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Introduction

This paper addresses several discrete topics that repeatedly arise in the employment practice. First is the very modern problem of whether employer e-mail monitoring represents a violation of any employee privacy rights. Second, the paper reviews recent Illinois case law on the common law cause of action for retaliatory discharge in violation of public policy. Third, some "traps for the unwary buried in the Illinois Personnel Records Review Act are noted.

E-Mail In The Workplace

E-mail is now an essential part of the modern workplace. What was once communicated in telephone conversations that could not be captured in anything other than the fallible and unreliable human memory is now preserved *in toto*, virtually indefinitely. E-mail provides an opportunity to monitor employee communications to a degree never before possible. This has made e-mail a valuable source of information for employer investigations: only the most cautious employee fails to leave a trail in the e-mail records.

Many people believe that deleting an e-mail message makes it disappear forever. Not so. Information systems protocols typically call for daily or at least weekly "backing up" of the entire contents of a system, which means that messages not immediately deleted can be recovered from computer tapes. Other mechanisms on the computer hard drive or on the server provide opportunities to recover even messages deleted immediately.

The question is whether browsing through the e-mail messages and employee has sent and received at work represents an invasion of the employee's privacy rights. The answer is, generally not. A similar problem arises where the employee has used the computer for visiting websites and the employer uses its technological capabilities to monitor those visits.

Constitutional Protections of Public Employees

O'Connor v. Ortega , 480 U.S. 709 (1987) recognized at least the possibility of employee privacy interests in employee desks and file cabinets, in the context of a public employee claim for unreasonable search and seizure under the Fourth Amendment. But the opinion also acknowledged that actual office practices could mean that the employee had no "reasonable expectation of privacy" necessary to secure Constitutional protection. The Court called for balancing employee expectations of privacy against the government employer's need for supervision, control and efficient operation of the workplace.

The balancing test has resulted generally in determinations that the government is entitled to snoop around in employee computers. In *United States v. Simons*, 206 F.3d 392 (4th Cir. 2000), the court found no reasonable expectation of freedom from search of the CIA employee's computer for downloading of pornography where employer policy stated that it would "audit, inspect, and/or monitor" employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages, "as deemed appropriate." *Accord,*; *United States v. Angevine,*281 F.3d 1130 (10th Cir. 2002)(no reasonable expectation of privacy where employer had posted warnings disclaiming right to privacy in electronic information).

In *Leventhal v. Knapek,* 266 F.3d 64 (2d Cir. 2001), the court did hold that an accountant had a reasonable expectation of privacy because of the secure surroundings of his computer and the lack of warnings of the possibility of search. The court concluded: "Leventhal occupied a private office with a door. He had exclusive use of the desk, filing cabinet, and computer in his office. Leventhal did not share use of his computer with other employees in the Accounting Bureau nor was there evidence that visitors or the public had access to his computer. We are aware that public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation." Construing the evidence in favor of Plaintiff at the summary judgment stage, the court found that there could be a reasonable expectation of privacy because "we do not find that the DOT either had a general practice of routinely conducting searches of office computers or had placed Leventhal on notice that he should have no expectation of privacy in the contents of his office computer."

By contrast, in *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir. 1994)(search of law clerk's office, desk and file cabinets), the court relied on the "open" context of the office—in that case the office of a court clerk in a judge's chambers—to conclude that there was no reasonable expectation of privacy. While this decision was not in the context of e-mail, it supports the view in *Leventhal* that the general office context can impact on the determination of whether

an employee has a reasonable expectation of privacy where there have been no explicit communications one way or the other concerning privacy of e-mail messages.

Judge Posner recently weighed in on this subject in *Muick v. Gkenayre Electronics,* 280 F.3d 741 (7th Cir. Feb. 6, 2002), concluding that while a public employer could create a reasonable expectation of privacy in employer-owned office equipment by furnishing locks for securing private papers, the employer's announcement that it reserved the right to inspect laptop computers provided to employees prevented there from being any reasonable expectation of privacy with respect to the contents of the laptop. Thus, the employer's stated intentions to employees are one crucial element of determining whether there are privacy rights.

