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Employment Law Edition

Brown & James dedicates this issue of *The Firm Inquiry* to employment law. Employers, in recent years, have seen a dramatic increase in the number of lawsuits for discrimination, harassment, retaliatory discharge, and wage and hour violations, not only in federal court, but now more frequently in state court. Almost all of these actions provide for jury trials in which lost wages, compensatory, and punitive damages may be recovered. This issue of *The Firm Inquiry* includes articles written by lawyers in the Brown & James Employment Law and Workers' Compensation Practice Groups. Their articles address a number of employment law issues that employers and their insurers regularly face as well as updates on recent case law and statutory changes in the area. Their articles also demonstrate the breadth of Brown & James' employment law practice. Should you have any questions or desire additional information concerning the topics discussed in this issue, please contact Brown & James.

Illinois Supreme Court Expands Strict Liability for Employers to Harassment by Any Supervisor

Denise Baker-Seal



Illinois's highest court recently broadened the strict liability rule to include harassment committed by any supervisory or management employee, although the harasser has no direct supervisory authority over the complainant. This ruling is a departure from existing standards under federal interpretations of Title VII, as well as previous rulings from Illinois's lower courts.

The Factual Background. The April 16, 2009 ruling came in the case of *Sangamon County Sheriff's Dep't v. Illinois Human Rights Comm'n*, 233 Ill.2d 125 (2009). *Sangamon County* involved a harassment claim brought by Donna Feleccia, a records clerk in the Sangamon County Sheriff's Department. Feleccia alleged she was sexually harassed by Ron Yanor, a sergeant. Yanor was a department supervisor, but was not Feleccia's supervisor. The two individuals worked in separate divisions in the department, and their work schedules only overlapped for three hours between 2:30 p.m. to 5:30 p.m.

Feleccia complained of several incidents of sexual harassment that occurred in late 1998.

None of these incidents had been reported to anyone in the Sheriff's Department. During one incident, Yanor called Feleccia at home after an annual dinner attended by members of the sheriff's department and asked her to go to a local bar. He told her others from the department would be present at the bar. Yanor picked Feleccia up, but when they arrived at the bar, only one other person from the department was present. Feleccia was uncomfortable and asked to be taken home. Yanor grabbed her and asked for a kiss. She refused, but eventually kissed him, after he would not release her arm. On another occasion, Yanor appeared at Feleccia's home uninvited with a cup filled with Christmas candy. Later that month, Feleccia saw Yanor in a local bar after a friend's party. Yanor glared at Feleccia as she danced. On another day, Yanor approached Feleccia when she was working alone in the office after 5 p.m. Yanor asked if she would like to go to a motel.

The final act of harassment involved a fake letter issued on the letterhead of the Illinois Department of Public Health. Feleccia received the letter in February 1999, which informed her that she had been exposed to

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Are You Ready for Swine Flu Season?

Updates on FMLA and ADAAA

Christine A. Vaporean



The Centers for Disease Control has warned the coming flu season may be marked by a widespread outbreak of the H1N1 influenza virus, commonly known as the Swine Flu. Because H1N1 is considered highly contagious, its symptoms can last for several weeks and can be significantly more debilitating than the common cold. An epidemic outbreak could force a significant percentage of the workforce to be out of work for extended periods of time. The United States Department of Commerce has encouraged employers to develop a contingency plan in the event of an outbreak, recommending employers consider such measures as staggering work schedules, reducing face-to-face meetings and discretionary travel, and instructing symptomatic workers to stay home until twenty-four hours after their fever breaks. The United States Government has published additional guidelines at www.flu.gov.

Employers should be aware that some employees may try to invoke federal and state law to ensure their jobs are protected in their absence. The Americans with Disabilities Act (“ADA”) and the Family and Medical Leave Act (“FMLA”), two laws that may be relied on by employees, have recently been amended. This article addresses the recent changes to these laws.

The FMLA

The United States Department of Labor’s final regulations interpreting the Family and Medical Leave Act took effect on January 16, 2009. These regulations do not change the law’s basic provisions that provide eligible employees who work for covered employers the right to take job-protected, unpaid leave of up to twelve weeks (consecutive or non-consecutive) in a twelve-month period for absences due to the birth of a child or to care for a newborn child; the placement of a child with the employee for adoption or foster care; the need to care for a child, spouse, or parent with a serious health condition; or the employee’s own serious health condition that makes the employee unable to perform the employee’s job functions.

The changes in the new regulations relate to employee eligibility, medical certifications, notice requirements, fitness-for-duty certifications upon return from leave, the concurrent use of paid leave, and certain military caregiver/military family member leave provisions under the National Defense Authorization Act. A summary of the most significant changes that are relevant to employees requesting leave follows:

Eligible Employee: To be eligible for FMLA leave, an employee must have been employed by the employer for at least twelve months; must have provided at least 1,250 hours of service to the employer during the twelve months preceding the leave; and must work at a worksite at which the employer employs at least fifty employees. The new regulations specify that although the employment need not be continuous to satisfy the “12-months of employment” eligibility requirement, any period of employment before a continuous break of seven years or more need not be considered. The regulations also define the calculation of the twelve-month period for military service members.

Serious Health Condition: The FMLA definition for “serious health condition” is multi-faceted. The new regulations do not change the six definitions of “serious health condition,” but they do provide clarification of the time frame in which visits to health care providers must be accomplished. The regulations now define a “serious health condition” as one that involves more than three consecutive, full calendar days of incapacity, plus a regimen of continuing treatment. The new regulations also require

an employee to visit a health care provider within seven days of the first day of the incapacity, and further require a second visit to a health care provider within thirty days of the onset of the incapacity. For chronic conditions, the regulations clarify that employees must see their health care providers twice per year.

Light Duty: Under the new rules, “light duty” time does not count towards FMLA leave time. If an employee is voluntarily on “light duty,” he is not on leave. Employees need not agree to light duty as an alternative to taking FMLA leave if they are unable to perform their essential job duties.

Medical Certification: The Department of Labor has created two new, expanded medical certification forms. An employee must be given seven days to correct incomplete forms after the employer provides written notice of the deficiencies. Certain representatives of the employer may directly contact providers if the information provided is unclear. Those representatives include health care providers, HR professionals, a leave administrator, or a management official, but exclude the employee’s direct supervisor. Employers may ask only for information that is required by the certification forms. The new regulations also allow (but do not require) that a health care provider state a diagnosis on the forms.

Notice Requirements: Employees must provide notice “as soon as possible and practical,” under the facts of the individual case, after the need for leave is known. This requirement eliminates the “two business-day” rule when the need for leave is known less than thirty days in advance. The rule also contemplates that employees who require

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Veo Peoples Joins Brown & James



Veo Peoples, a veteran patent and trademark lawyer, has joined Brown & James as a principal. Mr. Peoples has prepared and prosecuted over 300 chemical patents and even more trademarks. During the course of his career, he has represented Dow Chemical, Westinghouse, ALCOA, Frito Lay, Bristol Myers Squibb, Boeing Aircraft, the Naval Weapons Center in China Lake California, Monsanto Company, and Anheuser Busch Company. Mr. Peoples has also been active in public affairs. From 1994 to 1999, he served on the Board of Directors of The Federal Reserve Bank of St. Louis. He has also served as Co-General Counsel for the St. Louis Regional Convention and Sports Complex Authority. ■

Is an Employer Required to Show that a Non-Compete Agreement Protects a “Legitimate Business Interest”?

Trends in Missouri and Illinois

James Craney



Employers often require their employees to sign an employment contract that includes the employee’s agreement not to compete with the employer for some period of time *after* the employee leaves the position of employment. “Non-compete agreements” are most often contained in the employment contracts of sales and managerial staff who have access to the employer’s customer lists and trade secrets. These agreements are termed “restrictive covenants,” and are generally disfavored by the courts as improper restrictions on commerce. However, non-compete agreements will be upheld if they are found to be “reasonable.” *Healthcare Servs. of the Ozarks v. Copeland*, 198 S.W.3d 604, 610 (Mo. banc 2006).

Courts in both Missouri and Illinois, in deciding whether a non-compete agreement is reasonable, consider whether the agreement is reasonably limited in time and space. Restated, courts consider the length of time the employee has agreed not to compete, and the scope of the geographic region that the agreement embraces. This inquiry is a fact-intensive one, and the outcomes vary from one case to another. Decisions analyzing what constitutes a reasonable geographic limitation vary widely, and may range from a radius of a few miles to a statewide limitation. Generally, in both Missouri and Illinois, restrictions of two years or less are considered reasonable. Courts less frequently uphold restrictions of more than two years, and restrictions longer than five years are seldom upheld.

Also, when a former employee challenges a non-compete agreement, a third consideration is frequently raised in the courts, over and above whether the agreement is reasonably limited in time and space. Employees also argue the agreement is not reasonably calculated to protect the employer’s “legitimate business interest.” The employee’s argument posits that because the agreement does not protect a legitimate business interest, the agreement violates public policy. This issue is by far the most litigated one in the context of non-compete agreements, and often provides the basis for the invalidation of such agreements.

