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I. INTRODUCTION

This Article highlights developments in Illinois labor and employment law during the *Survey* year. The Illinois Supreme Court decided a number of significant cases involving employer criminal liability,[1] employee defamation claims,[2] the burden of proof in dis-

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1. *See infra* notes 17-43 and accompanying text.

crimination claims,[3] court authority with relation to arbitration[4] and joint employer status.[5] The Illinois courts also dealt with discrimination claims,[6] mandatory subjects of bargaining,[7] the relationship between grievance-arbitration and the civil service system[8] and supplemental pension benefits.[9] Additionally, the Illinois legislature modified laws affecting access to personnel files,[10], sexual harassment,[11] affirmative action[12] and AIDS testing.[13] The legislature enacted several new pieces of legislation pertaining to employment, including the Employee Rights Violation Act[14] and the Job Referral and Job Listing Services Consumer Protection Act.[15] Finally, a new provision in the Workers' Compensation Act creates a Self-Insurers Administration Fund.[16]

II. EMPLOYER CRIMINAL LIABILITY

Congress adopted the Occupational Safety and Health Act of 1970 ("OSHA")[17] to promote safe and healthful working conditions.[18] OSHA provides that an employer must comply with the standards adopted by the Occupational Safety and Health Agency and other nationally recognized standards.[19] Under OSHA, if a state desires authority to regulate health and safety in the work place, it must first obtain federal approval of its alternative plan.[20]

In a decision of national significance, *People v. Chicago Magnet*

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2. *See infra* notes 44-58 and accompanying text.
3. *See infra* notes 59-76, 103-18 and accompanying text.
4. *See infra* notes 77-101, 164-183, 184-208 and accompanying text.
5. *See infra* notes 119-38 and accompanying text.
6. *See infra* notes 139-49 and accompanying text.
7. *See infra* notes 150-63 and accompanying text.
8. *See infra* notes 175-83 and accompanying text.
9. *See infra* notes 184-207 and accompanying text.
10. *See infra* notes 208-10 and accompanying text.
11. *See infra* notes 211-12 and accompanying text.
12. *See infra* notes 213-15 and accompanying text.
13. *See infra* notes 217-18 and accompanying text.
14. *See infra* note 216 and accompanying text.
15. *See infra* notes 219-20 and accompanying text.
16. *See infra* notes 216-17 and accompanying text.
17. 29 U.S.C. § 651-678 (1982 & Supp. V 1987).
18. The Act provides that "Congress declares it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." 29 U.S.C. § 651(b) (1982).
19. *Id.* § 654. The Act also authorizes inspectors to investigate work places. *Id.* § 657. OSHA further provides for civil and criminal penalties based on the seriousness of the violation and the willfulness of the employer's acts. *Id.* § 666.
20. The Act provides:

(a) Nothing in this chapter shall prevent any State agency or court from assert-

Wire Corp.,[21] the Illinois Supreme Court held that OSHA does not preempt the State of Illinois from criminally prosecuting employers for conduct that OSHA standards regulate.[22] In *Chicago Magnet Wire*, a manufacturing company's officers and agents were indicted for knowingly and recklessly causing the injury of forty-two employees.[23] The indictments alleged that these agents and officers failed to take safety precautions to protect employees from exposure to toxic substances used by the company in its manufacturing processes.[24]

The defendants moved to dismiss the charges, claiming that OSHA preempted the State from prosecuting the defendants.[25] The defendants argued that OSHA is the sole mechanism for regulating the conduct that allegedly rendered the company's work place unsafe.[26] According to the defendants, Illinois did not have

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ing jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.
(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. § 667 (a), (b) (1982).

21. 126 Ill. 2d 356, 534 N.E.2d 962, *cert. denied sub. nom.* Asta v. Illinois, 110 S. Ct. 52 (1989).

22. 126 Ill. 2d at 365, 534 N.E.2d at 966.

23. *Id.* at 359, 534 N.E.2d at 963. The company's principal business was coating wire with chemical compounds.

24. *Id.* The charges against the corporation and five of its officers included aggravated battery and reckless conduct. The individual defendants were also charged with conspiracy to commit aggravated battery.

25. 126 Ill. 2d at 359, 534 N.E.2d at 963. Federal law may preempt action by states in one of three ways. First, Congress can preempt expressly by stating that any state law within a given field is superceded by federal law. Second, Congress can impliedly preempt if there is evidence that Congress intended to occupy a given field to the exclusion of state regulation. Finally, state law is preempted if it conflicts with federal law. *See generally* Pacific Gas and Elec. Co. v. State Energy Resources Conservation and Dev. Comm., 461 U.S. 190, 203-04 (1983).

26. *Chicago Magnet Wire*, 126 Ill. 2d at 363, 534 N.E.2d at 965. As authority for their proposition, the defendants cited a federal regulation promulgated by the Secretary of Labor that provides:

> Section 18(a) of [OSHA] is read as preventing any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue to which a Federal standard has been issued.

Id. at 365, 534 N.E. 2d at 965 (citing 29 C.F.R. § 1901.2 (1986)).

As further authority, the defendants cited another regulation that provides

> [OSHA's preemptive provisions] apply to all state or local laws which relate to an issue covered by a Federal standard, without regard to whether the state law would conflict with, complement, or supplement the Federal standard, and without regard to whether the state law appears to be 'at least as effective as' the Federal standard.

authority to prosecute the defendants because Illinois never received approval for an alternative regulatory plan.[27] In contrast, the State contended that OSHA did not preempt state criminal prosecutions because the OSHA objectives differed from state criminal law objectives.[28]

On appeal, the Illinois Supreme court reasoned that OSHA neither explicitly nor implicitly preempted state criminal law.[29] According to the court, OSHA did not explicitly preempt criminal prosecution because the OSHA language never refers to criminal law.[30] In addition, the court determined that OSHA did not implicitly preempt criminal prosecutions because, although OSHA is intended to be a comprehensive federal statute, OSHA still leaves a role for the states.[31] Specifically, the court noted that OSHA encourages the states to assume responsibility for the administration and enforcement of their occupational safety and health laws.[32]

The court determined that the federal interest in regulating safety matters does not mandate preemption.[33] According to the court, regulation of safety matters historically has been a matter of state and local concern.[34] Nothing in the structure of OSHA, or its legislative history, indicates that Congress intended to preempt the enforcement of state criminal laws which prohibit employer con-

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Id. at 365, 534 N.E. 2d at 966 (citing Hazard Communication Standard, 52 Fed. Reg. 31,852, 31,860 (1987)).

27. *Id.* at 364, 534 N.E.2d at 965.

28. *Id.* at 366, 534 N.E.2d at 966. The circuit court agreed with the defendants and dismissed the charges. *Id.* at 361, 534 N.E.2d at 964. For the same reasons, the appellate court affirmed. *Id.* at 359, 534 N.E.2d at 963. The Illinois Supreme Court, however, reversed the appellate court, concluding that the State could prosecute the defendants. *Id.* at 376, 534 N.E.2d at 970.

29. *Id.* at 367-69, 534 N.E.2d at 966-67.

30. *Id.* at 364, 534 N.E.2d at 965.

31. *Id.* at 367-68, 534 N.E.2d at 966-67.

32. *Id.* at 367-68, 534 N.E.2d at 967. The court noted the overall congressional purpose behind OSHA:

> Congress declares it to be its purpose . . . to assure . . . safe and healthful working conditions . . . by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with the provisions of this chapter, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith.

Id. (citing 29 U.S.C. § 651(b)(11) (1982)).

33. 126 Ill. 2d at 367, 534 N.E.2d at 966.

34. *Id.* The court noted that federal acts will not supersede state police power absent a "clear and manifest" congressional purpose. *Id.* (citing Hillsborough County v. Automated Medical Labs., Inc., 471 U.S. 707, 715 (1985); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 244 (1959)).

duct that OSHA also regulates.[35]

The court also reasoned that the OSHA objectives are not the same as those of state criminal laws.[36] The purpose of OSHA is to regulate safety in the work place by deterring prohibited conduct.[37] In contrast, state criminal laws regulate safety beyond the workplace and also serve both a retributive and deterrent function.[38] The court indicated that criminal intent must be proven in state criminal actions but not in actions alleging OSHA violations.[39] OSHA, therefore, applies merely because there is a violation of an OSHA standard; the relevant state criminal laws apply only to employers who recognize or should have recognized that the workplace poses a risk of injury, but who nevertheless fail to take preventative precautions.[40] Lastly, because the OSHA penalties for death or serious injury to employees are far less severe than under state criminal laws, a contrary holding would effectively grant immunity to employers who caused death or serious injury to employees.[41]

Chicago Magnet Wire is a landmark decision that will have a powerful impact on state criminal prosecutions across the nation.[42] The decision clears the way for state prosecutors to pursue criminal convictions as a means to ensure safe workplaces. This increased protection for workers has particular import in an era

35. *Id.* at 366-67, 534 N.E.2d at 966.

