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Herbester v. North American Company for Life and Health Insurance: Attorney's Retaliatory Discharge Action Unjustly Dismissed, 21 J. Marshall L. Rev. 215 (1987)

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*HERBSTER v. NORTH AMERICAN COMPANY FOR LIFE AND HEALTH INSURANCE:** ATTORNEY'S RETALIATORY DISCHARGE ACTION UNJUSTLY DISMISSED

As a general rule, employment contracts are terminable at will.[1] In order to avoid the harsh consequences[2] of this general rule, courts[3] have recently developed the common law tort of retaliatory

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* 150 Ill. App. 3d 21, 501 N.E.2d 343 (1986).

1. An at will employment relationship is one which has no specific duration and the employer or employee may terminate the relationship at will, with or without cause. Criscione v. Sears, Roebuck & Co., 66 Ill. App. 3d 664, 666, 384 N.E. 2d 91, 93 (1978). *See At-Will Employment*, A.B.A. 2 SEC. LAB. & EMPLOYMENT L. COMMITTEE REP. 15 (1982) (the American rule and English background of at will employment); Berendt, *Employment Contracts*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 8.8 (1983 & 1986 Supp.) (discussion of an at will employment relationship); Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1976) (major emphasis on modification of the at will employment concept); Peck, *Unjust Discharge from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1 (1979) (proposing that an employee who is unjustly dismissed from employment needs protection); Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (proposing a revision of common law rules to provide at will employees with a remedy when wrongfully discharged) [hereinafter *Protecting Employees*]; Annotation, *Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 544 (1982) (general theories and case law of at will employment relationships). *Cf.* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976) (advocating statutory reform for unfair dismissals). *But cf.* Grauer v. Valve & Primer Corp., 47 Ill. App. 3d 152, 361 N.E.2d 863 (1977) (memo supporting a contract of annual duration, thus, employment contract was not terminable at will). *See generally* H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE 1 (1984) (historical discussion of the employment at will rule originating during the industrial revolution); 53 AM. JUR. 2D *Master and Servant* § 43 (1970) (discussing the discharge of employees); Carley, *At-Will Employees Still Vulnerable*, A.B.A. J., Oct. 1, 1987, at 66 (limitations on the right of employers to end at will employment relationships).

2. The employer always has an upperhand, thus, an employer and employee are not on equal footing. Blades, *supra* note 1 at 1404-05. *See* Palmateer v. International Harvester Co., 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981) (states the need for a balance between the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's expectation that public policy is carried out). *See also Protecting Employees, supra* note 1, at 1824 (employer's absolute discretion in an at will employment relationship).

3. Twenty-two jurisdictions have expressly adopted a public policy exception to the general rule of employment at will. The following states, in highest appellate court decisions, or in uncontradicted lower court opinions, recognize retaliatory discharge: Arizona; Arkansas; California; Connecticut; Delaware; Florida; Hawaii; Illinois; Kentucky; Maryland; Massachusetts; Michigan; Montana; New Hampshire; New Jersey; New Mexico; Oregon; Pennsylvania; Texas; Virginia; Washington; and West Virginia. Solin, *Current National Trends and Strategies in Wrongful Termination Litigation*, 15 ANN. INST. ON EMPLOYMENT L. 309, 408 (1986). The following 13 states

discharge, which is founded upon an employer's discharge of an employee in contravention of a clearly mandated public policy.[4] Illinois courts first recognized retaliatory discharge in 1978,[5] but are reluc-

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have recognized the exception in part or have conflicting decisions on the issue: Colorado; Idaho; Indiana; Iowa; Kansas; Maine; Minnesota; Missouri; Nevada; North Carolina; South Carolina; Tennessee; and Wisconsin. *Id.* Finally, the following 16 jurisdictions deny the existence of a public policy exception or have not addressed the issue: Alabama; Alaska; District of Columbia; Georgia; Lousiana; Mississippi; Nebraska; New York; North Dakota; Ohio; Oklahoma; Puerto Rico; Rhode Island; South Dakota; Utah; Vermont; and Wyoming. *Id.* at 409. For a detailed state-by-state analysis of recent court decisions relating to the common law rule of employment at will, see *The Employment-At-Will-Issue*, A BUREAU OF NATIONAL AFFAIRS SPECIAL REPORT 8 (Nov. 19, 1982) [hereinafter BUREAU REPORT].

4. Retaliatory discharge, frequently called wrongful discharge, abusive discharge, or discharge in derogation of public policy, was first recognized as a newly developed rule of law in Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959). An employee discharged for refusing to violate a criminal statute can bring a retaliatory discharge cause of action. *Id.* Thus, an employee cannot be discharged from employment for acting in furtherance of public policy or for refusing to violate a public policy. *Id.* at 188-89, 344 P.2d at 27-28, 29 Cal. Rptr. at 400. *See* Blades, *supra* note 1, at 1404. Following *Petermann*, numerous courts involved in workers' compensation disputes based their decisions on public policy. *See, e.g.*, Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (employee fired for filing under Workers' Compensation Act); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (women filing workers' compensation claim discharged from employment); Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977) (employee discharged for filing workers' compensation claim may bring a cause of action against his employer); Frampton v. Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973) (exception to at will employment when an employee is discharged for filing a workers' compensation claim). *See generally* Annotation, *Liability for Discharging At-Will Employee for Refusing to Participate in, or for Disclosing, Unlawful or Unethical Acts of Employer or Coemployees*, 9 A.L.R. 4th 329 (1981) (analysis of whether an at will employee can bring a cause of action for wrongful discharge). The courts began to realize that an employer and employee do not stand on equal footing. Blades, *supra* note 1, at 1404-05; *Palmateer*, 85 Ill. 2d at 129, 421 N.E.2d at 878. Courts eventually relied on public policy to limit the exercise of the employer's power to discharge "in contravention of a clearly mandated public policy." *Id.* at 130, 421 N.E.2d at 881. Thus, courts allow a retaliatory discharge cause of action where an employee is fired for refusing to violate a statute. *Compare* Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee's refusal to engage in price fixing); *Palmateer*, 85 Ill. 2d at 124, 421 N.E.2d at 876 (employee fired for supplying information to police about suspected wrongful doing of fellow employee); O'Sullivan v. Mallon, 160 N.J. Super. 416, 390 A.2d 149 (1970) (employee fired for refusing to practice medicine without a license); Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E.2d 270 (1978) (an employee's refusal to violate a credit code) *with* Lansen v. Motor Supply Co., 117 Ariz. 507, 573 P.2d 907 (1977) (employee discharged for attending night school); Keneally v. Oregon, 186 Mont. 1, 606 P.2d 127 (1980) (worker discharged for taking too much sick time); Jones v. Keogh, 137 Vt. 562, 409 A.2d 581 (1979) (employee attempted to examine company's books in his capacity as a shareholder, and was discharged). Courts rejecting a retaliatory discharge cause of action do so out of deference to the legislature. Those courts argue that any substantive prohibition of retaliation should be adopted by an elected body. *See* Scroghan v. Kraftco Corp., 551 S.W.2d 811, 812 (Ky. Ct. App. 1977) (court refused retaliatory discharge cause of action, stating that it is a matter for legislative determination). *See also* W. HOLLOWAY, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 430 (1985) (summary of state statutes that support public policies for purposes of a retaliatory discharge cause of action).