A discussion of the divergent ways Missouri and Illinois courts address this issue follows:

Missouri: Non-Compete Agreements Are Only Enforceable To The Extent They Protect A “Legitimate Business Interest”

Missouri courts have applied the “legitimate-business-interest” test when evaluating the enforceability of a non-compete agreement. Under Missouri law, the party attempting to enforce a restrictive covenant must demonstrate that it is reasonably limited in time and territory, *and also* that the agreement is necessary to protect the employer’s “legitimate interests.” *A.B. Chance Co. v. Schmidt*, 719 S.W.2d 854, 857 (Mo. App. 1986). Generally speaking, Missouri courts have identified two “protectable interests” -- customer contacts and trade secrets. *AEE-EMF, Inc. v. Passmore*, 906 S.W.2d 714 (Mo. App. W.D. 1995).

The Missouri Supreme Court articulated this approach in *Osage Glass, Inc. v. Donovan*, 693 S.W.2d 71 (Mo. banc 1985). There, the plaintiff, a specialty automotive glass installer, brought suit to enforce a non-compete agreement against its former operations manager. The manager had signed an employment contract with the plaintiff, which included the following agreement: “I will not, during the period of three years from ... termination of my employment ... engage in, directly or indirectly, any business which is in competition with that of [the plaintiff] in the automotive glass installation business...” The employee subsequently accepted employment with the plaintiff’s direct competitor.

The former employer in *Donovan* sought a temporary and permanent injunction, enjoining the employee from competing directly with the company. The employer’s primary argument was that the employee, as operations manager, gained access to the employer’s customer lists, and dealt directly with the agents for various insurance companies who would refer business. The employee was also trained in a particular methodology used for determining the amounts that would be bid for certain jobs. After reviewing the evidence, the trial court in *Donovan* found the employer’s “customer list” did not constitute a trade secret. The trial

court reasoned that because the non-compete agreement did not protect a legitimate business interest, the agreement was unenforceable. The Western District of the Missouri Court of Appeals upheld this determination, noting no evidence had been presented that the employee – in his new position of employment – had used the plaintiff’s customer lists or confidential bidding methods.

The Missouri Supreme Court reversed both the trial court and the appellate court and upheld the non-compete agreement as enforceable. The Supreme Court acknowledged that restrictive covenants restrict commerce and limit the employee’s freedom to pursue his or her trade. Therefore, such agreements are disfavored in the law, and should be carefully restricted. Nonetheless, the Court noted such agreements are enforced when they “serve a proper interest of the employer” and are “reasonably limited in time and space.” The Missouri Supreme Court in *Donovan* further noted the employee had made no challenge to the time (three years) and space (State of Missouri) restrictions, as being unreasonable. Rather, the former employee argued he was an artisan, and that the employer did not have a protectable interest in his skill. The employee also argued that bidding methodologies did not rise to the level of “trade secrets,” and there was no protectable customer list that could not be obtained from standard directories listing insurance companies and body shops.

The Missouri Supreme Court, in so holding, agreed that a craftsman’s basic skills do not constitute a “legitimate business interest.” However, the Court held employers have a legitimate business interest in their customer lists and observed that, as an operations manager, the former employee was in a position to divert business from his old employer to his new one.

Illinois: There Is No “Legitimate Business Interest” Requirement

The Appellate Court of Illinois recently considered whether Illinois law requires a non-compete agreement to protect a “legitimate business interest” to be enforceable and held that such agreements are not subject to such a requirement. *Sunbelt Rentals, Inc. v. Ehlers*,

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Being Made Whole and Then Some, or How the Illinois Supreme Court Can Add Ten Years to Your Life

William E. Paasch



Workers' compensation law, being wholly dependent upon the statute that creates it, at times gives rise to results that defy the real world.

Just such a situation arises

from the recent Illinois Supreme Court decision in *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill.2d 364 (2009).

On its face, the *Beelman* case started as a classic "statutory" permanent total disability (PTD) case. The employee was involved in a horrendous work accident resulting in the paralysis of both legs and his left arm as well as the amputation of his right arm above the elbow. The Illinois Workers' Compensation Commission determined that not only was the employee entitled to the statutory PTD benefits but, additionally an award of 535 weeks for the loss of use of his arms.

The Commission's award was an unusual one to say the least.

One of the basic and universal principles of all workers' compensation acts, regardless of state or jurisdiction, is the understanding that a PTD award is a singular finding that encompasses all of the injuries and disabilities arising out of a single accident or injury. Under workers' compensation jurisprudence, it is understood that it is the sum of all injuries arising from a single accident that makes the claimant a PTD.

But not so in *Beelman*. There, the Illinois Workers' Compensation Commission, and subsequently the Illinois Supreme Court, determined that a claimant can have more disability than total disability. Both the Commission and the Supreme Court went beyond what had been the generally accepted notion of the compensation necessary to make a claimant "whole" under Illinois law. The Commission's ruling, which the Supreme Court upheld, is akin to a claimant who loses an arm in a work accident and then receives money for the loss of the arm and the hand separately or to a claimant being injured in an accident and dying the next day from the injury and the employer held liable to pay both a death benefit to the employee's widow as well as specific awards to the employee for the parts of the body injured.

The employer in *Beelman*, not surprisingly, appealed this decision as well as the additional parts of the decision awarding the employee costs associated with a home computer system to allow the employee greater freedom in his home (despite the provision of around-the-clock nursing care already in place) and compensation for the increased cost of automobile insurance associated with the employee's need for and use of a specially converted vehicle.

Under the Illinois Workers' Compensation Act, Section 8(e)(18), a petitioner is a "statutory" PTD if the

petitioner loses, or loses the use of, as a result of the work accident, both hands, feet, arms, legs or eyes, or any two thereof. The compensation for being a "statutory" PTD is a weekly payment for the remainder of the petitioner's lifetime, open medical for ongoing treatment necessitated by the accident, and an award to compensate for ameliorative changes to the petitioner's home to make it more accessible. One of the results of being a statutory PTD is that the employee can return to work, if able, and still receive the weekly benefit and medical care.

In *Beelman*, the Illinois Supreme Court went far beyond the previously understood interpretation of Section 8(e)(18) when it reversed the Appellate Court of Illinois and affirmed the Commission's decision that awarded the petitioner not just the statutory PTD benefits for the paralysis in both legs, but an additional separate benefit for the loss of each arm. The Commission's holding resulted in a windfall to the petitioner of 535 weeks of additional compensation in addition to the weekly life-time benefit. From a compensation standpoint, this result was tantamount to a decision by the Illinois Supreme Court nearly doubling the petitioner's compensation payments for the next ten years.

The Illinois Supreme Court interpreted the wording of Section 8(e)(18) to eliminate any restriction on the ability of a

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Medicare Reporting – Be Aware – Be Ready

Effective January 1, 2010, defendants and their insurers are bound by federal law – the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA") – to determine whether personal injury claimants are Medicare eligible. MMSEA imposes complex and onerous reporting requirements on insurers and self-insureds who settle personal injury claims with Medicare-qualified plaintiffs. The consequences for non-compliance with MMSEA are dire, including substantial fines, and even liability for satisfaction of the government's Medicare lien rights. Under recent amendments to the Medicare Act, the federal government can satisfy its Medicare lien from either the plaintiff or the settling defendant – even from those defendants who have already paid plaintiffs' claims in full. Brown & James is ready to protect its clients' rights under MMSEA. Insurers and self-insureds, in the face of MMSEA, should require their defense counsel to use formal discovery in every case to determine whether the plaintiff is Medicare-qualified to ensure full compliance with the law. Brown & James has prepared such discovery to use in every case to ensure that its clients are fully protected from MMSEA liability and meet all MMSEA reporting requirements.

Brown & James will hold an in-house seminar on December 10, 2009, at which MMSEA reporting requirements will be addressed by Kip Daniels, Vice President – Strategic Services for Gould & Lamb, a national Medicare set-aside service provider. For more information, contact Donna Howard at dhoward@bjpc.com or 314-5223. ■

The United States Supreme Court Makes Age Discrimination Claims Harder to Prove by Requiring ADEA Plaintiffs to Prove “But For” Causation and by Barring “Mixed-Motives” Jury Instructions

James Craney



The United States Supreme Court, in a sharply divided opinion, handed employers a significant victory in the battle over age discrimination claims. The Court, in *Gross v. FBL Fin'l Servs.*, 129 S.Ct. 2343 (2009), held employees, to successfully prove age discrimination, must demonstrate by a preponderance of the evidence that their age was the “but for” cause of the challenged employment action. The Court, in so ruling, closed the door on the recourse by employees to “mixed-motive” evidence to sustain their claims. Thus, unlike the burden of proof in Title VII cases, the burden of proof in age discrimination cases brought under the Age Discrimination in Employment Act (ADEA) will not shift to the employer to show it would have taken the action regardless of the employee’s age in those cases in which the employee has produced some evidence that age was one motivating factor that led to an adverse employment decision.

Jack Gross, the plaintiff in *Gross*, began working for FBL Financial Services in 1971. In 2001, Gross held the position of claims administration director. However, in 2003, at the age of 54, he was reassigned to the position of claims project coordinator. At the same time, FBL transferred many of Gross’s job responsibilities to a newly created “claims administration manager” position. One of Gross’s former subordinates was assigned to the new position. At the time of the re-assignment, the subordinate was in her early 40s.

In April 2004, Gross filed suit in federal district court. He alleged his reassignment violated the ADEA. The matter proceeded to trial. At trial, evidence was presented, showing his reassignment was based, *at least in part*, upon his age. His employer argued the reassignment was related to an overall corporate restructuring, and that his new position was “better suited” to Gross’s particular skills.

