

Feature Article

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Jury Trials in the Circuit Court for Employment Claims Under the Illinois Human Rights Act and Federal Statutes, for Retaliation and Punitive Damages

Background

In 1979, the Illinois Human Rights Act (IHRA) created the Illinois Department of Human Rights (IDHR) and the Illinois Human Rights Commission (IHRC). Claimants could file charges before the IDHR claiming civil rights violations in employment. The IHRC would review IDHR decisions and also adjudicate civil rights “complaints” in evidentiary hearings before an administrative law judge. See 775 ILCS 5/1-103(B)-(D), (Q); 5/2-102; 5/7-101(B); 5/7A-102(C); 5/7B-102(C); 5/7B-103(F); 5/8-103; 5/8A-102(A)-(B) (2000); *Blount v. Stroud*, 232 Ill. 2d 302, 309-10, 904 N.E.2d 1, 6-7 (2009) (*Blount I*).

The IHRA did not authorize private employment suits, and expressly limited the court’s jurisdiction. Section 8-111(C) stated: “except as otherwise provided by law, no Court of this state shall have jurisdiction over the subject of an alleged civil rights violation other than as set forth in this Act.” 775 ILCS 5/8-111(C) (2000); *Blount I*, 232 Ill. 2d at 310. The IHRA gave Illinois courts jurisdiction over the following matters: (1) a petition for temporary relief in the circuit court to include an order or judgment restraining the respondent (775 ILCS 5/7A-104(A)(1) (employment) and 5/7B-104(A)(1) (real estate)); (2) judicial review of a final order of the IHRC in the appropriate Illinois appellate court (775 ILCS 5/8-111(A)(1)); and (3) a civil action in the circuit court for a civil rights violation in a real estate transaction (775 ILCS 5/3-101, *et seq.*; 775 ILCS 5/10-102(A)(1)).

Under the IHRA, punitive damages are not available. See *Blount v. Stroud*, 915 N.E.2d 925, 946 (1st Dist. 2009) (*Blount II*) modified upon denial of rehearing. Actual damages are available. 775 ILCS 5/8A-104(B) (2008). Actual damages under the IHRA include emotional harm and mental suffering. *Szkoda v. Illinois Human Rts. Comm’n*, 302 Ill. App. 3d 532, 545, 706 N.E.2d 962, 972 (1st Dist. 1998); *ISS Int’l Servs Sys., Inc. v. Illinois Human Rts. Comm’n*, 272 Ill. App. 3d 969, 979, 651 N.E.2d 592, 598 (1st Dist. 1995).

Before the 1979 enactment of the IHRA, most claims for unlawful discrimination in connection with employment were brought under Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e. The claimant would file a charge with the local office of the federal Equal Employment Opportunity Commission (EEOC) and then potentially a civil action in the appropriate United States district court. 42 U.S.C. § 2000e-2(a); § 2000e-5(a)-(f). At that time, Title VII did not provide for a jury trial or compensatory or punitive damages. 42 U.S.C. § 2000e-5(g); see also BARBARA L. SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 427, 543 (2d ed. 1983 & Supp. 1989). To increase the chances for an award of compensatory and punitive damages, plaintiffs filed along with their federal civil rights action in the district court an Illinois common law cause of action, such as assault, battery, or retaliatory discharge, as a pendent claim under the district court’s supplemental jurisdiction. 28 USC § 1367; see also SCHLEI & GROSSMAN, *supra*, Ch. 23. In 1991, Congress amended the federal Civil Rights Act and provided for a jury trial and compensatory and punitive damages in suits brought under Title VII. 42 USC § 1981a(b)(1)-(2), (c). However,

compensatory and punitive damages are capped based on the number of employees that the employer employs. 42 U.S.C. § 1981a(b)(3). The maximum amount recoverable is \$300,000 from employers with more than 500 employees. 42 U.S.C. § 1981a(b)(3)(D).

The IHRA amendments, effective January 1, 2008, now give the circuit court of Illinois jurisdiction over suits for employment discrimination, as defined in the IHRA, including retaliation as defined in the IHRA. A claimant, after filing a charge with the IDHR, has the right to commence a civil action with a jury trial in the appropriate circuit court at various stages of the charge process, under appropriate procedural rules. See 775 ILCS 5/6-101(A); 5/7A-102(B), (D)(3)-(4), (G)(2); 5/8-111(A); 5/8A-104 (2008). Sections 5/8-111(A)(4) and 5/8A-104(b) of the IHRA provide that the circuit court or jury may award, among other damages, actual damages. 775 ILCS 5/8-111(A)(4); 5/8A-104(b).