5. *Kelsay*, 74 Ill. 2d at 177, 384 N.E.2d at 358-59. In the *Kelsay* decision, the

tant[6] to expand the tort. Unlike other jurisdictions,[7] Illinois has not developed an efficient[8] way of analyzing retaliatory discharge causes of action.[9] Instead, Illinois courts analyze retaliatory discharge cases

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Supreme Court of Illinois recognized a retaliatory discharge cause of action for the first time. The court based its decision on the public policy of the Workers' Compensation Act, which provides that an employee deserves an efficient and expeditious remedy when injured on the job. Moreover, the court stated that "[w]e are not convinced that an employer's otherwise absolute power to terminate an employee at will should prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workers' Compensation Act." *Id.* at 181, 384 N.E.2d at 357. *But cf.* Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977) (when legislature does not provide for a retaliatory discharge cause of action, employer liability cannot be assessed).

6. An Illinois court recently stated: "This court has not, by its *Palmateer* and *Kelsay* decisions, 'rejected a narrow interpretation of the retaliatory discharge tort' and does not 'strongly support' the expansion of the tort." Barr v. Kelso-Burnett Co. 106 Ill. 2d 520, 525, 478 N.E.2d 1354, 1356 (1985). Thus, based on this recent decision, Illinois courts clearly favor the general rule of employment at will unless there is a clear cut public policy exception. *Id.* Without this exception, employees can be fired with or without cause. *See supra* notes 1-3 for an extensive analysis of the at will employment setting. *See generally* W. PROSSER, PROSSER AND KEETON ON THE LAW OF TORTS § 1 (5th ed. 1984) (demonstrating the fluctuation of tort law and the protection of plaintiffs' interests). Prosser stated:

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before . . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

Id. at 3-4.

7. In order to avoid the harshness of the American rule of employment at will, France, Germany, England and Sweden protect against unjust dismissals through legislation. *See* Summers, *supra* note 1, at 508-19. France adopted a principle known as "abus de droit," (abuse of right) which makes abusive termination a tort if malicious intent, culpable negligence, or capriciousness is involved. *Id.* at 510. Germany disallows a termination unless four weeks notice is given. *Id.* at 511. England adopted a statute in 1971 providing full protection against unjust dismissal. *Id.* at 513. Sweden requires one month advance notice before an employee can be terminated. *Id.* at 517. Furthermore, the Swedish statute requires the employer to prove an objective cause for the dismissal. *Id.*

8. Beginning in 1978 with the *Kelsay* decision, Illinois courts have inconsistently decided cases in the area of retaliatory discharge. *Compare Palmateer*, 85 Ill. 2d at 124, 421 N.E.2d at 876 (court held that when a clear public policy is contravened, a retaliatory discharge cause of action can be maintained, thus carving out another exception to at will employment other than in the workers' compensation context) *with* Rozier v. St. Mary's Hosp., 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980) (after recognizing the rule stated in *Kelsay*, the court restricted the public policy limitation on discharge of at will employees to the workers' compensation context). *See also Barr*, 106 Ill. 2d 520, 478 N.E.2d 1354 (1985) (narrow interpretation of retaliatory discharge, thus, cause of action is limited).

9. Illinois courts recognize a retaliatory discharge cause of action when two elements are met. First, the employer must discharge the employee in retaliation for the employee's activities. Second, the discharge must be in contravention of a clearly mandated public policy. *Palmateer*, 85 Ill. 2d at 134, 421 N.E.2d at 881. *See also Barr*, 106 Ill. 2d at 529, 478 N.E.2d at 1358 (although elements set out identical to *Palmateer*, court adhered to a narrow interpretation of retaliatory discharge).

on a case-by-case approach.[10] This lack of procedure was recently evidenced in *Herbster v. North American Co. for Life & Health Insurance*,[11] when the Appellate Court of Illinois for the Second District addressed the issue of whether an attorney-employee[12] may bring a retaliatory discharge cause of action against his corporate employer. The *Herbster* court held that although the public policy[13] of preventing the obstruction of justice[14] was contravened, attorneys have no cause of action for retaliatory discharge because of the attorney-client relationship.[15]

Robert W. Herbster, a former in-house corporate attorney,[16] filed a retaliatory discharge suit against his past employer, North American Company for Life and Health Insurance ("North American"). The complaint alleged that Mr. Herbster was wrongfully discharged[17] after refusing to destroy or remove certain subpoenaed

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10. Illinois courts look at the specific facts of each case to determine if a retaliatory discharge cause of action exists. *See* Price v. Carmack Datsun, Inc., 109 Ill. 2d 65, 485 N.E.2d 359 (1985) (employee filing a claim under health insurance); Wheeler v. Caterpillar Tractor Co., 108 Ill. 2d 502, 485 N.E.2d 372 (1985) (employee discharged for refusing to work in x-ray department); *Palmateer*, 85 Ill. 2d at 124, 421 N.E.2d at 876 (employee fired for reporting a crime); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (employee discharged after filing under workers' compensation act); Thomas v. Zamberletti, 134 Ill. App. 3d 387, 480 N.E.2d 869 (1985) (employee alleged discharge for receiving medical treatment); Mein v. Masonite Corp., 124 Ill. App. 3d 617, 464 N.E.2d 1137 (1984) (employee brought action against employer for discharge based on age); Petrik v. Monarch Printing Corp., 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (employee discharged for reporting discrepancy in financial records).

11. 150 Ill. App. 3d 21, 501 N.E.2d 343 (1986). *See generally* Closen & Wojcik, *Lawyers Out in the Cold*, A.B.A. J., Nov. 1, 1987, at 94 (discussing the adverse effect of *Herbster* on lawyers, the legal profession, and the administration of justice).

12. For a discussion of whether an attorney can be an employee, see *infra* note 68 and accompanying text.

13. The *Palmateer* court stated that "[a]lthough there is no line of demarcation dividing matters that are the subject of public policies from matters purely personal . . . a matter must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed." *Palmateer*, 85 Ill. 2d at 130, 421 N.E.2d at 878. For a further discussion of the public policy element, see generally M. POLELLE, ILLINOIS TORT LAW 369 (1985) (retaliatory discharge claim based on tort theory); Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805, 826-27 (1975) (professionals and the public policy element based on their specific occupation). A retaliatory discharge cause of action is permitted where public policy is clear, but is denied where private interests are involved. *Palmateer*, 85 Ill. 2d at 131, 421 N.E.2d at 879.

14. ILL. REV. STAT. ch. 38, ¶ 31-4(a) (1985).

15. *Herbster*, 150 Ill. App. 3d at 29-30, 501 N.E.2d at 348. For a discussion of the attorney-client relationship, see *infra* notes 86, 94 and accompanying text.

16. Mr. Herbster was a licensed attorney and was employed as chief legal officer and vice-president in charge of North American's legal department. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344.

17. Appellant's Brief at 5-6, Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 501 N.E.2d 343 (No. 2-85-42) (1986) [hereinafter Appellant's Brief].

documents[18] at the request of North American corporate officials.[19] The complaint further stated that if Mr. Herbster destroyed or removed the documents, he would have violated the Illinois Code of Professional Responsibility.[20] North American subsequently filed a motion for summary judgment[21] based on the fact that Mr. Herbster's employment contract was an oral contract terminable at will.[22] Also, North American contended that Mr. Herbster was discharged for legitimate reasons.[23] The circuit court granted North American's motion for summary judgment, holding that the uniqueness[24] of the attorney-client relationship between Mr. Herbster and North American precluded a retaliatory discharge cause of action.