At the close of evidence, the district court instructed the jury -- over FBL’s objections -- that it must return a verdict for Gross if age was a “motivating factor” in his reassignment.

Specifically, the court instructed the jury that it must return a verdict for Gross if it found that he had proven that FBL demoted him to claims project coordinator and that his age was a *motivating factor*. *Id.* at 2347. The district court further instructed the jury that age would constitute a “motivating factor” if it played a part or role in FBL’s decision to demote Gross. *Id.* Finally, the court instructed the jury to return a verdict for FBL if the jury found that FBL would have demoted Gross, *regardless of his age*. *Id.*

The jury returned a verdict for Gross, awarding him \$46,945 in lost compensation. FBL appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the district court, and remanded the matter for a new trial. That Eighth Circuit held the jury had been incorrectly instructed under the standard established in *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989).

In *Price Waterhouse*, the United States Supreme Court considered the appropriate burden of proof in so-called “mixed-motive” cases brought under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”). 42 U.S.C. §§ 2000e, *et seq.* In mixed-motive cases, an employee alleges he suffered an adverse employment action (*e.g.*, termination, demotion, reassignment) due to both permissible and impermissible considerations. In a 6-4 decision, the Supreme Court in *Price Waterhouse* held that if the plaintiff proves that discrimination was a “motivating,” or “substantial” factor in the employer’s action, then the burden of persuasion shifts to the employer to show that it would have taken the same action regardless of the impermissible consideration. Of future significance, Justice O’Connor, in a concurring opinion, noted that before the burden of persuasion could shift to the employer, the employee must present “direct evidence” that an illegitimate criterion was a substantial factor in the employment decision.

In *Gross*, the Eighth Circuit followed the *Price Waterhouse* analysis, holding the district court had improperly instructed the jury. Because Gross had not presented any direct

evidence that age had formed the basis for his reassignment, the Eighth Circuit concluded the jury instructions were flawed. The Eighth Circuit noted that -- absent any direct evidence of an improper motive -- the burden of persuasion does not shift to the employer. Thus, the Eighth Circuit held Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motive claims. Under that analysis, the jury should have been instructed only to determine whether Gross had carried his burden of proving that age was the determining factor in FBL’s employment action. *Id.* at 2348.

Following the Eighth Circuit’s ruling, the United States Supreme Court granted certiorari to address the issue whether a plaintiff must present direct evidence of discrimination to submit a mixed-motive instruction in a non-Title VII discrimination case. However, the Supreme Court held that before that question could be answered, the Court had to decide whether the burden of persuasion ever shifts to the party defending a mixed-motive case brought under the ADEA. *The Supreme Court held the burden does not.*

The Court, in reaching this conclusion, noted the *Price Waterhouse* decision examined the burden-shifting scheme associated only with Title VII claims. Title VII, as amended by Congress, currently provides as follows:

An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-5(g)(2)(B).

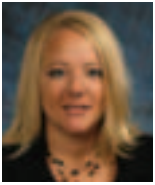
The Court observed the plain language of Title VII provides that the unlawful termination may be based partially upon a “motivating factor.” The Supreme Court in *Gross* noted, in contrast, that the ADEA makes no express reference to mixed-motive cases. The ADEA provides, in relevant part:

It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to

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Illinois Federal Court Restablishes E-Verify as a Proper Procedure in Illinois

Jessica Krauss



E-Verify is an Internet-based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA)

that allows participating employers to electronically verify the employment eligibility of newly hired employees. In 1996, Congress authorized the creation of E-Verify as a pilot program, which was initially available in just a few states, including Illinois. In 2001, Congress extended the E-Verify program to all fifty states.

As for the process, employers who participate in the E-Verify Program submit a new hire's identifying information to the program over the Internet. The employers receive either a confirmation that the new hire is authorized to work in the United States or a tentative nonconfirmation (TNC) notice, which indicates the Program is unable to confirm whether the new hire is authorized to work. In the event of the latter, the employer must notify a new hire of the TNC and provide him/her with information on how to pursue secondary verification. If the new hire fails to pursue the secondary verification, the TNC becomes final and the employee must not be permitted to work. If the new hire pursues the secondary verification, the Program must complete the secondary verification process and issue a final determination within ten business days. A new hire may not be terminated until a final nonconfirmation is issued.

On August 13, 2007, Illinois attempted to prohibit the use of E-Verify by Illinois employers. Specifically, Illinois amended the Illinois Right to Privacy Act to prohibit employers from enrolling in any employment eligibility verification system, including the E-Verify Program, until the SSA and DHS databases are able to make a determination on ninety-nine percent of the TNC notices issued to employers within three days, unless otherwise required by federal law. 820 ILCS 55/12(a). The Illinois Act became effective on January 1, 2008. Thereafter, the United States filed suit in the United States District Court for the Central District of Illinois seeking a declaratory judgment that Section 12(a) of the Illinois Act was invalid under the Supremacy Clause of the

United States Constitution because it conflicts with the federal Illegal Immigrant Reform and Immigrant Responsibility Act. *United States v. Illinois*, 2009 WL 662703 (C.D. Ill.). The United States and Illinois subsequently entered into a stipulation in which Illinois agreed not to enforce the Illinois Act during the pendency of this litigation. Thus, Illinois employers were permitted to enroll in and/or continue using E-Verify.

The case was ultimately decided on March 12, 2009 by the Honorable Jeanne Scott, who granted the United States' summary judgment motion, finding the Illinois Act invalid under the Supremacy Clause. Judge Scott noted state laws are invalid under the Supremacy Clause if the state law stands as an obstacle to the full purposes and objectives of Congress. As to the E-Verify Program, Congress put the program in place to allow all employers access to verify the employment eligibility of new hires, and the statute states that any employer may participate. Judge Scott found the Illinois Act frustrates Congress's purpose by prohibiting Illinois employers from participating in the federal program unless it meets Illinois's standard for accuracy and speed. Judge Scott further stated Illinois cannot dictate to Congress the standards that federal programs must meet.

Before Judge Scott, Illinois argued the matter is moot because the federal program may cease to exist. In 2008, Congress extended the pilot program to March 6, 2008 in a continuing resolution. Judge Scott stated a matter is not moot if a reasonable expectation for a recurrence exists, and Congress appropriated funds in the same resolution to operate the E-Verify program through September 30, 2009. Therefore, she declared the Illinois Act invalid and permanently enjoined the State of Illinois from enforcing the Act.

Judge Scott's decision in *United States v. Illinois* only addressed the United States' challenge to Section 12(a) of the Illinois Act; therefore, the other requirements in the Act presumably remain in effect. These requirements prohibit employers enrolling in the E-Verify Program from using the system to confirm the employment authorization of new hires unless the employer attests under penalty of perjury on a form prescribed by the Department of Labor that: (1) the employer has

received the Basic Pilot training materials from the DHS; (2) personnel who will administer the program have completed the Basic Pilot Computer Based Tutorial; (3) the employer has posted the notice from the DHS indicating the employer is enrolled in the Program, the anti-discrimination notices issued by the Office of Special Counsel for Immigration-Related Unfair Employment Practices of the United States Department of Justice's Civil Rights Division and Illinois Department of Human Rights and the notices be displayed in a prominent place that is clearly visible to all prospective employees.

The provisions of the Illinois Act that remain in effect also require the employer to: (1) notify all prospective employees at the time of application that the E-Verify Program may be used for immigration enforcement purposes only; (2) provide employees who receive a TNC with a referral letter and contact information for what agency the employee must contact to resolve the discrepancy; (3) use the information it receives from the SSA or the DHS only to confirm the employment eligibility of newly-hired employees after completion of the Form I-9 and to safeguard this information and means of access to it to ensure that it is not used for any other purpose and to protect its confidentiality. Finally, the Act provides that no unit of local government, including a home rule unit, may require any employer to use an employment eligibility verification system including under the following circumstances: (1) as a condition of receiving a government contract; (2) as a condition of receiving a business license; or (3) as a penalty for violating licensing or other similar laws.

E-Verify has been well received by many as a simple, modern and effective tool that helps employers maintain a legal work force. On July 8, 2009, the Senate approved by voice vote an amendment to the DHS's appropriations bill H.R. 2892 that would make the E-Verify Program permanent. Furthermore, the DHS Secretary announced that the Obama Administration would fully support the federal regulation that would award federal contracts only to those employers who use E-Verify.

On the other hand, the E-Verify Program has been the subject of some criticism as well.

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Missouri and Illinois Wrongful Termination Suits Alleging Employer Retaliation for Filing a Workers' Compensation Claim – A Primer

James Craney



Most causes of action in the area of labor and employment law arise under federal statutes. For example, Title VII of the Civil Rights Act of 1964 (“Title VII”) prohibits employment discrimination based on race, color, religion, sex, or national origin. The Age Discrimination in Employment Act of 1967 (“ADEA”) protects individuals who are forty years of age or older from termination due to age. Title I and Title V of the Americans with Disabilities Act (“ADA”) prohibit employment discrimination against qualified individuals with disabilities in the private sector, as well as within state and local government.

Because most lawsuits alleging employment discrimination or retaliation arise under federal statutes, those actions are typically brought in federal courts, applying federal law. However, the federal employment statutes do not specifically address employees who are terminated after they have made a workers' compensation claim.

