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## **Darnell v. Impact Industries: A Limitless Extension of Employer Liability Based on the Tort of Retaliatory Discharge, 19 J. Marshall L. Rev. 131 (1985)**

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**DARNELL v. IMPACT INDUSTRIES:\* A  
LIMITLESS EXTENSION OF EMPLOYER  
LIABILITY BASED ON THE TORT OF  
RETALIATORY DISCHARGE**

The tort of retaliatory discharge, founded on public policy considerations,<sup>1</sup> is an exception to the general rule that an at-will employee is terminable at any time for any or no cause.<sup>2</sup> Since the Illinois Supreme Court first recognized a cause of action for retaliatory discharge,<sup>3</sup> Illinois courts have struggled to define the scope of this new form of liability.<sup>4</sup> The result has been a continual broadening of the scope of employer accountability.<sup>5</sup> In *Darnell v. Impact Indus-*

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\* 105 Ill. 2d 158,473 N.E.2d 935 (1984).

1. See *infra* note 4 for a definition of public policy.

2. *Palmeteer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876, 878 (1981).

3. The Illinois Supreme Court first recognized the tort of retaliatory discharge in the landmark decision of *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). In *Kelsay*, the plaintiff alleged that she was discharged from her employment in retaliation for filing a workmen's compensation claim. The court allowed plaintiff to recover in order to prevent employers from placing employees in a position of having to choose between their jobs and their statutory rights under the Illinois Workmen's Compensation Act. *Id.* at 184, 384 N.E.2d at 357. See ILL. REV. STAT. ch. 48, §§ 138.1-138.28 (1983). The court further held that since the cause of action was novel, punitive damages would be inappropriate in the case before them, but would be available in future cases to deter employers from firing employees in retaliation for filing workers' compensation claims. *Kelsay*, 74 Ill. 2d at 189, 384 N.E.2d at 360.

4. To adequately plead a cause of action for retaliatory discharge, the plaintiff must allege that the employer discharged the employee in retaliation for the employee's activities and that the discharge contravened a clearly mandated public policy. *Palmeteer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981). "[T]he Achilles heel of the principle lies in the definition of public policy." *Id.* at 130, 421 N.E.2d at 878. The Illinois Supreme Court, in admitting that it lacked a precise definition for the term public policy, noted "public policy concerns what is right and just and what effects the citizens of the state collectively. [Furthermore], a matter [must] strike at the heart of a citizen's social rights, duties, and responsibilities . . ." before a cause of action for retaliatory discharge will be sustained. *Id.* The rulings in the growing number of court decisions, however, still have not adequately outlined the parameters of the public policy standard, which is the essential element of the retaliatory discharge tort. See Platt, *Rethinking the Right of Employers to Terminate At Will Employees*, 15 *J. Mar. L. Rev.* 633, 639 (1982); Note, *Palmeteer v. International Harvester Co.—Retaliatory Discharge of an Employee for Refusing to Obstruct Justice Held Actionable*, 30 *DEPAUL L. REV.* 527, 531 (1981).

5. Cases developing the tort of retaliatory discharge in Illinois include: *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) *cert. denied sub nom.* *Prestress Eng'g Corp. v. Gonzales*, 105 S.Ct. 3513 (1985); *Palmeteer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981) (employee discharged for providing information to law enforcement officials and assisting in a criminal investigation directed at a fellow employee allowed a cause of action for retaliatory discharge);

tries, Inc.,<sup>6</sup> the Illinois Supreme Court confronted the issue of whether the tort applied to the firing of a new employee discharged for having filed a workers' compensation claim against a prior employer.<sup>7</sup> The court held that the tort does apply to terminations based on the filing of workers' compensation claims during previous employment<sup>8</sup> because such discharge contravenes the public policy mandated by the Illinois Workers' Compensation Act (the Act).<sup>9</sup>

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*Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (court recognized the tort of retaliatory discharge when an employer terminated an employee for filing a workers' compensation claim); *Petrik v. Monarch Printing Corp.*, 111 Ill. App. 3d 502, 444 N.E.2d 588 (1982) (plaintiff allowed cause of action for retaliatory discharge after being fired for reporting discrepancies in company financial records to his employer); *Peatrick v. Funk Seeds Int'l.*, 109 Ill. App. 3d 998, 441 N.E.2d 669 (1982) (cause of action for retaliatory discharge denied to a union employee failing to exhaust his contract remedies under a collective bargaining agreement); *Wyatt v. Jewel*, 108 Ill. App. 3d 840, 439 N.E.2d 1053 (1982) (extended tort of retaliatory discharge to an employee covered by a collective bargaining agreement).

In *Midgett v. Sackett-Chicago, Inc.*, the Illinois Supreme Court confirmed the holding in *Wyatt v. Jewel*, *supra*, by extending the tort of retaliatory discharge to include union employees protected by collective bargaining agreements. Union members, however, are clearly *not* at-will employees. The court held that, although primarily protected by the bargained contract, a union employee need not exhaust his contract remedies before bringing an action in tort. "In order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective bargaining agreement." *Midgett*, 105 Ill. 2d 143, 149, 473 N.E.2d 1280, 1283 (1984). It would be unfair to immunize from punitive damages an employer who unfairly terminates a union employee while imposing a penalty of punitive damages against an employer who unjustly discharges a non-union employee. *Id. But see Lamb v. Briggs Mfg.*, 700 F.2d 1092 (7th Cir. 1983) (holding that a union employee covered by a collective bargaining agreement may not maintain a cause of action for retaliatory discharge).

For an overview of the recognition of the tort of retaliatory discharge throughout the United States, see Comment, *Kelsay v. Motorola, Inc.—A Remedy for the Abusively Discharged At Will Employee*, 1979 S. ILL. L.J. 563; Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy*, 1977 Wis. L. Rev. 777 [hereinafter cited as Comment, "*Protecting the Private Sector*"].