36. *Id.* at 366, 534 N.E.2d at 966. Arguably, state criminal laws also implicitly support the purpose of OSHA because OSHA's strict penalties serve as another form of deterrence.

37. *Id.*

38. *Id.*

39. *Id.* Compliance with OSHA standards is mandatory, unless a variation or exemption is obtained from the Secretary of Labor. 29 U.S.C. § 665 (1982). Regardless of intent, OSHA provides for civil penalties based on the seriousness of the violation. *Id.* § 666. If the employer's actions are "willful," the civil penalties increase and criminal penalties are mandated. *Id.*

40. *Chicago Magnet Wire*, 126 Ill. 2d at 373, 534 N.E.2d at 969.

41. *Id.* at 370-71, 534 N.E.2d at 968. For example, under OSHA, a willful violation resulting in death only has a six-month maximum sentence. 29 U.S.C. § 666 (e) (1982). A second conviction for the same offense has only a maximum jail penalty of one year. *Id.* If an employer willfully ignores an OSHA standard and employee deaths result, the maximum penalty under OSHA is incarceration for one year. The very same deaths prosecuted under state criminal usually would have much more severe penalties. 126 Ill. 2d at 366, 534 N.E.2d at 966. Accordingly, the court reasoned that the sentences provided in OSHA should be viewed as a "nationwide floor" for effective safety and health standards. *Id.* at 368, 534 N.E.2d at 967 (citing United Airlines v. Occupational Safety and Health Appeals Bd., 32 Cal. 3d 762, 187 Cal. Rptr. 387, 654 P.2d 157 (1982)).

42. On October 1, 1989, the United States Supreme Court denied certiorari in *Chicago Magnet Wire*. *See supra* note 21. Thus, other states may now look to Illinois for leadership in this area.

when death and injury rates are up, and federal enforcement is down.[43]

III. THE PRIVATE SECTOR

A. Defamation

Section 301 of the Labor Management Relations Act ("LMRA")[44] allows an employee covered by a collective bargaining agreement to bring suit in federal district court for a breach of that contract.[45] During the *Survey* year, the Illinois Supreme Court, in *Krasinski v. United Parcel Service, Inc.*,[46] held that section 301 of the LMRA does not preempt an employee's state claim.[47]

In *Krasinski*, a loss prevention supervisor suspected that an employee had stolen a saw from a shipment.[48] The supervisor and a manager thereafter publicly accused the employee of the theft, and the employee was discharged.[49] He then filed suit in the circuit court, alleging that his employer maliciously defamed him.[50] The

43. One report has concluded that 14,000 Americans are killed, and 2.5 million are permanently injured every year in their workplaces. 116 CONG. REC. 36,512 (1970) (statement of Sen. Mondale), *reprinted in* SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 1ST SESSION, LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 322 (Comm. Print 1971). During the Reagan administration, the Justice Department brought only two criminal indictments under OSHA. Address by New York Attorney General Robert Abrams, 10th Annual Membership Meeting of the New York Committee on Occupational Safety and Health (November 14, 1989).

44. Labor Management Relations (Taft-Hartley) Act § 301, 29 U.S.C. § 185 (1982).

45. 29 U.S.C. § 185(a).

46. 124 Ill. 2d 483, 530 N.E.2d 468 (1988).

47. *Id.* at 490, 530 N.E.2d at 471. To make out a claim for defamation, a plaintiff must demonstrate that: 1) a defendant made a false statement concerning the plaintiff, 2) there was unprivileged publication to a third party through fault of defendant, and 3) the unprivileged publication caused damage to the plaintiff. *See, e.g.*, Reuber v. United States, 750 F.2d 1039, 1060 n.31 (D.C. Cir. 1984). To make out a claim for malicious defamation, the employee must prove that the employer made statements with "actual malice," which requires employees to prove the employer made the statement with reckless disregard of its veracity, or with knowledge of its falsity. *See e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

48. *Krasinski*, 124 Ill. 2d at 486, 530 N.E.2d at 469.

49. *Id.* The supervisor and the manager confronted the employee when the employee returned to the office from his route. In front of the manager, the supervisor told the employee that he had a signed statement from a person who bought the saw from the employee. The statement supposedly indicated that the employee stole the saw and sold it knowing that it was "hot." *Id.* Actually, there was no signed statement. *Id.*

50. *Id.* at 485, 530 N.E.2d at 469. The employee also filed an unlawful discharge action in circuit court, alleging that he was discharged for being an active spokesman of employee rights. *Id.* at 487, 530 N.E.2d at 470. The circuit court dismissed the unlawful discharge count without giving a reason. *Id.* The court may have dismissed this count

employer moved to dismiss plaintiff's claim, arguing that it was preempted by the LMRA and the National Labor Relations Act ("NLRA").[51] The circuit court granted the employer's motion to dismiss on preemption grounds.[52] The appellate court reversed, holding that malicious defamation is an independent state court cause of action that is not preempted by federal law.[53]

The Illinois Supreme Court affirmed, and held that section 301 of the LMRA did not preempt the malicious defamation count because it exists independently of the collective bargaining agreement.[54] The court reasoned there could be no preemption under the LMRA because the employee's complaint made no reference to the collective bargaining agreement nor was interpretation of the collective bargaining agreement necessary to determine if there was actual malice.[55]

The court also rejected the employer's argument that the defamation claim was preempted by the NLRA.[56] The court stated that merely because the claim could arguably be characterized as an unfair labor practice does not mandate preemption in order to protect the exclusive jurisdiction of the National Labor Relations Board ("NLRB").[57] The right to be free from malicious defamation does not arise out of the rights negotiated in the labor con-

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because the employee had arbitrated the discharge under the collective bargaining agreement and the arbitrator had previously ordered the employee's reinstatement. *See id.* at 487-88, 530 N.E.2d at 470.

51. *Id.* at 487, 530 N.E.2d at 470 (citing 29 U.S.C. paras. 151-169 (1982 & Supp. V 1987)). Specifically, the employer argued that federal labor law preempted the malicious defamation claim because it required the court to determine whether the employee was discharged for "just cause" under the collective bargaining agreement. *Id.* In 1988, the Supreme Court, in Lingle v. Norge Div. of Magic Chef, 486 U.S. 399, *on remand* 857 F.2d 422 (7th Cir. 1988), held that section 301 of the LMRA did not preempt a union employee's state retaliatory discharge claim, because the state court was not required to interpret a just cause provision in a collective bargaining agreement. *Id.* at 413. In *Lingle*, a collective bargaining provision provided that employees could not be discharged except for just or proper cause. *Id.* at 401. The collective bargaining agreement also provided that disputes under the contract were to be submitted to arbitration. *Id.* Despite the arbitration provision, the *Lingle* employee filed a complaint in a circuit court alleging she was discharged in retaliation for filing a worker's compensation claim. *Id.* at 402. The employer removed the case to a federal district court and sought dismissal of the action on preemption grounds. *Id. See also* Ryherd v. General Cable Co., 124 Ill. 2d 418, 434, 530 N.E.2d 431, 438 (1988) (retaliatory discharge claim not preempted by LMRA, even if an employee had previously raised the claim as a grievance under the collective bargaining agreement and had taken it to arbitration).

52. *Krasinski*, 124 Ill. 2d at 485, 530 N.E.2d at 469.

53. *Id.*

54. *Id.* at 495, 530 N.E.2d at 473.

55. *Id.* at 490, 530 N.E.2d at 471.

56. *Id.* at 493, 530 N.E.2d at 473.

57. *Id.* at 493-94, 530 N.E.2d at 472-73. Congress established the NLRB in part to

tract, rather it arises out of state law.[58]

In light of the United State Supreme Court's decision in *Lingle v. Norge Division of Magic Chef* and the Illinois Supreme Court's decision in *Krasinski*, courts will scrutinize state tort actions to determine if they are preempted by federal law. If the state tort action can be resolved without reference to the collective bargaining agreement, the claim will not be preempted. If an employee alleges a violation of a collective bargaining agreement *and* a state tort claim, the employee may not be bound solely by the dispute resolution procedure in the collective bargaining agreement. In other words, the employee will get "two bites of the apple."

