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Kelsay v. Motorola, Inc. : Tort Action for Retaliatory Discharge upon Filing Workmen's Compensation Claims, 12 J. Marshall J. Prac. & Proc. 659 (1979)

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KELSAY V. MOTOROLA, INC.
TORT ACTION FOR RETALIATORY DISCHARGE UPON FILING WORKMEN'S COMPENSATION CLAIMS

> This doctrine of retaliation—eye for eye, tooth for tooth—is that which has been termed the right of self-revenge: it is this right alone which many suppose a man relinquishes when he enters into a state of social life. But I trust it will be acknowledged, that, we as rational human beings, never enjoyed this right, or rather that there is no such right, in a state of nature, and of course we have it not to relinquish.[1]

The surge of the Industrial Revolution at the turn of the twentieth century burgeoned into a shower of prosperity for America and, concomitantly, an increase in industrial casualties. Subject to severe limitations,[2] the courts recognized a worker's right to sue his employer for injuries received in the course of employment. The "unholy trinity"[3] of defenses available to an employer—assumption of risk, contributory negligence and negligence of a fellow-servant—often precluded an employee's recovery.[4] This resulted in state legislators moving to adopt Workmen's Compensation Acts. Illinois approved such an act in 1911,[5] to ensure compensation to employees for their work-related injuries.[6] In exchange for a comprehensive sched-

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1. J.M. GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE 26 (1819).

2. Eason, *Workmen's Compensation—1974 What the Future Holds*, 10 ILL. L.F. 145, 146-47 (1974).

3. W. PROSSER, TORTS § 80, at 526-27 (4th ed. 1971) [hereinafter cited as PROSSER].

4. *Id. See also* Schmidt & German, *Employer Misconduct as Affecting the Exclusiveness of Workmen's Compensation*, 18 U. PITT. L. REV. 81, 81 (1956); 1 T. ANGERSTEIN, ILLINOIS WORKMEN'S COMPENSATION 1, 1 (1952) [hereinafter cited as ANGERSTEIN].

5. This Act went into effect May 1, 1912. It was repealed and replaced by another Act in 1913. Since 1913, the various amendments to the Workmen's Compensation Act have become so numerous as to preclude discussion here.

6. The Illinois Supreme Court has stated:

> 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 its individual members.

O'Brien v. Rautenbush, 10 Ill. 2d 167, 173, 139 N.E.2d 222, 226 (1956).

ule of injuries and their respective values, an employee relinquished the common law right to sue his employer in tort for his injuries.[7]

The master-servant doctrine of terminable-at-will employment was introduced in America almost contemporaneously with the adoption of the Workmen's Compensation Acts.[8] This doctrine afforded employers the absolute right to discharge their employees when the employment relationship was of no set duration. Supported by *laissez-faire* capitalism, the doctrine flourished to the extent that it was afforded constitutional protection by the United States Supreme Court.[9] Illinois adopted the terminable-at-will doctrine in 1908.[10]

Exceptions to this absolute right of discharge, however, have been carved out over the years, both on the federal[11] and

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7. Grand Truck W. Ry. v. Industrial Comm'n, 291 Ill. 167 (1920); Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 1025, 366 N.E.2d 1145, 1147 (1977); ILL. REV. STAT. ch. 48, § 138.8-145 (1977).

8. Apparently, this was the creation of a writer who cites as authority four cases, none of which supported him. H.G. Wood wrote in his 1877 treatise on the law of master and servant that:

> With us (contrary to English law) the rule is inflexible that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at a date fixed for whatever time the party may serve.

H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1877). Despite the lack of authority, courts readily adopted the doctrine. *See, e.g.*, The Pokanoket, 156 F. 241, 243-44 (4th Cir. 1907); Greer v. Arlington Mills Mfg. Co., 17 Del. 581, 582-83, 43 A. 609, 610-12 (Super. Ct. 1899); McCullough Iron Co. v. Carpenter, 67 Md. 554, 557-59, 11 A. 176, 178-79 (1887); Martin v. New York Life Ins. Co., 148 N.Y. 117, 121, 42 N.E. 416, 417 (1895). *See also* Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 485 (1976) [hereinafter cited as Summers].

9. Adair v. United States, 208 U.S. 161, 174-75 (1908), wherein the Court rationalized that "the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee." *See also* Coppage v. Kansas, 236 U.S. 1 (1915), where the Court held that employers had a constitutional right to discharge employees arbitrarily, and invalidated a Kansas statute to the contrary, as violative of the Fourteenth Amendment.

10. Brougham v. Paul, 138 Ill. App. 455, 464 (1908). *See also* Roemer v. Zurich Ins. Co., 25 Ill. App. 2d 606, 323 N.E.2d 582 (1975), holding that there is no legal remedy for an at-will employee in an action based on breach of contract even when the discharge is improperly motivated. *See also* I.L.P. Employment § 26 (1956).

11. *E.g.*, Military Selective Service Act of 1967, 50 U.S.C. § 459(b) (1970) (an employee has a statutory right to job reinstatement upon returning to civilian life); Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1970 & Supp. 1974-78); National Labor Relations Act, 29 U.S.C. § 151-68 (1970) (guarantees to employees the right to form unions and engage in collective bargaining without fear of employer retaliation).

state[12] levels. One exception to the rule is recognized when the employer discharges the employee in retaliation for certain proscribed conduct.[13] Recently, the retaliatory discharge exception has been extended to instances where an employee is discharged for filing a Workmen's Compensation claim for injuries received in the course of employment.[14]

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12. *E.g.*, Illinois Wage Payment and Collection Act, ILL. REV. STAT. ch. 48, § 39.11 (1977); Service Men's Employment Tenure Act, ILL. REV. STAT. ch. 126-1/2, § 29-35 (1977); Fair Employment Practices Act, ILL. REV. STAT. ch. 48, § 85 (1977); and Equal Opportunity for the Handicapped, ILL. REV. STAT. ch. 38, §§ 65-23, 65-25 (1977).

13. *See* notes 45-47, 54-58 and accompanying text *infra*.

14. Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977) (recognizing a cause of action, and presumably affirmed by *Kelsay*); Frampton v. Central Ind. Gas Co., 297 N.E.2d 425 (Ind. 1973) (the landmark decision in this area, recognizing for the first time in the United States that a cause of action exists for retaliatory discharge in the workmen's compensation area); Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151 (1976) (citing *Frampton* as sole support for recognizing a cause of action).

However, several earlier cases have been reported holding that no cause of action may be maintained for retaliatory discharge. The first, Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950), cited no authorities. *Raley* appears to have been decided on the basis that a complaint for discharge, in order to be actionable, must be framed in terms of breach of contract. Furthermore, the *Raley* court found no invasion of the plaintiff's legal rights. Even though she had lost her job, the plaintiff was able to successfully maintain her workmen's compensation claim. Thus, the plaintiff, as an at-will employee, was held to be subject to discharge at any time; the employer was found to have properly exercised his absolute right to discharge an at-will employee. In Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956), the Missouri Supreme Court interpreted a statute similar to that of Illinois, *see* note 25 *infra*, providing for the imposition of criminal liability upon employers who discharged employees for exercising their rights to file claims for work-related injuries. In interpreting MO. ANN. STAT. § 287.780 (1949), which provided as follows:

> [e]very employer, his director, officer or agent, who discharges or in any way discriminates against an employee for exercising any of his rights under this chapter, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than fifty nor more than five hundred dollars, or by imprisonment in the county jail for not less than one week nor more than one year, or by both such fine and imprisonment[,]

the court held that no provision was included placing an affirmative duty upon the employer. Moreover, criminal statutes which did not by clear and express terms allow for a civil action, would not be otherwise construed. Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956). Since the decision in *Christy*, however, the Missouri legislature has amended that provision so that a civil cause of action for discharge is now available. MO. ANN. STAT. § 287.780 (1979); *See also* Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977) (the *Kelsay* court refused to follow the Seventh Circuit's decision in the retaliatory discharge question); Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204 (Mo. 1961) (citing *Christy*); Texas Steel Co. v. Douglas, 553 S.W.2d 111 (Tex. Civ. App. 1976) (citing a state statute providing a cause of action).