Electronic Communications Privacy Act

The ECPA is part of the federal wiretapping statute, 18 U.S.C. §2511, which prohibits interception of electronic communications. However, the meaning of "interception" has been acknowledged by the courts to be unclear, *Fraser v. Nationwide Mutual Insurance Co.,* 135 F.Supp. 623, 633 (E.D. Pa. 2001)(holding that there is no "interception" if the e-mail has been retrieved from post transmission storage).

ECPA also contains exceptions for interception in the "ordinary course of business" and "with consent" of the participant in the communication. Knowledge by the employee that a voice message would pass through a computer and be stored there was enough for the court to imply consent in *Bohach v. City of Reno,* 932 F.Supp. 1232 (D. Nev. 1996); *accord, Ali v. Douglas Cable Communications,* 929 F.Supp. 1362, 1380-1381 (D. Kan. 1996)

Common Law Privacy Rights

Although the case law in Illinois has not been totally consistent, it appears that Illinois recognizes the *Restatement, Second, of Torts* privacy cause of action for "intrusion upon seclusion." *Benitz v. KFC National Management Co.,* 305 Ill.App.3d 1027, 714 N.E.2d 1002, 239 Ill.Dec. 705 (2d Dist. 1999)(collecting cases) recognized

the cause of action, noting that the Illinois Supreme Court had not ruled on the issue and that while the Third and Fifth Districts had recognized the tort, the First and Third Districts had not. In that case, employees of the defendant alleged that they had been spied on through a peep hole in the rest rooms. No Illinois cases address whether or not an employee's e-mail messages or computer hard drive could represent an intrusion on seclusion. The same issues that drive the determination of a constitutional right of privacy for a public employer would come into play in this context.

In *Kelleher v. City of Reading,* 2002 WL 1067442 (E.D. Pa. 2001)(claim for invasion of privacy), the employee claimed to have had a reasonable expectation of privacy in her e-mail, and the court disagreed because the City had unequivocally reserved its right to inspect the e-mail messages of employees that Plaintiff claimed had been screened and read by defendants. The court disagreed with two decisions that categorically rejected the possibility that there could be a reasonable expectation of privacy in e-mail messages, *Smyth v. Pillsbury Co.,* 914 F.Supp. 97 (E.D. Pa. 1996) and *Commonwealth v. Proetto,* 771 A.2d 123 (Pa. Super. 2001).

Summary

E-mail will be protected for public employees where the employee has some reason to believe that there is security and the employer has not given warnings to the work force that it reserves the right to inspect e-mail messages.

For private employees, even without explicit warnings, computers owned by the employer and used in the employer's business are generally subject to examination by management in investigations, except where the interception is instantaneous or the employer has given affirmative assurances of employee privacy. However, there is a potential exposure to liability in tort for invasion of privacy, at least where the employer has fostered in employees the idea that they have a right of privacy in e-mail messages. For employers wishing to preserve their right to inspect employee e-mail messages, a written and conspicuous reservation of the right to inspect e-mail messages would be in order.

Common Law Retaliatory Discharge: Recent Cases

The Illinois Supreme Court continues to run hot and cold on retaliatory discharge as a tort, with the most recent decision employing an "implied private right of action" analysis to narrow the scope of the tort with respect to retaliation against whistleblowers. The Court of Appeals for the Seventh Circuit and the First District Appellate Court appear to recognize that the Supreme Court's comments that are critical of the tort are not to be taken literally, but may be explained by considering the Supreme Court's reluctance to authorize lawsuits where the legislature had a plain opportunity to do so and chose not to do so.

> Fischer v. Lexington Health Care, Inc., 188 Ill.2d 455, 722 N.E.2d 1145, 243 Ill.Dec. 46 (1999).

In this case, the employees of a nursing home discovered a resident who they found dead hanging from her bed, stuck under her lap bar, after being left alone by the staff. They were instructed to stop writing their report of the incident and not to speak with the family. They then refused instructions to sign a false report that the resident had died of natural causes. Instead, they advised the family what had occurred, told them to order an autopsy, and cooperated with the investigation into the death. This was followed by harassment from their supervisors and termination of employment.