B. Retaliatory Discharge

In employment discrimination charges based on Title VII of the Civil Rights Act of 1964,[59] the federal courts employ a shifting burden of proof.[60] In *Netzel v. United Parcel Service, Inc.*,[61] the Illinois Appellate Court for the First District held that the shifting burden of proof used in federal Title VII actions is not appropriate for state retaliatory discharge claims.[62]

The employee in *Netzel* injured his knee while driving a truck for his employer.[63] During his time off work, the employee filed for

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determine whether the employer or the representative of the employees committed violations of the NLRA. *See* 29 U.S.C. §§ 151-169 (1982 & Supp. V 1987).

58. 124 Ill. 2d at 494, 530 N.E.2d at 473.

59. 42 U.S.C. § 2000e to 2000e-17 (1982 & Supp. V 1987).

60. The Supreme Court articulated the shifting burden of proof in Title VII actions in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court stated that in cases of discrimination, the complainant has the initial burden of establishing a prima facie case. *Id.* at 802. To do so, complainant must show (i) that complainant is a member of a protected group; (ii) that complainant applied for and was qualified to perform a job for which the employer was seeking applicants; (iii) that, despite being qualified, complainant was rejected; (iv) after the rejection, the position remained open and "the employer continued to seek applicants with complainant's qualifications." *Id.*

After complainant establishes a prima facie case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the complainant's rejection. *Id.* This burden, however, is one of production only. The ultimate burden of proof remains with the plaintiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981). If the employer articulates a legitimate reason, the complainant must then prove that the employer's reason for the challenged action is pretextual. *McDonnell Douglas*, 411 U.S. at 804.

61. 181 Ill. App. 3d 808, 537 N.E.2d 1348 (1st Dist. 1989).

62. *Id.* at 812, 537 N.E.2d at 1350. Retaliatory discharge occurs when an employee is discharged in retaliation for activities protected by a clearly mandated public policy such as filing a worker's compensation claim. *See* Barr v. Kelso-Burnett Co., 106 Ill. 2d 520, 529, 478 N.E.2d 1354, 1358 (1985); Gonzalez v. Prestress Eng'g Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert. denied*, 483 U.S. 1032 (1987).

63. *Netzel*, 181 Ill. App. 3d at 811, 537 N.E.2d at 1349.

and received workers' compensation.[64] Two years later, the employee attempted to return to work but was discharged.[65] The employee alleged that he was discharged in retaliation for filing claims under the Illinois Workers Compensation Act.[66] The employer alleged that the employee was discharged for returning to a non-driving position in violation of company rules and a supervisor's express instructions.[67]

At trial, the jury awarded the employee $200,000.[68] The trial court, however, ordered a new trial on both liability and damages.[69] The employee appealed the decision, arguing that the court should have addressed the claim on the merits using the shifting burden of proof employed in Title VII cases.[70] The appellate court held that the Title VII standard is not appropriate in state retaliatory discharge actions.[71] The court reasoned that a retaliatory discharge action is very much like breach of an employment contract and wrongful discharge actions. Both are reviewed under traditional tort analysis.[72] Traditional tort analysis does not employ burden shifting. Rather, the employee has the ultimate burden of convincing the trier of fact, by a preponderance of the evidence, that the employee was discharged in retaliation for executing a right protected by Illinois public policy.[73] In contrast, the employer has the burden of persuasion of convincing the trier that the employee was guilty of conduct justifying the discharge.[74]

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64. *Id.*

65. *Id.* at 811, 537 N.E.2d at 1349-50. On two other occasions, the employee attempted to return to work. Because of pain and swelling in his knee, he was given permission to work in a non-driving capacity. The day he was discharged, the employee similarly had left his driving position to work in a non-driving position. His employer alleged that the employee was told not to leave his route. *Id.* at 811, 537 N.E.2d at 1349-50.

66. ILL. REV. STAT. ch. 48, paras. 138.1 -.30 (1987); *Netzel*, 181 Ill. App. 3d at 811, 537 N.E.2d at 1350.

67. 181 Ill. App. 3d at 811, 537 N.E.2d at 1349-50.

68. *Id.* at 810, 537 N.E.2d at 1349.

69. *Id.* at 811, 537 N.E.2d at 1350. The trial court stated that the filing of the worker's compensation claim was too attenuated in time to be a reason for the discharge. *Id.* The trial court also indicated that the damage award included impermissible punitive damages and that it was calculated erroneously. *Id.* at 817-18, 537 N.E.2d at 1353-54.

70. *Id.* at 812, 537 N.E.2d at 1350. *See supra* note 60 and accompanying text.

71. 181 Ill. App. 3d at 812, 537 N.E.2d at 1350.

72. *Id.*

73. *Id.*

74. *Id.* (citing Lukasik v. Ridell, Inc., 116 Ill. App. 3d 339, 346, 452 N.E.2d 55, 59 (1st Dist. 1983); Foster v. Springfield Clinic, 88 Ill. App. 3d 459, 464, 410 N.E.2d at 604, 608 (4th Dist. 1980)).

In rejecting the Title VII burden of proof standard,[75] the court gave little guidance for situations in which traditional tort analysis would be inadequate. For example, the trier of fact might believe that the employer had a valid reason for the discharge, such as excessive absenteeism, but at the same time, believe that the employer also was motivated by an unlawful reason, such as the employee's filing of a worker's compensation claim. Given the *Netzel* holding, employees will have the difficult task of persuading the trier of fact that the unlawful reason was the predominate reason for the discharge.[76]

IV. THE PUBLIC SECTOR

A. Illinois Public Labor Relations Act

1. Arbitration

The Illinois Public Labor Relations Act ("IPLRA")[77] provides that all grievance disputes must be resolved by final and binding arbitration, unless there is a contrary agreement between the employer and the union.[78] In a case decided under a similar provision of the Illinois Educational Labor Relations Act ("IELRA"),[79] the Illinois Supreme Court held that a labor arbitration award must be enforced if the arbitrator acted within the scope of his authority and the award draws its essence from the parties' collective-bargaining agreement.[80] During the *Survey* year, the Illinois Supreme Court refused to vacate an arbitrator's award to reinstate mental health employees discharged because of their involvement in the accidental death of a patient in *American Federation of State County and Municipal Employees v. Illinois Department of Mental Health*.[81]

In *American Federation*, two employees who worked at a state mental health facility for the severely mentally retarded received

75. With regard to the question of damages, the court held that a new trial on the basis of damages was proper. *Netzel*, 181 Ill. App. 3d at 817, 537 N.E.2d at 1351.

76. For a discussion of mixed motive employee discharge cases, see *infra* notes 102-18 and accompanying text.

77. ILL. REV. STAT. ch. 48, paras. 1601-1627 (1987).

78. ILL. REV. STAT. ch. 48, para. 1608 (1987).

79. ILL. REV. STAT. ch. 48, paras. 1701-1721 (1987) [hereinafter the "IELRA"].

80. Board of Trustees of Community College Dist. No. 508 v. Cook County College Teachers Union, 74 Ill. 2d 412, 421, 386 N.E.2d 47, 51 (1979). Both the IELRA and the IPLRA evidence the legislature's intent to further the goals of labor peace by encouraging the arbitration of disputes. *See* Board of Educ. v. Compton, 123 Ill. 2d 216, 526 N.E.2d 149 (1988), a decision in which the Illinois Supreme Court divested the circuit courts of the power to review questions of arbitrability arising under the IELRA.