Most recently, the Alabama Supreme Court has refused to recognize a cause of action for retaliatory discharge in the workmen's compensation area. In Martin v. Tapley, 360 So.2d 708 (Ala. 1978) the court relied only on

The Illinois Supreme Court resolved the conflict between the employer's absolute right of discharge and the employee's right to file a Workmen's Compensation claim in *Kelsay v. Motorola, Inc.*[15] This note deals with the conflict of retaliatory discharge as presented for the first time in Illinois. Should a cause of action for retaliatory discharge be recognized? If so, is such an action one in which punitive damages should be awarded, and further, should punitive damages have been awarded to the *Kelsay* plaintiff?[16]

FACTS AND PROCEDURAL HISTORY

Marilyn Kelsay, an at-will employee of Motorola, was injured in the course of her employment and filed a Workmen's Compensation claim.[17] A Motorola personnel manager informed her that the claim was unnecessary and she was asked to withdraw it. In subsequent conversations, the manager informed her of the company's policy to discharge employees who filed such claims. Upon her continued refusal to withdraw the claim, she was fired.[18] Kelsay filed a tort action against her employer for the discharge, and sought compensatory and punitive damages. The trial court granted Kelsay's motion for directed verdict as to liability for the discharge. The jury found actual damages in the amount of $1,000.00 and punitive damages in the amount of $25,000.00.[19] Motorola appealed to the Fourth District Appellate Court. That court, with one judge dissenting, re-

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Alabama precedent, and held that even in the presence of compelling public policy grounds the terminable-at-will doctrine should not be eroded. Similarly, in Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 N.E.2d 272 (1978), *cert. denied*, 246 S.E.2d 215, no cause of action was allowed. Nor was one allowed in Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510 (La. Ct. App. 1975).

15. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

16. *Id.* at 179, 384 N.E.2d at 356.

17. Brief for Appellant at 7, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The testimony of the personnel manager for Motorola indicated that his understanding of the company policy was the result of conversations with his immediate supervisors. It was an unwritten practice of Motorola to discharge an employee who failed to relinquish a claim filed for workmen's compensation benefits. The successor to that manager indicated during testimony that "the only policy of Motorola with respect to employees filing workmen's compensation claims was to take care of them." Brief for Appellant at 7, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

18. *Id.*

19. The jury was presented with a verdict form which required it to award actual damages. The option of awarding punitive damages was left to the jury, which elected to award them. The court remitted the actual damages to $745.00. Brief for Appellant at 8, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978). *See* notes 100-08 and accompanying text *infra* for discussion of damages.

versed the judgment, and held that Kelsay's complaint failed to state a cause of action.[20] Because a different panel of the same court reached a contrary result in an opinion filed on the same date,[21] the appellate court, on its own motion, issued a certificate of importance[22] to the Illinois Supreme Court.

THE DECISION OF THE ILLINOIS SUPREME COURT

In support of its decision to recognize a cause of action for retaliatory discharge, the Illinois Supreme Court relied on neither state precedent, analogies, nor statutory applications. Rather, the court proclaimed that recognition of such an action was in furtherance of the state's public policy.[23] That policy was inferred from the general purpose and function of the Workmen's Compensation Act. The court reasoned that the refusal to grant employees the right to sue their ex-employers for retaliatory discharge would undermine the Act's purpose. Without such a remedy, employees would be forced to forego exercising their statutory right to file claims in order to keep their jobs.[24] The Illinois General Assembly enacted a statute which made retaliatory discharge for filing compensation claims a criminal offense.[25] Motorola could not be subjected to that statute because it discharged Kelsay prior to the statute's effective date.[26]

In determining that a cause of action for retaliatory discharge would henceforth be recognized in Illinois, the supreme court held that compensatory damages were properly awarded

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20. Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977).

21. The opinion in Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (1977), recognizing a cause of action was filed on the same day as the appellate opinion in Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 366 N.E.2d 1141 (1977) (refusing to recognize a cause of action).

22. The Illinois Supreme Court Rule 316, titled "Appeals from Appellate Court to Supreme Court on Certificate" provides in part as follows: "Appeals from the Appellate Court shall lie to the Supreme Court upon the certification by a division of the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court. . . ." 58 Ill. 2d R. 316 (1975).

23. Kelsay v. Motorola, Inc., 74 Ill. 2d at 181, 384 N.E.2d at 357.

24. *See generally* Note, *A Right to Workmen's Compensation—Dangling of the Economic Apple?*, 6 MEM. ST. U. L. REV. 465 (1976) [hereinafter cited as *A Right to Workmen's Compensation*].

25. Kelsay was fired in 1973. Illinois enacted a criminal provision in the Workmen's Compensation Act with respect to discharges to be effective July 1, 1975:

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

ILL. REV. STAT. ch. 48, § 138.4(h) (1977).

26. *Id.*

to the plaintiff. However, the court refused to uphold the award of punitive damages in the instant case. Due to the novelty of the action, exemplary damages were to be granted only in actions subsequent to *Kelsay*.[27]

The dissent maintained that the majority's decision usurped the function of the General Assembly. Criminal sanctions had been provided. Because the General Assembly had refrained from providing a civil action, the dissent reasoned, so should the courts.[28]

BACKGROUND

History of the Terminable-At-Will Doctrine

Master and servant law reflects the kaleidoscopic change of American economic thought more explicitly than any other facet of the law. As previously mentioned, the evolution of the terminable-at-will doctrine was based upon the deeply rooted *laissez-faire* convictions of American society.[29] The late nineteenth century was a period of job abundance and labor scarcity,[30] as well as fledgling entrepreneurism and business failure.[31] In order to protect and nurture industrial expansion, the courts affirmatively chose to shield the employer's interest.[32]

Utilizing contract law, the courts justified in legal terms the decision to protect those interests.[33] Employment for an indefinite term was and is not a contract *per se*, but rather an offer for a series of unilateral contracts.[34] The "employee-offeree" accepts each unilateral offer through the performance of specified tasks.[35] Discharge by the "employer-offerer" constitutes withdrawal of a revocable offer.[36]

The employee is free to leave at will,[37] and the employer is

27. Kelsay v. Motorola, Inc., 74 Ill. 2d at 189, 384 N.E.2d at 361.

28. *Id.* at 192-93, 384 N.E.2d at 363-64.

29. *A Right to Workmen's Compensation*, *supra* note 24, at 468.

30. *Id.* at 469.

31. E. JOHNSON & H. KROSS, THE AMERICAN ECONOMY 242 (1960); T. COCHRAN & W. MILLER, THE AGE OF ENTERPRISE 136 (rev. ed. 1961). *See also* Note, *A Common Law Action for the Abusively Discharged Employee*, 26 HAST. L.J. 1435 (1975) [hereinafter cited as *A Common Law Action*].

32. *A Common Law Action*, *supra* note 31, at 1440.

33. *Id. See also A Right to Workmen's Compensation*, *supra* note 24, at 469; Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967) [hereinafter cited as Blades].

