

# **Discrimination & Employment Laws – Illinois**

*Justin R. Gaffney*  
Gaffney & Gaffney  
1771 Bloomingdale Road  
Glendale Heights, IL  
630-462-1200

**I. New LAWS on the Books –**

**A) Illinois Whistleblower Act (740 ILCS 174/1 et. seq.)**

Required Poster: NO

No. of Employees: 1

Tenure of Employment: None

Effective Date: January 1, 2004

P.A. 93-0544 established the Illinois Whistleblower's Act, which makes it illegal for an employer to take adverse employment actions against an employee for providing information to state or federal officials concerning matters the employee **reasonably believes** to be illegal conduct by the employer. It is also unlawful for an employer to establish rules or policies prohibiting employees from alerting authorities to potential illegal conduct committed by the Employer.

Remedies: Reinstatement, back pay, other damages, attorney fees. Class A misdemeanor.

**B) Right to Breastfeed (740 ILCS 137/1) et. seq.**

Required Poster: NO

No. of Employees: 1

Tenure of Employment: None

Effective Date: August 16, 2004

P.A. 93-0942, provides that a mother may breastfeed her child in any location that the mother is otherwise authorized to be. Being denied by the employer allows the mother to bring an action to enjoin the employer's actions and recover all fees and costs. Further, the Act provides an employer must provide reasonable break time that may be **unpaid** each day for an employee who needs to breastfeed. Employer may deny break time for the mother if they can show that providing this time would unduly disrupt the

employer's operations. An employer must also make reasonable efforts to provide a room or other location, **other than a toilet stall**, where the mother can breastfeed in private.

C) **The American Jobs Creation Act of 2004 with the Civil Rights Tax Relief Act** *26 USCS Sect. 62).*

Effective Date: October 20, 2004

“Adjusted gross income defined”

(a) General Rule. For purposes of this subtitle, the term “adjusted gross income” means, in the case of an individual, gross income minus the following deductions:

(20) Costs Involving discrimination suits, etc: Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any action involving a claim of unlawful discrimination (as defined in subsection (e)).

Please see (e) in your handout to see which claims are included in this.

C) **The Service Members Civil Relief Act (SCRA)** *(50 USCA Sect. 501 et. seq.)*

Effective Date: December 19, 2003

A default judgment cannot be entered against any individual covered by this Act (i.e. serviceman who is unavailable because they are on active duty). Before Plaintiff can obtain a default judgment, Plaintiff has an affirmative duty to determine whether or

not the defendant is covered by the Act, and aver that defendant is not in the military or despite their due diligence the plaintiff was unable to make a determination as to their status.

Penalty for a knowing violation is imprisonment for up to one year and money damages.

See Judge Kenneth A. Abraham's primer attached for more details.

II. A few RECENT 7<sup>th</sup> Circuit Sup. Ct. and Illinois Appellate Court Decisions

Walker v. Board of Regions, 410 F.3<sup>rd</sup> 387 (7<sup>th</sup> Cir. 2005)

**Plaintiff argued:** University official terminated her employment based on gender discrimination in violation of Title VII.

**Defendant's response:** Employee refused to carryout employer's directives, had antagonistic management style, made poor choices with respect to staff selection and supervision.

**Trial Court decision:** Judge Crabb of the Western District of Wisconsin granted defendant's motion for judgment as a matter of law at trial.

**7<sup>th</sup> Circuit decision:** Affirmed.

**Quotable quotes:**

- In the instant case-as with most employment discrimination cases in this day and age-there appears to be no direct evidence of discrimination whatsoever.
- We have identified three types of circumstantial evidence relevant to Title VII discrimination cases. The first is "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn." The key consideration is the totality of these "pieces of evidence, none conclusive in itself but together composing a convincing mosaic of discrimination against plaintiff".
- The second type is evidence, whether or not rigorously statistical, that employees similarly situated to the plaintiff other than in the characteristic (i.e. sex, race or whatever) on which an employer is forbidden to base a difference in treatment received systematically better treatment.
- Third is evidence that the plaintiff was qualified for the job in question but passed over in favor of (or replaced by) a person not having the forbidden characteristic and that the employer stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination.
- Nothing in the litany of factual quibbles points toward gender based discrimination. Even assuming, *arguendo*, that (the supervisor's) behavior was strange and inconsistent, nothing in the records supports an inference of sexism.