81. 124 Ill. 2d 246, 529 N.E.2d 534 (1988).

permission to go on an errand off the facility's premises.[82] Rather than returning directly to work, the employees took an unauthorized shopping trip for approximately an hour and a half. During this time, a resident accidentally died.[83] The two employees, however, were not assigned to watch this patient; they were assigned to a different wing. On that particular day, the facility was short-staffed.[84] As a result of the accident and the unauthorized trip, the Department of Mental Health terminated the employees for mistreatment of a service recipient.[85] Pursuant to the collective bargaining agreement between the Department and the union representing the employees, the union filed a grievance challenging the discharge and pursued it to arbitration.[86]

The arbitrator held that the discharge was not for just cause because there was no direct link between the resident's death and the employees' unauthorized absence.[87] The arbitrator did find, however, that the conduct constituted mistreatment of a service recipient.[88] Despite this conclusion, there were mitigating factors weighing against termination.[89] The discharged employees had exemplary work records and always treated the residents like family. Moreover, they admitted their wrongdoing, expressed remorse and gave straightforward and truthful testimony at the arbitration hearing. It was unlikely that they would repeat their actions.[90] Accordingly, the arbitrator reduced the discipline from discharge, to four months unpaid suspension.[91]

The union brought an action in the circuit court to enforce the award.[92] Deeming the arbitrator's award "absurd and beyond comprehension," the court refused enforcement. The court found no authority in the collective bargaining agreement for the arbitrator to consider mitigating circumstances.[93] According to the circuit court, the award represented a severe and extreme departure

82. *Id.* at 250, 529 N.E.2d at 536. The employees went to purchase barbecue supplies for a resident event. *Id.*

83. *Id.* at 251, 529 N.E.2d at 536. The patient died when he was left unattended while tied to a toilet seat, with the back of a wheelchair placed in front of him. It appeared as though he accidentally fell forward and broke his neck. *Id.*

84. *Id.* at 250-51, 529 N.E.2d at 536.

85. *Id.* at 251, 529 N.E.2d at 536.

86. *Id.*

87. *Id.* at 251-52, 529 N.E.2d at 536.

88. *Id.* at 251, 529 N.E.2d at 536.

89. *Id.* at 252, 529 N.E.2d at 536.

90. *Id.*

91. *Id.* at 251, 529 N.E.2d at 536.

92. *Id.* at 252, 529 N.E.2d at 536.

93. *Id.*

from the public policy of protecting mental health patients.[94]

The appellate court reversed, holding that the arbitrator did not exceed his authority by considering mitigating factors and that the award did not violate Illinois public policy.[95] On further appeal, the Illinois Supreme court stated that in order to vacate arbitration awards, a reviewing court must find that the contract, as interpreted by the arbitrator, violated some explicit public policy[96] that is both well-defined and ascertainable by reference to laws and legal precedent. General consideration of public interest will not suffice.[97] The court noted that there is no public policy that requires discharge of all employees found guilty of patient mistreatment;[98] therefore, the four-month suspension was appropriate.[99]

American Federation is significant because its recognizes a public policy exception to enforcement of an arbitrator's award under the IPLRA.[100] Even though the exception is narrowly drawn, rather than based upon some vague notion of public good,[101] it will now be extremely difficult for courts to second-guess arbitrators on public policy grounds. The decision should serve to discourage suits to

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94. *Id.*

95. *Id.* at 252-53, 529 N.E.2d at 536-37 (citing *American Fed'n*, 158 Ill. App. 3d 584, 593, 511 N.E.2d 749, 755 (1st Dist.).

96. *American Fed'n*, 124 Ill. 2d at 261, 529 N.E.2d at 540-41 (citing Meissner v. Caravello, 4 Ill. App. 2d 428, 432-33, 124 N.E.2d 615, 617 (1st Dist. 1954)).

97. *Id.* at 261, 529 N.E.2d at 540. *See e.g.* W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 766 (1983).

98. *American Fed'n*, 124 Ill. 2d 246, 263, 529 N.E.2d at 541. The court stated that this rule is particularly justified when the arbitrator finds that the employees were exemplary mental health employees and that there was no nexus between the employees' infractions and the death of a mental health patient. The court also noted that the arbitrator did not condone the employees' actions. Rather, he issued punishment that he believed was commensurate with the misconduct. *Id.* at 264-65, 529 N.E.2d at 542.

99. *Id.* at 265, 529 N.E.2d at 542.

100. The decision becomes even more significant because a decision rendered under one public bargaining statute may serve as precedent for a decision rendered under the other. Illinois Public Labor Relations Act, ILL. REV. STAT. ch. 48, para. 1615.1 (1988); Illinois Educational Labor Relations Act, ILL. REV. STAT. ch. 48, para. 1715.1 (1988). *See infra* notes 197-207 and accompanying text (for further discussion of the relationship between arbitration and public policy).

101. *Cf.* United Paperworker Int'l Union v. Misco, 484 U.S. 29 (1987). In *Misco*, the Fifth Circuit had ruled that reinstatement of an employee caught smoking marijuana on company premises was contrary to public policy because of general safety concerns about operating industrial machinery while under the influence of drugs. *Misco*, 768 F.2d 739, 743 (5th Cir. 1985). The Supreme Court reversed, holding that in the absence of fraud or dishonesty by the arbitrator, a federal court could not refuse to enforce an arbitration award on public policy grounds. 484 U.S. at 38, 45. The Court stated that it does not sanction "a broad judicial power to set aside arbitration awards as against public policy." *Id.* at 43.

vacate arbitration awards and should foster the goal of providing a quick, inexpensive method of resolving labor disputes.

2. Mixed Motive Discharges

An employer may lawfully discharge an employee for any number of commonly understood reasons, such as poor performance or chronic absenteeism. Occasionally, an employer may possess both a lawful and unlawful reason for wanting to terminate an employee. In this situation, it may be impossible to ascertain which motive actually prompted the discharge. In mixed motive cases brought under the National Labor Relations Act,[102] an employee establishes a prima facie case of unlawful discrimination by showing, by a preponderance of the evidence, that the adverse action was based in whole or in part on antiunion animus or that the employee's protected conduct was a substantial or motivating factor.[103] Once the employee establishes a prima facia case, the burden shifts to the employer to show that the employee would have been discharged for a legitimate business reason notwithstanding the employer's antiunion animus.[104] During the *Survey* year, the Illinois Supreme Court held that the model of proof utilized in federal labor law is appropriate for mixed motive discharges under the IPLRA.[105]

In *City of Burbank v. Labor Relations Board*,[106] a public works

102. 29 U.S.C. §§ 151-69 (1986 & Supp. V 1987). *See e.g.*, NLRB v. Transportation Management Corp., 462 U.S. 393, 398-405 (1983) (union organizing, leaving keys in bus, taking unauthorized breaks); Roscello v. Southwest Airlines Co., 726 F.2d 217, 222-23 (5th Cir. 1984) (union organizing, failure to perform duties, excessive absenteeism).

103. City of Burbank v. Labor Relations Bd. 128 Ill. 2d 335, 345, 538 N.E.2d 1146, 1150 (1989), (citing *Transportation Management Corp.*, 462 U.S. 393, 401 (1983)). In *City of Burbank*, the court noted that antiunion animus may be reasonably inferred from a variety of factors, including the employer's expressed hostility toward, and knowledge of, unionization; the proximity in time between the employee's union activity and his discharge; a pattern of conduct that targets union supporters for adverse employment actions; shifting explanations for the discharge; and inconsistencies between the proffered reason for the discharge and other actions of the employer (citations omitted).

104. *City of Burbank*, 128 Ill. 2d at 346, 538 N.E.2d at 1150 (citing *Transportation Management Corp.*, 462 U.S. 393, 401-02 (1983); Communication Workers of Am., Local 5008 v. NLRB, 784 F.2d 847, 850 (7th Cir. 1986)).

105. *Id.* at 345-46, 538 N.E.2d at 1149-50. The Illinois Appellate Court for the Fourth District held that the proper standard of review under the IPLRA is also the standard of review used under the NLRA in Hardin County Educ. Ass'n v. IELRB, 174 Ill. App. 3d 168, 178, 528 N.E.2d 737, 742 (4th Dist. 1988) (discharge for disciplinary problems and pro-union activity).

106. 128 Ill. 2d 335, 538 N.E.2d 1146 (1989). *City of Burbank* is discussed extensively in Troy and Fehringer, *State and Local Government*, 21 LOY. U. CHI. L.J. 601, 610 (1990).

department employee arranged for a union organizing meeting.[107] After expressing hostility to the union, the employer "reorganized," thereby eliminating the employee's position.[108] The union filed an unfair labor practice charge with the Illinois State Labor Board ("ISLRB") alleging that the employee was discharged because he supported the union.[109] The City contended that the employee's position was eliminated purely because of fiscal considerations.[110] An ISLRB hearing officer determined that the City's reasons were pretextual.[111] Subsequently, the ISLRB adopted the hearing officer's recommendation to reinstate the employee with back pay.[112] The appellate court affirmed, using the same shifting burden of proof analysis used by the NLRB and the federal courts to decide discrimination cases arising under the NLRA.[113]

The Illinois Supreme Court affirmed the lower court's analysis and its conclusion.[114] The court noted that because the IPLRA is modeled after the NLRA, the NLRA standard of proof should be applied to mixed motive cases arising under the IPLRA.[115] The court also stated that in order for a trier of fact to infer antiunion motivation, the employee must show more than that the employer had knowledge of an employee's protected activity.[116] In contrast, the employer's knowledge of the activity, coupled with the employer's inability to articulate any plausible, legitimate reason for its action, is sufficient for a finding of an unlawful discharge.[117]

City of Burbank establishes the standard courts will follow in mixed motive discharge cases arising under the Illinois public bar-

107. *City of Burbank*, 128 Ill. 2d at 340, 538 N.E.2d at 1147.