34. Blades, *supra* note 33, at 1418.

35. *Id.*

36. *Id.* at 1419.

37. As stated in an early case:

An employee is never presumed to engage his services permanently,

free to terminate the relationship as well, "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."[38] In the absence of employment contracts[39] and certain proscribed violations of public policy,[40] the terminable-at-will doctrine retains its original vitality.[41]

The Constitutional Right to Discharge and its Erosion

The United States Supreme Court elevated the absolute right of discharge to a constitutionally protected right of liberty and property, based on the due process clauses of the Fifth and Fourteenth Amendments.[42] This reflected the philosophy of the

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> thereby cutting himself off from all chances of improving his condition; indeed, in this land of opportunity it would be against public policy and the spirit of our institutions that any man should thus handicap himself; and the law will presume . . . that he did not so intend. And if the contract of employment be not binding on the employee . . . then it cannot be binding upon the employer; there would be a lack of mutuality.

Pitcher v. United Oil & Gas Syndicate, Inc., 174 La. 66, 69, 139 So. 760, 761 (1932).

38. Payne v. Western & Atl. R.R., 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134 (1915). "[T]he labor contract is not a contract, it is a continuing renewal of a contract at every successive moment, implied simply from the fact that the laborer keeps at work and the employer accepts his product." J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM 285 (1924).

39. Currently, nearly all contracts negotiated by unions provide that dismissals must be "for just cause." A RIGHT TO WORKMEN'S COMPENSATION, *supra* note 24, at 471.

40. *See* notes 14 *supra* and 56-58 *infra*.

41. *See, e.g.*, Northrop v. Kirby, 454 F. Supp. 698 (D.C. Ala. 1978) (upon termination of contract, employment is at-will); Griffith v. Electrolux Corp., 454 F. Supp. 29 (D.C. Va. 1978) (reason for terminating an oral hiring of no specified duration is immaterial; however, reasonable notice is required); Minor v. Lakeview Hospital, 434 F. Supp. 633 (E.D. Wis. 1977) (plaintiff failed to show discriminatory nature of discharge); Uriarte v. Perez-Molina, 434 F. Supp. 76 (D.C. D.C. 1977) (no cause of action for terminable-at-will employee); Bonham v. Dresser Industries, Inc., 424 F. Supp. 891 (D.C. Pa. 1976) (no cause of action under state age discrimination statute); Larsen v. Motor Supply Co., 573 P.2d 907 (Ariz. App. 1977) (termination proper for refusal to take "psychological stress evaluation tests"); DeMarco v. Publix Super Markets, Inc., 360 So. 2d 134 (Fla. 1978) (employer has constitutionally protected right to discharge at will); West v. First Nat'l Bank of Atlanta, 145 Ga. App. 808, 245 S.E.2d 46 (1978) (bank fired employee for filing bankruptcy petition); Stevenson v. ITT Harper, Inc., 51 Ill. App. 3d 568, 366 N.E.2d 103 (1977); Laird v. Eagle Iron Works, 249 N.W.2d 646 (Iowa 1977) (absolute right of discharge); Freeman v. Elbilco, Inc., 338 So. 2d 967 (La. 1977) (same); Goldstein v. Kern, 82 Mich. App. 723, 267 N.W.2d 37 (1978) (same); Stewart v. North Side Produce Co., 197 Neb. 245, 248 N.W.2d 37 (1976) (same); Grozek v. Ragu Goods, Inc., 406 N.Y.S.2d 213 (1978) (no notice required); Harless v. First Nat'l Bank in Fairmont, 246 S.E.2d 270 (W. Va. 1978) (public policy discussed).

42. Coppage v. Kansas, 236 U.S. 1 (1915); Adair v. United States, 208 U.S. 161 (1908). The *Adair* case involved a federal statute barring common carriers from discharging employees because of union membership. The Court

early 1900's: the encouragement of industrialization and maintenance of freedom of contract.[43] This era was short-lived, however.[44] In *NLRB v. Jones & Laughlin Steel Corp.*,[45] the Court upheld a provision in the Wagner Act[46] prohibiting, in effect, discharge of employees because of labor union membership.[47] The growing strength of unions and recognition of the employees' right to engage in collective bargaining[48] helped to balance the

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struck down the statute as "an arbitrary interference with the liberty of contract which no government can legally justify in a free land." 208 U.S. at 175. Moreover the Court announced in *Adair* that:

> It is a part of every man's civil right that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress.

Adair v. United States, 208 U.S. at 173, (*quoting* T. COOLEY, LAW OF TORTS 278 (1880)).

The Kansas anti-yellow-dog statute, which was struck by the *Coppage* Court as an unconstitutional deprivation of the employer's property right to "hire and fire", made it a criminal offense for employers to influence, coerce or require employees not to join labor organizations. The Court declared with respect to the inequalities of employer and employee that:

> [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.

Coppage v. Kansas, 236 U.S. at 17. *See also* Rodes, *Due Process and Social Legislation in the Supreme Court—A Post Mortem*, 33 NOTRE DAME LAW. 5 (1957).

43. The philosophy prevalent in the early twentieth century regarding freedom of contract is succinctly stated in the early case of Payne v. Western & Atl. R.R., 81 Tenn. 507, 518 (1884): "May I not refuse to trade with anyone? May I not forbid my family to trade with anyone? May I not dismiss my domestic servant for dealing, or even visiting, where I forbid? And if my domestic, why not my farmhand, or my mechanic, or teamster?"

44. *See, e.g.*, Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536 (1949); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (both impliedly overruling *Adair* and *Coppage*).

45. 301 U.S. 1 (1937).

46. National Labor Relations Act, 29 U.S.C. § 151-68 (1970 & Supp. IV 1974).

47. The National Labor Relations Act, 29 U.S.C. § 157 (1970) provides that:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized. . . .

48. *Id. See also* 29 U.S.C. §§ 158(a)(1), (a)(3) (1970).

respective bargaining powers of employers and employees,[49] and erode the employers' right to discharge.[50]

The Supreme Court, noting that problems still faced employees,[51] extended an invitation to state legislators to end arbitrary employment practices. The Court declared that states have the power to legislate against injurious practices in internal business and commercial areas, so long as those laws do not circumvent federal guidelines.[52] States, therefore, were primarily responsible for combating arbitrary discharge practices.[53]

State legislatures accepted the Supreme Court's invitation by prohibiting discharges based on color, religion, national origin, sex, physical handicaps and political affiliations.[54] Additionally, the state courts assumed the task of further restricting employers' discharge policies.[55] Applying concepts of public

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49. In fact, Justice Day's dissent in *Coppage* predicted the change in American philosophy with respect to the rights of the employee:

> I think the act now under consideration, and kindred ones, are intended to promote the same liberty of action for the employe (*sic*), as the employer confessedly enjoys. The law should be as zealous to protect the constitutional liberty of the employe as it is to guard that of the employer. A principal object of this statute is to protect the liberty of the citizen to make such lawful affiliation as he may desire with organizations of his choice. It should not be necessary to the protection of the liberty of one citizen that the same right in another citizen be abridged or destroyed.

Coppage v. Kansas, 236 U.S. at 40. *Cf.* 236 U.S. at 17 (majority opinion): "No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances . . . ."

50. [U]nionization provides no protection for the individual employed in a business where the employer has successfully resisted organizing attempts. Second, unions are concerned with the interests of the collective body, often at the expense of the individual employee who feels that he has been wrongfully discharged. Because the union usually maintains exclusive control over the right to utilize the grievance-arbitration machinery, a decision to sacrifice the individual's interests in return for a larger benefit for the majority may lawfully strip the employee of job protection. Finally, the argument overlooks the fact that many employees prefer not to be represented by labor unions. For these individuals, it is no solution to insist that they join labor unions in order to obtain basic protection against abusive discharge.