The Illinois Nursing Home Act was amended in 1979 to include an employee protection provision as part of a larger plan to expand the rights of residents of nursing homes. The provision states that a "nursing home … shall not transfer, evict, harass, dismiss, or retaliate against a resident … or an employee or agent who makes a report [of abuse or neglect] …"

The court analyzed the case as being whether or not there was an implied right of action to enforce the statute, and concluded that there was not. It considered the four somewhat pliable factors to be considered under Illinois law in deciding whether a statute implies a right of action: (1) membership in the class the statute was designed to protect; (2) an injury of the kind the statute sought

to prevent; (3) consistency between the statutory purpose and the recognition of a right of action; and (4) the need for a private action to provide an adequate remedy.

Rather than examining the specific language of the provision itself, the court looked to the overall collection of amendments, and concluded that residents, not employees, were the persons for whose protection the statute was adopted. It did not consider the possibility that the intent of the statute was to protect *both,* although the court recognized that the protection of employees effectively supported the resident protection purpose. Having parsed the statutory purpose in this way, the court easily concluded that the employees were not part of the protected class, that the statute was *not* designed to protect nursing home employees from retaliatory conduct Finding the first and second elements missing, the court then concluded that criminal penalties and availability of governmental investigation and enforcement made a private right of action unnecessary.

In justifying its conclusion in this case, where the only count asserted by the plaintiffs was an implied right of action, the court referred to the law on retaliatory discharge, stating that the court had "consistently sought to restrict the common law tort…" It concluded by stating that "While this case does not involve the common law tort of retaliatory discharge, these decisions are nonetheless instructive on the question presented in this case." Justice Harrison authored a strong dissent, opening with the conclusion that "For all practical purposes, implied rights of action have been abolished in Illinois."

The explanation for this highly restrictive decision lies in the idea of deference to the legislature. The court probably noted that while the 1979 amendments provided for any number of remedial steps, a private right of actions for employees was conspicuous by its absence. The court may have believed that it would have been adding something not intended to a comprehensive statutory scheme if it had recognized the implied right of action.

In the more typical retaliatory discharge case, there is no specific statute providing employee protection. In the tort of retaliatory discharge, the court not only implies a private right of action, but it also implies the *obligation not to retaliate* against the employee for activity that public policy would protect. This analysis should be conducted according to the familiar (although amorphous) "clearly mandated public policy" standard. The strong case is one presenting one of the following public policy concerns (1) employee exploitation concerns such as exist in the workers' compensation context; (2) criminal law concerns, in which the case is based on refusing to commit an criminal act or on blowing the whistle on illegality; or (3) public health and safety concerns such as those implicated in the the *Wheeler* case enforcing nuclear power plant safety standards.

> Fiumetto v. Garrett Enterprises, Inc., 321 Ill.App.3d 946, 749 N.E.2d 992, 255 Ill.Dec. 510 (1st Dist. 2001)

In this case, the court held that an employee could not be fired for exercising her right to receive unemployment benefits. The employee had worked for some time for the employer, and during one part of the year, her hours would be reduced because business was slow. When she filed for unemployment benefits, the employer said. "This is the end of a bad marriage. I can't believe you filed for unemployment. You're going to cost me $100 a week."

The Appellate Court appeared to miss the distinction between implying a right of action and implying a duty not to retaliate. Perhaps the court was intimidated by the comments of the *Fischer* case, or perhaps it decided that the private right of action analysis was appropriate because the recognition of a public policy claim for retaliatory discharge is at least as much an intrusion on legislative prerogatives as the implication of a right of action where the statute already recognized a duty to refrain from retaliation.

The court began by noting that "Retaliatory discharge actions have traditionally been allowed in two situations: when an employee is

discharged for seeking workers' compensation benefits and when an employee is discharged for reporting misconduct by the employer." After a long quotation from the policy statement of the Unemployment Act—which contains no provision prohibiting retaliation—it noted that the purpose is to lessen the burden of unemployment upon unemployed workers.