108. *Id.* at 339, 538 N.E.2d at 1147. The only position eliminated was that of the supervisor who actively supported the union. A supervisor with similar functions who opposed the union did not have his position eliminated. *Id.* The "restructuring" occurred two days before the union election. *Id.* at 341, 538 N.E.2d at 1148. The IPLRA prohibits employers from preventing employees from forming, joining, or assisting in attempts to organize. ILL. REV. STAT. ch. 48, para. 1606 (1987).

109. *City of Burbank*, 128 Ill. 2d at 342, 538 N.E.2d at 1148. The City was charged with violating section 10 (a) (1) - (3) of the IPLRA. *Id.* at 339, 538 N.E.2d at 1147.

110. *Id.* at 342, 349-50, 538 N.E.2d at 1148, 1151-52. The City claimed that a report showed it would be cheaper and more efficient to hire private contractors. The report, however, was not published until after the "restructuring." *Id.* at 350, 538 N.E.2d at 1152.

111. *Id.* at 343, 538 N.E.2d at 1148.

112. *Id.*

113. *Id.* at 343-44, 538 N.E.2d at 1148-49.

114. *Id.* at 346, 538 N.E.2d at 1150.

115. *Id.* at 345, 538 N.E.2d at 1149.

116. *Id.* at 348, 538 N.E.2d at 1151.

117. *Id.* at 349, 538 N.E.2d at 1151.

gaining statutes.[118] If an employee shows by a preponderance of the evidence that an employer took adverse action based in whole or in part on impermissible motivation, the employee will not necessarily prevail. Even if the employer harbored unlawful motives, as long as it can articulate any legitimate reason for its action, the discharge may not be deemed unlawful.

3. Joint Employment

The Illinois Constitution requires that funding for the circuit courts be provided by the counties in which the circuit courts preside.[119] During the *Survey* year, the Illinois Supreme Court held in *Orenic v. Illinois State Labor Relations Board*,[120] that despite funding by the counties, judges of the circuit courts are not joint employers of county employees for purposes of collective bargaining under the Illinois Public Labor Relations Act.[121]

In *Orenic*, various unions attempted to organize employees of the circuit courts in four Illinois counties.[122] The four chief judges affected contended that the ISLRB did not have jurisdiction over the counties as joint employers of court employees[123] and sought a writ of prohibition or mandamus against the ISLRB.[124] The judges argued that the State, by its agent the chief judge, is the sole employer of State judicial branch employees.[125] The judges also claimed that the counties' funding role in the court system did not make the court employees, county employees.[126]

The ISLRB contended that the counties and the chief judges were joint employers.[127] First, the ISLRB noted it has held consistently that an employer is an entity "whose presence is necessary to create an effective bargaining relationship."[128] Second, the IS-

118. *See supra* notes 102-05 and accompanying text.

119. The Illinois Constitution provides that "all salaries and such expenses . . . shall be paid by the State, except that Appellate, Circuit and Associate Judges shall receive such additional compensation from counties within their district or circuit as may be provided by law." ILL. CONST. art. VI § 14.

120. 127 Ill. 2d 453, 537 N.E.2d 784 (1989).

121. *Id.* at 455-56, 537 N.E.2d at 786.

122. *Id.* at 456-57, 537 N.E.2d at 786. *See* Troy and Fehringer, *supra* note 106 at 614 n.103 (for a complete description of the various unions and bargaining units at issue).

123. 127 Ill. 2d at 458-59, 537 N.E.2d at 787.

124. *Id.* at 459-60, 537 N.E.2d at 787.

125. *Id.* at 459, 537 N.E.2d at 787.

126. *Id.* Specifically, the judges contended that the statutes requiring counties to fund the courts violate provisions of the Illinois Constitution creating a unified State court system. *Id.* (citing ILL. CONST. art. VI § 1).

127. *Id.* at 463-65, 537 N.E.2d at 789-90.

128. *Id.* at 462, 537 N.E.2d at 789. *See* County of Tazewell, 1 Pub. Employee Rep.

LRB has defined "employer," under the statute, by determining who has the authority to hire, promote, evaluate, discipline, discharge and set work rules and benefit levels.[129] The ISLRB noted that the county has the authority to perform these very functions and it has funding authority as well; therefore, the ISLRB concluded that the county and the chief judges were both necessary to the bargaining process.[130]

The Illinois Supreme Court rejected the ISLRB's argument. The court stated that it is improper to evaluate joint employment in the public sector using the same analysis used in the private sector.[131] The court noted that to do so would neglect both the special role of the public employer as representative of the public interest,[132] as well as the involvement of the legislative branch.[133]

In addition, forcing judges to bargain as joint employers with the counties could violate the Illinois Constitution,[134] which prohibits a local entity from imposing controls or burdens on the judicial system.[135] If the counties and chief justices were required to bargain collectively, the counties would have significant control over funding issues.[136] If a county were intransigent on a salary issue, it could deadlock negotiations, thereby jeopardizing the courts' functioning.[137] This substantial burden on the judicial system would be unconstitutional.[138]

The result of *Orenic* is that it will be more difficult for unions to organize judicial employees for purposes of collective bargaining. Many judicial offices have few employees. It will be impractical and economically irrational for a union to organize many judicial offices. Without the ability to combine bargaining unit organizing

(Ill.) para. 2022, No. S-RC-2 (ISLRB Sept. 27, 1985); DuPage County Board, 1 Pub. Employee Rep. (Ill.) para. 2003, Nos. S-RC-9, S-RC-17 (ISLRB Apr. 16, 1985).

129. *Orenic*, 129 Ill. 2d at 463, 537 N.E.2d at 789. (citing DuPage County Board, 1 Pub. Employee Rep. (Ill.) para. 2003, at VIII-12). The federal test for joint employers is whether two or more employers exert significant control over the same employees, and whether the evidence demonstrates that they share or co-determine matters governing essential terms and conditions of employment. NLRB v. Browning-Ferris Indus., 691 F.2d 1117, 1124 (3d Cir. 1982).

130. *Orenic*, 127 Ill. 2d at 462-63, 537 N.E.2d at 789.

131. *Id.* at 476-77, 537 N.E.2d at 795.

132. *Id.* at 478-79, 537 N.E.2d at 796. (citing *Developments in the Law: Public Employment*, 97 HARV. L. REV. 1611, 1681 (1984)).

133. *Id.* at 478, 537 N.E.2d at 796.

134. *Id.* at 477, 537 N.E.2d at 796.

135. *Id.* at 480, 537 N.E. at 797. (citing Ampersand, Inc. v. Finley, 61 Ill. 2d 537, 542, 338 N.E.2d 15, 18 (1975)).

136. *Id.* at 480-81, 537 N.E.2d at 797.

137. *Id.*

138. *Id.* at 481, 537 N.E.2d at 797.

efforts directed at other county employees, unions may very well abandon their interest in organizing this sector of the labor force altogether. Additionally, the decision shows the importance the Illinois Supreme Court attaches to the different policy considerations that make private labor law analysis sometimes inappropriate for public labor law analysis.