A Common Law Action, *supra* note 31, at 1443-44.

51. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949) (those employees not protected by unions require other protective devices). *See* note 50 *supra*.

52. Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 536-37 (1949).

53. *Id.*

54. For Illinois legislation, *see* note 12 *supra*. *See also* ALASKA STAT. § 18.80.220 (1977); CAL. LAB. CODE § 1420(a) (West Supp. 1978); MASS. ANN. LAWS. ch. 149, § 24K (Supp. 1978); MINN. STAT. ANN. § 363.03(2) (Supp. 1977); OHIO REV. CODE ANN. § 4.12.02(A) (Page 1978); R.I. GEN. LAWS. ANN. § 28-5-7 (Supp. 1977); WASH. REV. CODE ANN. § 49.60.180 (Supp. 1977).

55. *See generally* Summers, *Individual Protection Against Unjust Dis-*

policy, the courts granted relief to at-will employees discharged for refusing to commit perjury before a legislative committee,[56] rejecting a foreman's sexual advances,[57] and filing Workmen's Compensation claims.[58]

THE KELSAY OPINION

Propriety of Precedent

In *Kelsay v. Motorola, Inc.*,[59] the Illinois Supreme Court granted relief to a plaintiff who was discharged solely for having filed a Workmen's Compensation claim.

The court cited two cases as authority conforming with the public policy expressed in the Illinois Workmen's Compensation Act.[60] The first case, *Frampton v. Central Indiana Gas Co.*,[61] was founded upon two policy grounds: an Indiana statute prohibiting the use of any device to relieve the employer of his obligations to injured employees,[62] and an analogy between retaliatory discharge and retaliatory eviction in landlord-tenant law.[63] The fear of retaliation for reporting violations of housing codes inhibits such reporting, and is analogous to the fear of retaliatory discharge for filing a compensation claim.[64]

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missal: Time for a Statute, 62 VA. L. REV. 481 (1976). *See also* Blades, *supra* note 33.

56. Petermann v. Teamster Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959). *Cf.* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (jury duty service proper grounds for discharge).

57. Monge v. Beebe Rubber Co., 316 A.2d 549 (N.H. 1974). *See generally A Right to Workmen's Compensation*, *supra* note 24, at 478; *A Common Law Action*, *supra* note 31 (comment on *Monge*). *See also* Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (refusal to sell unsafe pressure pipe); Roemer v. Zurich Ins. Co., 25 Ill. App. 3d 606, 323 N.E.2d 582 (1975) (secretary falsely accused plaintiff of making sexual advances); Annot., 62 A.L.R.3d 271 (1975).

58. *See* Annot., 63 A.L.R.3d 978 (1975).

59. 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

60. *Id.* at 182, 384 N.E.2d at 357.

61. 297 N.E.2d 425 (Ind. 1973).

62. *Id.* at 427-28. IND. CODE § 22-3-2-15 (1971) provides that: "No contract or agreement, written or implied, no rule, regulation *or other device* shall, in any manner, operate to relieve any employer in whole or in part of any obligation created by this Act" (emphasis added).

63. Although at the time of the *Frampton* decision, Indiana did not as yet recognize the tort of retaliatory eviction, the court cited several other jurisdictions in support of its analogy, including Edwards v. Habib, 397 F.2d 687 (D.C. Cir. 1968); Schweiger v. Superior Court, 3 Cal. 3d 507, 90 Cal. Rptr. 729 (1970); Portnoy v. Hill, 57 Misc. 2d 1097, 294 N.Y.S.2d 278 (1968).

64. Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 429 (Ind. 1973). The *Frampton* court announced the public policy as follows: "[I]n order for the goals of the [Workmen's Compensation] Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal." Frampton v. Central Ind. Gas Co., 297 N.E.2d 425, 427 (Ind. 1973).

The *Kelsay* court disagreed with Motorola's argument that *Frampton* was distinguishable because of the Indiana statute. Presumably, the *Kelsay* majority relied on the subsequently enacted criminal provision for retaliatory discharge as support for public policy.[65] *Kelsay* made no mention of the retaliatory eviction analogy, although an Illinois statute existed declaring retaliatory evictions violative of public policy.[66] Instead, the court maintained that the overriding principle of Indiana's public policy applied equally to injured employees in Illinois.[67]

The second case cited by *Kelsay* was *Sventko v. Kroger Company*,[68] wherein a Michigan court also used public policy as the basis for recognizing retaliatory discharge.[69] That state's legislature had not included prohibitions against discharge in its Workmen's Compensation Act.[70] Instead, *Sventko* relied on *Frampton* for recognition of the expansion of public policy in the workmen's compensation area.

The fallacy of *Kelsay's* reliance on *Frampton* and *Sventko* is in its "snowball" effect. While the *Frampton* court in part justified its recognition of retaliatory discharge by the language of its state statute, the *Sventko* court relied not on a statute but rather on the *Frampton* opinion. In turn, *Kelsay's* reliance on these decisions snowballed. While the *Kelsay* court may have felt justified in relying on those cases, in reality it did no more than approve of the Indiana statute.

The *Kelsay* dissent maintained that the majority's opinion constituted judicial legislation,[71] finding support in *Loucks v. Star City Glass Company*.[72] The *Loucks* case presented the question of whether Illinois should recognize an action for retaliatory discharge in the workmen's compensation area. The Seventh Circuit held on appeal that in the absence of legislative action it would not recognize such an action,[73] and that the

65. Kelsay v. Motorola, Inc., 74 Ill. 2d at 185, 384 N.E.2d at 358-59.

66. The Illinois legislature has enacted a retaliatory eviction statute: ILL. REV. STAT. ch. 80, § 71 (1977).

"Retaliatory eviction is the forced ejectment of a tenant in response to the tenant's complaint to a governmental authority of a housing code of similar regulatory violation." *See* Note, *Retaliatory Eviction: The Unsolved Problem—Clore v. Fredman*, 25 DEPAUL L. REV. 522 n.1 (1976).

67. Kelsay v. Motorola, Inc., 74 Ill. 2d at 184, 384 N.E.2d at 358.

68. 69 Mich. App. 644, 245 N.W.2d 151 (1976).

69. *Id.*

70. *Id.*

71. Kelsay v. Motorola, Inc., at 74 Ill. 2d at 193, 384 N.E.2d at 362-63.

72. 551 F.2d 745 (7th Cir. 1977).

73. *Id.* at 749.

proper functions of a court did not include legislative activism.[74]

The *Kelsay* majority dismissed this deliberate refusal of the *Loucks* court to engage in legislation.[75] In contrast, the *Kelsay* dissent stressed the significance of the 1975 amendment to the Workmen's Compensation Act, which made it a criminal offense for an employer to threaten or effect a discharge in retaliation for a claim. The dissent reasoned that the legislature intended the criminal sanctions to constitute a sufficient deterrent. Had a civil remedy been considered necessary, the legislature would have incorporated such a provision.[76]

The General Assembly's enactment of a criminal statute regarding retaliatory discharges is significant in that the legislature has recognized its function of providing such sanctions. Pragmatically, however, further legislative reform in the form of a civil remedy is unlikely. An excellent example of a similarly impotent statute is the Illinois retaliatory eviction statute[77] declaring such evictions to be against public policy. That statute has been characterized as "toothless."[78] The same may be said of the criminal provision for retaliatory discharge. Although the statute provides for a maximum fine of $500.00,[79] it cannot logically be said that the threatened payment of such a sum is a

74. *Id. See, e.g.*, Steinberg, *The Federal Employers' Liability Act and Judicial Activism: Policymaking by the Courts*, 12 WILLAMETTE L.J. 79 (1975).