The appellate court affirmed the trial court's decision.[25] The court addressed the issue of whether an attorney, who works solely for a large corporation, may bring a retaliatory discharge cause of

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18. The documents had been requested in lawsuits pending in Alabama against North American and other insurance companies. *Id.* at 2. The documents came from North American's actuarial department, and if made available to the Alabama plaintiffs, supported allegations of fraud in the sale of so called flexible annuities. *Id.*

19. The complaint alleged that on June 29, 1983, Elliot Leitner, a vice-president of North American, and Paul C. Colette, the president and chief executive of North American, told Mr. Herbster to remove or destroy the incriminating documents. *Id.* at 5.

20. The Illinois Code of Professional Responsibility states that "[a] lawyer shall not . . . engage in conduct prejudicial to the administration of justice." ILL. REV. STAT. ch. 110A, DR 1-102(a)(5) (1985). It further states that "[a] lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce." *Id.* at DR 7-109(a) (1985). *See Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344 (court's acknowledgment that the Illinois Code of Professional Responsibility would be violated if Mr. Herbster committed the illegal act of removing or destroying discovery documents).

21. On September 24, 1984, North American filed its motion for summary judgment pursuant to ¶ 2-1005 of the Illinois Code of Civil Procedure. Appellant's Brief, *supra* note 17, at 7. The trial court judge stated that "whether the plaintiff [Herbster] was or was not specifically instructed to destroy or take out of the files material that might have been the subject matter of the production order in the Alabama court . . . is an issue of fact . . . ." Record at 27, *Herbster*, 150 Ill. App. 3d 21, 501 N.E.2d 343 (No. 2-85-42) (1986). After the court held that the complaint stated a cause of action, it analyzed the public policy involved and reasoned that a conflict existed between the considerations underlying *Palmateer*, and the protection of confidentiality between an attorney and a client. Appellant's Brief, *supra* note, 17, at 10. Thus, the court decided that the public policy considerations of confidentiality must prevail and granted North American's motion for summary judgment. *Id.*

22. For a discussion of at will employment, see *supra* notes 1-3 and accompanying text.

23. North American alleged that Mr. Herbster was terminated because of his unsatisfactory performance in his employment capacity. Appellant's Brief, *supra* note 17, at 6-8.

24. For a discussion of the attorney-client relationship, see *infra* notes 86, 94 and accompanying text.

25. At the trial court level, the attorney's briefs focused on the privilege aspect of the attorney-client relationship. *Herbster*, 150 Ill. App. 3d at 30, 501 N.E.2d at 348. The appellate court found that all aspects of the attorney-client relationship are important, not just the attorney-client privilege. *Id.* For a discussion of what constitutes the attorney-client relationship, see *infra* notes 86, 94 and accompanying text.

action against that corporation. Although the court found that Mr. Herbster was discharged in contravention of a clearly mandated[26] public policy,[27] it reasoned that the adverse impact of allowing attorneys to sue their clients precluded Mr. Herbster from bringing a retaliatory discharge cause of action.[28] Thus, in Illinois, when an attorney is hired in his legal capacity, he does not have a cause of action for retaliatory discharge against his employer. The court further noted that an expansion[29] of the tort of retaliatory discharge was not justified because of the mutuality of choice[30] inherent in the legal profession.[31]

Initially, the court set forth the two elements necessary to bring a retaliatory discharge cause of action in Illinois. First, the employer must have discharged the employee in retaliation for the employee's activities.[32] Second, the discharge must be in contravention of a

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26. Mr. Herbster would have violated both criminal statutes and ethical rules if he had performed the act which North American requested. *See* ILL. REV. STAT. ch. 38, ¶ 31-4(a) (1985) (obstruction of justice is a criminal offense); ILL. REV. STAT. ch. 110A, DR 1-102, 7-102(a)(3) (1985) (attorney cannot prejudice justice and must produce all necessary evidence).

27. *See supra* note 13. Public policy can usually be found in a state's constitution or statutes, and when they are silent, judicial decisions can be examined. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981). One of the most compelling public policies is when the employee refuses to commit an unlawful act. W. HOLLOWAY, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 264 (1985). *Cf.* Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (court recognizes public policy from various sources, including judicial decisions). *But cf.* Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 335 N.W.2d 834 (1983) (court held that public policy must be evidenced by a constitutional or statutory provision).

28. A retaliatory discharge cause of action can be based on contract or tort theory. BUREAU REPORT, *supra* note 3, at 3. When proceeding under a contract theory, courts have held that employers are liable based on the implied covenant of good faith. Courts hold that where the employer discharged an at will employee in violation of good faith requirements, a cause of action exists because of the employer's breach of the implied contract of good faith. H. PERRITT, EMPLOYEE DISMISSAL LAW AND PRACTICE 122 (1984). Illinois does not recognize a retaliatory discharge cause of action based on a contract theory. Berendt, *Employment Contracts*, ILL. INST. FOR CONTINUING LEGAL EDUC. § 8 (1983 & 1986 Supp.). *See also* Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977) (employee recovered on implied good faith and fair dealing for a wrongful discharge cause of action); Monge v. Beebe Rubber Co, 114 N.H. 130, 316 A.2d 549 (1974) (employer who terminates an at will employee in bad faith or retaliation commits a breach of the employment contract).

29. Due to the fact that an employer and employee do not stand on equal footing, courts emphasize the growing need for the tort of retaliatory discharge. *Herbster*, 150 Ill. App. 3d at, 23, 501 N.E.2d at 345 (1986), (quoting *Palmateer*, 85 Ill. 2d 124, 129, 421 N.E.2d 876, 878 (1981)). *See generally* BUREAU REPORT, *supra* note 3, at 19 (employment at will discussed by labor relations experts and predictions for the 1980's).

30. The *Herbster* court reasoned that attorneys have more job opportunities than other employees, thus, the court distinguished Mr. Herbster from a traditional employee. *Herbster*, 150 Ill. App. 3d at 30, 501 N.E.2d at 348.

31. *Id.*

32. For a discussion of the elements of a retaliatory discharge cause of action, see *supra* note 9. *See also* Mein v. Masonite Corp., 124 Ill. App. 3d 617, 464 N.E.2d

clearly mandated public policy.[33] Although the court acknowledged[34] that there were public policy considerations[35] in this case to support the second element of the tort[36] and that Mr. Herbster was discharged in contravention of a clearly mandated public policy,[37] it neglected to decide whether Mr. Herbster was discharged for his activities as an employee.[38]

While the court ignored this element of the tort, it went on to note that because an employer and employee do not stand on equal footing,[39] there is a growing need for expansion of the tort of retaliatory discharge.[40] The court, however, in order to determine whether Mr. Herbster was an employee within the meaning of established case law,[41] asserted the importance of examining historical considerations of the retaliatory discharge tort.[42] The court concluded that Mr. Herbster was not an employee because of his profession as an attorney.[43]

The court reasoned that attorneys are unlike the typical employees of past retaliatory discharge cases because an attorney enjoys an abundance of job opportunities.[44] Moreover, the court relied

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1137 (1984) (employee failed to state a cause of action for retaliatory discharge because elements were not met).

33. For a discussion of public policy, see *supra* notes 13, 27.

34. *Herbster*, 150 Ill. App. 3d at 23-24, 501 N.E.2d at 344.

35. *See* ILL. REV. STAT. ch. 38, ¶ 31-4(a) (1985) (obstructing justice is a criminal offense); ILL. REV. STAT. ch. 110A, DR 1-102(5), 7-109(a) (1985) (lawyer cannot engage in conduct prejudicial to the administration of justice or suppress evidence that he has a legal obligation to reveal).

