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Employment Law

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The Rise of Illinois Whistleblower Act Cases

Increasingly, employees bringing claims of discrimination or retaliation under federal and state discrimination laws are adding a claim under the Illinois Whistleblower Act (IWA), against both the employer and supervisors. Originally effective on January 1, 2004, the IWA currently gives employees the right to file a civil action against their employer seeking monetary damages and equitable relief in five circumstances. 740 ILCS 174/30.

First, the IWA prohibits employers from retaliating "against an employee who discloses information in a court, an administrative hearing, or before a legislative commission or committee, or in any other proceeding, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation." 740 ILCS 174/15(a). Second, it prohibits employers from retaliating against employees "for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation." 740 ILCS 174/15(b). Third, it prohibits employers from retaliating "against an employee for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation, including, but not limited to, violations of the Freedom of Information Act." 740 ILCS 174/20.

The 2009 IWA amendments added new sections expanding what constitutes retaliation. In Section 20.1, "[a]ny other act or omission not otherwise specifically set forth in this Act, whether within or without the workplace, also constitutes retaliation by an employer under this Act if the act or omission would be materially adverse to a reasonable employee and is because of the employee disclosing or attempting to disclosure public corruption or wrongdoing." 740 ILCS 174/20.1. In Section 20.2, "[a]n employer may not threaten any employee with any act or omission if that act or omission would constitute retaliation against the employee under this Act." 740 ILCS 174/20.2. The IWA allows damages including "(1) reinstatement with the same seniority status that the employee would have had, but for the violation; (2) back pay, with interest; and (3) compensation for any damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney's fees." 740 ILCS 174/30.

The vast majority of IWA cases claim violations of Sections 15 or 20. To demonstrate a violation, an employee must show: "(1) an adverse employment action by his or her employer (2) which was in retaliation (3) for the employee's disclosure to a government or law enforcement agency (4) of a suspected violation of an Illinois or federal law, rule, or regulation." *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492, ¶ 15.

Courts Split on Individual Liability Under the IWA

In the original IWA, the term "employer" was defined as "an individual, sole proprietorship, partnership, firm, corporation, association, and any other entity that has one or more employees in this State, except that 'employer' does

not include any governmental entity." 2003 Ill. Legis. Serv. P.A. 93-544, § 5 (S.B. 1872) (West). The IWA has since been amended to include state and local governmental entities, including school districts, community and state colleges, as well as board, commissions and other agencies of those entities and "any person acting within the scope of his or her authority express or implied on behalf of those entities in dealing with its employees." 740 ILCS 174/5.

While the IWA is a state law, most court decisions interpreting the Act come from the federal district courts. One issue that the district courts regularly face is the extent to which there is individual liability under the IWA. One line of decisions holds that "there is no individual liability under the IWA, which 'only creates a cause of action against an employer.'" *Cunliffe v. Wright*, 51 F. Supp. 3d 721, 740 (N.D. Ill. 2014); *see also Hernandez v. Cook Cty. Sheriff's Office*, No. 13 C 7163, 2014 WL 1339686, at *3 (N.D. Ill. Apr. 3, 2014); *Martorana v. Vill. of Elmwood Park*, 12 C 6051, 2013 WL 1686869, at *4 (N.D. Ill. Apr. 18, 2013) (dismissing individual defendants with prejudice); *Robinson v. Morgan Stanley*, No. 06 C 5158, 2007 WL 2815839, at *15 (N.D. Ill. Sept. 24, 2007) (same).

More recent cases have found that claims against agents of an employer also satisfy the IWA. *See Logan v. City of Chicago*, No. 17 C 8312, 2018 WL 5279304, at *5 (N.D. Ill. Oct. 24, 2018) (denying motion to dismiss individual defendants because the definition of "employer" includes "an individual" as well as "any person acting within the scope of his or her authority express or implied on those entities in dealing with its employees"); *Bernero v. Village of River Grove*, No. 17 CV 05297, 2018 WL 3093337, at *6 (N.D. Ill. June 22, 2018) (denying motion to dismiss Village president because he was allegedly acting within the scope of his authority); *Van Pelt v. Bona-Dent, Inc.*, No. 17 C 1128, 2018 WL 2238788, at *6 (N.D. Ill. May 16, 2018) (stating that "[t]he unambiguous and plain language of the IWA includes [the individual defendant] because he is alleged to have been acting on behalf of the [ ] corporation and within the scope of his authority when he fired" the plaintiff); *Hower v. Cook Cty. Sheriff's Office*, No. 15 C 6404, 2016 WL 612862, at *3 (N.D. Ill. Feb. 16, 2016) (denying motion to dismiss because complaint alleged defendants acted within the scope of their authority when dealing with plaintiff as an employee); *Bello v. Vill. of Skokie*, 151 F. Supp. 3d 849, 865 (N.D. Ill. 2015) (finding that the IWA "makes it clear that individuals acting on behalf of an entity that one might colloquially understand to be a person's 'employer' may likewise be considered 'employers' potentially liability for violating the statute.")