In 1973, the Indiana Supreme Court handed down the landmark decision of *Frampton v. Central Indiana Gas Co.*, 260

Ind. 249 (1973). In that case, Indiana’s highest court recognized a state-law cause of action for “retaliatory discharge” based on the employee’s filing of a workers’ compensation claim. The cause of action allowed the employee to recover civil penalties if the employee could prove that he was terminated in retaliation for filing a workers’ compensation claim. The court noted that such a termination violated public policy, and was therefore actionable as a civil cause of action.

Since the advent of the *Frampton* decision, many state courts and legislatures have followed suit and recognized similar state-law causes of action. Illinois and Missouri have followed this general trend.

ILLINOIS RETALIATORY DISCHARGE CLAIMS

Under Illinois law, an “at-will employee” may be discharged by the employer at any time, and for any reason. However, the Illinois Supreme Court has recognized a limited exception to this rule -- where the employee can prove he was terminated in retaliation for exercising his rights to workers’ compensation benefits. *Kelsay v. Motorola, Inc.*, 74 Ill.2d

172 (1978). In such a situation, Illinois law permits an employee to bring an action in state court against the former employer, alleging retaliatory discharge.

In Illinois, the cause of action for retaliatory discharge arises from the Illinois Workers’ Compensation Act, which provides:

It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him or her by [the Workers’ Compensation Act] or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.... It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

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Illinois Federal Court Restablishes E-Verify as a Proper Procedure in Illinois

Jessica Krauss

One complaint about the E-Verify Program is its inability to detect identity theft, as unauthorized workers who submit stolen social security numbers and fake IDs are often confirmed as eligible for employment. Moreover, the program has been criticized for its inaccuracy. Some complain the System provides false negatives as a result of database errors, which then shifts the burden to correct those errors to the employee, who may in fact be a United States citizen. In addition, E-Verify has been criticized for affecting persons born outside of the United States and persons with Hispanic surnames disproportionately with its false negatives, which has been said to be a *de facto* source of employment discrimination. This has

already led employees who have wrongfully received a TNC from the E-Verify System and been denied employment on that basis, to file lawsuits alleging employment discrimination. Furthermore, until the accuracy rate of the program and strict compliance with its procedures by the employers who use E-Verify improves, this will likely be an expanding area of employment law claims.

On a positive note, there are several tips that employers can follow when using E-Verify to ensure that they will not be the subject of an employment discrimination claim. First and foremost, E-Verify should be used to check the employment eligibility of ALL potential employees, so as to eliminate any claim that the

program was used in a discriminatory manner. Second, employers and all personnel who use E-Verify should familiarize themselves with the training manuals, policies, procedures, and directives regarding E-Verify that are issued by the DHS to ensure that the program is being used correctly. Third, employers should be familiar with the secondary verification procedures and should direct employees who receive a TNC to the proper personnel to pursue the secondary verification to resolve the TNC. Finally, it is important that employers comply with the Illinois Human Rights Act and all applicable federal anti-discrimination laws. ■

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Missouri and Illinois Wrongful Termination Suits Alleging Employer Retaliation for Filing a Workers' Compensation Claim – A Primer

James Craney

820 ILCS 305/4(h).

The Illinois Supreme Court, citing the public policy underlying the statute, recognized the tort of retaliatory discharge. *See, e.g., Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12 (Ill. 1998). To recover damages in an Illinois retaliatory discharge claim predicated on the employee's filing of a workers' compensation claim, the employee must prove: (1) that he was an employee before the injury; (2) that the employee exercised a right granted by the Workers' Compensation Act; and (3) that the employee was discharged; and (4) that the discharge was causally related to the filing of a claim under the Act. *Paz v. Commonwealth Edison*, 314 Ill.App.3d 591 (2d Dist. 2000).

Illinois courts have held this tort claim is very narrow in scope, and have generally resisted attempts to apply the tort outside the realm of workers' compensation. Moreover, the mere fact that workers' compensation is involved does not ensure the employee always has a meritorious cause of action. For example, an employer may discharge an employee claiming benefits for a valid and nonpretextual reason.

Restated, an employer is not liable for retaliatory discharge simply because the employer fired an employee who had previously filed a workers' compensation claim. Instead, the employee must affirmatively show the discharge was undertaken in retaliation against the employee for exercising a protected right. Excessive absenteeism, *even caused by a compensable injury*, may be a valid reason for dismissal, and an employer is under no obligation to retain an at-will employee who is medically unable to return to an assigned position. *Hartlein v. Illinois Power Co.*, 151 Ill.2d 142 (Ill. 1992). However, an employer may not discharge an employee on the basis of a dispute over the extent or duration of a compensable injury. *Id.*

Plaintiffs who prove retaliatory discharge are entitled to recover those damages supported by the evidence and the law. In Illinois, recognized damages include past and future wage loss (*Clark v. Owens-Brockway Glass Container, Inc.*, 297 Ill.App.3d 694 (5th Dist. 1998)); the loss value of pension

benefits (*Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143 (Ill. 1984)); and emotional pain and suffering (*Reinneck v. Taco Bell Corp.*, 297 Ill.App.3d 211 (5th 1998)). When the employee can prove actual malice, or willful and wanton conduct on the employer's part, punitive damages may also be available. *Jackson v. Bunge Corp.*, 40 F.3d 3d 239 (7th Cir. 1994). However, Illinois law does not generally allow the employee to recover attorney fees. *Bill v. Board of Educ. of Cicero School Dist.* 99, 351 Ill.App.3d 47 (1st 2004).

A wrongfully-discharged employee must attempt to mitigate damages by seeking similar employment. However, Illinois courts will only require the discharged employee to make reasonable efforts to mitigate damages. If failure to mitigate is raised as an affirmative defense, the burden falls on the employer, not the discharged employee, to prove the amount of mitigation earnings necessary to reduce the damage award. The amount recoverable by a wrongfully-discharged employee is reduced by other wages earned by the employee. However, that reduction is allowed only insofar as such income would have been incompatible with the performance of the employee's duties to the erring employer. Thus, if the employee can prove that he would have been able to hold both jobs at the same time, then no setoff is allowed.

MISSOURI EMPLOYMENT RETALIATION CLAIMS

Missouri law also provides a statutory prohibition against the termination of an employee for exercising the employee's rights to workers' compensation benefits. The Missouri Workers' Compensation Law provides:

No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under this chapter. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer.

Section 287.780, R.S.Mo. 2000.

The Missouri Supreme Court has noted the workers' compensation law is entirely a creature of statute, and when interpreting the

law, the court must ascertain the legislature's intent by considering the plain and ordinary meaning of the terms and give effect to that intent if possible. *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 276 (Mo. banc 2002). Under Section 287.780's plain language, no employer may discharge an employee for exercising any of the employee's rights under the workers' compensation law. *Hayes v. Show Me Believers, Inc.*, 192 S.W.3d 706, 707 (Mo. banc 2006).

A wrongful discharge claim under Missouri law is a tort. A successful action under Section 287.780 requires proof of the following elements: (1) the plaintiff's status as the defendant's employee before the injury; (2) the plaintiff's exercise of a right granted by the Act; (3) the employer's discharge of, or discrimination against, the plaintiff; and (4) an exclusive *causal relationship* between the plaintiff's actions and defendant's actions. *Wey v. Dyno Nobel, Inc.*, 81 S.W.3d 208 (Mo. App. S.D. 2002).

This cause of action does not invalidate Missouri's employment-at-will doctrine. Under Missouri law, an employer may fire an employee without a durational contract for any reason or for no reason at all. The Workers' Compensation Act did not abolish the at-will doctrine, but, instead, provided a limited exception that allows an action only where there is an *exclusive causal relationship* between the discharge and the employee's exercise of his right to claim workers' compensation under Chapter 287. *Stephenson v. Raskas Dairy, Inc.*, 26 S.W.3d 209 (Mo. App. E.D. 2000).

Because Missouri courts require an exclusive causal relationship between the discharge and the workers' compensation claim, an employer may fire an employee for excessive absenteeism, even if the absenteeism is caused by a compensable injury. In other words, although the termination is the end result of a compensable injury, a cause of action for retaliatory discharge will not lie if the basis for discharge is valid and nonpretextual. *Rodriguez v. Civil Service Comm'n*, 582 S.W.2d 354 (Mo. App. 1979).

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Illinois Supreme Court Expands Strict Liability for Employers to Harassment by Any Supervisor

Denise Baker-Seal

a sexually transmitted disease. The letter was determined to be a forgery. Yanor's fingerprints were found on the letter, and Yanor eventually acknowledged that he created the letter, but did so as a practical joke.

The Sheriff disciplined Yanor, suspending him for four days and issuing a letter of reprimand. Feleccia was dissatisfied with the discipline, and it was only after she complained about the discipline, that Feleccia reported the prior incidents of harassment.

Feleccia filed a charge of sexual harassment and retaliation with the Illinois Human Rights Commission. The IHRC determined that Feleccia had established sexual harassment based on a hostile work environment and ruled the Department was strictly liable for Yanor's harassment. The IHRC awarded \$10,000 in damages and \$13,400 in fees and costs.

The Appellate Court of Illinois reversed, explaining Yanor was merely a co-employee and did not have supervisory authority over Feleccia. The Court ruled the Department was not liable because it took reasonable corrective measures upon learning of the harassment.