36. For a discussion of the contract and tort theories of retaliatory discharge, see *supra* note 28. *See also* J. BARBASH, UNJUST DISMISSAL AND AT WILL EMPLOYMENT 29 (1982) (differences of tort and contract theory as it relates to retaliatory discharge and their respective remedies).

37. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344.

38. An employee must be discharged for his activities. *Id.* Mr. Herbster was asked to remove or destroy discovery documents and he refused to do so because of his ethical responsibility to the legal profession. *Id.* Shortly after his refusal to violate the Illinois Code of Professional Responsibility, he was discharged. *Id.*

39. *Herbster*, 150 Ill. App. 3d at 25, 501 N.E.2d at 345. *See also* Blades, *supra* note 1, at 1404 (demonstrates the advantage an employer has over an employee, thus, the employee is left in an unprotected position).

40. *Herbster*, 150 Ill. App. 3d at 24, 501 N.E.2d at 345, (citing *Palmateer*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981)).

41. *Herbster*, 150 Ill. App. 3d at 24, 501 N.E.2d at 344. *See Kelsay*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (first Illinois court to recognize retaliatory discharge cause of action for an employee).

42. *Herbster*, 150 Ill. App. 3d at 24, 501 N.E.2d at 344.

43. *Id.* at 30, 501 N.E.2d at 348.

44. *Id.* A recent survey, however, stated that "[d]espite the glowing nature of a 90.6% employment rate . . . jobs remain hard to get for the most part, even at the most well known law schools in the country." NATIONAL ASS'N FOR LAW PLACEMENT, INC., CLASS OF 1983 EMPLOYMENT REPORT AND SALARY SURVEY (10th ed. 1985). In support of this proposition, Mr. Herbster was unemployed for five months after his discharge from North American despite his excellent credentials. Appellant's Petition for Leave to Appeal, at 9, Herbster v. North Am. Co. for Life & Health Ins., 150 Ill.

heavily upon the attorney-client relationship[45] to bolster its conclusion that an attorney cannot bring a retaliatory discharge cause of action. The court found that the attorney-client relationship encompasses mutual trust, exchanges of confidence, and reliance on an attorney's judgment.[46] Therefore, an attorney bringing suit against his client would have serious impact on the attorney-client relationship because of the deterioration of these factors.[47] Finally, the *Herbster* court deferred to the public policy that an attorney-client relationship must promote full and frank consultation between a client and an attorney, without the fear of disclosure.[48] Consequently, the court held that an attorney cannot be an employee because of his unique relationship with his client,[49] and barred Mr. Herbster from bringing a retaliatory discharge cause of action.

The *Herbster* court improperly concluded that Mr. Herbster was not entitled to bring a retaliatory discharge cause of action. The court's reasoning is deficient for two reasons. First, the court failed to recognize that Mr. Herbster was an employee[50] in a corporate setting. Second, the court unjustifiably neglected to redress a violation of the clearly mandated public policy of preventing the obstruction of justice.[51] Moreover, the court had the opportunity to expand the tort of retaliatory discharge into a needed employment setting. Instead, the court circumvented the issue and delivered a superficial

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App. 3d 21, 501 N.E.2d 343 (No. 85-0042) (1986) [hereinafter Appellant's Brief for Leave to Appeal].

45. For a discussion of the attorney-client relationship, see *infra* notes 86, 94 and accompanying text. *See generally* Fried, *The Lawyer as Friend: The Moral Foundations of the Attorney-Client Relation*, 85 YALE L.J. 1060 (1976) (discussion of attorney's duty to his client and promoting confidentiality).

46. *Herbster*, 150 Ill. App. 3d at 29-30, 501 N.E.2d at 348.

47. *Id.*

48. *Id.* at 27, 501 N.E.2d at 346-47. For a general discussion of the attorney-client privilege, see C. MCCORMICK, MCCORMICK ON EVIDENCE § 87 (3d ed. 1984) (background and policy of the attorney-client privilege); Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 A.B.A. J. 708 (1961) (author discusses the rationale behind the attorney-client privilege, and its exceptions); Comment, *Witness-Competency-Whether Confidential Relations by Client to Attorney Regarding Future Criminal or Fraudulent Transactions Must be Divulged*, 33 CHI-KENT L. REV. 271, 273 (1955) (requirements for attorney-client privilege to exist).

49. *Herbster*, 150 Ill. App. 3d at 29-30, 501 N.E.2d at 348.

50. For a discussion of Illinois case law defining an employee, see *infra* notes 53-55 and accompanying text.

51. For a definition of public policy, see *supra* note 13. Some courts, however, require a statutory source for the actions which led to the discharge. *See* Hamblen v. Danners, Inc., 478 N.E.2d 926 (Ind. Ct. App. 1985) (in absence of statutory directive, there is no public policy violation in discharge of employee who refuses to take polygraph examination); Rice v. Grant County Bd. of Comm'rs, 472 N.E.2d 213 (Ind. Ct. App. 1984) (no public policy violated where traffic statutes did not confer a right upon an individual). *Cf.* Pepsi Cola Gen. Bottlers, Inc. v. Woods, 440 N.E.2d 969 (Ind. Ct. App. 1982) (public policy exception to employee at will rule prevails when employee is discharged for exercising a right conferred on him by statute, constitution, or other positive law).

opinion which leaves attorneys in an unprotected position.

The *Herbster* court inaccurately analyzed the relationship between Mr. Herbster and North American. Even though Mr. Herbster was an attorney, he was clearly an employee[52] of North American. In determing whether an individual is an employee, Illinois courts traditionally look to three elements. First, the employer must have control over the employee.[53] Second, a contract must exist between the employer and employee.[54] Finally, the employee must be

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52. For a discussion of a professional employee, see *infra* notes 68-69 and accompanying text.

53. The control element is crucial in analyzing whether an employer-employee relationship exists. *See* American Casualty Co. of Reading, Pa. v. Wypior, 365 F.2d 164 (7th Cir. 1966) (Illinois courts require control, contract, and compensation in an employer-employee relationship); Carroll v. Social Security Bd., 128 F.2d 876 (7th Cir. 1942) (essential characteristic of employer-employee relationship is that the employer retains the right to control and direct the individual performing the services); Mutual of Omaha Ins. Co. v. Chadwell, 426 F. Supp. 550 (N.D. Ill. 1977) (employer-employee relationship requires control over the employee); Gundich v. Emerson-Comstock Co., 21 Ill. 2d 117, 171 N.E.2d 60 (1961) (a master-servant relationship is premised upon the employer's right to control, which includes the power to discharge); Circle Sec. Agency, Inc. v. Ross, 107 Ill. App. 3d 195, 437 N.E.2d 667 (1982) (essential characteristic of relationship is employer's control over employeee's work); Jones v. Atterberry, 77 Ill. App. 3d 463, 396 N.E.2d 104 (1979) (right to control the manner in which an employee's work is performed is probably most important element in determining whether employer-employee relationship exists); Lilly v. County of Cook, 60 Ill. App. 3d 573, 377 N.E.2d 136 (1978) (manner of supervision of work done is fact to consider when determining an employer-employee relationship); Balfour v. Dohrn Transfer Co., 328 Ill. App. 163, 65 N.E.2d 624 (1946) (primary element of the employer-employee relationship is the source and nature of control).