What Type of Report Rises to the Level of Whistleblowing Under the IWA?

Many employers move to dismiss IWA claims on the basis that the employee's actions do not satisfy the requirements of being a true whistleblower as defined by the statute. Generally, there is "no cause of action where an employee reveals information only to his or her employer." *Huang v. Fluidmesh Networks, LLC*, No. 16-cv-9566, 2017 WL 3034672, at *3 (N.D. Ill. July 18, 2017); *Van Pelt*, 2018 WL 2238788, at *6 (granting motion to dismiss IWA claim where employee only made internal complaints).

A number of courts have addressed the issue of when an employer also happens to be a law enforcement agency. The leading case on this issue is *Brame v. City of North Chicago*, 2011 IL App (2d) 100760, which held that a police lieutenant's report to the mayor of suspected illegal activity by the police chief was protected even though his complaint was made only to "his own employer, who also happens to be the head of a 'government or law enforcement agency.'" *Brame*, 2011 IL App (2d) 100760, ¶ 8. More recently, in *Milsap v. City of Chicago*, No. 16-cv-4202, 2018 WL 488270, at *8-9 (N.D. Ill. Jan. 19, 2018), a district court denied the city's motion to dismiss, holding that the plaintiff who reported what he perceived to be illegal conduct to the Office of the Inspector General (OIG) stated enough to bring a claim under Section 15(b) of the IWA even though OIG was an agency of his employer. *See also Elue v. City of Chicago*, No. 16 CV

9564, 2018 WL 4679572, at *8 (N.D. Ill. Sept. 28, 2018) (denying city's motion for summary judgment on IWA claim where city attorney complained to her supervisor about a possible ethical conflict of interest with the supervisor's husband and attorney was not promoted five months later).

The Illinois Appellate Court, Fourth District, distinguished the holding in *Brame* in *Sweeney v. City of Decatur*, and affirmed the dismissal of a police chief's IWA claim who alleged that he was terminated by the city manager after he repeatedly told the city manager that the manager's personal use of police resources was improper. *Sweeney v. City of Decatur*, 2017 IL App (4th) 160492. The police chief never reported the alleged violation of Illinois law to the city manager's superiors and the court held that "section 15(b) of the Whistleblower Act does not protect an employee who simply notes the impropriety of conduct with the alleged wrongdoer, as that does not constitute the disclosure of information under the [IWA]." *Sweeney*, 2017 IL App (4th) 160492, ¶ 19. This is true even when the violator is the employee's boss. *Id.*; *but see Carbajal v. City of Highland Park*, No. 16 C 8364, 2017 WL 818858 (N.D. Ill. Mar. 2, 2017) (denying defendants' motion to dismiss IWA claim where police sergeant repeatedly complained of discrimination to police chief and city manager, rejecting defendants' argument that he did not properly disclose information because "it is not at all clear just who, if not [chief and city manager], would have been the logical or appropriate representative" to be presented with his discrimination complaint). *Carbajal*, 2017 WL 818858, at *4.

The Disclosure Must Involve a Violation of the Law

While an employee need not identify any particular laws that he believed were violated, he must allege facts to from which to infer some illegality. In *Post v. Northeast Illinois Regional Commuter Railroad Corp. d/b/a Metra*, No. 18 CV 77, 2018 WL 5249231 (N.D. Ill. Oct. 22, 2018), the court dismissed a Metra foreman's IWA complaint alleging he was demoted after submitting an internal report to Metra's confidential close call reporting system of a train car derailment which he claimed was caused by his coworker's failure to follow proper protocol. *Post*, 2018 WL 5249231, at *4. The court found that "a protocol is not necessarily a government law, rule, or regulation" but seemed to be more an internal Metra rule, and even if the derailment did involve illegal activity, the plaintiff failed to allege that he knew that or reasonably believed it did and did not include that information in his report. *Id.*

In *Myers v. America's Disabled Homebound, Inc.*, the district court dismissed one claim by a nurse for a home physician service who alleged that she was fired in violation of the IWA after she refused to follow defendants' instructions to enroll a patient who already had a home doctor which she contends would have resulted in double enrollment and would have resulted in double billing for the same services. *Myers v. Am.'s Disabled Homebound, Inc.*, No. 14 C 8525, 2018 WL 1427171, at *8 (N.D. Ill. Mar. 22, 2018). The court found that the plaintiff failed to cite a federal regulation preventing a patient from receiving home physician services from two different providers. *Myers*, 2018 WL 1427171, at *8. On the other hand, the court denied the employer's motion to dismiss the nurse's claim that she refused to see patients for less than 10 minutes, yet submit claims under Medicare Codes which reflect that the physician spent more than 10 minutes with the patient, finding that based on the current record, the court could not decide the issue of whether such practice violates any federal regulation. *Id.* Most courts do not require the plaintiff to specifically identify the particular statute or regulation that the employer allegedly violated where the complaint clearly implicates important public policy. See e.g., *Daniel v. Advocate Health Care Network*, 278 F. Supp. 3d 1056, 1065 (N.D. Ill. 2017) (denying employer's motion to dismiss where employee reported race discrimination, which would violate federal law, to two federal agencies).