Culver v. Gorman & Co., 416 F.3<sup>rd</sup> 540 (7<sup>th</sup> Cir. 2005)

**Plaintiff argued:** Termination and retaliation for threatening to bring a sex discrimination complaint.

**Defendant's response:** She was fired for insubordination and refusal to perform work tasks.

**Trial Court decision:** Judge Crabb of the Western District of Wisconsin granted defendant's motion for summary judgment.

**7<sup>th</sup> Circuit decision:** Reversed and remanded for trial.

**Quotable quotes:**

- The evidence of the non-movement is to be believed, and all justifiable inferences are to be drawn in her favor.
- The persuasiveness of the defendant's explanation is normally for the finder of fact to assess, unless the court can say without reservation that a reasonable finder of fact would be compelled to credit the employer's case on this point.
- Summary judgment should be granted only if the defendant presents un rebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had no retaliatory motive.
- We have never said that temporal proximity is dispositive in providing or disproving a causal link.
- Suspicious timing is thus "often an important evidentiary ally of the plaintiff". Lalvani v. Cook County, 269 F.3<sup>rd</sup> 785, 790 (7<sup>th</sup> Cir. 2001).
- Culver's satisfactory performance review together with Schroeder's insistence that he harbored no desire to fire her at the time of her annual review, establish that she was in no danger of losing her job until after she made her allegations of gender discrimination.
- A reasonable fact finder could conclude that the radical reversal of Gorman's perception of Culver's fitness as an employee was closely associated with her protected activity, and thus contributes to an inference of causation.
- Insubordination is defined as "willful disregard of an employer's instructions" or an "act of disobedience to proper authority". Black's Law Dictionary (8<sup>th</sup> Edition 2004). Culver's undisputed refusal to answer Schroeder's request for information appears to qualify as disobedience or defiance even about a relatively trivial matter. Gorman, however, did not refer to this incident as an example of insubordination until filing its summary judgment motion. This was only after Culver mentioned the matter in her deposition. Schroeder failed to mention any specific instances of insubordination at the time of the firing; he later at his deposition, when asked to identify all incidents of Culver's insubordination, failed to mention this matter. This failure to earlier mention the incident as a reason for termination is evidence of pretext.
- The basic question is whether Schroeder *honestly believed* that Culver's refusal to answer his question ... justified her termination. In that respect, his failure to discuss these incidents when provided with

opportunities to do so is troubling. Schroeder identified none of these incidents either when he fired Culver or during his deposition.

- An inconsistent employer explanation may help to support a finding of pretext. Zaccagnini v. Chas. Levy Circulating Co., 338 F.3<sup>rd</sup> 672, 678 (7<sup>th</sup> Cir. 2003). If Culver's attitude did indeed fall off the cliff of acceptable workplace behavior in the three days prior to her termination, we find it surprising that Schroeder did not specifically refer contemporaneously to this recent period of substandard behavior.
- While the relevant time for determining the effectiveness of an employee is the time of discharge, "previous employment history may be relevant and probative in assessing performance at the time of termination." Fortier v. Ameritech Mobile Communications, 161 F.3<sup>rd</sup> 1106, 1113 (7<sup>th</sup> Cir. 1998). CF. Giacoletto v. Amax Zinc Co., 954 F.2d 424, 426-27 (7<sup>th</sup> Cir. 1992).
- Although Gorman argued that it is not discriminatory for an employer to take preemptive action against an employee who has announced her intention to leave at the first opportunity (Miller v. American Family Mut. Ins. Co., 203 F.3<sup>rd</sup> 997, 1009 (7<sup>th</sup> Cir. 2000)), Culver did not announce her intention to leave Gorman at the first available opportunity and asserted that she never threatened to quit her job. We are extremely reluctant to extend the holding of Miller to include situations where an employee does not explicitly indicate her intention to leave at the first available opportunity, thus it is a genuine issue of material fact as to whether Schroeder honestly believed Culver was about to leave Gorman.