Many jurisdictions are in harmony with Illinois case law, and hold that the control element is one of the most important elements to satisfy when proving an employer-employee relationship. *See* Florida Gulf Coast Symphony, Inc. v. Department of Labor & Employment Sec., 386 So. 2d 259 (Fla. Dist. Ct. App. 1980) (musicians declared not employees because of lack of control over their performances); Sloan v. Hobbs Sporting Goods Shop, 145 Ga. App. 255, 243 S.E.2d 673 (1978) (employer must be able to control method of performance of employee's work); Johnson v. Maricle, 386 So. 2d 677 (La. Ct. App. 1980) (employee must be under continuous auspices of his employer's control); L.M.T. Steel Prods. v. Peirson, 47 Md. App. 633, 425 A.2d 242 (1981) (the only element that has significance in determining the employer-employee relationship is the power or right to control); Iverson v. Independent School Dist., 257 N.W.2d 572 (Minn. 1977) (bus driver for school district was not an employee of school district because it had no control over him); McCabe & Willig Realty, Inc. v. Ross, 80 A.D.2d 935, 437 N.Y.S.2d 770 (1981) (salespersons who were furnished limited amount of office space may not be considered employees because of lack of control); Ackley v. State, 592 S.W.2d 606 (Tex. Crim. App. 1980) (servant is person who is controlled in his employment); Western Casualty & Sur. Co. v. Marchant, 615 P.2d 423 (Utah 1980) (employer's performance must be subject to comparatively high degree of control). *See generally* 53 AM. JUR. 2D *Master and Servant* §§ 1-2 (1970) (definition of employer-employee relationship); 56 C.J.S. *Master and Servant* §§ 1-2 (1948) (definition and existence of relationship between employer and employee); 17 ILL. L. AND PRAC. EMPLOYMENT § 2 (1956) (requirements needed for an employer-employee relationship to exist).

54. The normal indicia required for an employer-employee relationship are control, contract, and compensation. *Wypior*, 365 F.2d at 167. *See Chadwell*, 426 F. Supp. at 553 (highlight of characteristics law attributes to employment relationship). *See also Sloan*, 145 Ga. App. at 256, 243 S.E.2d at 673 (test for whether person em-

compensated for his services.[55]

As to the first element, North American controlled the manner and means of Mr. Herbster's work. Mr. Herbster was chief legal officer and vice-president in charge of the legal department for North American.[56] He owed duties to the corporate board of directors, shareholders, and officers.[57] Thus, Mr. Herbster's work was subject to the review of his superiors.[58]

Unlike an independent contractor,[59] North American presumably controlled the time, method, and manner in which Mr. Herbster performed his work.[60] An employer, however, need only possess, rather than exercise, control over a person's work, in order to satisfy

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ployed is an employee).

55. Some courts hold that compensation for services is necessary in a true employer-employee relationship. *See Wypior*, 365 F.2d at 167 (court held that compensation was important, but it did not need to be in the form of money); *Chadwell*, 426 F. Supp. at 553 (employee who has been compensated without existence of contract or control is not an employee); *Johnson*, 386 So. 2d at 262 (necessity of method of payment in determining individual's status as employee). Since compensation can be found in almost all working relationships, it may not always determine whether a person is not an employee in the absence of a contract and control over the employee. For a discussion of the contract and control elements, see *supra* notes 53-54.

56. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344.

57. *Id.* at 26, 501 N.E.2d at 346.

58. Mr. Herbster's superiors were named in the appellant's brief. The brief named Paul C. Colette, president of North American, Elliot Leitner, vice-president, and Richard W. Hadley, an executive vice-president of North American. Appellant's Brief, *supra* note 17, at 7. Presumably, Mr. Herbster's performance was reviewable by any one or all of these officials.

59. Note that determining the nature of an employment relationship depends upon an analysis of the particular facts of each case. *See* Hindle v. Dillbeck, 68 Ill. 2d 309, 370 N.E.2d 165 (1977) (person transporting passengers in course of employment was employee); Kouba v. East Joliet Bank, 135 Ill. App. 3d 264, 481 N.E.2d 235 (1985) (agency hired to repossess automobile is independent contractor and is liable for its acts because there is no element of control); Pemberton v. Medical Emergency Servs. Assocs., 117 Ill. App. 3d 502, 453 N.E.2d 802 (1983) (doctor who is subject to audits and other review procedures not an independent contractor, but is an employee due to the existence of control over him). *See also* Iverson v. Independent School Dist., 257 N.W.2d 572 (Minn. 1977) (bus company hired for services is an independent contractor); Friend v. Audits & Survey Co., 64 A.D.2d 800, 407 N.Y.S.2d 924 (1978) (interviewers hired to take surveys who work out of their homes are employees because supervision exists). The question of whether a person is an employee or a general contractor is a question of fact for the jury to decide. DeRosa v. Albert F. Amling Co., 84 Ill. App. 3d 64, 404 N.E.2d 564 (1980).

60. One can assume that Mr. Herbster, as an employee of North American, had deadlines to meet, meetings to attend, and duties to fulfill. Consequently, he was under the supervision of corporate officials. For the names and titles of the corporate officials, see *supra* note 58.

The facts of the case show that Mr. Herbster was in an authority position as chief legal officer and vice-president of North American. Therefore, Mr. Herbster would not be supervised in the same manner as a traditional employee. This does not preclude him, however, from being classified as an employee. *See* L.M.T. Steel Prods., Inc. v. Pierson, 47 Md. App. 633, 636, 425 A.2d 242, 245 (1981) (general foreman on a project is less likely to be subject to the supervision that other employees receive). For a discussion of the supervision necessary when a professional employee is involved, see *infra* notes 61, 74.

the control requirement.[61] Accordingly, the control element existed in the relationship between Mr. Herbster and North American because North American possessed control, even though it may not have exercised its authority over Mr. Herbster.

The second element necessary to determine if Mr. Herbster was an employee is the existence of a contract. Undoubtedly, a contract existed between Mr. Herbster and North American.[62] The court recognized its existence when it stated that North American employed Mr. Herbster under an oral contract[63] which was terminable at will.[64] Furthermore, the parties stipulated that the contract existed.[65] Therefore, it was evident that a contract existed between Mr. Herbster and North American.

Third, Mr. Herbster was compensated for his services. He was a salaried employee, received employment benefits, and was not on a contingent fee basis.[66] Furthermore, Mr. Herbster's employment with North American was his only means of economic support.[67] Clearly, Mr. Herbster met the third element of being compensated for his services.

In addition to satisfying these elements, further authority for the proposition that an attorney can also be an employee is found in other jurisdictions.[68] Similar to an attorney, who can be fired at his

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61. *See* American Casualty Co. of Reading, Pa. v. Wypior, 365 F.2d 164 (1966) (in an employer-employee relationship, the employer only has to possess control, thus, the fact that it is never exercised is irrelevant); *L.M.T. Steel Prods., Inc.*, 47 Md. App. at 633, 425 A.2d at 242 (master-servant relationship does not require the actual exercise of supervision when employee is in an authoritative position); *Friend*, 64 A.D.2d at 800, 407 N.Y.S.2d at 924 (depending on the type of occupation, supervision may be less visible).

62. For a general discussion of the contract requirement between an employer and employee, see *supra* note 54.

63. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344. The contract can be oral or written. Sloan v. Hobbs Sporting Goods Shop, 145 Ga. App. 255, 256, 243 S.E.2d 673, 674 (1978).

64. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344. For an in-depth analysis of the employment at will rule, see *supra* notes 1-3.

65. Because the court clearly established that an oral contract existed between Mr. Herbster and North American, it is presumed that the parties stipulated to the existence of the contract. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344.

66. *Id.* For relevant case law discussing the compensation element, see *supra* note 55.

67. Mr. Herbster did not have a private practice of law. All of his efforts were devoted to North American. Thus, all financial support came from North American. Appellant's Brief for Leave to Appeal, *supra* note 44, at 9.

68. Pennsylvania is a leading jurisdiction on the issue of whether a professional person can also be an employee. *See* Budzichowski v. Bell Tel. Co. of Pa., 503 Pa. 160, 469 A.2d 111 (1983) (doctors who work for telephone company are employees and cannot be sued by fellow employee); Kinloch v. Tonsey, 325 Pa. Super. 476, 473 A.2d 167 (1984) (doctor who works for company is employee, rather than independent contractor); Babich v. Pavich, 488 Pa. Super. 140, 411 A.2d 218 (1980) (doctor who works in steel plant medical dispensary is employee and not independent contractor). All these cases are analogous to an attorney working for a corporation. Both an attorney

client's discretion, a doctor can be fired at his patient's discretion. In both instances, however, the attorney or doctor should not be discharged at the discretion of his employer when the employer has contravened a clearly mandated public policy. For example, in *Kinloch v. Tonsey*,[69] a Pennsylvania court found that a doctor employed as medical director of a company[70] was an employee. To sustain this conclusion, the court primarily relied on three facts. First, the doctor worked from 8:00 a.m. to 4:00 p.m., five days a week, fifty-two weeks a year, as a full-time employee.[71] Second, the company paid the doctor a monthly salary.[72] Third, the doctor received standard fringe benefits, which included medical insurance, life insurance, vacation, and an investment plan.[73]

Additionally, the *Kinloch* court stated that "an employer-employee relationship may be found even though a particular occupation may involve such technical skill that the employer is wholly incapable of supervising the details of performance."[74] Thus, when a

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and a doctor are professionals who can also be employees.

Most cases arise when the professional is working in an employment setting and is sued for his actions. Courts have been liberal in holding that under the Workers' Compensation Act, the individual cannot be sued because he is an employee. *See* Komel v. Commonwealth Edison Co., 56 Ill. App. 3d 967, 372 N.E.2d 842 (1978) (employee bringing action against doctor who works for a company is barred from recovering because doctor is co-employee). *See also In re* Concourse Opthalmology Assocs., P.C., 89 A.D.2d 1047, 456 N.Y.S.2d 112 (1982) (opthalmologists performing services in provided office space are employees to certain extent); Gullack v. Catherwood, 27 A.D.2d 759, 276 N.Y.S.2d 1019 (1967) (attorney who was free to engage in private legal practice can also be employee). In further support that an attorney can be an employee, see RESTATEMENT (SECOND) OF AGENCY § 223 comment a (1958), which states that "[e]ven in the case of attorneys and physicians there may be the master and servant relation, as where a firm of attorneys employs an attorney as a member of the office staff . . . ." *Id.* Based on this assertion, an attorney who is working for a large corporation can also be an employee. Clearly, Mr. Herbster was an attorney-employee in this case.

69. 325 Pa. Super. 476, 473 A.2d 167 (1984). For a discussion of an accountant employed in his professional capacity, see generally Note, *A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics*, 28 VAND. L. REV. 805 (1975).

70. The doctor in *Kinloch* worked in the medical dispensary of the Budd Company. *Kinloch*, 325 Pa. Super. at 477, 473 A.2d at 168.

71. *Id.* at 478, 473 A.2d at 169.

72. *Id.*

73. *Id.*

74. *Id.* (quoting Potash v. Bonaccurso, 179 Pa. Super. 582, 588, 117 A.2d 803, 806 (1955)). Professional employees require special consideration in the area of control because of their unique skills. *See* Kay v. General Cable Corp., 144 F.2d 653 (3d Cir. 1944) (difficult to have full control over a doctor because he is a highly trained professional); L.M.T. Steel Prods., Inc., v. Pierson, 47 Md. App. 633, 425 A.2d 242 (1981) (when persons are employed in supervisory or authoritative roles, it is less likely that employer has full control over individuals); Budzichowski v. Bell Tel. Co., of Pa., 503 Pa. 160, 469 A.2d 111 (1984) (doctor who has superior skills to supervisors can still be employee even though full control is impossible because of his profession); Babich v. Pavich, 270 Pa. Super. 140, 411 A.2d 218 (1980) (physician is an employee regardless of fact that full control over him cannot be achieved). Professionals such as

professional is involved, the control element may not need to be satisfied to the extent that is necessary in traditional employer-employee relationships. Surely, the doctor in *Kinloch* had technical skills superior to many of the company superiors, and full control over him was impossible. Consequently, the court held that even though a professional person is involved, an employer-employee relationship may still exist.[75]

Like the doctor in *Kinloch*, Mr. Herbster was the chief legal officer and vice-president in charge of the legal department for North American.[76] He worked eight hours per day, five days per week, fifty-two weeks a year.[77] North American paid Mr. Herbster a salary and gave him fringe benefits, similar to the doctor-employee in *Kinloch*.[78] Furthermore, Mr. Herbster, like the doctor, had special skills that his supervisors did not possess, and full control over him was unlikely due to the nature of an attorney's work. Pursuant to the *Kinloch* court's reasoning, the element of control is less relevant when a professional employee is involved.[79] Thus, the *Herbster* court, following the *Kinloch* reasoning, could have held that Mr. Herbster was an employee. Indeed, there was no just reason to deny that Mr. Herbster was an employee[80] entitled to a cause of action for retaliatory discharge. The *Herbster* court unjustifiably denied Mr. Herbster his rights[81] as an employee.[82] Illinois courts should give deference to such persuasive authority[83] in order to adequately de-

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attorneys, accountants, and doctors working in an employment capacity, almost always will have skills superior to their supervisors. Thus, case law reflects the issue that full control over a professional is not necessary in determining whether the professional is an employee. For an extended analysis of the professional employee, see *supra* notes 68-69.

75. *Kinloch*, 325 Pa. Super. at 478, 473 A.2d at 169.

76. Herbster v. North Am. Co. for Life & Health Ins., 150 Ill. App. 3d 21, 23, 501 N.E.2d 343, 344 (1986).

77. Telephone interview with John M. Bowlus, attorney for Robert W. Herbster (February 16, 1987 and March 26, 1987).

78. *Id.*

79. For a discussion of the control element when a professional employee is involved, see *supra* note 74.

80. For a list of elements necessary to determine an employer-employee relationship, see *supra* notes 53-55. *See generally* BLACK'S LAW DICTIONARY 471 (5th ed. 1979) (definition of an employee); H. REUSCHLEIN, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP §§ 50-52 (1979) (definitions and elements of an employer-employee relationship); H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 2 (1877) (history and conditions of the master-servant relationship).

81. An argument can be made that Mr. Herbster was denied equal protection of the law. Appellant's Brief for Leave to Appeal, *supra* note 44, at 15. The decision of the *Herbster* court failed to protect Mr. Herbster the same way it would have protected a non-professional employee. *Id.* Thus, he was denied equal protection of the law. *See* U.S. CONST. amend. XIV, § 1 (language of the equal protection clause); ILL. CONST. art. I, § 1 (no person can be denied equal protection of the law).