The court noted that the Act "does not expressly grant a private right of action for individuals discharged in retaliation for seeking unemployment benefits." It cited no provision of the statute which even prohibits such retaliatory conduct by an employer, but did not acknowledge it, but proceeded to apply an analysis driven by the "implied right of action" factors in the *Fischer* case

The key points of distinction the court found between the Nursing Home Act and the Unemployment Act were that the Unemployment Act is intended to benefit unemployed workers and that the injury caused by retaliatory discharge—loss of employment—is the type of injury to which the Unemployment Act is specifically addressed. The court also noted that the penalties applicable to nursing home statutory violations are more severe that apply to unemployment cases.

In the end, the court returned to the retaliatory discharge precedents and noted that "the reasoning that supports implying a private right of action under the Workers' Compensation Act provides sounder guidance than does *Fischer*". The court noted that employers have a financial incentive to threaten retaliation against employees to prevent them from exercising their rights and that a retaliating employer can successfully prevent any of the other sanctions from being available simply by preventing the filing of a claim in the first place.

The court probably focused on the *Fischer* analysis because it fit nicely into the statute that the court was considering. It was also probably concerned that its decision might come under scrutiny by the Supreme Court, and wanted to show that court that its own analysis dictated the result it was reaching. The effect of this

approach, taken to its logical conclusion, would effectively limit availability of retaliatory discharge to cases where the legislature has expressly created employee rights, which the Supreme Court did not intimate it had in mind at all.

> McGrath v. CCC Information Systems, Inc.,314 Ill.App.3d 431, 731 N.E.2d 384, 246 Ill.Dec. 856 (1st Dist. 2000)

This case reversed the decision in *Brazinski v. Transport Service Co.,*159 Ill.App.3d 1061, 513 N.E.2d 76, 111 Ill.Dec. 830 (1st Dist. 1987), and held that the Wage Payment and Collection Act is not a "clearly mandated public policy," but that compensation disputes are private matters implicating no public policy.

The decision purports to be based on general restrictive language in Illinois Supreme Court decisions handed down since 1987, although neither the cases nor the language addressed the Wage Payment and Collection Act. Remarkably, the court swept aside all principles of *stare decisis,* and without citing any case holding that the WPCA did not represent a clearly mandated public policy, wrote the *Brazinski* decision out of the appellate reports.

The court disregarded the specific criminal prohibition against retaliation contained in the WPCA, stating that it was not necessarily a "clearly mandated" public policy. Finally, the court concluded that the workers' compensation analogy did not apply to this statute protecting employee rights because unlike the Workers' Compensation Act, the WPCA did not supplant common law remedies, but merely provided a supplemental remedy to the common law remedies. The outcome in this decision is directly contrary to that of the *Fiumetto* case. Each argument presented would justify denial of recovery in *Fiumetto*, and each disregards a contrary argument in *Fiumetto.* The two considerations that seem to drive this decision are (1) the fact that at the bottom, the case was about recovery of disputed disputed stock options and bonus; and (2) the vehemence of the Supreme Court's expressed determination to rein in the tort of retaliatory discharge, albeit in cases where different issues from those presented were being decided.

Brandon v. Anesthesia & Pain Management Associates, Ltd., *277 F.3d 936 (7th Cir. 2002*)

For the first time in decades, it appears that federal court is a better place for an employee to be than state court with an action for public policy retaliatory discharge. In this case, the employee had raised concerns about invoicing that violated Medicare requirements with the medical corporation's board of directors. No Action was taken and after a running battle of six months' duration, he was fired. The Seventh Circuit held that this stated a claim for public policy retaliatory discharge.

Rejecting an argument that compliance with Medicare regulations was not a well-established public policy of Illinois, the court held that the Supremacy Clause *prohibits* Illinois from relegating federally created rights to "second class citizenship." It also cited and relied upon Illinois enactments establishing that prevention of public assistance fraud as a public policy. It noted a number of Illinois cases, such as *Wheeler v. Caterpillar Tractor Co.,* 108 Ill.2d 502, 485 N.E.2d 372, 92 Ill.Dec. 561 (1985), that upheld federal policies as within the protection of the tort.