6. 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

7. *Id.*

8. The court considered the question of whether the trial court erred in directing a verdict for defendant because Impact Industries was not the employer against whom Darnell had filed the workers' compensation claim. *Id.* at 162, 473 N.E.2d at 937. However, the evidence included testimony by Darnell stating that Impact informed her that her discharge was based on her past workers' compensation activities. A memo prepared by defendant's personnel administrator illustrated that Darnell's previous employers had been contacted in an effort to clarify her workers' compensation history. *Id.* After viewing all the evidence, the court held that the circuit court erred in directing a verdict for defendant. *Id.* A cause of action should not be dismissed on the pleadings unless no set of facts may be proved that will entitle the plaintiff to recover. *Fitzgerald v. Chicago Title & Trust Co.*, 72 Ill. 2d 179, 187, 380 N.E.2d 790, 794 (1978). A verdict should be directed only if all the evidence, when viewed in an aspect most favorable to the opponent, so overwhelmingly favors the movant that no adverse verdict based on the evidence could possibly stand. *Pedrick v. Peoria & Eastern R.R.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513 (1967); *First Nat'l Bank v. Porter*, 114 Ill. App. 3d 1, 11, 448 N.E.2d 256, 263 (1983).

9. *Darnell*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). See ILL. REV. STAT. ch. 48, §§

On May 7, 1981, Norma Darnell submitted an employment application to Impact Industries.<sup>10</sup> On the application, Darnell indicated that she had not suffered any recent injury and had not received any compensation benefits in the past.<sup>11</sup> Darnell began work on May 11 as a probationary employee,<sup>12</sup> but was suspended the next day pending an investigation into allegations that she had filed a workers' compensation claim against a previous employer.<sup>13</sup> She was officially discharged three days later.<sup>14</sup> Darnell brought an action for retaliatory discharge in the Circuit Court of Kendall County. The court directed a verdict in favor of Impact Industries.<sup>15</sup>

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138.1-138.28 (1983).

10. *Darnell*, 105 Ill. 2d at 160, 473 N.E.2d at 936.

11. The application contained two relevant questions: "Have you had a serious illness or injury in the past 5 years?" and "Have you ever received compensation for injuries?" Darnell replied in the negative to both questions. *Darnell*, 105 Ill. 2d at 160, 473 N.E.2d at 936.

12. During oral argument on September 20, 1984, certain justices expressed interest in determining whether or not Darnell was a probationary employee. Subsequently, the court characterized Darnell's status with Impact as "new and probationary." Petition for Rehearing of Defendant, Impact Industries at 2, n.1, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

13. On May 12, 1981, a co-employee informed Impact's personnel office that Darnell had suffered injuries on her previous job. *Darnell*, 105 Ill. 2d at 160, 473 N.E.2d at 936. Federal-Huber, Darnell's former employer, verified this information claiming that Darnell had received benefits from a worker's compensation fund. *Id.* By contacting Darnell's employer previous to Federal-Huber, Impact learned that Darnell had taken several lengthy medical leaves. *Id.* Upon questioning, plaintiff admitted filing a claim but stated that she withdrew it before receiving any compensation payments. *Id.* Darnell further denied suffering any serious illness or injury. *Id.*

14. *Id.*

15. Darnell brought an action for retaliatory discharge against Impact Industries and Federal-Huber Corp. *Darnell*, 105 Ill. 2d at 160, 473 N.E.2d at 936. Federal-Huber was voluntarily dismissed as a defendant. *Id.* Impact made a motion to dismiss for failure to state a cause of action, which motion the trial court denied. *Darnell v. Impact Industries, Inc.*, 119 Ill. App. 3d 763, 457 N.E.2d 125 (1983). After Darnell presented her evidence, Impact made a successful motion for a directed verdict. *Darnell*, 105 Ill. 2d at 160, 473 N.E.2d at 936. See *supra* note 8.

In *Pedick v. Peoria & Eastern R.R.*, 37 Ill. 2d 494, 510, 229 N.E.2d 504, 513 (1967), The Illinois Supreme Court held that the scope of review for directed verdicts in Illinois must include an analysis of all the evidence in the case, not just the evidence presented against the party moving for the directed verdict. This holding liberalized the scope of review in directed verdict cases by giving courts latitude to uphold directed verdicts against parties offering some evidence in its favor. The majority noted that the presence of some evidence of a fact which when viewed alone seems substantial, may not, when viewed in the context of all the evidence, retain its significance: "As the light from a lighted candle in a dark room seems substantial but disappears when the lights are turned on, so may weak evidence fade when the proof is viewed as a whole." *Id.* at 504-05, 229 N.E.2d at 510.

In *Darnell*, the evidence presented against Impact included a memo acknowledging calls to plaintiff's past employers checking on Darnell's workers' compensation history plus testimony by Darnell stating she had been told her discharge was the result of having filed a past workers' compensation claim. When viewed in an aspect most favorable to Darnell, such evidence does not so overwhelmingly favor Impact that a contrary verdict could never stand. *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 162, 473 N.E.2d, 935, 937 (1984). In a concurring opinion, Justice Simon noted that the majority opinion holds only that the Circuit Court erred in directing a

The Appellate Court for the Second District reversed, holding that plaintiff's evidence presented a factual question for the jury.<sup>16</sup> Focusing solely on the procedural issue, the appellate court did not decide whether Darnell's complaint stated a cause of action for retaliatory discharge, and Impact Industries appealed.<sup>17</sup>

The Illinois Supreme Court, in a 4-3 decision, affirmed, holding that Darnell's complaint did state a cause of action for retaliatory discharge.<sup>18</sup> In addressing the issue of whether the tort applied to the subsequent-employer situation, the court noted that the evil resulting from the discharge of an employee for filing a workers' compensation claim against a prior employer is as great as if the discharge had been effected by the prior employer.<sup>19</sup> In both situations, retaliatory discharge is equally offensive to the public policy of the State of Illinois.<sup>20</sup> This decision marked a break from the traditional confinement of the tort of retaliatory discharge to a single employment relationship.<sup>21</sup>

The supreme court began its analysis by considering whether plaintiff's complaint stated a cause of action for retaliatory discharge.<sup>22</sup> Darnell's complaint alleged that she had been discharged in retaliation for filing a worker's compensation claim against a prior employer.<sup>23</sup> Impact Industries contended that Darnell's discharge did not violate a "clearly mandated public policy,"<sup>24</sup> and that to be "retaliatory" a discharge must be in retaliation for conduct necessa-

verdict before the defendant offered any evidence of its reason for discharging the plaintiff. The reason for discharge is a question of fact to be determined by the finder of fact after the defendant has presented its case. *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 163, 473 N.E.2d 935, 938 (1984) (Simon, J., concurring).