82. For a list of factors which constitute an employer-employee relationship, see *supra* notes 53-55.

83. For an analysis of other jurisdictions dealing with the professional employee

cide unprecedented issues.[84] Instead, the *Herbster* court overlooked sound case law,[85] and based its decision on the attorney-client relationship.[86] Therefore, the court found that an exception to the general rule of at will employment[87] was not permissible.

It is difficult to quarrel with the sacredness of the attorney-client relationship where the attorney is consulted to perform a non-continuing service. Mr. Herbster, however, was a salaried employee of North American and did not work on a contingent fee basis. North American was his only employer and only client.[88] Moreover, the relationship between Mr. Herbster and North American was continuous.[89] Furthermore, contrary to the traditional attorney-client relationship, Mr. Herbster looked to North American for career development, compensation, and job security.[90] Clearly, an attorney

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dilemma, see *supra* notes 68-69 and accompanying text.

84. The *Herbster* court stated that

> [w]e must decide . . . whether an attorney as general counsel and an employee of a corporation is entitled to bring a claim for retaliatory discharge. Counsel does not cite nor does our research disclose any case on point. Therefore, we must examine the historical considerations of the tort itself and whether plaintiff is an employee within the meaning of established case law.

Herbster, 150 Ill. App. 3d at 24, 501 N.E.2d at 344.

85. Clearly, the court neglected to rely on persuasive authority, and failed to make an analogy to the facts of this case with other professional employee cases. For professional employee case law, see *supra* note 68-69.

86. The attorney-client relationship is based on trust and confidence. Rhoades v. Norfolk & W. Ry., 78 Ill. 2d 217, 222, 399 N.E.2d 969, 974 (1979). Consequently, a client may discharge his attorney at any time, with or without cause. Tobias v. King, 84 Ill. App. 3d 998, 1000, 406 N.E.2d 101, 103 (1980). Because of obligations, which are referred to as the fiduciary duty of the attorney, all phases of the relationship are superseded and the employment contract can be breached. *Herbster*, 150 Ill. App. 3d at 27, 501 N.E.2d at 347. Thus, the right of discharge is implied in every attorney-client relationship because of the confidential nature of the relationship. *Rhoades*, 78 Ill. 2d at 222, 399 N.E.2d at 974. *See Tobias*, 84 Ill. App. 3d at 1000, 406 N.E.2d at 103 (unless there is an agreement expressly stating that the client cannot discharge his attorney, the attorney can be fired with or without cause). *Cf.* Warner v. Basten, 118 Ill. App. 2d 419, 255 N.E.2d 72 (1970) (even though attorney can be discharged with or without cause, he is still entitled to be compensated for his services). Furthermore, courts subject the attorney-client relationship to strict scrutiny and may declare transactions void which would be valid between other persons. Miller v. Solomon, 49 Ill. App. 2d 156, 163, 199 N.E.2d 660, 667 (1964).

87. For a discussion of at will employment, see *supra* notes 1-3 and accompanying text.

88. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344. The usual attorney-client relationship consists of one attorney serving many clients. North American, however, was Mr. Herbster's only client. *Id. See also supra* note 67.

89. Mr. Herbster was a salaried employee of North American. *Herbster*, 150 Ill. App. 3d at 26, 501 N.E.2d at 346. He was not hired as an independent contractor/outside counsel for the firm and worked on a full time basis. For authority supporting Mr. Herbster's continuous service for North American, see *supra* notes 76-77 and accompanying text.

90. Unlike the traditional attorney-client relationship, which is usually temporary employment and involves no career development, Mr. Herbster relied on North American for indefinite career development. *Herbster*, 150 Ill. App. 3d at 24, 501 N.E.2d 346.

working for a corporation on a full time[91] basis has a different relationship than the usual attorney-client alliance. Therefore, under the circumstances where the attorney is working solely for one corporation, he should be considered an employee and be permitted to bring a retaliatory discharge cause of action as a means of protecting his rights.[92] Also, one must consider the effect of denying an attorney employee status. Attorneys who work for banks, corporations, and large law firms will be denied employee rights, especially the right to a retaliatory discharge cause of action.

The *Herbster* court, in order to bar Mr. Herbster's retaliatory discharge cause of action, premised its decision upon the attorney-client relationship,[93] rather than upon the traditional employer-employee relationship. One aspect of the attorney-client relationship that the court relied on to support its decision is the attorney-client privilege.[94] The attorney-client privilege exists to encourage a client to consult freely with his attorney without fear of compelled disclosure of information.[95] Although the attorney-client privilege applies to all attorneys,[96] in all settings,[97] there are exceptions to the privi-

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91. For a discussion of Mr. Herbster's full time employment with North American, see *supra* notes 76-77 and accompanying text. *Cf.* Kinloch v. Tonsey, 325 Pa. Super. 476, 473 A.2d 167 (1984) (professional employee working on a full time basis can also practice independently and still be considered an employee).

92. For a discussion of equal protection, see *supra* note 81.

93. The *Herbster* court held that Mr. Herbster, as an attorney, occupied a special position in society because of his profession and was precluded from bringing a retaliatory discharge cause of action. *Herbster*, 150 Ill. App. 3d at 27, 501 N.E.2d at 346. For other characteristics of the attorney-client relationship, see *supra* note 86 and accompanying text.

94. The attorney-client privilege is the oldest of the privileges for confidential communications. Upjohn v. United States, 449 U.S. 383, 389 (1981). The purpose of the privilege is to encourage full and frank consultation between a client and an attorney, without the fear of compelled disclosure of the information. Consolidated Coal Co. v. Bucyrus-Erie Co., 89 Ill. App. 2d 103, 438 N.E.2d 150 (1982). Thus, full disclosure will be promoted when the client knows that communications with his attorney cannot be extorted in court. *See* Cain, *The Attorneys Obligation of Confidentiality-Its Effect on the Ascertainment of Truth in an Adversary System*, GLENDALE L. REV. 81 (1978) (history and foundation of the attorney-client privilege); Fried, *The Lawyer as Friend: The Moral Foundations of the Attorney-Client Privilege*, 85 YALE L.J. 1060 (1976) (discussion of policy rationale and history of the attorney-client privilege); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061 (1978) (history and fundamentals of the attorney-client privilege); *See generally* C. MCCORMICK, MCCORMICK ON EVIDENCE §§ 87-88 (3d ed. 1984) (background of attorney-client privilege); 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290-2292 (rev. ed. 1961) (history, policy, and general principles of the attorney-client privilege).

95. *Consolidated Coal Co.*, 89 Ill. 2d at 117-18, 432 N.E.2d at 257. *See also* People v. Adam, 51 Ill. 2d 46, 48, 28 N.E.2d 205, 207 (1972) (essentials for the creation of the attorney-client privilege).

96. *See* C. MCCORMICK, MCCORMICK ON EVIDENCE § 88 (3d ed. 1984) (analysis of the communications between attorney and client).