The Supreme Court's Ruling. The Illinois Supreme Court reversed the lower court's ruling, holding the department was strictly liable. The Court grounded its decision in the language of the Illinois Human Rights Act. The

first applicable clause of the Act provides that it is a civil rights violation for any employer or employee to engage in sexual harassment. The second clause limits liability for "nonemployees" and "nonmanagerial" and "nonsupervisory" employees. The Act specifically provides: "That an employer shall be responsible for sexual harassment of the employer's employees by nonemployees or nonmanagerial and nonsupervisory employees only if the employer becomes aware of the conduct and fails to take reasonable corrective measures." 775 ILCS 5/2-102(D).

In addition to the plain language of the Act, the Illinois Supreme Court cited public policy considerations. The Court explained, "[it] is not unfair to hold employers responsible for sexual harassment by supervisory employees. . . . Not only are supervisors the 'public face' of the employer, but employers are in the best position to train supervisors and make them aware of the law prohibiting sexual harassment." The Court further stated the Act should be construed liberally to achieve its purpose in preventing harassment for all individuals. The Court reasoned a liberal construction would ensure that all victims have full incentive to report harassment. Victims of harassment by supervisors might have a reasonable belief of retaliation, since supervisors often are better connected and have greater job security.

Significance of the Decision. The *Sangamon County* case is significant because the complainant's claim would have met a different result had the case been analyzed under Title VII and federal case law. Under Title VII, an employer is strictly liable for a supervisor's harassment only when the harasser has immediate or higher authority over the complainant. The distinction between federal and Illinois law was observed by Illinois Justice Karmeier, who dissented. Justice Karmeier noted the majority's decision departed from employment law decisions across the United States, writing: "I note, moreover, that by adopting the construction it does, the majority not only goes beyond the principles governing sexual harassment claims under federal law, it imposes a standard of liability which appears to be without precedent in any jurisdiction of the United States."

Under the *Sangamon County* decision, Illinois employers may be held liable for sexual harassment more easily under the Illinois Human Rights Act. Adequate harassment training is more important than ever. Employers should continue training all supervisors about harassment. Employees should be informed what harassment is and how to prevent it. Employees should also be trained about the consequences of conduct, including the fact that all supervisors will bind the employer for their treatment of all lower-level employees. ■

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Is an Employer Required to Show that a Non-Compete Agreement Protects a "Legitimate Business Interest"? Trends in Missouri and Illinois

James Craney

No. 4-09-0290 (Ill. Ct. App. 4th Dist., Sept. 23, 2009). In *Sunbelt*, the defendant employee held a sales representative position with Sunbelt, a company engaged in the rental and sales of industrial equipment. The employee was responsible for developing and maintaining the company's customer base and was also responsible for other aspects of customer relations.

The employee entered into a written employment agreement in which he agreed that he would not "[d]uring the term of this agreement and for a period of one ... year after the date of the expiration or termination of this agreement ... directly or indirectly provide or solicit the provisions of products or services similar to those provided by [Sunbelt]." The provision also limited this restriction to a certain geographic region.

In early January 2009, the employee accepted a position as a sales representative with Midwest Aerials & Equipment, Inc. ("Midwest"). Midwest sold aerial work platforms to industrial and construction customers. Soon after the employee took this position, Sunbelt sent a cease-and-desist letter to the employee and Midwest, demanding that the employee cease work for Midwest, which Sunbelt considered a

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Being Made Whole and Then Some, or How the Illinois Supreme Court Can Add Ten Years to Your Life

William E. Paasch

statutory PTD petitioner to collect separate compensation for other injuries associated with the accident in which a petitioner loses the use of two limbs and receives the status of, and payment for, statutory permanent total disability. Prior decisions interpreted the law to allow a statutory PTD petitioner to collect for injuries sustained in a subsequent work accident after being made a statutory PTD, but no court had ever applied the interpretation the Illinois Supreme Court affirmed in the *Beelman* case.

The Illinois Supreme Court reached this conclusion through an obtuse interpretation of Section 8(e)(18). A proper interpretation would have required the Court to construe the statute as the Appellate Court of Illinois did by restricting the award to only lifetime income and medical benefits. The Supreme

Court's holding, otherwise, subverted the intent of the Illinois Workers' Compensation Act to compensate claimants for lost earning capacity and not for pain and suffering, and rewarded the petitioner for losses beyond that required by the Act, at the employer's expense.

Workers' compensation law is a creature of statute. What the legislature giveth, the legislature taketh away. Unfortunately, until the Illinois General Assembly acts, there will be no relief to *Beelman Trucking* or any other employers caught in the conundrum created by the Illinois Supreme Court's interpretation of the statutory permanent total disability section of the Act.

From the Illinois Supreme Court's decision, certain cautionary admonitions can be drawn. Thus, if, as in *Beelman*, more than

two extremities are lost, the employee should be reimbursed immediately for those members not being used to add to the employee's statutory PTD. As knowledgeable Illinois claims handlers know, the Commission can award penalties for each day a non-disputed amputation goes unpaid. Thus, awareness of the *Beelman* decision may save exposure to penalty awards.

In addition, a realistic view must always be given to the issues presented by a claim. In *Beelman*, the employer apparently focused on the employee's need for a computer system and its liability for additional auto insurance. Given the great exposure presented by the other issues, in hindsight, the employer would have been served by conceding those issues in order to address the larger issues presented by the employee's PTD claim. ■

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The United States Supreme Court Makes Age Discrimination Claims Harder to Prove by Requiring ADEA Plaintiffs to Prove "But For" Causation and by Barring "Mixed-Motives" Jury Instructions

James Craney

his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1).

Thus, the Supreme Court noted that unlike Title VII, the ADEA does not expressly provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor, amongst other factors shown. Rather, "but for" causation must be proven.

The Supreme Court's decision in *Gross* may portend major changes in the litigation of age-discrimination claims. For the present, the practical implication of the *Gross* decision is that more age-discrimination claims will be brought in state courts. Both Missouri and Illinois have enacted Human Rights Acts that make it unlawful for an employer to take adverse action against an employee based upon age when the employee is at least forty years of

age. (See Illinois Human Rights Act, 775 ILCS 5/1-103(Q); Missouri Human Rights Act (MHRA), Section 213.055, R.S.Mo. 2000.) In both states, the standard of proof for maintaining such a state law claim is less than the standard adopted by the Supreme Court in *Gross*.

Under Illinois law, for example, a plaintiff may use either direct or indirect evidence to allow a jury to infer that age was a motivating factor in the employer's decision. *Sola v. Illinois Human Rights Comm'n.*, 316 Ill. App.3d 528 (1st Dist. 2000). Missouri case law is less clear as to whether the motivating factor standard applies. The recent Missouri Supreme Court decision in *Hill v. Ford Motor Co.*, 277 S.W.3d 659 (Mo. banc 2009), calls into question whether the burden-shifting analysis still applies to age discrimination claims brought under the MHRA.

In the past, Missouri courts had applied the federal Title VII burden-shifting analysis when faced with a state-law age discrimination claim. See, e.g., *Herrero v. St. Louis Univ. Hospital*, 109 F.3d 481 (8th Cir. 1997); *West v. Conopco Corp.*, 974 S.W.2d 554 (Mo. App. W.D. 1998). Under that standard, if the defendant provided evidence of non-pretextual basis for the determination, the plaintiff was required to show that age was a factor in her termination. *Id.*

In the future, the question will be whether Missouri and Illinois state courts will adopt the *Gross* standard for future claims brought under their respective Human Rights Acts. Should they do so, employers and their insurers will have won a major victory in the defense of age discrimination claims – one depriving employees of the recourse to mixed-motive evidence to support their claims. ■

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Are You Ready for Swine Flu Season? Updates on FMLA and ADAAA

Christine A. Vaporean

unforeseen leave should still be able to comply with an employer's policy governing requests for leave. Employers can require the use of regular call-in procedures if an employee's leave is intermittent.

Employers must provide eligibility notices to employees within five business days of the employee's request for leave (previously, notice was required in two days). Designation notices must be provided within five days of the determination of the qualifying reason for leave. Employers may also retroactively designate leave as FMLA leave if the employee is not prejudiced.

Bonuses: Employers may now proportionally reduce or deduct from a bonus otherwise owed to an employee who takes FMLA leave, or deny a bonus altogether, as long as other employees on non-FMLA leave are treated the same way.

Fitness-for-Duty Certifications: If a reasonable job safety concern exists, an employer may require an employee taking intermittent leave to provide a fitness-for-duty certification before returning to work. The certification can specifically address the employee's ability to perform the "essential functions" of his job, but the employer must provide a description of the essential job functions.

Holidays Occurring During Leave Period: The new rules clarify that if an employee takes less than a full week of leave, any holiday that falls during the leave period is *not* counted against the employee's leave time, but if an employee takes more than a full week, any holiday that falls during the leave period is counted against the employee's eligible leave time.

Substitution for Paid Leave: The new regulations outline specific requirements for concurrent use or substitution of paid leave for FMLA leave. First, an employer or an employee may substitute paid leave for unpaid FMLA leave. "Substitution" under FMLA means the paid leave and FMLA leave run concurrently. The regulations clarify that employers may apply their normal paid leave policies to the substituted leave, but the employer must notify the employee of any

restrictions on the use of paid leave (e.g., that leave must be taken in full-day increments).