16. Plaintiff's evidence included conflicting testimony regarding the reason that motivated her dismissal. *Darnell v. Impact Industries, Inc.*, 119 Ill. App. 3d 763, 457 N.E.2d 125 (1983). At one point, Darnell stated she was told that she was fired because she filed a workers' compensation claim. At another point, the alleged reason involved the misrepresentation of health information on the employment application. The court stated that the jury is best equipped to consider this type of dispute. *Id.* at 768, 457 N.E.2d at 127.

17. *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

18. *Id.*

19. *Id.* at 161, 473 N.E.2d at 937.

20. *Id.*

21. *Id.*

22. For a discussion of the requirement to adequately plead a cause of action for retaliatory discharge, see *supra* note 4.

23. After Darnell filed her complaint alleging retaliatory discharge against Impact Industries, defendant responded with a motion to dismiss for failure to state a cause of action. This motion was denied. However, the trial court directed a verdict for Impact Industries after hearing Darnell's evidence, finding that no cause of action existed under the facts of the case. Brief of Plaintiff-Appellant at 8, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d at 935 (1984). For purposes of the motion, the facts well pleaded must be taken as true by the reviewing court. *Fitzgerald v. Chicago Title & Trust Co.*, 72 Ill. 2d 179, 187, 380 N.E.2d 790, 794 (1978).

24. *Darnell*, 105 Ill. 2d at 161, 473 N.E.2d at 937.

rily confined to a single employment relationship.<sup>25</sup> Relying primarily on *Kelsay v. Motorola, Inc.*,<sup>26</sup> the court rejected both arguments and concluded that plaintiff's claim did state a cause of action for retaliatory discharge.<sup>27</sup>

The majority found a compelling similarity between the facts presented in *Kelsay* and those asserted in Darnell's complaint.<sup>28</sup> In *Kelsay*, the supreme court held that an exception to the terminable-at-will doctrine exists where an employee is discharged for asserting statutory rights enumerated in the Illinois Workmens' Compensation Act.<sup>29</sup> The *Darnell* majority found no difference between a situation where an employee is discharged for having filed a workers' compensation claim against the discharging employer and one where a new employer discharges an employee upon discovery that the employee had filed a claim against a previous employer.<sup>30</sup> The court determined that a discharge in either situation is equally offensive to the public policy embodied in the Workers' Compensation Act.<sup>31</sup>

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25. *Id.*

26. 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The first judicial decision to recognize a cause of action for retaliatory discharge was in *Petermann v. International Bhd. of Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959). Plaintiff, a union business agent, was discharged after disobeying instruction to perjure himself before a legislative committee. Plaintiff's cause of action was based on an employment contract, yet the court held that an employer's right to terminate an employee may be limited by statute or by public policy considerations. Fifteen years later, New Hampshire joined California in recognizing a cause of action for retaliatory discharge in *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974). In 1973, the Indiana Supreme Court became the first jurisdiction to recognize a civil cause of action for retaliatory discharge in a worker's compensation context. *Frampton v. Central Indiana Gas. Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). Michigan followed the *Frampton* precedent in *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

The Illinois Supreme Court first faced the issue and joined this trend after different panels of the Appellate Court for the Fourth District, on the same day, reached contrary results in two cases alleging retaliatory discharge in a Workers' Compensation context. *Kelsay v. Motorola, Inc.*, 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977), *rev'd*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978); *Leach v. Lauhoff Grain Co.*, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977). *But see* *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977) (holding Illinois law does not permit a cause of action against an employer who discharges an employee in retaliation for filing a worker's compensation claim).

27. *See supra* note 3.

28. The court stated that "[t]o hold that the tort of retaliatory discharge requires that the workers' compensation claim be made against the discharging employer would seriously undermine the comprehensive statutory scheme which provides for efficient and expeditious remedies for injured employees." *Darnell*, 105 Ill. 2d at 162, 473 N.E.2d at 937.

29. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

30. *Darnell*, 105 Ill. 2d at 161, 473 N.E.2d at 937.

31. *Id.* *See* ILL. REV. STAT. ch. 48, § 138.1 (1983). The Workers' Compensation Act extinguishes the common law rights and liabilities of employers and employees in the case of accidental injuries or death arising out of and in the course of employment. The employee gives up his common law right to sue his employer in tort but recovery for on-the-job injuries becomes automatic without regard to fault. The em-

Finding no distinction between the case before it and *Kelsay*, the court held that the *Kelsay* rationale controlled.<sup>32</sup> Thus, to reinforce the comprehensive statutory scheme providing for "efficient and expeditious" remedies for injured employees, the supreme court extended the tort of retaliatory discharge to include a termination effected by a subsequent employer.<sup>33</sup>

An analysis of *Darnell* reveals an attempt to strike a balance between the competing interests of an employer's right to discharge "at will" and an employee's right to protection under the Workers'

ployer gives up his right to plead common law defenses and is compelled to pay into the fund. However, the employer's liability becomes fixed and is not subject to the sympathies of juries. This tradeoff between employer and employee is embodied in the fundamental purpose of the Act, and provides employees with prompt and equitable compensation for their injuries while promoting the general welfare of the state:

The primary purpose of the Workmen's Compensation Act is to provide employees prompt, sure, and definite compensation together with a quick and efficient remedy for injuries or death suffered by such employees in the course of their employment . . . and to require the cost of such injuries to be borne by the industry itself and not by the individual members.

*O'Brien v. Ratutenbush*, 10 Ill. 2d 167, 173, 139 N.E.2d 222, 226 (1956). In addition to compensating workers, the Act's other objective include: relieving the financial drain on charities caused by uncompensated work-related injuries, promoting employer interest in safety programs, preventing accidents by encouraging objective studies of the causes of accidents, and discouraging hidden work hazards. See Comment, *Kelsay v. Motorola—Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act*, 1980 U. ILL. L.F. 839.

Recognizing that employers may pressure employees to forego claims under the statute, the Act was amended in 1975 to protect employees who file claims. 1983 Ill. Laws 2307. The statute now provides that:

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

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

ILL. REV. STAT. ch. 48, § 138.4(h) (1983). The criminal provisions detailed in the preceding section are enlarged upon in ILL. REV. STAT. ch. 38, § 1005-9-1(4) (1983), which provides for a fine not to exceed \$500 but does not provide for reinstatement of the employee who claims retaliatory discharge. Although the 1975 amendment made retaliatory discharge a minor criminal offense, the civil consequence of a retaliatory termination remained unaltered in Illinois until the 1978 case of *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

32. For a comprehensive analysis of *Kelsay* and its impact on the terminable-at-will doctrine see Comment, *Kelsay v. Motorola—Illinois Courts Welcome Retaliatory Discharge Suits Under the Workmen's Compensation Act*, 1980 U. ILL. L.F. 839.