75. It is interesting to note that the Seventh Circuit in *Loucks* just as readily refused to abstain, pending determination of whether the cause of action should be recognized in Illinois by that state's highest court. Although the Seventh Circuit was aware of the *Kelsay* trial court verdict in favor of the plaintiff, it decided not to await final determination by a state tribunal. Loucks v. Star City Glass Co., 551 F.2d 745, 746 n.1 (1977).

76. Kelsay v. Motorola, Inc., 74 Ill. 2d at 193, 384 N.E.2d at 362. The Illinois Constitution clearly provides for separation of powers: "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." ILL. CONST. art. II, § 1 (1970).

77. ILL. REV. STAT. ch. 80, § 71 (1977).

78. MODEL RESIDENTIAL LANDLORD—TENANT CODE 70 (1969), *cited in* Note, *Retaliatory Eviction: The Unsolved Problem—Clore v. Fredman*, 25 DEPAUL L. REV. 522, 529 (1976).

79. *See* ILL. REV. STAT. ch. 48, § 138.26 (1977) and ILL. REV. STAT. ch. 38, § 1005-1-17 (1977). The criminal sanctions provided by the General Assembly are "toothless" for several reasons. In order for anyone to become aware of an employer's violation—threat of discharge, for example—the employee would have to make public the threat. If the employee had preferred to keep the job, he would certainly remain silent, rather than report the violation.

Moreover, the Attorney General's and State's Attorneys' offices of Illinois enforce these provisions only upon the request of the Industrial Commission. Thus, an employee wrongfully discharged would first have to report to the Commission and convince the Commission to persuade the Attorney General or State's Attorney to act against the employer. The cumulative effect of these efforts is a $500.00 fine imposed on the employer. Brief for Amicus Curiae at 10, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

sufficient deterrent to any large, financially stable employer who intends to discharge his employees. Thus, the criminal provision for retaliatory discharge is without potency or force. Furthermore, the criminal sanction enriches the state. Civil sanctions, however, compensate the plaintiff for damages suffered. The *Kelsay* majority recognized this distinction and independently added "teeth" to the criminal provisions.[80]

The *Kelsay* dissent is implicitly supported by a decision it did not cite. In *Martin v. Tapley*,[81] the Alabama Supreme Court recently refused to circumvent the terminable-at-will doctrine. *Martin* involved a retaliatory discharge action wherein the plaintiff alleged that his discharge was the result of having filed a compensation claim. This case supports the *Kelsay* dissent in that the Alabama court declined to expand the application of that state's compensation act, even on public policy grounds.[82]

Public Policy and Workmen's Compensation

In light of the origin of the terminable-at-will doctrine, the decision of the *Kelsay* court to carve out an exception in the workmen's compensation area is clearly justifiable. As previously mentioned, the doctrine originated in the courts.[83] Therefore, the courts should be fully entitled to erode the doctrine or abrogate it entirely. Additionally, the doctrine arose because of the economic conditions and concomitant public policy of the early twentieth century. As economic conditions have changed,

80. The court had refused to give "teeth" to an age discrimination suit, brought on the basis of the Age Discrimination Act, which in pertinent part provides that "[t]he right to employment otherwise lawful without discrimination because of age, where the reasonable demands of the position do not require such an age distinction, is hereby recognized as and declared to be a right of all the people of the State *which shall be protected as provided herein.*" ILL. REV. STAT. ch. 48, § 881(c) (1977) (emphasis added). Teale v. Sears, Roebuck & Co., 66 Ill. 2d 1, 359 N.E.2d 473 (1976).

The Illinois Workmen's Compensation exclusivity provision states that: "The compensation herein provided, together with the provision of this Act shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated. . . ." ILL. REV. STAT. ch. 48, § 138.11 (1977).

However, the Workmen's Compensation Act provides for a right, separate and independent of the job itself. That is, while the Workmen's Compensation Act involves primarily compensation for work-related injuries, the Age Discrimination Act involves merely ages, and discrimination on the job as a result of age. In this respect, *Teale* and *Kelsay* are distinguishable. Workmen's compensation is a separate and distinct right, statutorily imposed on the employer as a liability, and guaranteed to the employees. Age is not a separate and distinct "right" in terms of statutory protection.

81. 360 So. 2d 708 (Ala. 1978).

82. *Id.*

83. *See* notes 8-10 *supra*. *See also* notes 29-41 and accompanying text *supra*.

so have social policies.[84]

Social change involves identification of a problem and an attempt to resolve that problem.[85] Public policy is the legal instrument for recognizing social change.[86] Thus, the use of public policy by the *Kelsay* court was necessary to implement this exception to the terminable-at-will doctrine. When society has changed its approach to a problem, the law, by definition, has no precedent for recognizing and adopting the change in values. The use of public policy, therefore, is needed to permit legal precedent to be made and justified.

The *Kelsay* court condemned retaliatory discharge as offensive to the public policy of Illinois as stated in the Workmen's Compensation Act.[87] It characterized the Act as having the hu-

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84. Friedman and Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 51 (1967).

85. *Id.*

86. *Id.*

87. In a similar vein, the Illinois Supreme Court has acknowledged that courts recognize change in society's values without the benefit of legal precedent. Justice Dooley, in his concurring opinion in the recent case of *Renslow v. Mennonite Hospital* aptly stated: "Obviously, the courts create law. If it were otherwise the common law would be out of touch with life as is a corpse. Courts must take an active part in the development of common law, although this may mean creativeness." 67 Ill. 2d 348, 361, 367 N.E.2d 1250, 1257 (1977) (cited in Brief for Appellant at 16, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978)). *See* Note, *Renslow v. Mennonite Hospital: Prenatal Injuries and A Pre-Existence Duty*, 10 J. MAR. J. 417 (1977).

The plaintiff, while before the Illinois Supreme Court, relied heavily on the argument of public policy. In characterizing the retaliatory discharge action as one sounding in tort, the brief expanded its discussion to other areas of law where the master-servant relationship did not bar suit by the latter against the former: *i.e.* libel, slander, etc. Further arguments were presented stressing the independent nature of the retaliatory discharge cause of action, and in support of recognition thereof, the Brief for Appellant cited at page 3 the case of *Marchlik v. Cornet Ins. Co.*, 40 Ill. 2d 327, 332, 239 N.E.2d 799, 802 (1968); "Public policy has been defined as judicial decisions, legislation, and constitutions, as well as customs, morals, and notions of justice which may prevail within the state."

The *Kelsay* court implicitly determined that it, as the Supreme Court of Illinois, was the only route of recourse left available to the employees. In fact, it is commendable that the General Assembly has acted at all. No strong lobby supports the employees effectively. Employees lack cohesiveness, apart from union activities, in their attempts to influence the General Assembly, because of the diverse nature of their employments and demands. Finally, strong interest groups do exist which would predictably oppose further, more potent legislation. Therefore, the close and yet impartial contact the courts maintain with society and its changing demands does lend support to judicial innovation.

See generally Blades, *supra* note 33, at 1433-35, and authorities cited therein. *Cf.* Summers, *supra* note 8.