Ashman v. Bd. Of Regents Of The Univ. Of Wis. System, 438 F.3d 781 (7<sup>th</sup> Cir. 2006)

**Plaintiff argues:** University retaliated against her for speaking out in violation of her First Amendment rights.

**Defendant's response:** Employee's First Amendment protected speech was not a motivating factor or did not play a substantial part in her rejection and termination.

**District Court decision:** Judge Shabaz of the Western District of Wisconsin granted the University's motion for summary judgment.

**7<sup>th</sup> Circuit decision:** Reversed and remanded for trial as the record was replete with incidents that were open to interpretation and required factual finding.

**Quotable quotes:**

- We are particularly leery of resolving issues involving a state of mind on summary judgment. Alexander v. Wis. Dep't. Of Health & Family Servs., 263 F.3<sup>rd</sup> 673 (7<sup>th</sup> Cir. 2001).

- Summary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play dominant roles. *McGreal v. Ostrov*, 368 F.3<sup>rd</sup> 657, 677 (7<sup>th</sup> Cir. 2004).
- Significantly, there are the observations of *Ashman's* co-workers that (a decision maker) was very angry with her.
- After setting out to create the position, why did they change course? Are the reasons they give convincing? The record contains no indication that *Ashman* was incompetent and, in fact, she continues to be employed by the University... There are too many unanswered questions about motivation and intent.

*Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763 (7<sup>th</sup> Cir. 2006)

**Plaintiff argues:** *Mattenson*, a patent lawyer, age 51, was fired in 2001 having worked for Baxter for 14 years. He was fired 10 days before his early retirement benefits vested and was replaced by a much younger man at a higher salary. He asserted that he was meeting expectations based upon years of meets expectations performance reviews and asserted that the supervisors who pretended his termination was voluntary were unworthy of belief.

**Defendant's response:** *Mattenson* had quit but there was a history of performance failures that would have justified firing him.

**District Court decision:** Judge Darrah, Northern District of Illinois, granted judgment on jury verdict in favor of plaintiff and doubled verdict as willful violation of ADEA. Judge Darrah refused to award front pay.

**7<sup>th</sup> Circuit decision:** Judgment was reversed and remanded for retrial on the issue of liability. Refusal to award front pay was affirmed.

**Quotable quotes:**

- The judge on his own initiative gave a *McDonnell-Douglas* instruction despite tireless repetition by Appellate Courts that the burden-shifting formula of that case is not intended for the guidance of jurors; it is intended for the guidance of the judge when asked to resolve a case on summary judgment.
- A related error was to instruct the jury that it “must determine whether or not *Mattenson's* determination is legitimate or only a pretext for age discrimination,” the implication being that proof of pretext compels, rather than merely permits, an inference of discriminatory intent.
- One of the three fired employees testified that he was fired on the verge of being entitled to a full pension, which is what happened to *Mattenson*. And in this day and age, for executives at the vice-presidential level of a major business enterprise to be talking openly about the desirability of

getting rid of old employees is at least some evidence of the discriminatory workplace culture of which we spoke... Testimony based on the personal knowledge of the testifying employees can provide a basis for an inference that discriminatory attitudes permeate a firm's employment policies and practices.

- Language in some judicial opinions suggest that prejudicial remarks are always to be excluded unless they are made by someone who had an input into the decision to terminate (or take other challenged adverse employment action against) the plaintiff... This language should not be taken literally, however. Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1423 (7<sup>th</sup> Cir. 1986). The admissibility of "stray remarks" as to cases call them, is governed by Rule 403 of the Evidence Rules, which establishes a standard rather than a rule-and a standard that tilts in favor of admissibility; the probative value of the evidence must not merely be outweighed, it must be substantially outweighed, by its negative consequences, to be excludable. And that will depend on context-the circumstances in which the remarks were made, such as the number of similar remarks, when they were made, and by whom and to who they were made.

Loughman v. Malnati Org., Inc., 395 F.3d 404 (7<sup>th</sup> Cir. 2005)

**Plaintiff argued:** sexual harassment arising primarily out of three physical confrontations at a Lou Malnati's restaurant from the cooking staff.

**Defendant's response:** The company had an effective sexual harassment policy in place and made reasonable efforts to prevent future occurrences.