The court rejected the employer's argument that an alternate criminal and civil remedy under the federal False Claims Act made recognition of an Illinois common law action unnecessary. Rather, said the court, a criminal remedy was the *sina qua non* of a whistleblower retaliatory discharge action. The court noted that there might otherwise be a gap in protection, in cases where the statutory threshold for conduct "in furtherance of an action brought or to be brought" was not met.

The court repeatedly noted that an internal complaint about unlawful conduct was sufficient as protected activity for the tort.

The court also upheld the availability of punitive damages based on the following aggravating factors: (1) in response to his complaints, management told him he was "fucked" because he did not have a written contract and it could do what it wanted with him; (2) there were fabricated complains and false evaluations of

his job performance; (3) management threatened to make it difficult for him to find another job; and (4) management began a series of verbal and written threats of discharge if he did not stop complaining about the billing procedures.

> Miller v. Ford Motor Co., 152 F.Supp.2d 1046 (N.D. Ill. 2001)(Bucklo, J.)

The employee alleged in this case that he was fired as a scapegoat, in an effort by the employer to show that it was taking remedial action to combat sexual harassment. The company claimed that the employee should have known of improper activity and did not The court rejected the employee's argument that he had repeatedly asked for better equipment, personnel and resources in his security position and had been denied them. The court was unwilling to extend the public policy standard to cover this situation.

> Crampton v. Abbott Laboratories, 186 F.Supp.2d 850 (N.D. Ill. 2002)(Shadur, J.)

The employee in this case had engaged in presumably protected activity, arguing against violations of clinical protocols and FDA regulations, principally several years before her termination. She was terminated after circulating an e-mail message to subordinates about job opportunities with a competitor, closing with the statement that the last person left should turn out the lights. Management discovered this and fired her. The court held that given the raises that she had received in the years when her whistleblowing was most active, no retaliatory intent could be inferred. It also concluded that the factual similarity of other instances in which the employer did not discipline for similar conduct must be very close, citing, *Radue v. Kimberly-Clark Corp.,* 219 F.3d 612 (7th Cir. 2000). Because the most closely similar situation involved a non-management employee who simply passed along a name and telephone number, the court found that the employer had not condoned similar activity in a way that suggested a retaliatory motive.

> Stebbings v. University of Chicago, 312 Ill.App.3d 360, 726 N.E.2d 1136, 244 Ill.Dec. 825 (1st Dist. 2000)

A researcher allegedly fired for insisting that it was necessary to report radiation tests on human subjects was protected against retaliatory discharge, relying on the *Wheeler* declaration of an interest in protecting Illinois citizens from harmful radiation as well as the whistleblower ("citizen crime fighter") model. It was not necessary for the employee to show a specific statutory violation, and the employee's good faith belief was a sufficient basis to allow protection.

> Bourbon v. K-Mart Corp., 223 F.3d 469 (7th Cir. 2000)

This decision held that the employee had failed to establish proof of causation and assumed that reporting the employer for charging customers for unnecessary repairs would be actionable as blowing the whistle on theft by deception. A concurring opinion by Judge Posner addresses whether and to what extent reliance on *McDonnell Douglas* standards is appropriate where an action for retaliatory discharge is heard in federal court.

> Lanning v. Morris Mobile Meals, Inc., 308 Ill.App.3d 490, 720 N.E.2d 1128, 242 Ill.Dec. 173 (3d Dist. 1999)

This case was based on the reporting of a public health code violation, although the court did not consider that issue. The Third District reversed its prior position and held, in accord with other appellate districts, that an internal report of wrongdoing was a sufficient basis for protection, and that a report to a public official was not required to support a claim for retaliatory discharge.

> Vance v. Dispatch Management Services, 122 F.Supp.2d 910 (N.D. Ill. 2000)(Bucklo, J.)

The employee sought and obtained a protective order against a co-worker who assaulted her in the workplace. The employee was immediately fired. The court held that the public policy of protecting persons from battery reflected in the Illinois law authorizing protective orders was a sufficient basis for retaliatory discharge.