It is interesting to note that the Illinois Supreme Court has historically been very protective of the Workmen's Compensation Act. At the same time, it has been loath to restrict its applicability; in fact, the court has been known to expand the Act, with some startling results. For illustration, the

mane and beneficial purpose of providing employees with a remedy for work-related injuries.[88] To permit employers to force employees to choose between their jobs and compensation for injuries, the court reasoned, is untenable and contrary to the public policy expressed in the Act.[89]

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case of *Allen-Garcia Co. v. Industrial Comm'n*, 334 Ill. 390, 166 N.E. 78 (1929), first introduced the doctrine of the loaned servant in the workmen's compensation area. Although the Act at the time did not include a provision regarding the status of these workers' claims, the court interpreted the then-existing statute so as to provide coverage for the loaned servant. Thereafter, *Allen-Garcia* met with state-wide disapproval, yet courts cited it as support on numerous occasions. The doctrine resulted in more litigation, as the opinion in *Allen-Garcia* made it unclear which employer was liable to pay compensation in the event of an injury.

The startling result of this case is that the General Assembly eventually adopted the court's initiative portrayed in *Allen-Garcia*, and in 1963, enacted an amendment to the Workmen's Compensation Act which provided for the loaned-servant. *See* ILL. REV. STAT. ch. 48, § 138.1(b)(2) (1977), which includes as covered those employees not in the usual course of their employment, but there at the lawful direction or instruction of their employers. *See also* ILL. REV. STAT. ch. 48, § 138.1(a)(4) (1977) (borrowing employer is primarily liable).

For other early examples of judicial activism in the employment area, *see* Union Asbestos & Rubber Co. v. Industrial Comm'n., 415 Ill. 367, 114 N.E.2d 345 (1953); Franklin County Coal Corp. v. Industrial Comm'n, 398 Ill. 528, 76 N.E.2d 457 (1947).

88. As said by dissenting Chief Justice T.E. Brennan in Whetro v. Awkerman, 383 Mich. 235, 249, 174 N.W.2d 783, 787 (1970):

> The function of the Workmen's Compensation Act is to place the financial burden of industrial injuries upon the industries themselves, and spread that cost ultimately among the consumers.
>
> This humane legislation was developed because the industrialization had left in its wake a trail of broken bodies.
>
> Employers were absolved from general liability for negligence in exchange for the imposition of more certain liability under the Act.

See also Fisher Body Div., Gen. Motors Corp. v. Industrial Comm'n, 40 Ill. 2d 514, 240 N.E.2d 694 (1968) (purpose of Act is to protect employees against risks and hazards peculiar to nature of work they are employed to do); O'Brien v. Rautenbush, 10 Ill. 2d 167, 139 N.E.2d 222 (1956) (burden of caring for casualties of industry should be borne by the industry, not the individual); Shell Oil Co. v. Industrial Comm'n, 2 Ill. 2d 590, 119 N.E.2d 224 (1954) (same).

89. The court in *Kelsay* was obviously concerned about the coercion employed by Motorola. It is relatively simple to envision the scenarios the decision was intended to prohibit: An employee P, of a low-income bracket, is injured while working at employer D's facility. P files the compensation claim, and D's management orders P to drop the claim, or face the risk of being fired. P may then either: 1) do as ordered, and drop the claim, or 2) refuse, and consequently, lose the job. In the first situation, D has effectively saved the expenses normally involved in litigation before the Industrial Commission. D might pay a small sum to P for placating purposes, or might not. In any event, D has effectively avoided the statutory liability imposed, in contravention of the public policy embodied in the compensation act.

In the second situation—that involved in *Kelsay*—while the employer is not successful in avoiding liability for the injury to the employee, he nevertheless gets revenge. Moreover, it is likely the employer persists in hop-

The policy embodied in the Act recognizes that over the

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ing that threats of discharge will have the results described in the first situation, up until the moment when discharge actually occurs. Finally, it is probable that many employees, faced with the choice of a job lost, or payment of several thousand dollars worth of medical bills, would prefer the latter. That "choice" for the employee contravenes the underlying purpose of the Workmen's Compensation Act.

There is no recorded documentation available as to whether retaliatory discharge for filing compensation claims is a general practice among employers. With the *Kelsay* decision, of course, no Illinois employer will admit to such practices in the future. It is possible to assume that retaliatory discharge in this situation is not common. The novelty of this action in the United States lends credence to this assumption; with *Kelsay*, only ten state cases have discussed this precise issue. *See* note 14 *supra*.

However, the very scarcity of decisions favorable to the employees in this specific area equally supports the converse proposition. As a practical matter, before *Kelsay*, the state of the law regarding the traditional terminable-at-will employment relationship and Workmen's Compensation was insurmountable. Those employees most commonly filing compensation claims are blue collar workers; they are most frequently in contact with industrial areas and machinery, most commonly leading to on-the-job injury. They are of limited financial means, ordinarily. Attorneys' fees are prohibitive, and more importantly, the attorneys themselves for the most part would prefer sure collection of fees to the non-pecuniary award of a difficult battle perhaps lost.

According to the docket books of the Illinois Industrial Commission, the number of filed cases (cases in which disputes have arisen, by definition (ILL. REV. STAT. ch. 48, § 138.19 (1977)) are as follows:

1950	15,168
1955	21,037
1960	25,218
1965	29,256
1970	34,699
1971	34,663
1972	34,624
1973	38,846
1974	40,290
1975	40,117
1976	48,189
1977	57,484

The above figures are reprinted in Stevenson, *The Illinois Workmen's Compensation System: A Description and Critique*, 27 DE PAUL L. REV. 675, 678 (1978) [hereinafter cited as Stevenson]. Mr. Stevenson hypothesizes that the increase of persons employed in Illinois over these years does not account for the increase in disputed claims. Rather, it is his belief that the factors causing the marked increase are: 1) increased awareness of legal rights, 2) increased activity on the part of unions, lawyers, doctors or others, and 3) increased benefits. A *caveat* must be made with respect to the second factor, however. The extent of union activity in the workmen's compensation area is, in Stevenson's words, "little more than a lawyer referral service. Frequently, the union fills out the application and the attorney never meets his client until the day of the hearing." *Id.* at 680. *See also* Parrish, *Workmen's Compensation Law in Illinois: Some Economic Consequences of Recent Changes*, 27 DE PAUL L. REV. 715 (1978) [hereinafter cited as Parrish]. As a result of the 1975 amendments to the Act, Illinois benefits are now the highest of the fifty states in nearly all categories. A survey conducted in 1977 of the 8,000 members of the Illinois Manufacturers' Association resulted in about 700 respondents, with the following results. Their

years, society has altered its hierarchy of values.[90] Industrialization and the safeguarding of the employer's interests, once paramount in importance to society, has given way to individualism and protection of employees. Accordingly, public policy is a proper vehicle for creating this exception to the terminable-at-will doctrine. The exception protects the integrity of the workmen's compensation laws.[91]

Retaliatory Discharge as a Tort

The *Kelsay* majority characterized the retaliatory discharge exception as a tort.[92] A distinction was made between liability under the Workmen's Compensation Act and liability for this tort. The Act compensates employees for physical work-related injuries. The tort action, however, imposes liability on the employer for a retaliatory discharge and provides compensation to the employee for lost wages.[93] The court did not characterize the type of tort action recognized.

Analogies have been drawn between retaliatory discharge and abuse of process[94] as well as prima facie tort.[95] The tort of

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responses show that workmen's compensation costs rose from $34 million in 1974 to nearly $156 million in 1977. That is an increase of 357% in three years. *Id.* at 722.