33. *Darnell*, 105 Ill. 2d at 162, 473 N.E.2d at 937; *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 182, 384 N.E.2d 353, 363 (1978). See also *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984) (discharge of an employee in violation of a clearly mandated public policy gives rise to a cause of action for the tort of retaliatory discharge independent of any contract action).

Compensation Act.<sup>34</sup> Although the tort of retaliatory discharge is firmly established in Illinois, the *Darnell* court incorrectly extended *Kelsay* to include the subsequent-employment situation. First, the court mistakenly assumed that the discharge was motivated solely by Darnell's previous filing of a workers' compensation claim, rather than by Darnell's falsification of her employment application.<sup>35</sup> Second, the court incorrectly concluded that Impact Industries violated a "clearly mandated public policy"<sup>36</sup> embodied in the Illinois Work-

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34. For an overview of the "at will" employment doctrine, see Comment, *Protecting At Will Employee Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980). In 1978, the Illinois Supreme Court acted to inject greater equality into the relationship between management and the at-will employee. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The court overturned established case law holding that an at-will employee may be discharged for any reason, or no reason. *Long v. Arthur Rubloff & Co.*, 27 Ill. App. 3d 1013, 327 N.E.2d 346 (1975); *Roemer v. Zurich Ins. Co.*, 25 Ill. App. 3d 606, 323 N.E.2d 582 (1975). The *Darnell* decision chips away at the at-will doctrine even further by infringing upon not only an employer's right to fire at will, but also to hire at will. *Darnell*, 105 Ill. 2d at 165-66, 473 N.E.2d at 939 (Moran, J., dissenting).

35. The concurring opinion states that the majority does not hold that Darnell could not have been legitimately discharged for dishonesty, if it was demonstrated that she falsified her employment application. *Darnell*, 105 Ill. 2d at 163, 473 N.E.2d at 937. However, unless there is evidence, absent here, of a pattern to exclude job applicants with a workers' compensation history, the employer's screening to obtain the most productive worker possible offends no law or public policy. Reply Brief of Defendant-Appellant at 13, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

36. For a definition of "public policy" see *supra* note 4. In *Palmateer v. International Harvester, Co.*, Justice Simon divided retaliatory discharge cases into three groups: (1) those where the discharge strikes at the heart of a citizen's social rights, duties, and responsibilities; (2) those where the discharge arises from a dispute encompassing company internal management and (3) those where the distinction between public and private interests is not clear. 85 Ill. 2d 124, 130-32, 421 N.E.2d 876, 878-79 (1981). Most courts recognize a cause of action for cases in the first group, reject an action in the second group, and rule inconsistently in the third group. The *Darnell* case falls within the first group.

Cases within the first category include: *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610 P.2d 1330, 164 Cal. Rptr. 839 (1980) (employee refuses to engage in price fixing); *Petermann v. International Bhd. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25, 29 Cal. Rptr. 399 (1959) (employee refuses to commit perjury); *O'Sullivan v. Mallon*, 160 N.J. Super. 416, 390 A.2d 149 (1978) (employee refuses to practice medicine without a license); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (employee refuses to evade jury duty); *Harless v. First National Bank*, 166 W. Va. 116, 246 S.E.2d 270 (1978) (employee refuses to violate a consumer credit code). These cases exemplify terminations arising out of an employee's refusal to violate a statute.

Cases in the second category include: *Abriz v. Pulley Freight Lines*, 270 N.W.2d 454 (Iowa 1978) (discharge for aiding a co-worker seeking unemployment benefits does not violate public policy); *Keneally v. Orgain*, 186 Mont. 1, 606 P.2d 127 (1980) (worker takes too much sick leave); *Jones v. Keogh*, 137 Vt. 562, 409 A.2d 581 (1979) (worker tries to examine company books in the capacity of a shareholder); *Scrogan v. Kraft Co.*, 551 S.W.2d 811 (Ky. App. 1977) (employer may fire an employee attending law school at night because continuing education is a private concern).

Cases in category three display conflicting results. Compare *McCluney v. Schlitz Brewing Co.*, 489 F. Supp. 24 (E.D. Wis. 1980) and *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974) (discharges for refusal to submit to sexual advances



ers' Compensation Act.<sup>37</sup> Third, by extending the tort of retaliatory discharge to include a probationary employee, the court has virtually created a new common law tort of wrongful refusal to hire.<sup>38</sup> Finally, the *Darnell* decision expands the tort of retaliatory discharge to a point where it now threatens to destroy the general terminable-at-will rule.<sup>39</sup>

The *Darnell* majority improperly characterized *Darnell's* discharge as "retaliatory" under the *Kelsay* standard.<sup>40</sup> Two requirements must be satisfied to adequately plead a cause of action for retaliatory discharge.<sup>41</sup> First, an employer must discharge an employee in retaliation for the employee's actions.<sup>42</sup> Second, the discharge must be in contravention of a "clearly mandated public policy."<sup>43</sup> In *Kelsay*, the plaintiff was explicitly warned that it was company policy to terminate any employee who pursued a workers' compensation claim.<sup>44</sup> Accordingly, the motive behind *Kelsay's* discharge was clearly retaliatory.

In comparison, the motive behind *Darnell's* dismissal was not clearly retaliatory.<sup>45</sup> The term "retaliatory"<sup>46</sup> contemplates a rela-

did contravene public policy) *with* *Geary v. United Steel Corp.*, 456 Pa. 171, 319 A.2d 174 (1974) (dismissals resulting from internal company disputes over product safety does not violate a clearly mandated public policy) *and* *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. Super. 58, 417 A.2d 505 (1980).

37. ILL. REV. STAT. ch. 48, § 138.4(h) (1983). *See supra* note 31.

38. In his dissent, Justice Moran stated that "under the reasoning of the majority . . . if plaintiff had honestly answered the two questions on the application at issue here, and defendant . . . refused to hire her . . . the same public policy which the majority finds offended in the case at bar would be compromised." The recognition of a refusal to hire as a form of retaliation is inevitable if the majority continues its trend of judicial activism. *Darnell*, 105 Ill. 2d at 166, 473 N.E.2d at 939 (Moran, J., dissenting).