The ADA and ADAAA

The ADA Amendments Act (ADAAA) does not change the definition of an actionable "disability," which is still defined as: (a) a physical or mental impairment that substantially limits one or more of a person's major life activities; (b) a record of such an impairment; or (c) being regarded as having such an impairment. However, the ADAAA mandates that this definition be "construed in favor of broad coverage" and, thus, dramatically expands the number of conditions that qualify as a "disability" requiring the employer's reasonable accommodation. Under the ADAAA, a "disability" now includes an impairment that is episodic or in remission if it would substantially limit a "major life activity" when active. Of note, if an employee falls under the "regarded as" category of impairments, the condition will not be considered a "disability" if it is "transitory and minor," meaning an actual or expected duration of six months or less.

For most employees, even the ADAAA will not justify its use for a case of the Swine Flu. However, for an employee with chronic problems, contraction of the Swine Flu that instigates a recurrence of the chronic illness may justify accommodation. The ADAAA clarifies that "accommodation" may include a leave of absence provided the employee will be able to perform her essential job functions upon her return. The EEOC's Enforcement Guidance for the ADA clarifies that leave requests under the ADA can be broader than those under FMLA. Thus, the ADAAA requires an employer to provide an employee more than twelve weeks of leave as a reasonable accommodation of a disability, unless the employer can show such an accommodation would create an undue hardship for the employer.

The ADAAA also establishes two categories of "major life activities." This categorization expands the list of activities that can support the determination that an employee is "disabled." The first category includes caring for one's self, seeing, hearing,

eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The second category covers major bodily functions such as those involving the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive systems. The ADAAA clarifies that an impairment to even one of these bodily systems now renders an employee "disabled," even without a demonstration that the impairment affects the employee's daily life. Thus, a whole host of medical problems that were not previously considered "disabilities" now qualifies an employee for protection, including such conditions as hearing problems, digestive problems, eating disorders, learning impairments, respiratory compromise such as COPD and many others.

The ADAAA also specifies that "mitigating measures" are no longer to be considered when determining whether an employee is disabled. Thus, if an impairment "substantially limits" a "major life activity," but can be corrected with hearing aids or medications, the analysis of whether the employee is disabled is to be made without taking into account whether the hearing aids or the medications work to correct or improve the impairment. The only exception to this broad expansion is the correction of vision with the use of eye glasses; if an employee's glasses correct his vision, he is not to be considered "disabled" because of vision.

At first blush, the ADA and the ADAAA may not be invoked by an employee who contracts H1N1. While employees are more likely to request FMLA leave during an acute illness, the employee may request reasonable accommodation if they suffer any sort of ongoing problem or impairment from contraction of the virus. Under the ADAAA, many more employees will now qualify as "disabled." Employers should therefore be prepared for extended periods of decreased staffing levels and requests for leave in the event of a widespread outbreak of the H1N1 virus. ■

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Is an Employer Required to Show that a Non-Compete Agreement Protects a “Legitimate Business Interest”?

Trends in Missouri and Illinois

James Craney

direct competitor. Shortly thereafter, a Sunbelt representative observed the employee deliver Midwest industrial equipment to a Sunbelt client.

In February 2009, Sunbelt filed suit against the employee and Midwest, seeking injunctive relief based on the employee’s violation of the non-compete agreement. After an evidentiary hearing, the trial court granted the injunction for Sunbelt, and the employee and Midwest appealed. They argued Sunbelt had failed to prove it had a “legitimate business interest” of sufficient magnitude to warrant injunctive relief.

The Appellate Court of Illinois in *Sunbelt* observed that Illinois courts have traditionally evaluated the reasonableness of restrictive covenants by looking to the “limitations as to time and territory” imposed by the agreement. The court also noted, over the past three decades, that each of Illinois’s five appellate courts has considered a “legitimate-business-interest” test when deciding restrictive covenant cases. The *Sunbelt* court further observed this test appears to have been created out of whole cloth, and has no basis under Illinois law.

The first reference to the “legitimate-business-interest” test in Illinois occurred in 1975 in *Nationwide Advertising Service, Inc. v. Kolar*, 28 Ill.App.3d 671 (1st Dist. 1975). In *Kolar*, the plaintiff, an advertising company, sought to enjoin its former employee and his new employer from soliciting business from the plaintiff’s customers. On appeal, the First District of the Appellate Court of Illinois discussed an employer’s interests, and whether they may be protected by contract:

Our review of the cases relied on by plaintiff established that an employer’s business interest in customers is not always subject to protection through enforcement of an employee’s covenant not to compete. Such interest is deemed proprietary and protectable only if certain factors are shown. A covenant not to compete will be enforced if the employee acquired confidential information through his employment and subsequently attempted to use it for his own benefit. An employer’s interest in its customers also is deemed proprietary

if, by the nature of the business, the customer relationship is near-permanent and but for his association with plaintiff, defendant would never have had contact with the clients in question. Conversely, a protectable interest in customers is not recognized where the customer list is not secret, or where the customer relationship is short-term and no specialized knowledge or trade secrets are involved. Under these circumstances the restrictive covenant is deemed an attempt to prevent competition per se and will not be enforced.

Kolar, 28 Ill.App.3d at 672.

The court in *Sunbelt* discussed how subsequent appellate courts cited the *Kolar* decision and, thus, created a “legitimate-business-interest” test. The *Sunbelt* court further observed the Illinois Supreme Court has never embraced the legitimate-business-interest requirement in the restrictive covenants context. Furthermore, after reviewing the Illinois Supreme Court’s jurisprudence on restrictive covenants -- from its earliest decision on the issue in 1896 to its most recent decision in 2006 -- the court observed the Illinois Supreme Court had never mentioned such a test

In the Illinois Supreme Court’s most recent restrictive covenant case, a group of physicians filed a declaratory judgment action against their employer, alleging the restrictive covenants in their employment contracts were void as against public policy. *Mohanty v. St. John Heart Clinic*, 225 Ill.2d 52 (2006). Upholding the enforceability of these provisions, the Illinois Supreme Court in *Mohanty* noted: “This court has a long tradition of upholding covenants not to compete in employment contracts involving the performance of professional services when the limitations as to time and territory are not unreasonable....” The court later determined the limitations set as to time (three years) and territory (a five mile radius) were not unreasonable. *Mohanty*, 225 Ill.2d at 100.

Ultimately, the *Sunbelt* court rejected the notion that Illinois courts must apply the legitimate-business-interest test in non-compete

cases. The Appellate Court of Illinois so held because the Illinois Supreme Court had never embraced the test, and the test’s application is inconsistent with the Illinois Supreme Court’s jurisprudence governing restrictive covenant cases.

Conclusion

Under both Missouri and Illinois law, an employer must narrowly tailor any non-compete agreement so that the contract will withstand judicial scrutiny. In either state, the agreement must be limited temporally and geographically. It is difficult to provide uniform guidelines concerning those limitations that will be considered reasonable, because when they are challenged, these agreements are analyzed by the courts on a case-by-case basis. However, agreements restricting the employee’s activities for two years or less are more frequently upheld than not. Further, the geographic region within which the employee is prohibited from working should be tailored to suit the nature of the work, and an employer should be prepared to offer specific evidence, such as the location of the employer’s offices vis-à-vis the competitor’s offices, and the size of the employer’s client or customer base.

In Missouri, an employer must overcome one additional hurdle to prove that a non-compete agreement is enforceable. A Missouri employer must show the agreement protects a “legitimate business interest.” Missouri courts have recognized that employers have a legitimate business interest in their customer lists and trade secrets. A review of the most recent decisions from the Missouri Supreme Court shows the application of the legitimate-business-interest test is well-settled.

In contrast, Illinois law is less settled concerning the legitimate-business-interest test. Under the *Sunbelt Rentals* decision, the current trend in Illinois law removes the test from the judicial calculus in non-compete cases. Should other Illinois courts follow the *Sunbelt* decision, the rights of employers to impose binding non-compete agreements on their employees will be considerably strengthened. ■

BROWN & JAMES^{PC.}
LAW FIRM
Case Results

Eagle Star Group, Inc. v. Berkowitz, Oliver, Williams, Shaw & Eisenbrandt, LLP. Jackson County, Missouri. The plaintiff, in this legal malpractice claim, hired the defendant law firm to set aside a \$370,000 default judgment. After the trial court's refusal to set aside the judgment was affirmed on appeal, the plaintiff brought a malpractice action, alleging the law firm negligently failed to raise all of the proper jurisdictional defenses to the default judgment. At the conclusion of the malpractice trial, the jury returned a verdict for the law firm. Tried by Steven H. Schwartz.

Kempka v. Catering St. Louis. St. Louis City, Missouri. Plaintiffs were family members of the decedent who fell while exiting the Boat House, a popular St. Louis restaurant in Forest Park. The decedent struck her head and suffered a severe subdural hematoma. She died approximately ten weeks later from complications related to the injury. Plaintiffs claimed the decedent's fall was caused by a trip on step that was in violation of applicable building codes and against industry standards. Defendants denied these allegations. Defendants also presented two eye witnesses who testified that it appeared as if the decedent had fainted and the step had nothing to do with her fall. After a five-day trial in the Circuit Court of St. Louis City, the jury found for Defendants. Tried by David P. Bub

Brookfield v. Metro. St. Louis City, Missouri. Plaintiffs, in this wrongful action alleged Metro's Call-A-Ride, which had been called to transport the decedent to her dialysis treatment, failed to take her to the hospital's emergency room when she appeared in distress, but instead left her at the hospital's front entrance. Plaintiffs claimed that if their decedent had been taken immediately to the emergency room, she would not have suffered a cardiopulmonary arrest and died. Plaintiffs demanded \$1.2 million before trial. The jury returned a

defense verdict. Tried by John P. Rahoy and Edward W. Zeidler, II.