Taimoorazy v. Bloomington Anesthesia Serviceas, Ltd., *122 F.Supp.2d 967 (C.D.Ill. 2000)(Mihm, J.)*

A report of a physician for quality of care problems is protected conduct, and termination for making such a report is actionable as retaliatory discharge, rejecting analogy to attorney-client exception. This exception mandating no protection for attorneys was reiterated in *Jacobson v. Knepper & Moga PC*, 185 Ill.2d 372, 706 N.E.2d 411, 235 Ill.Dec. 936 (1998)(attorney could not sue law law firm for discharge based on refusal to violate Fair Debt Collection Practices Act).

Workers' Compensation Retaliatory Discharge.

With an increasingly restrictive construction of the Americans With Disabilities Act, this common law action, which appears unlikely to be abrogated, will become more important. Its value is limited by the string of decisions handed down in the 1980's and early 1990's allowing for discharge even where the reason for termination is related in some way to the compensable injury. These cases will be highly fact-intensive and will turn on the employee's ability to establish a retaliatory motive.

Paz v. Commonwealth Edison, 314 Ill.App.3d 591, 732 N.E.2d 696. 247 Ill.Dec. 641 (2d Dist. 2000)

This case concerned a claim for workers' compensation retaliatory discharge in a familiar situation. The employer and employee differed over whether the employee was fit to return to work. The employee unsuccessfully argued that the termination was retaliatory because the employer's reason for termination was the employee's refusal to go against his doctor's orders and return to work. The case went to the appellate court after a jury found against the plaintiff. Citing *Clark v. Owens-Brockway Glass Container , Inc.,* 297 Ill.App.3d 694, 697 N.E.2d 743, 232 Ill.Dec. 1 (1998), the employee argued that discharge on the basis of a dispute about the extent or duration of a compensable injury was by definition retaliatory. The notion is that this is an issue that is to be resolved by the workers' compensation system, and that when an employee is terminated for not agreeing with the employer's

position in the proceedings, that is necessarily retaliatory. The court rejected this position, holding that the issue of retaliation is a question of fact, not law, and citing *Hartiien v. Illinois Power Co.,*151 Ill.2d 142, 601 N.E.2d 720, 176 Ill.Dec. 22 (1992) for the proposition that the element of causation is not satisfied where there is a valid, non-pretextual basis for discharge, including excessive absenteeism due to a compensable injury. A*ccord, Borcky v. Maytag Corp.* 248 F.3d 691 (7th Cir. 2001). The *Paz* court said that the authority of the Industrial Commission is limited to questions arising under the Workers' Compensation Act, and does not extend to whether or not the employer can allow continued absence during an injury. The court rejected the employee argument that the effect of allowing the discharge "obliterated" his right to select his own physician, a right protected by the Act, saying that his right to select his own doctor and follow orders was not impaired, and that the question was whether the employer was required to retain him in its employ in order to comply with the treatment plan.

In *Paz,* the termination took place *after* the workers' compensation dispute was settled. In a different factual context, the employer's insistence that the employee return to work when his doctor says it is not safe is typically the employer's justification for a decision to terminate temporary total disability benefits. Especially if the employee can bring a successful proceeding to obtain reinstatement of the benefits, then there could be a basis on which to argue that the employer's insistence on a return to work was an effort to coerce the employee to give up the temporary total disability benefit to which (s)he was entitled under the Act.

Note that the Fifth Appellate District disagrees, *Hollowell v. Wilder Corp.,* 318 Ill.App.3d 984, 743 N.E.2d 707, 257 Ill.Dec. 839 (5th Dist. 2001).