90. *Compare* notes 29-43 *with* 54-58 and accompanying text *supra.*

91. *See* note 89 *supra.*

92. It can be said that the characterization of retaliatory discharge as a tort is a landmark in itself. Neither *Frampton* nor *Sventko* determined what type of action retaliatory discharge was. *But see* Aikens v. Wisconsin, 195 U.S. 194 (1904) (discussion of prima facie intentional infliction of temporal damages); Nees v. Hocks, 536 P.2d 511 (Ore. 1975) (tort action recognized for discharge because of service of jury duty); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 NW. U. L. REV. 563 (1959) [hereinafter cited as Brown].

The *Kelsay* case was for the purpose of non-comittalism, an excellent vehicle for creating a cause of action for retaliatory discharge. As previously stated, it was clear that the sole reason for Kelsay's discharge was retaliation for filing the claim. *See* note 17 and accompanying text *supra.* The Illinois Supreme Court was thus able to leave to lower courts in future decisions the further development of this tort.

93. Kelsay v. Motorola, Inc., 74 Ill. 2d at 183, 384 N.E.2d at 360.

As previously noted, only two state courts had recognized a civil action for retaliatory discharge in the workmen's compensation area at the time of the *Kelsay* decision. This action was indeed novel. Its resolution in favor of the plaintiff was even more remarkable. Compare, however, the statement of Professor Larson, who presumably had in mind the history of the terminable-at-will doctrine, and more importantly, its erosion: "It is odd that such a decision was so long in coming." 2 A.A. LARSON, WORKMEN'S COMPENSATION § 68.36 (Supp. 1978).

94. *See* PROSSER, *supra* note 3, at 856; Blades, *supra* note 33, at 1423.

95. Blades, *supra* note 33, at 1422-23. *See* Brown, *supra* note 92; Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894). The classic language used to express the concept of prima facie tort is as follows: "Now intentionally to do that which is calculated in the ordinary course of events to

retaliatory discharge in the workmen's compensation area, however, is unique. The discharged employee seeks to exercise his rights under the Workmen's Compensation Act by filing a claim. The right to pursue that claim, an element not present in other retaliatory discharge cases, can be characterized as a legally protected property interest.[96] Retaliatory discharge can thus be described as an intentional interference with a legally protected property interest.[97] The interference applies to the duress exer-

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damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse." Mogul Steamship Co. v. McGregor, Gow & Co., 23 Q.B.D. 598, 613 (C.A. 1889). In fact, the *Kelsay* plaintiff stated:

> The employee does not ask this court to establish a new tort category labeled prima facie tort, but rather requests this court to join a unified national trend of authority that has recognized that a remedy should lie for situations where the plaintiff suffers harm which the community would conclude should be compensated because of the conduct of the defendant.

Brief for Appellant at 9, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

Other theories of retaliatory discharge characterization have been propounded as well. The most notable is the tort of interference with contractual relations. Although it was once normally applied to the liability of labor unions in calling strikes, such theory has largely been abrogated by statute. PROSSER, *supra* note 3, at 946-47. Such theory is not readily applicable to the terminable-at-will employee discharged for filing a compensation claim, precisely because that employee has no contract with his employer, and no right to the job.

Compare, however, the view that an employee has a legally protected right to his job. This assumption leads to the approach that the burden is on the employer, not the discharged employee, to prove by a preponderance of the evidence that the employee should be deprived of his job rights. Concomitantly, the employee's most valuable asset is his job. This approach has been espoused by several writers. *E.g.*, E. GINGBERG & I. BERG, DEMOCRATIC VALUES AND THE RIGHTS OF MANAGEMENT ch. 11 (1963); Summers, *supra* note 8.

It has been said that:

> There was a time when a worker's job was a thing of the hour; he could be hired or fired at will, and his only right was to be paid for the hour he worked. Today, the job has become a thing of value. . . . [T]he worker has come to have what might be called a property right in his job. His wages and benefits generally accrue with seniority, which increases the value of his job as time goes on. . . . Like any other property holder in our free, democratic society, he cannot be deprived of his rights except by due process.

Braden, *From Conflict to Cooperation*, in PROCEEDINGS TO THE SIXTH ANNUAL LABOR RELATIONS CONFERENCE 43 (Inst. of Indus. Rel., W. Va. Univ., 1956).

96. *See* notes 2-10 and accompanying text *supra*, regarding the exchange of rights and liabilities as the result of the Workmen's Compensation Act.

97. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 871, at 61 (Tent. Draft No. 22, 1976). One who intentionally deprives another of his legally protected property interest or causes injury to the interest is therefore subject to liability to the other if his conduct is culpable and not justifiable. Although this tort is phrased as one of "deprivation," the comments to

cised by the employer in forcing the employee to choose between his job and the compensation claim.[98]

Notwithstanding the novelty of this tort, certain circumstances should guarantee to future plaintiffs a cause of action. These can be enumerated as follows: an employer-employee relationship, injury to the employee in the course of employment, compensation claim filed by the employee, threat of discharge by employer for employee's refusal to withdraw claim, refusal by employee to withdraw claim, discharge of employee and damages (lost wages).[99]

Damages for Retaliatory Discharge

Compensatory Damages

The Illinois Supreme Court affirmed the trial court's award of $749.00 compensatory damages.[100] This amount represented the wages that Kelsay would have earned from the time she was fired until the time she found a new job.[101] In affirming the award, the court implicitly recognized that it was incumbent upon a discharged employee to seek other employment in mitigation of damages.[102]

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it cover invasion as well. Such a tort would cover the acts of the employer, whether tney result in a fired employee, or an employee minus the compensation act benefits. The American Law Institute characterizes this tort as one covering a wide range of the general tort principles.

98. Duress, as defined by the American Law Institute, is a threat of unlawful conduct which is intended to prevent and which does prevent another from exercising free will and judgment in his conduct. Courts originally restricted the use of duress to imprisonments, mayhem, fear of loss of life, etc. These boundaries have been gradually relaxed. *Id.* at 66.

Acts or threats can be considered to be duress only if they are unlawful. That element of the tort is satisfied by the Illinois criminal provision for retaliatory discharge. ILL. REV. STAT. ch. 38, § 1005-1-17 (1977).

This characterization is tenuous, however. First, "interference" suggests that mere threat of discharge would be sufficient. Although *Kelsay* involved a discharge, language in the majority's opinion suggests that threats alone would suffice.

Second, the compensation claim can be characterized as a mere expectancy of monetary relief, rather than a property interest. This problem can be reconciled by the fact that an injured worker's sole recourse against his employee for work-related injuries is the right to file the claim. More properly, then, the "property interest" element is that right to pursue the claim, and not necessarily the right to receive the amounts claimed.

99. However, to tenuously list the elements of the tort is to do no more than restate the facts. In light of the difficulty in characterizing the tort itself, it is no wonder that the *Kelsay* court refrained from enumerating the elements of this elusive tort action. *See* notes 94-98 *supra.*

100. Kelsay v. Motorola, Inc., 74 Ill. 2d at 190, 384 N.E.2d at 361.

101. *Id.* at 178; 384 N.E.2d at 355.

102. In Hill v. Bell Discount Corp., 39 Ill. App. 2d 426, 188 N.E.2d 517 (1963), the plaintiff was discharged in July, 1959 from his employment as a tractor operator due to the defendant's unlawful use of wage assignment.

However, discharge in the workmen's compensation area is unique in that the plaintiff has suffered a physical injury prior to the discharge. That injury may interfere with the plaintiff's ability to seek other employment, especially when the injury is of a serious nature. The courts will have to consider the extent of injury in the issue of mitigation. Obviously, if the plaintiff is incapacitated for a period of time, the plaintiff cannot be expected to seek other employment.