4. Discrimination

The Illinois Public Labor Relations Act provides that an employer may not discriminate with regard to hiring, tenure of employment, or terms or conditions of employment.[139] In *City of Chicago v. Illinois Local Labor Relations Board*,[140] the Illinois Appellate Court for the First District held that an employee need not prove financial or tangible harm for a showing of discrimination under the IPLRA.[141]

In *City of Chicago*, the employer filed disciplinary proceedings against an active union supporter for lying on her resume, mishandling funds, refusing orders and violating confidentiality.[142] The employee then filed an unfair labor practice charge against the City, alleging that the disciplinary measures constituted discrimination on the basis of union activity.[143] The ILLRB accepted a hearing officer's determination that the employee's claims were valid. The ILLRB ordered the employer to rescind, withdraw and discontinue disciplinary claims against the employee, remove references to the disciplinary actions from her personnel file, and post notice of the ILLRB's decision.[144]

The City appealed on the grounds that the ILLRB's decision was incorrect as a matter of law because there was no evidence that the employee had suffered a financial loss as a result of the discipline. In the alternative, the City argued that the employee did not

139. ILL. REV. STAT. ch. 48, para. 1610(a)(2) (1987). The Act established the Illinois Local Labor Relations Board ("ILLRB"), to administer public employee labor relations in Cook County, Illinois, and the Illinois State Labor Relations Board, to administer all other public employee labor relations in the State. Public educational employee labor relations are governed by the Illinois Educational Labor Relations Act. The statutes were enacted at the same time and contain nearly-identical provisions. *See* Malin, *Implementing the Illinois Educational Labor Relations Act*, 61 CHI.-KENT L. REV. 101 (1985) (for a comparison of the acts).

140. 182 Ill. App. 3d 588, 536 N.E.2d 1219 (1st Dist. 1988).

141. *Id.* at 594-95, 536 N.E.2d at 1223-24.

142. *Id.* at 590-91, 536 N.E.2d at 1221.

143. *Id.* at 589, 536 N.E.2d at 1220.

144. *Id.* at 589-90, 536 N.E.2d at 1220.

establish a prima facie case of discrimination.[145] The employee argued that discrimination does not require monetary loss and that harassment is sufficient to establish an unfair labor practice.[146] The appellate court agreed and held that harassment provides a sufficient basis for a violation of the IPLRA.[147] The court noted that the statute's language does not specifically require financial or tangible harm[148] and that its non-discrimination provisions were broad enough to encompass harassment.[149]

The court's holding may make it easier for employees disciplined, short of firing, to sustain an unfair labor practice claim under the IPLRA. The decision suggests that when an employer takes action against an employee because of pro-union activity, the employer has committed an unfair labor practice even if the employee suffers no financial harm. The court also makes clear that harassment by itself is sufficient to make out an unfair labor practice claim under the IPLRA.

B. Illinois Educational Labor Relations Act

1. Mandatory Subjects of Bargaining

The Illinois Educational Labor Relations Act[150] provides for collective bargaining between public educational employers and public school employees.[151] A public educational employer is not

145. *Id.* at 592-93, 536 N.E.2d at 1222. The City was precluded from arguing that the employee suffered no financial consequences as a result of the alleged breach of confidentiality. For that infraction, she was suspended.

146. *Id.* at 593, 536 N.E.2d at 1222. The employee also asserted that her employer's actions had an adverse, tangible impact on her job tenure and conditions of employment. *Id.*

147. *Id.* at 594-95, 536 N.E.2d at 1223-24.

148. *Id.* at 594-95, 536 N.E.2d at 1223.

149. *Id.* at 594-95, 536 N.E.2d at 1223-24 (citing ILL. REV. STAT. ch. 48, para. 1610(a)(3) (1987) providing that an employer may not "discharge or *otherwise discriminate*" (emphasis in opinion)).

150. ILL. REV. STAT. ch. 48, paras. 1701-1721 (1987).

151. *Id.* para. 1710(a). In addition to the protection afforded public educational employees by the IELRA, Illinois public school teachers are also protected by the Illinois School Code. ILL. REV. STAT. ch. 122, para. 24-13 (1987). Although the IELRA governs the relationship between public educational employers and employee organizations with regard to collective bargaining matters, the Code governs other concerns that may arise during the course of the teacher-school authority relationship. For example, the Code provides that tenure rights may not be affected by a leave of absence mutually agreed upon by the teacher and the school board.

During the *Survey* year, the Illinois Appellate Court for the Fifth District held that the school board may attach conditions to a leave of absence without protecting a teacher's tenure. In Fisher v. Board of Educ., 181 Ill. App. 3d 653, 658, 537 N.E.2d 354, 357-58 (5th Dist. 1989), a tenured teacher requested that the school board allow her to take a one-year leave of absence for medical reasons. *Id.* at 655, 537 N.E.2d at 355. The school

required to bargain over matters of inherent managerial policy, but it must bargain collectively over policy matters "directly affecting wages, hours and terms and conditions of employment as well as the impact thereon . . . ."[152] Since the enactment of the public employee bargaining acts in 1984, the law regarding the scope of mandatory bargaining was unclear. During the *Survey* year, the Illinois Appellate Court for the Fourth District held that class size is a mandatory subject for bargaining.[153]

In *Decatur Board of Education v. Illinois Educational Labor Relations Board*, the school district refused to bargain over class size and its impact upon teachers' salary, preparation and planning time and other terms and conditions of employment.[154] The union then filed an unfair labor practice claim with the IELRB.[155] The school district disagreed with the union's position that class size was a mandatory subject of bargaining.[156]

The IELRB concluded that class size directly affects, and therefore has an impact, on terms and conditions of employment,[157] but

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board considered the teacher's request and stated that her leave of absence was not "mutually agreeable." *Id.* A non-tenured teacher was then hired to fill the position and the tenured teacher did not object. The school board considered the teacher's written request to return and determined that it was not obligated to reemploy her. The teacher then petitioned the circuit court to order the school board to reinstate her. *Id.* at 654, 537 N.E.2d at 355. The circuit court granted summary judgment in the school board's favor. *Id.* The teacher appealed, contending that the school board was prohibited from attaching conditions on her leave affecting tenure rights. The appellate court affirmed on the ground that the parties never had a "mutual agreement" as required by the Code.

152. ILL. REV. STAT. ch. 48, para. 1704 (1987). Similarly, section 4 of the Illinois Public Labor Relations Act, ILL REV. STAT. ch. 48, para. 1604 (1987) exempts non-educational public employers from bargaining over matters of inherent managerial policy. In Departments of Central Management Servs. and Corrections v. AFSCME, No. S-CA-88-86 (ISLRB September 14, 1988), the ISLRB held that the employer could institute a limited drug testing program for its employees without first bargaining over the decision. The employer had a duty, however, to bargain over the impact of its new policy. After the *Survey* period concluded, the Illinois Appellate Court for the Fourth District affirmed, finding that the Department's need for stricter security measures did not lend itself to the bargaining process. The court stated that the ISLRB properly balanced the impact of the testing policy on workers' rights against the State's need to curb criminal activity in its prisons. AFSCME v. ISLRB, 190 Ill. App. 3d 259, 546 N.E.2d 687 (4th Dist. 1989) (citing with approval the balancing test used in Decatur Bd. of Educ. v. IELRB, 180 Ill. App. 3d 770, 536 N.E.2d 743 (1st Dist. 1989). *See infra* notes 153-63 and accompanying text (for further discussion of *Decatur*).

153. 180 Ill. App. 3d 770, 777, 536 N.E.2d 743, 748 (4th Dist. 1989). "Class size" represents the number of students per class.

154. *Id.* at 771-72, 536 N.E.2d at 744.

155. *Id.* at 771, 536 N.E.2d at 744.

156. *Id.* at 772, 536 N.E.2d at 744. The school district also contended that the union had waived its right to bargain on the subject. *Id.* The court, however, rejected this argument because the parties had stipulated otherwise. *Id.*

157. *Id.* at 772, 536 N.E.2d at 744-45. (citing Decatur School Dist. No. 61, 4 Pub.

a direct effect on a term or condition of employment does not automatically create a mandatory duty to bargain.[158] The IELRB used a balancing test, to measure employee interests against the school district interests in maintaining unencumbered control over managerial policy,[159] and concluded that the employer had a duty to bargain.[160]

The court's problem was to reconcile two seemingly irreconcilable provisions in the statute. On one hand, the employer must negotiate with the union over certain subjects of bargaining. On the other, the employer need not bargain over matters that are "inherently managerial." The appellate court determined that the IELRB's balancing test was appropriate to decide the matter.[161] The court stated that the legislature could not have intended a literal interpretation of "directly affect" and "impact."[162] A literal interpretation would negate the provision providing that employers need not bargain over matters of inherent managerial policy because almost everything affects and impacts upon terms and conditions of employment.[163]

Decatur is significant, not only for its direct impact upon teachers' working conditions in an era of educational reform, but also for the court's endorsement of the Board's balancing approach. In the future, courts will have to weigh any new policy's impact on working conditions, against an employer's need for managerial discretion and control.