“Retaliation” was identified as a civil rights violation in the IHRA prior to the 2008 Amendments. See 775 ILCS 5/6-101(A) (2000). Specifically, it is a civil rights violation for a person to retaliate against a person because that person has opposed that which he or she reasonably and in good faith believes to be, among other things, unlawful discrimination or sexual harassment in employment or because that person has made a charge or testified, assisted or participated in an investigation, proceeding or hearing under the IHRA. *Blount I*, 232 Ill. 2d at 310-11.

The circuit court can also exercise jurisdiction over an Illinois common law tort claim arising in an employment setting. The circuit court has jurisdiction if the tort claim is not inextricably linked to a civil rights violation and has an independent basis apart from the IHRA. See *Blount I*, 232 Ill. 2d at 311-14, 904 N.E.2d at 7-9; *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 516-17, 687 N.E.2d 21, 23-24 (1997); *Geise v. Phoenix Co. of Chi., Inc.*, 159 Ill. 2d 507, 516-17, 639 N.E.2d 1273, 1277 (1994). The plaintiff must allege sufficient facts to establish the elements of a recognized tort, such as retaliatory discharge, without reference to the legal duties created by the IHRA. *Blount I*, 232 Ill. 2d at 311-14 (citing *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172 (1978); *Palmateer v. Int’l Harvester Co.*, 85 Ill. 2d 124, 128 (1981); and *Hinthorn v. Roland’s of Bloomington, Inc.*, 119 Ill. 2d 526, 529, 519 N.E.2d 909, 911 (1988) (recognizing the tort of retaliatory discharge and setting forth the plaintiff’s burden of proof)).

The *Blount v. Stroud* cases, decided in January 2009 by the Illinois Supreme Court (*Blount I*), and in October 2009 by the appellate court (*Blount II*), confirm the jurisdiction of the circuit court over causes of action brought by plaintiffs alleging retaliation under both Illinois common law and federal statute (41 U.S.C. § 1981). Both of these causes of action provide for compensatory and punitive damages without caps.

A. Circuit Court Jurisdiction over Employment Claims for Violations Defined in the IHRA

Effective January 1, 2008, amendments to the IHRA created a new venue for a plaintiff to pursue rights and remedies for employment “civil rights violations” defined in the IHRA: the circuit courts of the State of Illinois. The option to file suit in the circuit court is available for those charges filed with the IDHR after January 1, 2008, upon notice by the IDHR at various times during the charge-filing and investigation process at the IDHR. See 775 ILCS 5/7A-102(J); 5/8-111(F). The option is available upon notice:

- (1) Within the dates provided by the IDHR via notice mailed within ten days of the date on which the charge was filed, and again no later than 335 days thereafter. 775 ILCS 5/7A-102(B);
- (2) After investigation, if the Director of the IDHR determines there is no substantial evidence to support the charge. The claimant must file suit within 90 days of notice. 775 ILCS 5/7A-102(D)(3);
- (3) After investigation, if the Director determines that there is substantial evidence to support the charge. The claimant must file suit within 90 days of notice. 775 ILCS 5/7A-102(D)(4); and
- (4) If the IDHR has not issued its report within 365 days after the charge is filed, or any such longer period agreed to in writing by all the parties. The claimant must file suit within 90 days of these dates. 775 ILCS 5/7A-102(G)(2).

The venue for a civil action shall be in the circuit court in the county wherein the civil rights violation was allegedly committed. 775 ILCS 5/7A-102(F)(2). The form of the complaint shall be in accordance with the Illinois Code of Civil Procedure. See 775 ILCS 5/8-111(A)(1).

Upon the finding of a civil rights violation, the court or jury may award any of the remedies set forth in Section 5/8-104 of the IHRA, including, among other relief, actual damages, hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and interest on actual damages and back pay. See 775 ILCS 5/8-111(A)(4); 5/8-104(B).

B. Circuit Court Jurisdiction under *Blount v. Stroud*

In *Blount I*, the Illinois Supreme Court ruled that the circuit court had jurisdiction over the plaintiff's claims alleging retaliation under both common law and 42 U.S.C. § 1981. 232 Ill. 2d at 314, 328, 904 N.E.2d at 9, 17.