Punitive Damages

The court conceded that punitive damages are generally not recoverable for wrongful discharge. Actions for discharge based on a theory of breach of contract do not give rise to claims for punitive damages.[103] The court distinguished its decision to allow punitive damages for cases subsequent to *Kelsay* by stressing that retaliatory discharge is a tort action.[104] Characterization of retaliatory discharge as a tort is significant because it affords plaintiffs the opportunity to seek punitive damages.[105]

The purpose of awarding punitive damages in Illinois is twofold: to punish and to deter.[106] That same purpose is also the basis of criminal punishment. Therefore, the *Kelsay* court implicitly determined that the criminal provision in the Workmen's Compensation Act,[107] standing alone, was insufficient, and added the element of punitive damages as further deterrent. In the instant case, the defendant had no warning of the impropriety in firing Kelsay. Consequently, the court refused to impose punitive damages for an act previously considered rightful.[108]

He remained unemployed until January, 1962. The court found that the plaintiff made insufficient efforts during that period to seek other employment, and that he was under a duty to minimize his damages. *See* Annot., 44 A.L.R.3d 629 (1972).

103. *See generally* notes 32-41 and accompanying text *supra.*

104. *See, e.g.*, Raley v. Darling Shop of Greenville, Inc., 216 S.C. 536, 59 S.E.2d 148 (1950) (court held that no cause of action was stated, because plaintiff did not allege breach of contract as grounds for the discharge).

105. McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571, 572 (1978) [hereinafter cited as McKillip]; C. MCCORMICK, DAMAGES (1935).

106. *See generally* McKillip, *supra* note 105.

107. The court did not consider the maxim: *Inclusio unius est exclusio alterius.* ILL. REV. STAT. ch. 48, § 138.4(h) (1975); ILL. REV. STAT. ch. 38, § 1005-9-1(4) (1975).

108. As grounds for inferring that a civil action may exist for a violation of a criminal statute, the court cited the case of Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955). *Heimgaertner* involved a criminal statute for withholding wages of employees who left work to vote. There, the court announced that a violation of a statute may result in civil as well as criminal liability, even though the former is not specifically men-

IMPLICATIONS AND RAMIFICATIONS

It was clear in *Kelsay* that the employer's sole motive was retaliation. Evidence had been admitted that Kelsay was a good worker, with no complaints about the quality of her work.[109] However, future cases may not be so manifestly retaliatory. Thus, the problem will be whether retaliation must be shown to be the sole motive in discharge, or whether lesser standards shall suffice, such as dominant, mixed or even partial motive.[110]

Another complication is the extent to which future courts will extend this declaration of public policy. Public policy may be such that the ex-employee's right to file a compensation claim should be absolute. If so, any coercive device or interference with the filing of the claim might be actionable in the future. Although a narrow reading of the *Kelsay* case limits actions to those for discharge, a broader application may include actions for demotions, undesirable transfers, shift changes and other coercive devices available to the employer. Mere threat of discharge, and in the alternative, discharge without notice to the employee of the employer's policy, may be sufficient to constitute a violation of public policy. This reasoning is supported by language in *Kelsay* regarding threats of discharge as undermining the public policy embodied in the compensation act.[111] Because of the strong statement of public policy announced by the *Kelsay* court, it is likely that the courts will move to enforce employees' rights whenever feasible.[112]

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tioned. However, the *Kelsay* court neglected to state that this was *dicta*; *Heimgaertner* held the statute itself unconstitutional. *See also* Boyer v. Atchison, T. & S.F. Ry. Co., 38 Ill. 2d 31, 230 N.E.2d 173 (1973).

The use of the term *ex post facto*, although a misnomer, adequately represents the novelty of the action, as well as the punishment or lack thereof, in *Kelsay*. In Illinois, *ex post facto* laws are only those enacted by statute, and then, only of a criminal, not civil, nature. Even so, the *Kelsay* court refused to impose a civil version here. *See* People *ex. rel.* County Collector of Ogle Co. v. Chicago, B. & O. R.R. Co., 323 Ill. 536, 154 N.E.2d 468 (1926).

The *Kelsay* court did rely on the decision of Nees v. Hocks, 272 Ore. 210, 536 P.2d 512 (1975). In that case, punitive damages were not awarded in a novel action where the firing was the result of the employee's service of jury duty. It was determined that future plaintiffs would have available punitive damages.

109. Brief for Appellant at 6, Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

110. Cases involving discharge of employees for union activities utilize a variety of standards in determining whether the employer's motive in firing was wrongful. *See, e.g.*, NLRB v. George J. Roberts & Sons, Inc., 451 F.2d 941 (2nd Cir. 1971) ("partial motivation" is sufficient to construe violation of National Labor Relations Act); NLRB v. Pioneer Plastics Corp., 379 F.2d 301 (1st Cir. 1967) ("dominant motive" test used).

111. Kelsay v. Motorola, Inc., 74 Ill. 2d at 182, 384 N.E.2d at 357.

112. Nor do any defenses seem readily available to the employers. *Cf.*

CONCLUSION

For Marilyn Kelsay, this case was a moral—not a pecuniary—victory. For employees in the future, the tort of retaliatory discharge may be a windfall. A minor injury at work may result in "constructive tenure" for an employee whose employer is fearful of discharging a potentially litigious worker. In the alternative, an ex-employee may recover a windfall of punitive damages awarded by a sympathetic jury.

It is likely that an employee who apprehends imminent discharge will file a frivolous compensation claim in order to prevent discharge. The more ruthless employee may even consider self-inflicted injuries in order to keep a job. However, a finding by the court that the claim was fraudulent and groundless should justify a denial of recovery in the independent tort action.[113]

Employers may react unfavorably to *Kelsay*, and leave the unfriendly business climate of Illinois.[114] New firms may be discouraged from locating here.[115] While employees' rights are being protected, employers are gaining nothing. Instead, they have lost the most powerful device available to them—that of the right to fire—albeit in a limited area. No relief to the employers is foreseeable. In fact, further erosion of the terminable-at-will doctrine is likely.

That is not to say, however, that erosion of the doctrine is without merit. Particularly in the area of workmen's compensation, commanding public policy arguments can and have been made, as evidenced by the *Kelsay* opinion. While public policy substitutes for legal precedent, public policy realistically serves as a vehicle for incorporating the cognizance of a problem and its resolution. Although the prevalence of the discharge problem in retaliation for filing compensation claims was not at issue, the *Kelsay* court implicitly found it sufficiently egregious to

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Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151, 154 (1976) where concurring Judge Allen made additional comments which he felt would be helpful in the future. There, the plaintiff had suffered a low back injury which had a high probability of reoccurrence, for which she had filed a compensation claim. She was then discharged. Judge Allen was of the opinion that the equally plausible alternative explanation would not be actionable. That is, employers are within their rights to not retain "accident-prone" employees. Thus, the use of "accident prone" discharge may constitute a viable defense.

113. *See, e.g.*, ILL. REV. STAT. ch. 110, § 41 (1977).

114. Parrish, *supra* note 89, at 731. Mr. Parrish based his discussion of the problem of fleeing industry on the rising costs of workmen's compensation benefits in Illinois.

115. *Id.* at 732.

warrant resolution.[116]

The most compelling aspect of *Kelsay* is the court's adamant refusal to permit employers to evade their legally imposed liabilities under the compensation act through duress and coercion. The compelling purpose in Kelsay's moral victory against the coercive tool of discharge judicially balances the inequities in employment relationships. As a result of *Kelsay*, the creation of a more equitable balance is a victory shared by all who have felt the imbalance and inequity of being in the employ of another.

Elena Z. Kezelis

116. *See* note 89 *supra.*