Personnel Records Review Act: Traps For the Unwary

The Illinois Personnel Records Review Act, 820 ICLS §40/1 *et seq.* creates several employee rights: (1) the right to review employee personnel records during employment and for up to one

year thereafter upon seven (and in some cases fourteen) days' notice, 820 ICLS §40/2; (2) the right to obtain copies of those records, 820 ICLS §40/3; (3) the right to exclude in judicial and quasi-judicial proceedings any personnel record "information" that has been intentionally withheld after a request, 820 ICLS §40/4; (4) the right to have a statement explaining the employee's position included in the records and in releases of those records to a third party, 820 ICLS §40/6; (5) the right to expunge personnel records containing false information where they have been knowingly placed in the records, 820 ICLS §40/6; (7) limitations on the right of an employer to gather and record information concerning non-employment activities in which the employer has no legitimate interest; (8) a right to have disciplinary records more than four years old deleted from disclosures to third parties, 820 ICLS §40/8; and (9) a right to written notice of the disclosure of any disciplinary record to a third party, to be given at or before the time the disclosure is made, 820 ICLS §40/7. This panoply of rights is so extensive that any one of them is a potential trap for the unwary or careless employer.

When A Personnel Record is not a Personnel Record

With limited exceptions found at 820 ICLS §40/10, the definition of "personnel records' covered by the Act is expansive. The operative definitional language in the statute is "documents which are, have been or are intended to be used in determining the employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action." In short, if information in a document has been taken into consideration in making any employment decision, the document is a "personnel record," disclosure of which may be compelled.

What case law there is confirms this broad interpretation. In *Sindermann v. Civil Service Commission of the Village of Gurnee,* 275 Ill.App.3d 917, 657 N.E.2d 41, 212 Ill.Dec. 346 (2d Dist. 1995), the court made it clear that a "personnel record" is not defined by whether or not it is contained in an employee's "personnel file." In that case, the employee requested his personnel *file,* and was given it—but not the documents in an "incident file." The court observed that the employee was given what he requested—his "personnel file"—and that this expression

was not co-extensive with the statutory "personnel records," which it concluded the "incident file" fell within.

Landwer v. Scitex America Corp., 238 Ill.App.3d 403, 606 N.E.2d 485, 179 Ill.Dec. 653 (1st Dist. 1992) took the meaning of "personnel record" to a new level. The court concluded that the employee's request for sales records was proper within the Act, even though the records were a part of the employee's work product and related to the operation of the employer's business. This, the court observed, did not mean that they could not also be "personnel records" by virtue of being used for an employment decision. Included in what was ordered disclosed were sales contracts.

But at the same time, the court upheld denial of access to financial records concerning the sales transactions because it would be relevant to a pending dispute between the employer and employee over his compensation. This is specifically permitted by one of the exceptions to the disclosure requirement, 820 ICLS §40/10, which is designed to prevent the statute from displacing discovery rules.

Where the Act's Exclusionary Rule Does Not Apply

The exclusionary rule, although it does require proof of an intentional withholding of a personnel record, is a powerful tool. But a trap for the unwary plaintiff is that the employee cannot use this tool where the case is in federal court and arises under federal law. In *Park v. City of Chicago,* 2002 WL 1608221, 89 FEP Cases 698, --- F.3d --- (7th Cir. July 22, 2002), a Title VII plaintiff sought to rely on this provision, and the Court of Appeals emphatically rejected the effort to impose a state law exclusionary rule on federal proceedings to enforce a federal law.

Duty to Exhaust Administrative Remedies

Another trap for employee's counsel lies in the remedy provision of the statute, 820 ICLS §40/12. This requires that before the employee may initiate suit on an alleged violation, he or she must first file a complaint with the Illinois Department of Labor. Under the statute, the Department is called upon to "attempt to resolve the

complaint by conference, conciliation, or persuasion." The statute provides that only where this has failed and the Department has not filed suit may the employee may file an action in Circuit Court. *see Park v. City of Chicago,* 2002 WL 1608221, 89 FEP Cases 698, --- F.3d --- (7th Cir. July 22, 2002)(not deciding issue but affirming District Court's decision to that effect on another ground). There are no decisions addressing whether the employee may go to court with a complaint where the Department concludes that there has been no violation; the language of the statute is not clear. On the one hand, a finding of a violation is explicitly a prerequisite for a suit by the Department, and not for the employee. On the other hand, the exhaustion provision calls for the efforts by conference, conciliation or persuasion to have "failed."