2. Arbitration

The IELRA is a comprehensive statute, creating rights and duties that did not exist at common law.[164] For example, the Act provides for binding arbitration of disputes concerning a collective

Employee Rep. (Ill.) para. 1076, case No. 86-CA-0042-S (ILLRB, May 17, 1988)). Two of the three Board members determined that class size directly affects terms and conditions; one member determined that it did not have a direct effect but had an impact on employment terms, thus triggering a duty to bargain. *Id.* at 772, 536 N.E.2d at 744-45.

158. *Id.*

159. *Id.* at 772, 536 N.E.2d at 745. The agency also stated that the balancing test could be used to determine if the impact of a particular policy decision would subject the topic to mandatory bargaining. *Id.* at 772-73, 536 N.E.2d at 745.

160. *Id.*

161. *Id.* at 772, 536 N.E.2d at 744-45.

162. *Id.* at 773, 536 N.E.2d at 745.

163. The court pointed out that a school district may address its concern over fiscal problems by taking a firm position during collective bargaining. *Id.* at 775-77, 536 N.E.2d at 747.

164. Board of Educ. v. Compton, 123 Ill. 2d 216, 220-21, 526 N.E.2d 149, 151-52 (1988).

bargaining agreement's interpretation.[165] In an important case decided during the last *Survey* period, *Board of Education v. Compton*,[166] the Illinois Supreme Court divested circuit courts of the authority to review IELRA arbitration awards, as well as the authority to decide whether a disagreement over the terms of a collective bargaining agreement is properly subject to arbitration.[167]

During the current *Survey* period, the Illinois Supreme Court was confronted with an issue not addressed in *Compton*, that is, whether circuit courts retain the power to enjoin arbitration. In *Board of Education v. Warren Township High School Federation of Teachers, Local 504*,[168] the court held that circuit courts do not retain the power to enjoin arbitration in the context of public educational disputes. In *Warren Township*, a school district refused to rehire a nontenured teacher on probationary status.[169] The union filed a grievance alleging that certain provisions in the collective bargaining agreement pertaining to teacher evaluations were not followed. When the union tried to take the grievance to arbitration, the employer refused on the grounds that the grievance was inarbitrable.[170]After the union filed an unfair labor practice charge with the IELRB, and after the agency issued a complaint, the school district obtained, from the circuit court, a preliminary injunction to prevent the union from proceeding with the arbitration proceeding.[171]

Recognizing the broad legislative policy behind the IELRA to promote peaceful relationships between educational employers and their employees, the court indicated that to allow judicial intervention in these types of disputes would disrupt the statutory scheme.[172] The court determined that the circuit court lacked jurisdiction to enjoin arbitration and that the question of arbitrability is for the IELRB to decide in the first instance.[173] *Warren Township* is the most recent of several Illinois decisions giving the

165. ILL. REV. STAT. ch. 48, para. 1710 (c) (1987)

166. 123 Ill. 2d 216, 526 N.E.2d 149 (1988). *See generally*, Gecker and Albrecht, *Labor Law*, 20 LOY. U. CHI. L.J. 527, 548-551 (1989).

167. *Id.* at 225, 526 N.E.2d at 153.

168. 128 Ill. 2d 155, 538 N.E.2d 524 (1989).

169. *Id.* at 165, 538 N.E.2d at 529.

170. The employer argued that it had a nondelegable right to make rehiring decisions under the Illinois School Code as a matter of inherent managerial control. *Id.* at 160, 538 N.E.2d at 526.

171. *Id.* at 159, 538 N.E.2d at 525.

172. *Id.* at 165, 538 N.E.2d at 529.

173. *Id.* at 166, 538 N.E.2d at 529.

IELRB, rather than the courts, the broad authority to be the sole reviewing forum for arbitration awards and questions of arbitrability.[174] If the agency fails to fulfil its mandate, the loss of a judicial forum for review of awards may someday prompt legislative action.

In a case involving the interplay between a civil service statute and the IELRA, *Board of Governors of State Colleges and Universities v. IELRB*,[175] the Illinois Appellate Court for the Fourth District held that the grievance-arbitration provisions of the IELRA do not displace the dispute resolution procedure provided by the civil service system.

The case arose when a terminated employee filed a grievance pursuant to the parties' collective bargaining agreement.[176] Her former employer informed her that her only option was to contest her discharge through the Merit Board of the State Universities Civil Service System.[177] The Merit Board hearing officer concluded that the employer had cause to discharge the employee.[178] Subsequently, the union filed charges with the IELRB. The IELRB adopted an agency hearing officer's determination that the employer had committed an unfair labor practice and her recommended remedial order that the employer process the grievance.[179] Of particular significance was the Board's conclusion that the bargaining agreement and its grievance-arbitration mechanism provided an alternative dispute resolution that supplemented, rather than displaced, the Civil Service procedure.[180] The employer had argued that Merit Review Board is the exclusive remedy available to a Civil Service employee to protest a discharge.

The Illinois Supreme Court disagreed with the employer's contention that the arbitration procedure would supplant the Civil Service scheme.[181] The Court looked at the legislative scheme of both the Civil Service Act and the IELRA and concluded that it

174. *See e.g.*, Board of Educ. v. Chicago Teachers Union, 86 Ill. 2d 469, 427 N.E.2d 1199 (1981), in which the court held that the IELRA removed from the courts their former jurisdiction to vacate arbitration awards under the Uniform Arbitration Act, ILL. REV. STAT. ch. 10, paras. 102-123 (1987).

175. 170 Ill. App. 3d 463, 480, 524 N.E.2d 758, 768 (1988).

176. *Id.* at 467, 524 N.E.2d at 759.

177. Created pursuant to ILL. REV. STAT. ch. 24, para. 38(b)(3) (1985).

178. *Board of Governors*, 170 Ill App. 3d at 467, 524 N.E.2d at 759. At the time, the employee failed to raise her objection to the proceeding. The Illinois Supreme Court considered this lapse fatal. *See infra* note 183 and accompanying text.

179. 170 Ill. App. 3d at 470, 524 N.E.2d at 761.

180. *Id.* at 469, 524 N.E.2d at 761.

181. *Id.* at 478, 524 N.E.2d at 766.

was the legislature's intent to enlarge upon employee rights.[182] Accordingly, a civil service employee has two coextensive dispute resolution devices available.[183]

C. *Illinois Pension Code*

The Firefighters' Pension Fund Act[184] requires municipalities to establish and administer pension funds for the benefit of firefighters and their families.[185] The Act also provides that if a firefighter is disabled while performing a job-related matter, the firefighter is entitled to sixty-five percent of his monthly salary, attached to rank, at the date of his removal from a municipality's fire department payroll.[186] The Act additionally prohibits a municipality from providing any type of retirement or annuity benefit to a firefighter other than through establishment of a fund as provided in the Act.[187]

During the *Survey* year, the Illinois Appellate Court for the Second District held that a municipality cannot enter into a collective bargaining agreement that provides for more pension benefits than those established in the Pension Fund Act.[188] In *City of De Kalb v. International Association of Fire Fighters*, the City and the firemen's union entered into a collective bargaining agreement which provided that fire fighters who received job-related injuries would receive supplemental differential disability pay equal to the difference between their normal pay and the benefits received under the Illinois Workmen's Compensation Act,[189] Workmen's Occupational Disease Act,[190] or the Illinois Pension Code.[191] The City subsequently learned that the differential disability payments pro-

182. *Id.* at 480, 524 N.E.2d at 768.

183. Although affirming the IELRB's finding that the employer had committed an unfair labor practice by refusing to process the grievance, the court vacated the agency's remedial order on the grounds that the employee failed to seek a stay and judicial review of the Merit Board's decision. *Id.* at 483, 524 N.E.2d at 770.

184. ILL. REV. STAT. ch. 108, paras. 4-101 to 4-144 (1987).

185. *Id.* para. 4-101.

186. *Id.* para. 4-110.

187. *Id.* para. 4-142.

188. 182 Ill. App. 3d 367, 373, 538 N.E.2d 867, 870-71 (2d Dist. 1989).

189. *Id.* at 369, 538 N.E.2d at 868 (referring to ILL. REV. STAT. ch. 48, paras. 138.1-.30 (1987)).

190. *Id.* (referring to ILL. REV. STAT. ch. 48, paras. 172.36 -.62 (1987)).