Arguing Lack of Causation at the Motion to Dismiss Stage Proves Difficult

A number of employers move to dismiss IWA claims on the basis that the employee cannot satisfy the causation requirement, especially where the employee fails to show that the individual defendants had knowledge of the internal complaint when they took an adverse action against the plaintiff. At the motion to dismiss stage, courts have found that the employee need not prove causation at that point, only to allege it plausibly. *Logan*, 2018 WL 5279304, at *6; *Bresnahan v. City of Chicago,* Nos. 18-cv-1974 and 18-cv-1880, 2018 WL 4829597, at *5 (N.D. Ill. Oct. 4, 2018); *McGowan v. Motel Sleepers, Inc.*, No. 17 C 7284, 2018 WL 3997361, at *8 (N.D. Ill. Aug. 21, 2018). Even at the summary judgment stage, courts are reluctant to dismiss the case on those grounds. *See Spalding v. City of Chicago*, 186 F. Supp. 3d 884, 918 (N.D. Ill. 2016) (denying motion for summary judgment where a reasonable jury could infer that the defendant officers retaliated against the plaintiffs for their whistleblowing on police corruption even though the defendants denied knowing that plaintiffs were whistleblowers).

Section 20 Claims Must Truly Involve a Refusal to Participate

In order to bring a claim under Section 20 of the IWA, the plaintiff must actually refuse to participate in an activity that would result in a violation of a state or federal law, rule, or regulation. *Sardiga v. Northern Trust Co.*, 409 Ill. App. 3d 56, 62 (1st Dist. 2011). The *Sardiga* court noted that 'refusing' means refusing; it does not mean 'complaining' or 'questioning' . . . ." *Sardiga*, 409 Ill. App. 3d at 62. Based on the reasoning in *Sardiga*, the Illinois Appellate Court, First District, affirmed the dismissal of an IWA complaint alleging that the plaintiff was "intentionally excluded" and allowed "no input" into the decision to hire or retain unqualified instructors and that he refused to "cover things up," "be quiet," and "look the other way," since there was no allegation that his employer ever asked, requested, or demanded his participation in the allegedly wrongful activity. *Roberts v. Bd. of Trustees Cmt'y Coll. Dist. No. 508 d/b/a City Colleges of Chicago*, 2018 IL App (1st) 170067, ¶ 38; *see also Corah v. The Bruss Co.*, 2017 IL App (1st) 161030, ¶ 19 (employer's motion for summary judgment affirmed where plaintiff acknowledged that the employer never asked plaintiff to misstate where an individual's injury occurred in violation of the Workers' Compensation Act, 820 ILCS 305/4(h)); *Huang*, 2017 WL 3034672, at *4 (IWA claim dismissed where plaintiff had not set forth any allegations that he "refused" to engage in a policy or practice of sharing insider information).

The IWA is Not Preempted by the Illinois Human Rights Act and There is No Immunity Under the Tort Immunity Act

A number of courts have considered the issue of whether the IWA is preempted by the Illinois Human Rights Act. While there are decisions from 2010 or earlier accepting this argument, more recent decisions have found that there is no preemption. *Torres v. Merck Sharp & Dohme Corp.*, 255 F. Supp. 3d 826, 832 (N.D. Ill. 2017); *Carbajal*, 2017 WL 818858, at *5. Similarly, courts have not been persuaded by the arguments advanced by local governmental entities that they are entitled to immunity under Section 2-201 of the Local Government and Government Employees Tort Immunity Act, 745 ILCS 10/2-201. *See Bello*, 151 F. Supp. 3d at 866; *Spalding v. City of Chicago*, 186 F. Supp. 3d at 919.

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Practice Pointers

Very few employers seem to have the IWA on their radar when contemplating taking disciplinary action against an employee. Given how difficult it is to dismiss an IWA claim either in the early stages or on a motion for summary judgment, attorneys who counsel employers on employee disciplinary matters should consider asking the employer whether the employee has engaged in any act whatsoever that may rise to the level of whistleblowing or refusal to participate in an activity that would result in a violation of a State or federal law, rule, or regulation.

About the Author

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