1. Common Law Cause of Action for Retaliatory

Discharge

In *Blount v. Stroud*, the plaintiff's common law claim for retaliatory discharge alleged that the employer terminated the plaintiff in retaliation for her refusal to commit perjury in a co-employee's separate federal discrimination lawsuit against the employer and that the employer's conduct violated Illinois public policy. *Blount I*, 232 Ill. 2d at 306, 311, 318-19, 904 N.E.2d at 4-5, 7, 12. The employer argued that the circuit court lacked jurisdiction over the plaintiff's retaliation claims because of the exclusivity provision of §5/8-111(C) of the IHRA. *Id.* at 310-11, 904 N.E.2d at 7. The employer also argued that the plaintiff's claims were "inextricably linked" to a civil rights violation set forth in the IHRA and thus the plaintiff's claim was preempted. *Id.* at 307, 904 N.E.2d at 5.

The Illinois Supreme Court applied the *Geise* and *Maksimovic* cases and held that the circuit court had subject matter jurisdiction over the plaintiff's common law retaliatory discharge claim. *Id.*, at 311-14, 904 N.E.2d at 7-9. The court explained that actions for retaliatory discharge have been allowed where the employee was discharged for refusing to violate a statute, including a statute which makes the commission of perjury unlawful. *Id.* The court held that the plaintiff did not rely upon the public policy embodied in the IHRA to satisfy the elements of her common law tort claim and that nothing in §5/8-111(C) restricting jurisdiction in the circuit court indicated an intent to abolish all common law torts factually related to incidents of retaliation. *Id.* at 313-15, 904 N.E.2d at 9-10.

2. Cause of Action for Retaliation under 42 U.S.C. § 1981

The *Blount* plaintiff's retaliation claim under 42 U.S.C. § 1981 alleged that the employer, an African-American, harassed and intimidated the plaintiff and retaliated against the plaintiff, also an African-American, because the plaintiff supported the Caucasian co-employee in the co-employee's separate federal discrimination suit against the employer. *Blount I*, 232 Ill. 2d at 305-06, 318-19, 904 N.E.2d at 4-5, 12. Section 1981 encompasses a complaint of retaliation against a person who has complained about a violation of another person's contract-related right. 42 U.S.C. § 1981(a); *Blount I*, 232 Ill. 2d at 318, 904 N.E.2d at 11, citing *CBOCS West Inc. v. Humphreys*, 128 S. Ct. 1951, 1961 (2008).

In *Blount I*, the supreme court ruled that a plaintiff could properly pursue rights and remedies under federal law in the circuit court. *Blount I*, 232 Ill. 2d at 328, 904 N.E.2d at 17. The court's ruling expressly abrogated those prior Illinois appellate court opinions holding that the IHRA was intended to be the exclusive remedy in Illinois for handling claims of employment discrimination and that the circuit court of Illinois had no jurisdiction over federal civil rights claims. See *id.* at 324-28, 904 N.E.2d at 15-17, citing *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990) (holding that federal courts do not have exclusive jurisdiction over a federal cause of action, because state courts have the inherent authority, and presumptively are competent, to adjudicate claims arising under the laws of the United States, such as the Title VII suit involved in that case).

The supreme court held that the circuit court had subject matter jurisdiction over the plaintiff's federal civil rights claim and the plaintiff was not required, as argued by the employer, to litigate her federal claim in the administrative forum provided by the IHRA. *Id.* at 318-26, 904 N.E.2d at 11-16. The court ruled that the definition of a "civil rights violation" in the IHRA is limited to civil rights violations arising under the enumerated sections of the IHRA and does not include a civil rights violation as defined by, or arising under, federal law. *Id.* at 325-26, 904 N.E.2d at 16. The court went on to hold that even if the facts giving rise to a civil rights violation, as defined by the IHRA, could also give rise to a civil rights violation as defined by federal law, the IDHR and the IHRC administer the IHRA, not federal law, and those administrative entities have no statutory authority to entertain federal claims. *Id.* at 326-27, 904 N.E.2d at 16. The supreme court remanded the case to appellate court for consideration of the defendant's claims of error besides jurisdiction. *Id.* at 330, 904 N.E.2d at 18.

C. *Blount v. Stroud* and Punitive Damages

On remand to the appellate court, the *Blount II* court reviewed the circuit court's punitive damage award of \$2.8 million. Punitive damages are available for claims alleging retaliation under both common law and 42 USC § 1981. See generally *Blount II*, 915 N.E.2d 945-46; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-60, 95 S. Ct. 1716, 1720 (1975).