**District Court decision:** Judge Leinenweber granted summary judgment in favor of defendant finding that "Malnati's not only had a sexual harassment policy in place but had an effective one."

**7<sup>th</sup> Circuit decision:** Reversed and remanded.

**Quotable quotes:**

- "When it comes to remedying a bad situation, greater vigor is necessary when the harassment is physically assaultive". (The manager) testified that she talked to the kitchen workers between 10 and 20 times about how to treat female employees, often in response to complaints from the female employees about inappropriate comments to them. While a reasonable jury could view such diligence as evidence of Malnati's commitment to preventing harassment, it might also think the frequency of the discussions suggests that a different approach was needed. A jury could determine that, at some point, the management at Malnati's needed to stop merely

issuing warnings and start taking disciplinary action against the offending employees.”

- (The manager’s) comments to Loughman suggesting that the harassment was inevitable because it is the “culture” of Hispanic workers do not help the restaurant’s case, either.
- While Malnati’s sexual harassment policy allowed employees to report incidents to upper management, a reasonable jury could find that Loughman took adequate steps by reporting the incidents to her supervisors.

Fischer v. Cingular Wireless, LLC, 2006 U.S. App. LEXIS 10790 (7<sup>th</sup> Cir. May 1, 2006)

- **Pro Se plaintiff** sued Cingular for age and sex discrimination.
- **Disposition:** District Judge dismissed case because plaintiff failed to prosecute after Plaintiff failed to appear at the first two status hearings.
- **Plaintiff argued:** Reinstatement claiming she hadn’t received notice
- **7<sup>th</sup> Circuit:** Issue to be decided is whether or not an explicit warning to the plaintiff must always precede such a dismissal.
- “Most of our cases soften “must” to “should” [provide a warning].
- Leaving the decision to the district courts ensures that dilatory tactics are sanctioned appropriately.

IBP v. Alvarez, 126 S.Ct. 514 (2005).

- **Supreme Court’s Disposition:** The time spent donning and doffing employee’s uniform and the time spent walking post-donning and pre-doffing to and from those changing areas are to be compensated under the Portal to Portal Act as long as that activity is “integral and indispensable” to a principal activity under 4(a) of the Portal-to-Portal Act.

Popko v. Continental Casualty Co. and CNA Financial Corp., 355 Ill.App.3d 257 (1<sup>st</sup> Dist. 2005).

- **Plaintiff argued:** Employee sued employer for defamation based upon certain communications employer made relating to a performance review including oral and written statements that Plaintiff used profanity during the performance review and that he challenged his supervisor’s authority and showed a “pattern and practice of unacceptable conduct.”

- **Defendant argued:** No legally cognizable publication because the material involved was merely a corporation “talking to itself” rather than publication to a third party
- **Appellate Court:** “Communication of interoffice reports within a corporation has determined to constitute a publication for defamation purposes.”
- Defamatory statements to any third person, including the corporate defendant’s own agent, employee, or officer satisfies the publication requirement.

Landers-Scelfo v. Corporate Office Systems, Inc., 356 Ill.App.3d 1060 (2<sup>nd</sup> Dist. 2005)

- **Plaintiff argued:** Unpaid commissions due and owing under the IWPCA and for Attorney Fees under the Fees Act against two employers, as joint employers; Synergy PEO and Corporate Office Systems.
- **Defendant argued:** Motion to dismiss because Synergy was not the “employer” under the IWPCA. Attorney Fees cannot be granted under the Fees Act because Synergy is not the “Employer” under that definition either.
- **Appellate Court:** Synergy fits the definition of “employee” under the IWPCA and that claim was improperly dismissed by the trial court, but Plaintiff does not fit the definition of “employee” utilized by the Illinois Attorneys Fees in Wage Actions Act so that count was properly dismissed by the trial court.
- “For this count, Synergy’s right to control the manner and method in which the work is to be carried out is central.
- The complaint lacked allegations suggesting the presence of significant secondary factors to support the existence of a common-law employment relationship.

### III. Illinois Servicemen’s Tenure Act and IHRA v. USERRA:

- A. Illinois Serviceman Tenure Act only protects reemployment
- B. IHRA protects discrimination/retaliation against Serviceman but not reemployment
- C. How is USERRA different? Is it better? See handouts.