39. *Darnell*, 105 Ill. 2d at 163, 473 N.E.2d at 937. Aside from judicially created exceptions, the state and federal legislatures also impose limits on the terminable at-will doctrine. *See, e.g.*, Public Health & Welfare Act, 42 U.S.C. § 2000e (1982) (guarantees equal employment opportunities); National Labor Relations Act, 29 U.S.C. §§ 151-68 (1982) (employees have the right to form unions and engage in collective bargaining without the fear of employer retaliation); Servicemen's Employment Tenure Act, ILL. REV. STAT. ch. 126 ½, §§ 29-35 (1983) (employee has a right to job reinstatement upon return to civilian life); Human Rights Act, ILL. REV. STAT. ch. 68, § 2-104 (1983) (employer has freedom of selecting employees subject only to certain civil rights violations). "If the concept of at-will employment is to retain any vitality, this court or the legislature must establish some boundaries." *Darnell*, 105 Ill. 2d at 166, 473 N.E.2d at 939 (Moran, J., dissenting).

40. *Kelsay*, 74 Ill. 2d at 185, 384 N.E.2d at 359.

41. *Palmateer*, 85 Ill. 2d at 134, 421 N.E.2d at 881.

42. *Id.*

43. *Id.*

44. *Kelsay*, 74 Ill. 2d at 179, 384 N.E.2d at 356.

45. Impact's effort to test the accuracy of the job application does not demonstrate that Impact was preoccupied solely with *Darnell's* workers' compensation history. An equally plausible explanation is Impact's interest in retaining honest employees. "An employer has the right to demand that its employees be honest and truthful in every facet of their employment." *NLRB v. Mueller Brass Co.*, 509 F.2d

tionship in which the action and reaction occur between the same parties.<sup>47</sup> In *Kelsay*, the employer fired the employee after she filed a workers' compensation claim against the company.<sup>48</sup> In *Darnell*, the plaintiff filed a workers' compensation claim long before she had any contact with the discharging employer. Since the action and reaction did not occur between the same parties in *Darnell*, the court had no basis for concluding that a retaliatory motive was present.<sup>49</sup>

*Darnell* is further distinguishable from *Kelsay* because *Darnell* was a probationary employee while *Kelsay* was a permanent employee.<sup>50</sup> In *Darnell*, the employer, while in the process of evaluating a new worker, discovered information indicating employee dishonesty.<sup>51</sup> Elements such as a probationary status and a falsified job application were neither present in *Kelsay* nor within the scope of its doctrine. The *Darnell* majority, however, never addressed the possibility that plaintiff's dismissal resulted from falsification of her employment application.<sup>52</sup> The court merely assumed that *Darnell's* discharge was based solely on the exercise of her rights under the Workers' Compensation Act and was thus a violation of public policy.<sup>53</sup>

However, for the discharge to be actionable under the tort of retaliatory discharge, it must contravene a public policy that is clearly mandated by the legislature.<sup>54</sup> The *Darnell* court's assumption that Impact Industries violated a clearly mandated public policy enunciated in the Worker's Compensation Act is erroneous for several reasons. First, the Workers' Compensation Act specifically refers to the context of a single employment relationship.<sup>55</sup> Second, Impact Industries made no attempt to systematically exclude all workers' compensation claimants from its employ.<sup>56</sup> Finally, a prospective employer has the right to screen out unhealthy or injury-prone employees. A refusal to hire or the termination of a proba-

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704, 713 (5th Cir. 1975).

46. "Retaliation" is defined as follows: "The act of returning evil for evil, or disfavor for disfavor." *State v. Fidelity & Casualty Ins.*, 490 Ohio St. 44, 31 N.E.2d 658 (1982).

47. Petition for Leave to Appeal of Impact Industries at 14, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

48. *Kelsay*, 74 Ill. 2d at 179, 384 N.E.2d at 356.

49. *Darnell*, 105 Ill. 2d at 158, 473 N.E.2d at 935.

50. Petition for Rehearing of Defendant, Impact Industries, Inc., at 2, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

51. *Darnell*, 105 Ill. 2d at 160, 473 N.E.2d at 936.

52. For a discussion of conflicting evidence *Darnell* presented regarding her discharge, see *supra* note 16.

53. *Darnell*, 105 Ill. 2d at 161, 473 N.E.2d at 937.

54. *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

55. ILL. REV. STAT. ch. 48, § 138.4(h) (1983).

56. Petition for Leave to Appeal of Impact Industries at 15, *Darnell*, 105 Ill. 2d at 158, 473 N.E.2d at 935.

tionary employee in such a situation should not be characterized as a public policy violation.<sup>57</sup> In *Palmateer v. International Harvester Co.*,<sup>58</sup> the supreme court stated that an employer retains the right to discharge workers at will in situations where no clear mandate of public policy is involved.<sup>59</sup> Thus, even assuming public policy considerations entered into the court's scrutiny of Impact's actions, the lack of a clear mandate applicable to the facts here should have precluded the court from sustaining Darnell's cause of action.

In the past, Illinois courts faced with the issue of the applicability of the *Kelsay* public policy doctrine have been inconsistent in evaluating the scope of the tort of retaliatory discharge.<sup>60</sup> The *Kelsay* doctrine is an attempt to implement and enforce the public policy of the State as enunciated in the Workers' Compensation Act.<sup>61</sup> In enacting the statute, the Illinois legislature intended to provide efficient and expeditious remedies for injured employees.<sup>62</sup> Additionally, the legislature amended the Workers' Compensation Act in 1975, adding section 138.4(h), to specifically make it unlawful for an employer to discharge, threaten to discharge or refuse to rehire or recall an employee because of the exercise of his rights under the Act.<sup>63</sup> This clearly contemplates permanently employed workers in the single employment relationship. The *Darnell* court's use of this mandate in a probationary employment context, however, raises even greater problems for determining the boundaries of the mandated "public policy."

For example, the *Darnell* court never addressed the "prospective employee" situation, yet the effect of the decision may have a

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57. An employer has a legitimate interest in seeking fit and reliable employees to avoid the excessive problem of absenteeism. Petition for Leave to Appeal of Impact Industries, Inc., at 17, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). An employee with a history of poor attendance or serious ailments may pose a problem to a prospective employer. Recognition of the employer's right to hire and retain productive employees while discharging those with excessive absenteeism records is illustrated in *Atlantic Richfield Co.*, 69 L.A. 484, 492 (1977), where it is stated that an employment relationship creates an obligation of regular attendance on the part of the employee. In circumstances where an employee loses his usefulness to the employer, and the employer cannot plan adequately because of an erratic attendance record, the employment relationship must be severed. *Id.* In *Darnell*, it was established that the plaintiff had been on various medical leaves totalling approximately forty weeks over a 2-½ year period. Petition for Leave to Appeal of Impact Industries, Inc., at 6, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). Therefore, Impact Industries should have a right to consider Darnell's past medical history in making an employment decision. *Id.*

58. 85 Ill. 2d 124, 130, 421 N.E.2d 876, 878 (1981).