191. *Id.* (referring to ILL. REV. STAT. ch. 108, paras. 4-101 to 4-144 (1985). For example, if a fire fighter's base pay were $2000 per month, a disabled employee would receive $1,300 per month under the pension plan (65% of $2000) and $700 per month under the differential pay agreement.

vision in the collective bargaining agreement was unlawful[192] and discontinued the differential payments. The City entered into a new collective bargaining agreement that did not include this provision.[193] The union and the City also signed a separate agreement that provided that if an arbitrator or a court determined that the differential payments did not violate Illinois public policy, the payments would be reinstituted.[194]

After the new agreement was signed, the union filed a grievance on behalf of two members who were denied differential pay.[195] The union contended that the City was bound by the original collective bargaining agreement.[196] The City responded that it could not be bound because the original agreement violated Illinois public policy insofar as it conflicted with the Pension Code, a statute passed by the Illinois Legislature.[197] The grievance went to arbitration, whereby an arbitrator sustained it and ordered differential pay.[198] The City sought to vacate the arbitrator's decision by appeal to the circuit court.[199] The union filed a motion to dismiss, which was granted.[200]

On appeal, the City reiterated its public policy argument.[201] The union contended that the City had waived its right to challenge the decision because it had submitted the issue to arbitration.[202] The union also argued that the payments were not prohibited by Illinois public policy because the payments were continuing compensation, and not supplemental pension benefits.[203]

The court rejected the union's position and held that the payments violated Illinois public policy.[204] It found no merit in the argument that the supplemental pension payments should be characterized as continuing compensation.[205] Because the Pension

192. 182 Ill. App. 3d at 369, 538 N.E.2d at 868.
193. *Id.* at 369-70, 538 N.E.2d at 868.
194. *Id.* at 370, 538 N.E.2d at 868.
195. *Id.*
196. *Id.*
197. *Id.* at 370, 538 N.E.2d at 869.
198. *Id.* at 370, 538 N.E.2d at 868.
199. *Id.* at 370-71, 538 N.E.2d at 869.
200. *Id.* The circuit court stated that by granting a motion to dismiss, the appellate court would be able to consider expeditiously the public policy argument. *Id.* at 371, 528 N.E.2d at 869.
201. *Id.* at 369, 538 N.E.2d at 868.
202. *Id.* at 376-77, 538 N.E.2d at 873.
203. *Id.* at 373, 538 N.E.2d at 870-71.
204. *Id.* at 373-74, 538 N.E.2d at 870-71.
205. *Id.* at 373, 538 N.E.2d at 870-71. (citing Paterson v. City of Granite City, 78 Ill. App. 3d 821, 397 N.E.2d 237 (5th Dist. 1979)). The court in *Paterson* stated that the

Fund Act specifically prohibits supplemental pension benefits, the court vacated the arbitrator's decision.[206] This case makes it clear that although an arbitrator is bound to interpret only the terms of the contract, the Illinois courts are not similarly bound and must consider public policy issues as well. Therefore, if an arbitration award appears to implicate a public policy issue, the courts are far less likely to accord it traditional deference.[207]

V. LEGISLATION

A. Higher Education

The Personnel File Act[208] permits employees to inspect the contents of their personnel files.[209] To assist decisions regarding promotions and tenure, institutions of higher education solicit recommendations from persons, not employed by those institutions, who are familiar with the employee's work. During the *Survey* year, the Personnel File Act was amended to exclude test documents, letters of reference and external peer review documents for academic employees of institutions of higher education.[210]

The legislature also amended the Illinois Human Rights Act[211] during the *Survey* period. The Act prohibits discrimination on the basis of race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental handicap, or unfavorable discharge form military service. Public Act 85-1229[212] guarantees freedom from sexual harassment in employment and in higher education. In addition to prohibiting sexual harassment, the amendments make it unlawful to aid or abet sexual harassment, or to

difference between a retired fire fighter's compensation and disability pension paid pursuant to a municipal ordinance was a pension supplement and not continuing compensation. *Paterson*, 78 Ill. App. 3d at 824, 397 N.E.2d at 239.

206. 182 Ill. App. 3d at 372-73, 538 N.E.2d at 870.

207. In a famous series of cases called the "Steelworkers Trilogy," the Supreme Court expressed a policy of deference toward arbitration as a preferred method of dispute resolution. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

208. ILL. REV. STAT. ch. 48, paras. 2001-2012 (1987).

209. *Id.* para. 2002. *See*, Gecker and Albrecht, *supra* note 166, at 541-45 (for a discussion of recent amendments to the Personnel File Act).

210. ILL. ANN. STAT. ch. 48, para. 2010(a)(b) (Smith-Hurd 1989). Peer review documents may be revealed to other sources, however. In University of Pa. v. EEOC, 110 S. Ct. 577 (1990), the Supreme Court held that a university had to make peer review documents available to the Equal Employment Opportunity Commission so that it could investigate a charge of sex discrimination.

211. ILL. REV. STAT. ch. 68, para. 7-102 (A)(1) (1985).

212. Codified at ILL. REV. STAT. ch. 68, paras. 1-102, 6-101, 7-106 (1988).

retaliate against any individual complaining of sexual harassment under the Act.

B. Civil Rights

H.B. 3469[213] requires public contractors to take affirmative action to correct violations of the Illinois Human Rights Act within sixty days after notification by the Illinois Department of Human Rights. It is a civil rights violation for public contractors to fail to comply with the Department's regulations concerning equal employment and affirmative action[214] and to fail to provide any information or assistance that the Department may request.[215]

A new statute, the Employee Rights Violation Act,[216] requires the immediate discharge of a policy-making employee when there is a judgment rendered against the employee for violating another employee's rights under the first and fourteenth amendments of the federal Constitution, and when there has been a finding of willful or wanton conduct or an award of punitive damages.

C. AIDS Testing

During the *Survey* year, the Communicable Disease Act,[217] was amended to allow persons to be tested for AIDS without their informed consent if a physician believes they may have exposed a health car provider, firefighter, or emergency medical technician to the AIDS virus.[218]

D. Job Listing Services

The legislature created the Job Referral and Job Listing Services Consumer Protection Act[219] during the *Survey* period in order to provide protection to those seeking employment through fee-seeking agencies. Before accepting a fee, a job referral service must provide the job seeker with a written contract specifying the applicant's qualifications and acceptable employment opportunities.[220]

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213. Codified at ILL. REV. STAT. ch. 68, para. 2-105 (1988).
214. *Id.* para. 2-105 (1)-(4).
215. *Id.* para. 2-105 (3).
216. ILL. REV. STAT. ch. 127, para. 63 (b)(100)(1) (1988).
217. ILL. ANN. STAT. ch. 111, para. 22.12a (Smith-Hurd 1989).
218. *Id.* para. 7307.
219. ILL. REV. STAT. ch. 121, para. 2006 (1988).
220. *Id.* para. 2006 (1)-(2).

E. Workers' Compensation

A new provision in the Workers' Compensation Act[221] creates a Self-Insurers Administration Fund and a Self-Insurers Advisory Board to administer the Fund.[222] The State Treasurer will be the custodian of the Fund, and shall protect the fund with a general bond. Upon the Fund Chairman's authorization, the State Comptroller will pay out of the Fund, only upon receipt of properly certified vouchers from the Workers' Compensation Commission.

VI. CONCLUSION

During the *Survey* year, the Illinois courts decided a number of significant cases that will have an impact upon labor and employment law. In a case having national implications, the Illinois Supreme Court ruled that federal law does not preempt state criminal prosecutions for violations of occupational safety and health laws. Like many courts, including the United States Supreme Court, Illinois courts had to determine the impact of public policy on arbitration awards and the burden of proof that applies to employee discrimination claims. The courts continued to enlarge the body of law interpreting the recently enacted public employee bargaining laws. One court clarified the scope of mandatory bargaining by endorsing a balancing test that limits a public employer's obligation to bargain over matters concerning managerial policy. Administrative agencies and the legislature addressed the timely issues of discrimination, drug testing, and AIDS. Finally, even though the public employee bargaining statutes contain provisions safeguarding a public employer's right to control matters of managerial policy, the Illinois Supreme Court effectively rendered nugatory union ability to organize non-judicial court employees.

221. ILL. REV. STAT. ch. 48, para. 138.1 -.30 (1987).
222. *Id.* paras. 138.4(a) -(6.1).