Capitol Specialty Insurance Corporation v. Charles Whitaker. United States District Court, Southern District of Illinois. Capitol Indemnity sought a declaratory judgment that it had no duty to defend or indemnify its insureds, the owners of a Cairo, Illinois nightclub, against a lawsuit alleging damages stemming from a bar fight. The district court entered summary judgment for the insurer, finding the insurer's assault and battery exclusion barred coverage for the insureds' negligence. The district court also concluded there was no coverage under the insurer's liquor liability coverage part. Tried by John P. Cunningham and Dan Hasenstab.

Ken Derendinger v. Eleanor Teague. Boone County, Missouri. Plaintiff, a law school graduate appearing pro se, alleged defendant traveled the wrong direction in a parking lot and struck the passenger's side of his vehicle, causing significant damage. Plaintiff claimed property damage, personal injuries, including soft tissue injuries and low back pain, and lost wages. The jury returned a defense verdict. Tried by Rebecca Schubert.

Amco Insurance Company v. Robert Rohr. United States District Court, Southern District of Illinois. Amco sought a declaratory judgment that it had no duty to defend or indemnify the insured against an underlying lawsuit arising out of an ATV accident involving the insured's daughter and friend. Amco denied the claim because the ATV accident did not occur at an "insured location," as required by the policy's terms. The underlying plaintiff responded, arguing a survey was required to determine whether the accident occurred on an "insured location," that the insured held an easement over the property on which the accident occurred, the accident resulted from the intoxication of the insured's daughter, which began on the insured's property, and that the ATV was used solely to service the insured's property. The district court disagreed and entered summary judgment for Amco, finding the ATV accident did not occur at an "insured location." Tried by James Craney and Gregory Odom.

Bolton & Ascoli v. St. Clair Roofing Company. Boone County, Missouri. Plaintiffs were seriously injured when their motorcycle struck a pickup truck hauling a utility trailer full of siding material. Plaintiffs' combined medical bills totaled over \$100,000. The driver of the pickup truck, a self-employed siding installer, had just completed a siding installation job for the firm's client, and was returning the client's unused siding material to its warehouse. Plaintiffs alleged the driver was the client's employee/agent at the time of the accident. The firm's client denied the driver was negligent and further denied he was its employee/agent, but, instead, an independent contractor. The jury returned a verdict for our client. Tried by Chad M. deRoode.

Sappington v. Skyjack, Inc. United States Court of Appeals, Eighth Circuit. Plaintiffs brought claims for wrongful death based on strict product liability. The decedent sustained fatal injuries when he fell while working in a scissor lift at a construction site in Kansas City. After the district court dismissed the claims against Brown & James' client based upon Missouri's innocent seller statute and awarded substantial costs, plaintiffs appealed. As a matter of first impression, the Eighth Circuit affirmed the district court's judgment, ruling a party dismissed under the innocent seller statute is a prevailing party that is entitled to its costs. Briefed and argued by James Maloney and Kenneth Goleanor.

Shipp v. GfK NOP, LLC. United States Court of Appeals, Eighth Circuit. Plaintiff brought this wrongful death claim based on her mother's disappearance while conducting door-to-door surveys for the defendants. The mother's murderers were never identified, but plaintiff filed her action against the companies that had employed her mother, claiming they had a duty to protect her against third-party criminal acts. The district court dismissed Brown & James' client on plaintiff's pleadings, and the Eighth Circuit affirmed. Briefed and argued by James Maloney.

Illinois Case Law Update

Denise Baker-Seal

Common-law cause of action for retaliatory discharge upheld: The Illinois Supreme Court held the circuit court had subject-matter jurisdiction over an African-American female plaintiff's common-law claim for retaliatory discharge against her employer for being fired after she supported a Caucasian female co-worker in the co-worker's federal discrimination suit against their employer. Plaintiff's recourse to the common law was not limited to the administrative procedures set forth in the Illinois Human Rights Act because her claim that her employer discharged her for refusing to commit perjury in the co-worker's case was not inextricably linked to a civil rights violation. Rather, plaintiff established a basis for imposing liability on her employer independent of the Act, namely the state's public policy against perjury as embodied in the state's criminal code. The circuit court also had subject-matter jurisdiction over plaintiff's federal retaliation claim under 42 U.S.C. § 1981 because circuit courts are courts of general jurisdiction and are presumptively competent to adjudicate claims arising under the laws of the United States. Moreover, the Illinois Department of Human Rights and the Human Rights Commission, which were created by the Illinois Act to accomplish its objective of securing freedom from unlawful employment discrimination, have no statutory authority to entertain federal claims. *Blount v. Stroud*, 232 Ill.2d 302 (2009).

No discrimination based on sexual orientation: A lesbian plaintiff who was fired after taking excessive leave to care for her life partner who was being treated for breast cancer was not discriminated against on the basis of sexual orientation by her employer. The Appellate Court of Illinois held there was no evidence that plaintiff's employer treated other heterosexual employees more favorably under similar circumstances. Moreover, the Court found the incidents disclosed by plaintiff as being reflective of how she was treated differently did not have any discriminatory tones. Rather, the Court noted plaintiff was absent more than she worked, and much of her time away was not excused. The Court further noted plaintiff was granted significant amounts of leave (including 12 weeks of FMLA leave, 40 sick days, 24 vacation and floater days, 13 leave of absence days and 22 hours of miscellaneous time off in a one-year period), but constantly requested more, called

off on short notice, or just did not come back to work at all. Finally, the Court noted it is not the job of the Commission to support plaintiff's allegation of discrimination, and since plaintiff offered nothing to rebut her employer's nondiscriminatory reason for its discipline and termination, the Commission's investigation was adequate. *Powell v. City of Chicago Human Rights Comm'n*, 389 Ill.App.3d 45 (1st Dist. 2009).

Disparate pay claim based on gender failed: A female plaintiff who received unequal pay as two male co-workers was not discriminated against by her employer because the male employees were not similarly situated, as they were hired into different positions than plaintiff and performed different job duties involving far more skill and responsibility than plaintiff's position required. Furthermore, another female employee with the same job title as the two male employees cited by the plaintiff actually earned more than either of her similarly situated male co-workers. Therefore, the Appellate Court of Illinois held there was a lack of substantial evidence that plaintiff's employer paid her lower wages on the basis of her sex and the nondiscriminatory reasons for paying the plaintiff less than her two male co-workers was not merely pretextual. The Court also held the Department of Human Rights used the correct three-prong standard in analyzing discrimination actions brought under Title VII, rather than the procedure used in actions under the Equal Pay Act, which permits the shifting of the burden of proof to the employer. In the three-prong standard, a plaintiff must first establish by a preponderance of evidence a *prima facie* case of unlawful discrimination. The employer then rebuts the presumption of discrimination by articulating, not proving, a legitimate nondiscriminatory reason for its decision. Finally, the plaintiff must prove by a preponderance of the evidence that the employer's reason was untrue and was a pretext for discrimination. However, the ultimate burden of persuasion remains on the plaintiff throughout the proceedings. *Budzileni v. Department of Human Rights*, 2009 WL 1606656 (Ill. App. 1st Dist. June 5, 2009).

Discrimination claim originating in Missouri may be prosecuted in Illinois: An employee who worked in the St. Louis office of a company that was headquartered in Illinois brought a lawsuit in an Illinois circuit court

alleging age and gender discrimination under the Missouri Human Rights Act after he was fired. The employee first filed a claim with the Missouri Commission of Human Rights, which issued him a right to sue letter. The Appellate Court of Illinois law held the plaintiff's lawsuit was not barred from being brought in an Illinois circuit court by the exclusivity provision of the Illinois Act in light of the Illinois Supreme Court's holding in *Blount v. Stroud*, 232 Ill.2d 302 (Ill. 2009). The Illinois Supreme Court in *Blount* held the administrative procedures contained in the Illinois Act, which govern the filing and disposition of the alleged civil rights violations, are applicable only to civil rights violations under the Illinois Act. The Court further noted that permitting plaintiff's claim based on a Missouri statute to be brought directly in an Illinois circuit court was proper because of the full faith and credit clause of the Constitution and did not violate the public policy of Illinois. *Ferreri v. Hewitt Associates, LLC*, 391 Ill.App.3d 221 (2d Dist. 2009).