59. *Id.*

60. See *supra* note 3. See also Berendt, *Employment Contracts*, ILL. CONTRACT LAW 8-1 (1983) (published by Illinois Institute for Continuing Legal Education) (overview of cases analyzing recent Illinois retaliatory discharge decisions).

61. *Kelsay v. Motorola*, 74 Ill. 2d 172, 354 N.E.2d 353 (1978).

62. See *supra* note 31.

63. ILL. REV. STAT. ch. 48, § 138.4(h) (1983).

serious impact on an employer's refusal to hire an employee with a workers' compensation history.<sup>64</sup> The legislature never intended the statutory proscription of section 138.4(h) to apply to a pre-employment situation.<sup>65</sup> Contrary to the court's reasoning, the statute lacks language which would justify the conclusion that a prospective employer is precluded from considering a job applicant's medical or workers' compensation history at the time of initial hire.<sup>66</sup> The explicit terms "discharge or refusal to rehire or recall" refer to present employers only. If the legislature had intended to prevent a prospective employer from evaluating a prospective employee's workers' compensation history, they could have easily included the term "refusal to hire" in the statutory proscription.<sup>67</sup> This the legislature did not do. Therefore, *Kelsay* should not have been extended to include the subsequent-employment relationship.<sup>68</sup>

64. As the dissent points out, under the reasoning of the majority, if Darnell had admitted on the employment application that she had filed a workers' compensation claim, and Impact had refused to hire her, the same public policy which the majority found to be offended would similarly be compromised because non-hiring as a form of retaliation would occur. *Darnell*, 105 Ill. 2d at 166, 473 N.E.2d at 939.

65. ILL. REV. STAT. ch. 48, § 138.4(h) (1983). See *supra* note 29 for text. The language of the statute refers to a situation concerning a threat, a discharge, or refusal to rehire or recall to active service. This does not include an employer's review of employee workers' compensation history at the time of initial hire.

66. *Id.*

67. Public policy formation is first and foremost a legislative concern. *Palmateer v. International Harvester, Co.*, 85 Ill. 2d 124, 137, 421 N.E.2d 876, 882 (1981) (Ryan, J., dissenting). The Illinois Constitution provides for separation of powers between the judiciary and the legislature. "No branch shall exercise powers properly belonging to another." ILL. CONST. art. III, § 1 (1973).

68. In *Kelsey*, the court recognized a cause of action for retaliatory discharge to prevent employers from placing employees in the position of choosing between their jobs and their remedies under the Workmen's Compensation Act. *Kelsey*, 74 Ill. 2d at 175, 384 N.E.2d at 359. In comparison, Darnell was not required to choose between her job or her exercise of her rights under the Act. *Darnell*, 105 Ill. 2d at 158, 473 N.E.2d at 935. In the post *Darnell* decision *Cook v. Optimum/Ideal Managers, Inc.*, 130 Ill. App. 3d 180, 473 N.E.2d 334 (1984), the Illinois Appellate Court refused to extend the tort of retaliatory discharge to include retaliatory termination of workers' compensation payments. The first issue the court addressed was whether a cause of action should be implied from the Illinois Workers' Compensation Act for retaliatory termination of payments by an insurance adjuster. ILL. REV. STAT. ch. 48, § 138.4(h) (1983). For text of the statute see *supra* note 31. In resolving this issue, the majority properly applied a five part test, one not used in *Darnell*, to determine whether a cause of action should be implied from legislation which does not specifically provide for it. *Cook*, 130 Ill. App. 3d at 186, 473 N.E.2d at 338. The questions include:

1. Does the violation alleged contravene the public policy of this state?
2. Are the plaintiff's within the class the statute was designed to protect?
3. Is the injury one the statute was designed to protect?
4. Is the need for civil actions under the statute clear?
5. Is there any indication that the remedies available are limited to those enumerated in the Act?

*Id.*, citing, *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379, 389, 432 N.E.2d 849 (1982); *Sherman v. Field Clinic*, 74 Ill. App. 321, 29, 392 N.E.2d 154 (1979). The court found that consideration of the first three factors tended to support implication of a cause of action. *Cook*, 130 Ill. App. 3d at 186, 473 N.E.2d at 338. However, factors

By acknowledging a cause of action against a subsequent employer who makes no attempt to interfere with an employee's exercise of her rights under the Workers' Compensation Act, the Illinois Supreme Court has arguably created a new tort of wrongful refusal to hire.<sup>69</sup> Although distinction exists between an employee who is refused employment based upon past medical history and an employee who is discharged after one day on the job because the employee falsified the medical history record on the employment application, under the *Darnell* court's reasoning the same public policy violation is present in both situations.<sup>70</sup> Thus, the decision contains an inherent contradiction because, based on *Kelsay* and the Workers' Compensation Act, the holding prohibits a prospective employer from refusing to hire an employee based upon a past medical history that includes a workers' compensation claim.<sup>71</sup> Yet, neither the *Kelsay* doctrine nor the language of the Act offer support for such a result.<sup>72</sup>

Illinois appellate court decisions have recognized the need to curb the trend of extending the tort of retaliatory discharge to a point where the complete erosion of the terminable-at-will doctrine is inevitable.<sup>73</sup> For example, in *Bryce v. Johnson & Johnson*,<sup>74</sup> the

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four and five worked against the implied cause of action. *Id.* Under four, the act itself already provided appropriate remedies and under five, there were indications that the remedies available were limited to those enumerated in the Act. *Id.* at 186-87, 473 N.E.2d at 339. In distinguishing *Kelsay*, the court noted that the employee in *Cook* was not faced with the dilemma of choosing between his job and filing a workers' compensation claim. *Id.* Accordingly, by failing to extend the application of § 138.4(h) to include insurance adjusters, the court properly follows a trend of judicial conservatism, one it failed to follow in *Darnell*.