The circuit court, following the conclusion of the evidence, had instructed the jury on a single claim of retaliation predicated on both the plaintiff's "support" for the co-employee's suit (42 U.S.C. § 1981) as well as her refusal to commit perjury (common law). The court gave the pattern instruction on punitive damages (IPI Civil, No. 35.01 (2005 ed)). Following deliberations, the jury returned a verdict in favor of the plaintiff on her retaliation claim. The jury awarded the plaintiff \$257,250 in back pay, \$25,000 for physical and/or emotional pain and suffering, and \$2.8 million in punitive damages. The court subsequently awarded the plaintiff \$1,182,830.10 in attorneys' fees under 42 U.S.C. § 1988. *Blount II*, 915 N.E.2d at 936.

1. Punitive Damages – Common Law

On review, the appellate court restated the rule that punitive damages may be awarded in a common law retaliatory discharge claim where the retaliatory discharge was committed with fraud, actual malice, deliberate violence, or oppression, or when the defendant has acted willfully. *Blount II*, 915 N.E.2d at 938. The appellate court reaffirmed that in reviewing a jury's award of punitive damages under the Illinois common law punitive damages inquiry, relevant circumstances to consider include, but are not limited to, the nature and enormity of the wrong, the financial status of the defendant, and the potential liability of the defendant. *Id.* at 939.

2. Punitive Damages – 42 U.S.C. § 1981

Punitive damages are available as a remedy for a cause of action brought under 42 U.S.C. § 1981. *Johnson*, 95 S. Ct. at 1720; *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417, 1424-25 (7th Cir. 1986) (affirming award for emotional distress and punitive damages); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1296 (7th Cir. 1987) (affirming punitive damage award of \$100,000).

The appellate court also reviewed the punitive damages award under the federal due process standard. Under that standard, the due process clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary amounts on a tortfeasor because such awards serve no legitimate purpose and constitute an arbitrary deprivation of property. *Blount II*, 915 N.E.2d at 941. In judging the punitive damage award under the federal due process standard, the *Blount II* court used the guide posts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1598-99 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417, 123 S. Ct. 1513, 1520 (2003). *Id.*

Significantly, the appellate court ruled that the fact that damages under Title VII are capped based on the number of employees employed by the defendant, with the highest amount available being \$300,000, does not limit punitive damages under Section 1981 unless there is a "huge discrepancy." *Id.* at 946. The appellate court

found the amount of punitive damages was not excessive under either the Illinois common law or the federal due process standard, and affirmed the award and judgment for the plaintiff. *Id.*

D. Summary of Employment and Retaliation Causes of Action and Remedies over which the Circuit Court Has Jurisdiction

Thus, under the circuit court's expanded jurisdiction set out in the IHRA amendments of 2008, as well as the circuit court's continued jurisdiction over Illinois common law causes of action and federal statute causes of action, an employee or terminated employee may bring one or more of the following causes of action in the circuit court of Illinois:

(1) Civil rights violations as defined in the IHRA, with an *ad damnum* requesting actual damages (to include emotional harm and mental suffering), hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and interest on actual damages and back pay;

(2) Retaliation under the IHRA, with an *ad damnum* requesting actual damages (to include emotional harm and mental suffering), hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and interest on actual damages and back pay;

(3) Illinois common law and retaliatory discharge actions arising in an employment setting where the complaint presents a justiciable matter that has an independent basis for the common law action apart from a duty set forth in the IHRA, with an *ad damnum* including compensatory and punitive damages, without caps;

(4) Retaliation or discrimination cause of action alleging a violation of federal statute 42 U.S.C. § 1981, with an *ad damnum* including punitive and compensatory damages, without caps, and attorneys' fees under 42 U.S.C. § 1988; or

(5) A civil rights violation, including retaliation, under the federal civil rights statute (Title VII of the Civil Rights Act) with an *ad damnum* requesting actual damages, hiring or reinstatement, back pay, benefits, attorneys' fees and costs, and compensatory and punitive damages capped, depending on the number of employees that the employer employs.

About the Author

James P. DeNardo is a partner in the Chicago firm of *McKenna Storer* where he concentrates on equal employment litigation, labor law and appellate practice. He has litigated employment cases on behalf of employers before the Illinois Department of Human Rights, Illinois Human Rights Commission, Federal Equal Employment Opportunity Commission, in the Circuit Court of Illinois, the U.S. District Courts and the U.S. Court of Appeals, Seventh Circuit. He has litigated agent agreement contract matters before the Financial Industry Regulatory Authority (FINRA). He has litigated civil appeals before the Illinois Appellate and Supreme Courts and the United States Court of Appeals, Seventh Circuit. As a member of the United States Army Judge Advocate General's Corps, he represented military personnel before courts-martial in Vietnam and Germany. Mr. DeNardo is a member of the Federal Trial Bar of the United States District Court for the Northern District of Illinois.

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