Race and gender discrimination claim failed: The Seventh Circuit held the promotion of a white male over an African-American female employee did not constitute race and gender discrimination because the white male had more relevant experience to the desired position, despite the African-American female's greater experience and qualifications in other areas. The fact the decision maker was well acquainted with the white male who received the promotion may suggest favoritism, but did not constitute evidence of discrimination. The Seventh Circuit further held the plaintiff was not retaliated against by receiving less desirable assignments that were still within her job description. Neither plaintiff's disciplinary action for clocking out early, nor the City's failure to investigate vandalism to the plaintiff's vehicle while it was parked in the secure City lot, constituted retaliation because there was no evidence the disciplinarian or Commissioner who failed to investigate were aware of plaintiff's EEOC Charge. Finally, being assigned undesirable duties that are part of one's job description and having co-workers congregate outside of a shared office does not constitute a hostile work environment. Although the City's failure to investigate the vandalism to plaintiff's vehicle was disgraceful, one act alone is not egregious enough to create a hostile work environment. *Hobbs v. City of Chicago*, 2009 WL 2151308 (7th Cir. July 21, 2009).

Missouri Case Law Update

Christine A. Vaporean

Sexual Harassment/Hostile Environment/Retaliation Claims under MHRA: The Missouri Supreme Court's decision in *Hill v. Ford Motor Co.*, 277 S.W.3d 659 (Mo. banc 2009), impacts many facets of Missouri employment law. First, the Supreme Court, in this sexual harassment / hostile work environment / retaliation claim, held that an employee, who was suspended and directed to obtain psychiatric treatment in retaliation for rejecting her supervisor's sexual harassment and for making a prior unrelated discrimination claim, stated a claim under the Missouri Human Rights Act (MHRA), and not under Title VII. This aspect of the Court's decision may have a significant impact on future discrimination claims in Missouri because MHRA claims are not subject to the burden-shifting analysis that governs Title VII claims. Under the federal burden-shifting analysis, employers may escape liability by showing a legitimate, non-discriminatory reason for the employment action. Therefore, the Missouri Supreme Court's decision may signal an increase in claims brought under the MHRA. Second, in the employer's favor, the Supreme Court recognized the *Faragher-Ellerth* defense to sexual harassment claims subject to Missouri law. To

prove this defense, an employer must show: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Third, the Supreme Court permitted the late joinder of parties to MHRA claims. The Court held the MHRA allows an action to be brought against a supervisor in his individual capacity even though he was not a party in the employee's initial administrative claim before the Missouri Commission on Human Rights. The Court explained the failure to join the supervisor as a party will bar the employee's claim only if the prior non-joinder results in prejudice. Fourth, the Missouri Supreme Court expressed its disfavor for summary judgment procedure in employment claims brought under the MHRA. The Court stated summary judgment on MHRA claims should be rarely granted because the claims almost always involve a dispute over material facts.

Retaliatory Discharge, Punitive Damages, "Me Too" Evidence, Expert Testimony on Emotional Distress: The Missouri Court of Appeals upheld a jury's

verdict for the plaintiff on a claim of retaliatory discharge for making a sexual harassment complaint. The Court, in so ruling, held the "contributing factor" standard is the appropriate standard for establishing the causation element of a retaliatory discharge claim, which element can be proven by indirect and circumstantial evidence. The Court further held a submissible claim for punitive damages is made in a retaliatory discharge claim when "the evidence and the inferences drawn therefrom are sufficient to permit a reasonable juror to conclude that the plaintiff established with convincing clarity – that is, that it was highly probable – that the defendant's conduct was outrageous because of evil motive or reckless indifference." The plaintiff sustains this burden by showing the defendant's wrongful conduct was intentional and without just cause or excuse. Thus, the same evidence that supports a plaintiff's claim that a retaliatory motive contributed to her discharge may also support the plaintiff's punitive damage claim. The Court also held that "me too" evidence of the employer's treatment of other employees may be relevant to support both the underlying and the punitive damage claim. Finally, the Court addressed the plaintiff's emotional distress damage claim, holding expert testimony is inadmissible on the legitimacy of "garden variety" emotional distress. *Williams v. Trans States Airlines, Inc.*, 281 S.W.3d 854 (Mo. App. E.D. 2009).

More Than Just a "Policy" Required for the Faragher/Ellerth Affirmative Defense in Sexual Harassment Cases: To establish the "prevention" prong of the *Faragher/Ellerth* affirmative defense in sexual harassment claims, the Missouri Court of Appeals held an employer must do more than have a facially-valid anti-harassment policy. Restated, the mere existence of the policy is insufficient to satisfy the employer's burden to show that it exercised reasonable care in preventing sexual harassment. Instead, courts must consider the employer's conduct in implementing the policy. In this case, as the employer had some information about an applicant's termination from prior positions, the Court reversed the trial court's summary judgment for the employer, holding the employer had an obligation to investigate the applicant's prior acts of misconduct. *Herndon v. City of Manchester*, 284 S.W.3d 682 (Mo. App. E.D. 2009).

(continued from page 8)

Missouri and Illinois Wrongful Termination Suits...

James Craney

If a plaintiff is successful in proving a retaliatory discharge claim, Missouri law allows the plaintiff to recover various elements of damages, including the employee's lost wages and emotional distress. *Hopkins v. Tip Top Plumbing & Heating Co.*, 805 S.W.2d 280 (Mo. App. W.D. 1991); *Palermo v. Tension Envelope Corp.*, 959 S.W.2d 825 (Mo. App. E.D. 1997). When the plaintiff provides sufficient proof of an employer's knowledge and malicious intent, punitive damages may be awarded as well. *Self v. Lenertz Terminal, Inc.*, 854 S.W.2d 571 (Mo. App. E.D. 1993).

RETALIATORY DISCHARGE: THE STANDARD OF PROOF

The state-law remedies for retaliatory discharge in the workers' compensation context, which are predicated on common-law tort principles, create a higher hurdle

for plaintiffs to clear than do the remedies available in Title VII actions brought under federal law. However, this appearance can be deceptive. State courts are often less inclined to grant summary judgment and dispose of frivolous claims than are federal courts. In addition, as retaliatory discharge claims related to workers' compensation matters are filed in state courts, the possibility of forum-shopping arises – where plaintiffs attempt to creatively select state circuit courts that have exhibited a pro-plaintiff bias. Thus – when viewed from a practical perspective – these types of claims are often more problematic for employers than may be expected. Employers and their insurers should take care to preserve and gather the evidence necessary to establish a non-retaliatory basis for the employee's termination at the earliest opportunity once the employer learns that a potential claim may be made. ■

If anyone receiving The Firm Inquiry would prefer to receive it by e-mail, simply e-mail Donna Howard at dhoward@bjpc.com and Brown & James will arrange for it to be sent electronically to you.

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Firm Inquiry Announcements

The Best Lawyers in America 2010, a definitive guide to legal excellence in the United States, named four Brown & James attorneys as leaders in their fields. These lawyers, selected through peer nominations, are **David P. Ellington** (Medical Malpractice Law (Defense) and Personal Injury Litigation), **Lawrence B. Grebel** (Personal Injury Litigation, Products Liability Litigation, and Professional Malpractice), **Robert S. Rosenthal** (Legal Malpractice Law (Defendants) and Medical Malpractice (Defense)), and **T. Michael Ward** (Appellate Law).

Brown & James, P.C. has been elected a "Go-To Law Firm" for 2010 by general counsel from the top Fortune 500 companies in the United States according to a survey conducted by **ALM's Corporate Counsel Magazine**. The ALM survey asked Fortune 500 general counsel to name those law firms that they retain to handle their most significant matters. On annual basis, less than one percent of all law firms in United States receive the honor of being elected a "Go-To Law Firm." Brown & James was also elected as a "Go-To Law Firm" by the top companies in the financial services industry.

Joseph R. Swift spoke on September 28, 2009, at the **2009 National Safety & Operations Conference** for the **American Moving & Storage Association** in Indianapolis, Indiana. His presentation addressed the strategies employed by national plaintiffs' lawyer groups that have targeted the trucking industry. The conference was attended by member companies' executives and their safety directors.

Robert W. Cockerham has been named a Fellow of the **Litigation Counsel of America**. The Litigation Counsel of America is a trial lawyer honorary society whose membership is limited to less than one-half of one percent of all American lawyers. A fellowship in the Litigation Counsel of America is a highly selective honor and by invitation only. Fellows in the Litigation Counsel of America are selected based upon their effectiveness and accomplishment in litigation, both at the trial and appellate levels, and their superior ethical reputation.

Russell F. Watters and **Timothy J. Wolf** will lead a roundtable discussion at the **Counsel on Litigation Management's** annual meeting in Ponte Vedra Beach, Florida, on March 24-26, 2010. Mr. Watters and Mr. Wolf, along

with other leaders in the field, will address the management of class action lawsuits from the insurers' perspective.

Joseph R. Swift recently spoke at the **2009 Product Safety and Liability Conference** on Green Marketing Claims to industry representatives. The conference was sponsored by the **Association of Home Appliance Manufacturers** in conjunction with the Air-Conditioning, Heating, and Refrigeration Institute and the Consumer Electronic Association.

Timothy J. Wolf will speak on behalf of the **National Business Institute** on February 11, 2010, on "Settling Uninsured and Underinsured Motorist Claims."

Robert W. Cockerham spoke on October 8, 2009, at the annual **National Society of Professional Insurance Investigators (NSPII) 2009 Important Case Law Update** in O'Fallon, Missouri. Mr. Cockerham spoke on important recent decisions affecting insurance law that have been decided by courts in Missouri, Illinois, and Kansas. Mr. Cockerham will also speak at NSPII's annual Advanced Insurance Fraud Seminar on November 17, 2009, in Columbus, Ohio, as a member of the NSPII's National Legal Panel.