69. Petition for Rehearing of Defendant, Impact Industries, at 1, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). Until now, there has been no common law constraint on new employee selection. In *People v. Chicago, Milwaukee, and St. Paul Ry.*, the Illinois Supreme Court stated that "[t]he relation of an employer and employee is purely voluntary . . . Every man has a . . . right to hire his services to anyone he pleases or refrain from such hiring and it is equally the right of everyone to determine whose services he will hire." 306 Ill. 486, 493, 138 N.E. 155, 158 (1923).

70. *Darnell*, 105 Ill. 2d at 166, 473 N.E.2d at 939 (Moran, J., dissenting).

71. *Id.* at 165, 473 N.E.2d at 939.

72. *Ill. Rev. Stat. ch. 48, § 134.8(h)* (1983).

73. Since this court created the tort of retaliatory discharge, it should be concerned with attempts to unduly extend *Kelsay* beyond its intended application. See *Cook v. Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, 407 N.E.2d 95 (1980); *Rozier v. St. Mary's Hospital*, 88 Ill. App. 3d 994, 411 N.E.2d 50 (1980) (limiting the scope of the retaliatory discharge tort).

The *Kelsay* dissent states:

Henceforth, no matter how indolent, insubordinate, or obnoxious an employee may be, if he has filed a compensation claim against an employer, that employer may thereafter discharge him only at the risk of being compelled to defend a suit for retaliatory discharge and unlimited punitive damages, which could severely impair or destroy the solvency of small businesses.

74 Ill. 2d at 192, 384 N.E.2d at 362 (Underwood, J., dissenting).

plaintiff-employee suffered a neck injury and filed a workers' compensation claim. Plaintiff returned to work after this injury, but a subsequent injury left him permanently disabled and precluded his return to gainful employment.<sup>75</sup> The court held that the case did not fit properly into the *Kelsay* mold because no discharge occurred and there was no evidence of interference with the employee's exercise of his rights under the Workers' Compensation Act.<sup>76</sup> The *Bryce* court stated that even assuming that Bryce was unjustly treated, interference by the defendant with Bryce's exercise of his rights under the Workers' Compensation Act was an essential factor, the absence of which precluded a cause of action under the statute.<sup>77</sup> This exception to the *Kelsay* doctrine applies with equal force to Darnell's case. *Kelsay* provides no precedential basis for *Darnell* because an employer who makes no attempt to interfere with an employee's exercise of her rights under the Workers' Compensation Act cannot violate any clearly mandated public policy.

The supreme court's interpretations of the public policy mandate that delineates the scope of the retaliatory discharge tort, have increasingly blurred the dividing line between lawful and unlawful conduct on the part of an employer.<sup>78</sup> Judicial activism is illustrated in post-*Kelsay* decisions such as *Palmateer v. International Harvester Co.*<sup>79</sup> and *Midgett v. Sackett-Chicago, Inc.*<sup>80</sup> In *Palmateer*, the court extended the tort of retaliatory discharge to provide a remedy for a judicially created public policy violation.<sup>81</sup> In *Midgett*, the court took another giant step by holding that a union employee

74. 115 Ill. App. 3d 913, 450 N.E.2d 1235 (1983).

75. *Id.* Plaintiff became permanently disabled after a subsequent injury.

76. *Id.* at 918, 450 N.E.2d at 1240.

77. *Id.*

78. In *Kelsey*, the court applied punitive damages prospectively because the case involved a novel cause of action. *Kelsay*, 74 Ill. 2d at 189, 384 N.E.2d at 361. In comparison, *Darnell* is novel because it places restrictions on an employer's hiring process, thus opening up a new area of liability. Accordingly, punitive damages should not be assessed against Impact Industries. Petition for Rehearing of Defendant, Impact Industries at 9, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

The extension of the scope of the tort of retaliatory discharge is, in effect, renewing common-law problems. Excessive jury damage awards are frequently reappearing. *Netzel v. United Parcel Service*, Ho. 81 L 2787 (Cir. Ct. Cook County, 1984) (\$200,000 jury verdict for plaintiff, alleging a *Kelsay* violation); *Bryce v. Johnson & Johnson*, 115 Ill. App. 3d 913, 450 N.E.2d 1235 (1983) (\$350,000 jury verdict struck down by the court). The *Darnell* decision can only serve to exacerbate the declining business environment in Illinois. In the end, both the employer and the employee lose. Petition of Illinois Manufacturers Association at 4, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984).

79. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

80. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984). For a commentary on judicial activism see Rishel, *Retaliatory Discharge: A Broadened Tort Through Statutory Analysis*, 1982 ILL. B.J. 454.

81. 85 Ill. 2d 124, 421 N.E.2d 876 (1981).

covered by a collective bargaining agreement could bring a separate tort action for retaliatory discharge without exhausting his contract remedies.<sup>82</sup> In *Darnell*, the court further intruded into the field of

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82. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984). See Comment, *The Common Law Contract and Tort Rights of Union Employers: What Effect After the Demise of the "At Will" Doctrine?*, 59 CHI-KENT L. REV. 1007 (1983). Furthermore, post *Darnell* decisions in Illinois indicate a trend of judicial conservatism. See *Barr v. Burnett Co.*, No. 60426 (May 1985) (discharge of an employee for exercising his right to free speech does not constitute a violation of clearly mandated public policy); *Burgess v. Chicago Sun Times*, 132 Ill. App. 3d 181, 476 N.E.2d 1284 (1985) (discharge of an employee who refuses to work after being denied a route reassignment due to an alleged armed robbery does not constitute violation of a clearly mandated public policy); *Spooner v. Armour-dial*, 131 Ill. App. 3d 929 (1985) (plaintiff's failure to exhaust grievance and arbitration procedures under a collective bargaining agreement bars any tort or bailment action where no retaliatory discharge is involved); *Cook v. Optimum/Ideal Managers Inc.*, 130 Ill. App. 3d 180, 473 N.E.2d 333 (1984) (refusal to extend tort of retaliatory discharge to include retaliatory termination of workers' compensation payments and refusal to turn over medical reports). But see *Cooley v. Swift & Co.*, 129 Ill. App. 3d 812, 473 N.E.2d 364 (1984) (collective bargaining agreement does not preclude a separate tort cause of action for retaliatory discharge); *Ella v. Industrial Personnel Corp.*, 125 Ill. App. 3d 1026, 466 N.E.2d 1054 (1984) (employee's use of a grievance procedure provided in a collective bargaining agreement will not preclude a tort action for retaliatory discharge where plaintiff did not raise the retaliatory issue in the grievance proceeding).