97. The corporate setting can cause much confusion on the issue of whether a communication made to an in-house attorney is privileged. *See Consolidated Coal Co.*, 89 Ill. 2d at 103, 432 N.E.2d at 250 (attorney-client privilege is inapplicable if

lege.[98] When an exception arises, the privilege between the attorney and his client is dissipated. One such exception to the privilege is the fraud or crime exception.[99]

The attorney-client privilege did apply to Mr. Herbster in his capacity as an in-house corporate attorney.[100] North American officials, however, requested that Mr. Herbster remove or destroy discovery documents.[101] Because this falls within the exception of fraud,[102] the attorney-client privilege between Mr. Herbster and North American dissipated. The court, therefore, mistakenly based its reasoning on the attorney-client relationship,[103] and should have held that there was a clear exception to the attorney-client privilege

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communication was not from a "control group" member); Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314 (7th Cir. 1963) (corporation entitled to the same treatment as any other client when asserting the attorney-client privilege). The "control group" test is a means of defining the client in the corporate setting. Day v. Illinois Power Co., 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964). *See also* Johnson v. Frontier Ford, Inc., 68 Ill. App. 3d 315, 386 N.E.2d 112 (1979) (determines who is entitled to the attorney-client privilege in a corporate setting). The "control group" test, however, was rejected by the United States Supreme Court as the governing test in the federal courts. *Upjohn*, 449 U.S. 383 (1981). For a discussion of the attorney-client privilege, and its applicability to the corporate setting, see generally Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and "Work Product" in Illinois*, 56 ILL. B.J. 542 (1968) (attorney-client privilege and its role in a corporate setting); Note, *Attorney-Client Privilege for Corporate Clients: The Control Group Test*, 84 HARV L. REV. 424 (1970) (determination of a corporate client and his right to the attorney-client privilege); Comment, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 N.W. U.L. REV. 235 (1961) (scope of the attorney-client privilege and relevant communications).

98. For examples of exceptions to the attorney-client privilege, see ILL. REV. STAT. ch. 110A, DR 1-102, 4-101, 7-102 (1985) (an attorney's duty to disclose information under certain circumstances and the inapplicability of the attorney-client privilege when fraud is implicated).

99. Since the attorney-client privilege is deeply embedded in the effective administration of justice, it would be illogical to extend the privilege to communications which reveal the client's intent to commit a fraud or a crime. *See* Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*. 47 A.B.A. J. 708 (1961) (case law and establishment of the fraud or crime exception); Comment, *Witness-Competency-Whether Confidential Relations by Client to Attorney Regarding Future Criminal or Fraudulent Transactions Must be Divulged*, 33 CHI. KENT L. REV. 271 (1955) (the attorney-client privilege is lost if abused). *See, e.g., In re* Berkley & Co., 629 F.2d 548 (8th Cir. 1980) (documents prepared as part of a continuing fraudulent or illegal scheme are not privileged); United States v. Aldridge, 484 F.2d 655 (7th Cir. 1973) (communications involving securities and mail frauds are not privileged). *See generally* 81 AM. JUR. 2D *Witnesses* § 285 (1970) (policy exceptions to the attorney-client privilege).

100. For a discussion of the attorney-client privilege and its applicability to in-house corporate attorneys, see *supra* notes 96-97.

101. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344. For a discussion of the subpoenaed documents, see *supra* note 18.

102. Mr. Herbster would have committed a fraud on the Alabama court had he removed or destroyed the discovery documents. *Id.* For a discussion of the crime or fraud exception to the attorney-client privilege, see *supra* note 99.

103. For a discussion of the attorney-client relationship, see *supra* note 86 and accompanying text.

because of possible fraud.[104] Thus, there was no reason to deny the retaliatory discharge cause of action in Mr. Herbster's case.

Additionally, the *Herbster* court failed to recognize the public policy ramifications[105] of denying Mr. Herbster's retaliatory discharge cause of action. In the landmark case of *Palmateer v. International Harvester Co.*,[106] the Illinois Supreme Court recognized that when an employee is discharged in contravention of a clearly mandated public policy, an exception to the employment at will rule exists and the wrongfully discharged employee should be granted a retaliatory discharge cause of action.[107] In *Palmateer*, an employee was discharged for reporting a possible violation of a crime.[108] The court held that the public policy at stake was one of favoring the effective protection of the lives and property of citizens.[109] Because of the magnitude of this policy, the court allowed the discharged employee to bring a retaliatory discharge cause of action to recover damages.[110]

Mr. Herbster, like the plaintiff in *Palmateer*, was discharged for reporting a possible fraud on a court.[111] The fundamental public policy at stake in *Herbster* was the prevention of an obstruction of justice.[112] Nevertheless, the *Herbster* court failed to redress this clear violation of public policy, and denied Mr. Herbster's retaliatory discharge cause of action. Both the plaintiff in *Palmateer*, and Mr. Herbster were discharged in contravention of a clearly mandated public policy.[113] Because the cases are analogous, and in addition to the fact that an employer-employee relationship existed in Mr. Herbster's case, the *Herbster* court's decision to deny Mr. Herbster a remedy[114] is without merit. Furthermore, the fact that Mr.

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104. Fraud does not have to be actually committed as long as the contemplated crime would or might inure to the client's benefit. *In re* Doe, 551 F.2d 899, 901 (2d Cir. 1977).

105. The *Herbster* court acknowledged that a clearly mandated public policy had been contravened. It failed, however, to redress the clear violation. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344. Consequently, attorneys will find little wrong with committing unethical acts pursuant to the *Herbster* court's reasoning. Furthermore, ethical responsibilities will become obsolete due to the fear of unemployment after an attorney refuses to perform an unethical act.

106. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

107. For a discussion of retaliatory discharge, and the necessary elements to state a cause of action, see *supra* notes 3-4, 9.

108. Palmateer v. International Harvester Co., 85 Ill. 2d 124, 127, 421 N.E.2d 876, 877 (1981).

109. *Id.* at 132, 421 N.E.2d at 879.

110. For a discussion of damages for retaliatory discharge, see *infra* note 114.

111. *Herbster*, 150 Ill. App. 3d at 23, 501 N.E.2d at 344.

112. *Id.*

113. For a discussion of public policy and determining whether it exists in a given case, see *supra* notes 13, 27.

114. In Illinois, compensatory and punitive damages can be recovered under a retaliatory discharge cause of action. Palmateer v. International Harvester Co., 85 Ill.

Herbster is an attorney is irrelevant under these circumstances.

The court's pejorative opinion failed to adequately analyze whether an attorney can be an employee in certain situations. Instead, the court relied on an unconvincing policy rationale based on the attorney-client relationship. A more thorough analysis would have led the court to a different conclusion. In failing to recognize Mr. Herbster as an employee, the court has cast a dark shadow over the rights of an attorney when the attorney is also an employee. Even though the court should have expanded the tort of retaliatory discharge to an unprotected employment setting, it delivered a barren opinion. Illinois courts must recognize an attorney as an employee in certain situations, and carve out an exception to the general rule of at will employment for a retaliatory discharge cause of action. Both attorney-employees and traditional employees deserve the same protection when they are discharged in contravention of a clearly mandated public policy. Without this protection, attorney-employees will continue to be on unequal footing with their employers.

Dennis M. Nolan

2d 124, 421 N.E.2d 876 (1981); *Kelsay*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The potential liability for damages is greater in tort actions rather than in contract. Montavlo v. Zamora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401 (1970). Damages, however, are sparsely discussed in retaliatory discharge cases. Harless v. First Nat'l Bank, 169 W. Va. 673, 681, 289 S.E.2d 692, 700 (1982). *See generally* W. HOLLOWAY, EMPLOYMENT TERMINATION RIGHTS AND REMEDIES 397 (1985) (remedies and damages for wrongful discharge, including reinstatement); RESTATEMENT (SECOND) OF TORTS § 908 (1979) (awarding and amount of punitive damages in tort cases).