrates, the common law tort of retaliatory discharge easily can be extended beyond the facts of the *Kelsay* case. The public policy against criminal activity is at least as strong as that manifested in the Workmen's Compensation Act.¹³⁶

Extension of the public policy exception will not depend solely on the existence of a statute. As in the *Kelsay* decision, the supreme court can exercise its law-making power to extend the exception where there is no statute. Indeed, expansion of the exception via judicial activism seems more likely than a legislative response because powerful interest groups probably would oppose such legislation.¹³⁷ Judicial expansion is appropriate here because retaliatory discharge is a common law tort,¹³⁸ and the development of common law torts is one of the most recognized and legitimate functions of the courts.¹³⁹

Assuming future Illinois decisions or legislation expand the scope of employee rights in retaliatory discharges, the new remedy recognized in the *Kelsay* decision could become a major factor in employer-employee rela-

133. A more detailed discussion of a similar hypothetical appears in *Professional Ethics*, *supra* note 116.

134. 74 Ill. 2d at 189, 384 N.E.2d at 361.

135. Reporting of employer violations by employees is known as "whistleblowing." See generally *Protecting the Private Sector At Will Employee*, *supra* note 22, at 777-806.

136. In *Professional Ethics*, *supra* note 116, it is argued that the public policy exception should extend to cover situations where employers force employees to commit ethical violations because of the tremendous impact professional employees have on the everyday affairs of society. See *Professional Ethics*, *supra* note 116, at 808-09, 826-29.

137. See *Some Kind of Hearing*, *supra* note 4, at 316-17. Professor Peck contends that legislation occurs because of efforts by interested and effective lobbying groups. *Id.* at 317. Employers would not support such a proposal, nor would organized labor. *Id.* Labor unions would oppose a bill outlawing unjust dismissal because job protection is one of a labor union's most persuasive benefits. *Id.* See generally *Unjust Employment Discharges*, *supra* note 19, at 3.

138. 74 Ill. 2d at 185, 384 N.E.2d at 358.

139. See generally *Day*, *supra* note 100.

tions.¹⁴⁰ At-will employees comprise well over half the United States work force.¹⁴¹ This category of employees, often unorganized, appears to be losing its bargaining power as economic control becomes more concentrated in corporate employers.¹⁴² Unable to present a united front, at-will employees cannot demand the contractual protection from retaliatory discharge present in nearly all union collective bargaining agreements.¹⁴³ With labor unions representing a declining percentage of the total work force,¹⁴⁴ the protection provided by collective bargaining agreements will not be available to an increasing number of employees. Absent statutory or contractual protection, the tort recognized in the *Kelsay* decision becomes an important remedy for at-will employees in Illinois.

CONCLUSION

Illinois has followed a judicial trend emerging throughout the United States that seeks to limit an employer's absolute power to discharge at-will employees. By recognizing the tort of retaliatory discharge, the Illinois Su-

140. See generally *A Dangling of the Economic Apple*, *supra* note 97.

141. This is a conservative estimate. Professor Peck estimates that "between [60] and [65%] of [the nonagricultural] work force is employed under contracts of employment that are terminable at will and hence terminable without cause." *Unjust Employment Discharges*, *supra* note 19, at 9.

142. See *Blades*, *supra* note 4, at 1405 n.6.

143. See *Summers*, *supra* note 4, at 499 n.104, where the author notes that in 1975 it was estimated that 79% of all collective bargaining agreements surveyed had provisions for dismissal only with "cause" or "just cause."

144. The U.S. Department of Labor published the following information on Sept. 3, 1979:

When Canadian members are excluded from the total, membership in U.S. labor organizations increased to 22.8 million in 1978 (Table 2). As a proportion of total labor force, however, membership declined by more than one percentage point between 1976 and 1978, continuing the decline that had been briefly reversed in 1974. Membership in the U.S. represented 22.2 percent of the labor force in 1978 and 26.6 percent of employment in nonagricultural establishments.

U.S. Dept. of Labor, Bureau of Labor Statistics release on Sept. 3, 1979, at 2 (emphasis added). Table 2 is printed below.

Year	Total labor force		Employees in non-agricultural establishments		
	Total Membership	Number	Percent Union Members	Number	Percent Union Members
1970	21,248	85,903	24.7	70,880	30.0
1972	21,657	88,991	24.3	73,675	29.4
1974	22,809	93,240	24.5	78,265	29.1
1976	22,662	96,917	23.4	79,382	28.5
1978	22,798	102,537	22.2	85,763	26.6

preme Court has provided an effective remedy for a segment of the labor force that is unable to protect itself from employer abuse. Although the *Kelsay* decision relied on broad public policy considerations, legislation could overcome any confusion regarding this new cause of action by focusing on the nature of the employer's conduct, rather than solely emphasizing public policy determinants. Even in the absence of legislation, the scope of prohibited employer conduct subject to retaliatory discharge actions can be expanded by the judiciary exercising its law-making power. Considering the obvious importance of secure employment, one scholar's comment regarding *Frampton* seems equally appropriate for *Kelsay*: "It is odd that such a decision was so long in coming."¹⁴⁵

William Lynch Schaller

145. LARSON, *supra* note 58, at 57, *quoted in* *Kelsay v. Motorola, Inc.*, 74 Ill.2d at 183, 384 N.E.2d at 358.