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## High court clarifies standard of proof for retaliatory discharge claims

**E**arly this month, the Illinois Supreme Court clarified the standard of proof governing retaliatory discharge claims brought under Illinois common law.

In Illinois, the general rule of law is that non-contractual employees are at-will, which means that they can be discharged by their employer at any time, with or without cause.

One of the few exceptions to this general rule is the common law tort of retaliatory discharge. Under this narrow exception, Illinois employers cannot fire employees in retaliation for the employee's protected activities where the discharge would violate a clear mandate of public policy.

Illinois courts have not established a precise definition of what constitutes "clearly mandated public policy." Historically, retaliatory discharge claims have been allowed in two settings: Where an employee is discharged for filing, or in anticipation of filing, a workers' compensation claim; and where an employee is discharged in retaliation for the reporting of illegal or improper conduct, i.e., for whistle-blowing.

In *Michael v. Precision Alliance Group LLC*, No. 117376 (Dec. 4, 2014), three former employees filed retaliatory discharge claims, alleging they were fired because they complained to a state agency that their employer was selling and shipping underweight product.

Defendant Precision Alliance Group LLC is in the agricultural supply business. It grows, packages and distributes soybean seeds for commercial agricultural use. The plaintiffs,

Wayne Michael, Alan Hohman and Craig Klumke, worked at Precision's facility in Nashville, Ill.

In 2002, Precision began experiencing problems with underweight seed bags. Under Illinois law, any bag containing a certain weight of seeds must actually weigh that amount. Some of Precision's seed bags, which were sold in 50-pound and 1-ton sizes, were underweight by up to 20 pounds.

In early 2003, Precision fired Shawn Dudley for engaging in horseplay. After Dudley's unemployment benefits claim was denied, with revenge on his mind, he hatched a plan to report the underweight bags to the state. Dudley enlisted the help of the three plaintiffs, who provided him identification numbers and locations of underweight bags. In turn, Dudley reported the underweight bags to the Illinois Department of Agriculture's Bureau of Weights and Measures.

The department conducted an onsite investigation of Precision's warehouse. It found underweight bags and issued stop sale orders. Precision then stopped production for 10 days while employees, each working 12-hour shifts,

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worked around the clock to inspect bag weights.

It was discovered that about half of the bags were light. The plaintiffs alleged that during this period, the safety manager said, "If we find out that anybody in this company had anything to do with us being turned in, it will

### LIFE IN THE WORKPLACE



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result in termination."

After the investigation closed, Precision's assistant plant manager discovered that the complaint to the department could not have been lodged by a customer. Thus, Precision then believed that an employee or former employee had reported it to the department.

The assistant plant manager memorialized this belief to the general manager. Also, the assistant plant manager called two of the plaintiffs into his office and told them if an employee had turned Precision in, it would be "very job threatening." In March 2013, Precision discharged Hohman (one of the plaintiffs) for engaging in horseplay with a forklift. In April 2013, Precision terminated the employment of the other two plaintiffs (and two other employees) as part of a reduction in force.

At trial, the court ruled in favor of Precision on the retaliatory discharge claims. The circuit court applied the well-

known burden shifting method of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), which has been adopted by Illinois courts.

Under this approach, a plaintiff is required to establish that the defendant committed an adverse act against him and that a "causal nexus" existed between the protected activity and the adverse act. If the plaintiff establishes this prima facie case, the defendant must articulate a legitimate, non-discriminatory reason for the adverse act. Lastly, the plaintiff must prove that the defendant's articulated reason is a pretext.

The circuit court held that the plaintiffs established their prima facie case because Precision discharged them a short time after they reported Precision (through Dudley) to the department. Thus, according to the court, there was a causal nexus between the plaintiffs' reporting and their discharges.

The circuit court also held that Precision established legitimate, non-discriminatory reasons for the firings of all three plaintiffs, and that they failed to prove that these articulated reasons were pretexts.

The appellate court reversed. The court held that by finding a causal nexus between the whistle-blowing and discharges, the circuit court essentially had found that the plaintiffs proved the causation element of their retaliatory discharge claim.

The appellate court further held that the circuit court erroneously increased the plaintiffs' burden of proof by requiring them to prove, in addition to causation, that Precision's stated reasons for the discharges were not pretexts.

The Supreme Court reversed the judgment of the appellate court and affirmed the judgment of the circuit court.

The high court held that the appellate court improperly relieved the plaintiffs of their burden of proof to establish the causation element of their claims: That their discharges were in retaliation for their whistleblowing.

The court recognized that in retaliatory discharge cases, the employer is not required to come forward with an explanation for the employee's discharge, but the employer is free to do so. If the employer chooses to come forward with a valid basis for discharging the employee and the trier of fact believes it, the required causation element is

not met.

The court held that the appellate court failed to hold the plaintiffs to their burden of proving causation, i.e., that their discharges were in retaliation for protected activity, but instead, held that the plaintiffs proved causation based on the circuit court's finding of a causal nexus between the plaintiffs' discharges and their protected activity.

The court further stated that the circuit court improperly applied the McDonnell Douglas burden-shifting method, which the Supreme Court rejected in 1998 as it applied to retaliatory

discharge claims. Therefore, the circuit court's finding of a causal nexus did not mean that the plaintiffs established causation.

This is so because where, as in this case, the employer chooses to come forward with a valid basis for discharging its employees — one that is not a pretext — and the trier of fact believes it, the causation element is not met.

Here, the circuit court as trier of fact concluded that Precision presented legitimate reasons for discharging the plaintiffs. Thus, the plaintiffs did not prove the causation element, and the circuit court properly found that

the plaintiffs failed to prove a cause of action for retaliatory discharge.

The *Michael* decision reaffirms that a key defense for employers in retaliatory discharge cases is to show that the plaintiff was discharged for a legitimate reason. The decision also reaffirms that the well-known McDonnell Douglas burden-shifting method is not applicable to retaliatory discharge claims brought under Illinois common law.

— *Matthew P. Kellam, an associate at Laner, Muchin Ltd., assisted in the preparation of this column.*