In *Barr v. Kelso Burnett Co.*, No. 60426 slip op. at 5 (May 1985) the Illinois Supreme Court refused to extend the tort of retaliatory discharge to include discharge activated by plaintiff-employee's exercise of his first amendment right to free speech. The court noted that plaintiff's complaint failed to allege the two components necessary to adequately plead a cause of action for retaliatory discharge. *Id.* For a discussion of the requirements necessary to plead a cause of action for retaliatory discharge see *supra* note 4. First, plaintiff failed to allege that he was discharged in retaliation for exercising his constitutional rights. *Id.* Second, the public policy mandate of the Illinois Constitution limits the right of government not the right of individuals. *Id.* Consequently, "[t]here is nothing in either the Illinois Constitution nor the Illinois Human Rights Act to mandate the inclusion of the right of free speech into those rights which are applicable to the employer-employee relationship." *Barr*, No. 60426 slip op. at 5 (May 1985).

Apparently heading the warning of the dissent in *Darnell*, the majority in *Barr* severely narrows the scope of the tort of retaliatory discharge. *Id.* In *Darnell*, Justice Moran in his dissent stated, "If the concept of at will employment is to retain any vitality, this court or the legislature must establish some boundaries." *Darnell*, 105 Ill. 2d 158, 166, 473 N.E.2d 935, 937 (1984) (Moran, J., dissenting). In comparison, the majority in *Barr* states, "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*, No. 60426 slip op. at 2-3. "The common law doctrine that an employer may discharge an employee-at-will for any reason or no reason is still the law in Illinois, except when the discharge violates a clearly mandated public policy." *Barr*, No. 60426 slip op. at 3, citing, *Palmateer v. International Harvester*, 85 Ill. 2d 124, 132-33, 421 N.E.2d 876, 878 (1981). This surge of newfound judicial conservatism contrasts sharply with the decision in *Darnell*. The *Darnell* majority expanded the tort of retaliatory discharge to include discharge by a subsequent employer. *Darnell*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). As justification for its action the court noted "that the evil resulting from the discharge of an employee for filing a workers' compensation claim against a prior employer is as great as if the discharge had been effected by the prior employer." *Id.* at 161, 473 N.E.2d at 937. In *Barr*, the court retreats from its prior position refusing to create another exception to the terminable-at-will doctrine. *Barr*, No. 60426 slip op. (May 1985). Thus, the Illinois Supreme Court clearly indicates that decisions such as *Midgett* and

employer-employee relations by virtually placing a common law constraint on new employee selection.<sup>83</sup>

This trend of judicial interference in employer-employee relations can only serve to weaken the already deteriorating terminable-at-will doctrine.<sup>84</sup> The effect of the *Darnell* decision creates a new public policy exception to this doctrine by prohibiting termination of an employee who possesses a workers' compensation history. Furthermore, an employee with a workers' compensation record may now bring suit against a subsequent employer, regardless of the amount of time that intervenes, if the employer considers the employee's medical history in making an employment or discharge decision.<sup>85</sup> This will increase the class of defendants who may be compelled to defend a suit for retaliatory discharge with unlimited punitive damages.<sup>86</sup> The cumulative result will further erode the declining business climate in Illinois.<sup>87</sup> As the dissent in *Darnell* correctly notes, the court must establish guidelines which clearly delineate the scope of the tort of retaliatory discharge; otherwise all formulation of public policy exceptions to the terminable-at-will rule should be left to the legislature.<sup>88</sup>

The Illinois Supreme Court's constant expansion of the tort of

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*Darnell* may have gone too far in delineating the outer parameters of the tort of retaliatory discharge.

83. The *Darnell* decision conflicts with two fundamental rights inherent in the employer-employee relationship: the right to know what kind of employee you are selecting and the right to freely select the most efficient and productive employees. *Darnell* also contradicts the legislative policy set out in the Illinois Human Rights Act. ILL. REV. STAT. ch. 68, § 2-104 (1983). The legislature recognizes the prerogative of employers to select employees subject only to certain statutorily prohibited acts of discrimination. *Id.* By creating a judicial precedent against excluding new employees, the *Darnell* decision fails to uphold this legislative policy.

84. Many other jurisdictions have limited the scope of the tort of retaliatory discharge. *See, e.g.,* Larabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97 (Me. 1984) (the key to determining whether a cause of action should be judicially implied from a statute is legislative intent); McKiness v. Western Union Tel., 667 S.W.2d 738 (Mo. App. 1984) (employee bringing an action for retaliatory discharge must exhaust his collective bargaining remedies before resorting to the courts for redress); Harrah's v. MGM Grand Hotel, Reno, Inc., 100 Nev. Adv. Ops. at 8, 675 P.2d 394 (1984) (*per curiam*) (retaliatory discharge by employer stemming from the filing of a workers' compensation claim by an injured employee is actionable in tort); Currey v. Lone Star Steel, Co., 676 S.W.2d 205 (Tex. App. 1984) (an oral employment contract is terminable at the will of either party and an employer is not liable for a discharge based on good reason, bad reason, or no reason at all).

85. *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 165, 473 N.E.2d 935, 939 (1984).

86. *Id.*

87. Petition of Illinois Manufacturers Association at 4, *Darnell v. Impact Industries, Inc.*, 105 Ill. 2d 158, 473 N.E.2d 935 (1984). Employment selection procedures which are standard everywhere else in the United States will now be forbidden to Illinois employers. An economic climate conducive to employers locating or remaining in Illinois is an important public policy consideration. *Id.* A hostile business climate poses an impediment to both an employer and an employee.

88. *Darnell*, 105 Ill. 2d at 166, 473 N.E.2d at 937.



retaliatory discharge will inevitably lead to the destruction of the terminable-at-will doctrine. Removing the tort from its traditional confinement of the present-employment relationship, the scope of the *Darnell* holding is too broad, going far beyond the public policy mandates embodied in the Workers' Compensation Act. The *Darnell* court lost an important opportunity to clarify the boundaries of the tort of retaliatory discharge. Rather, it opened the door to a virtually limitless extension of the tort's applicability. Instead of clarifying the rights and liabilities of the employment relationship, the court has further blurred the dividing line between lawful conduct on the part of the employer. The court must establish clear public policy guidelines for the employer to follow, or the business environment in Illinois will continue to erode and the employment-at-will doctrine will become a right of the past.

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