Tort Remedy for Retaliatory Discharge: Illinois Workmen's Compensation Act Limits Employer's Power to Discharge Employees Terminable-at-Will - Kelsay v. Motorola, Inc.

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TORT REMEDY FOR RETALIATORY DISCHARGE: ILLINOIS WORKMEN'S COMPENSATION ACT LIMITS EMPLOYER'S POWER TO DISCHARGE EMPLOYEES TERMINABLE-AT-WILL—KELSAV. MOTOROLA, INC.

The long-standing rule that an employer may discharge a terminable-at-will employee for just cause, no cause, or even a "cause [that is] morally wrong" has been examined with increasing frequency by courts and commentators. Confronted with a particularly harsh application of this rule in Kelsay v. Motorola, Inc., the Illinois Supreme Court held that the retaliatory discharge of an employee for pursuing a workmen's compensation claim offended the public policy of Illinois as manifested in the Workmen's Compensation Act. The court also held that such a discharge constituted a tort and gave rise to compensatory and punitive damages. By limiting an
employer's "otherwise absolute" power to terminate at-will employees, the Kelsay court demonstrated a clear understanding of the potential for abuse of this power and indicated a willingness to intervene when an employer's discharge actions contravene important public policy considerations.

This Note examines the reasoning in Kelsay and criticizes its analysis of prior case law. A legislative alternative expanding the protection afforded employees by Kelsay is suggested and a sample statute designed to achieve this expansion is presented. Finally, the Kelsay decision's impact on the employer-employee relationship is discussed and a hypothetical that demonstrates a possible extension of the Kelsay public policy considerations is analyzed.

THE TERMINABLE-AT-WILL RULE

The unqualified American rule empowering an employer to terminate an at-will employee originated approximately 100 years ago and remains the law today in most states. The rule first was expressed in a treatise and

9. Id. at 181, 384 N.E.2d at 357.
10. Id. at 185, 384 N.E.2d at 358.
11. France, Germany, England, and Sweden protect against unjust dismissals by legislation, thus avoiding the harshness of the American rule. See Summers, supra note 4, at 508-19. France statutorily adopted a principle known as "abus de droit," which makes abusive termination a tort if the employer acted with malicious intent, culpable negligence, or capriciousness. Id. at 510. Germany prohibits dismissals that are "anti-social" in character, and requires a minimum notice period of four weeks before a discharge can be effective, except in cases of serious employee misconduct. Id. at 511. In 1971, England adopted a statute providing comprehensive protection against unjust dismissal. Id. at 513. Sweden also has a fairly comprehensive unjust-dismissal statute requiring written notice of the dismissal at least one month in advance. The Swedish statute also requires that the dismissal be for "an objective cause" that must be proven by the employer. Id. at 517. These four countries had harsh common law discharge rules similar to the American rule, but all have softened the rule's impact by comprehensive statutes.
12. See note 14 infra.
13. 9 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 1017 (3d ed. 1967); 53 AM. JUR. 2d Master and Servant § 43 (1970). One jurisdiction has abandoned the rule. See Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974). The court in Monge held that an employer's termination of an at-will employment contract is not in the best interests of the economic system or the public good where the termination is motivated by bad faith, malice, or retaliation and that such a termination constitutes a breach of the employment contract. This decision has evoked considerable commentary but has not been followed by other jurisdictions. See Note, A Remedy for Malicious Discharge of the At-Will Employee: Monge v. Beebe Rubber Co., 7 CONN. L. REV. 758 (1975) (Monge court's reasoning examined and some implications of the decision suggested); Note, A Common Law Action for the Abusively Discharged Employee, 26 HASTINGS L.J. 1435 (1975) (tort remedy proposed as alternative to contract analysis in Monge) [hereinafter cited as A Common Law Action]; Comment, Employment Contracts Terminable At Will: Monge v. Beebe Rubber Co. and Bad Faith Discharges, 63 KY. L.J. 513 (1975) (contract theory underlying at-will rule explored and the effect of Monge discussed). Like Monge, the Kelsay decision also has triggered commentary. See Filippi and Popko, Workmen's Compensation: New Cause of Action for Retaliatory Discharge, 68 ILL. B.J. 329 (1980); Note, Kelsay v. Motorola, Inc.—Tort Action for Retaliatory Discharge Upon Filing Workmen's Compensation Claims, 12 J. MAR. J. PRAC. & PROC. 659 (1979); Recent Decisions, 68 ILL. B.J. 287 (1979).
14. The rule's origin generally is traced to the following statement by H.G. Wood: With us the rule is inflexible, that a general or indefinite hiring is prima facie a
later was declared a constitutional right in a series of United States Supreme Court decisions based on extreme notions of laissez-faire economics.\textsuperscript{15} Although the treatise has been proven erroneous\textsuperscript{16} and the Supreme Court has abandoned its early laissez-faire position,\textsuperscript{17} the rule remains. In fact, the rule is so firmly entrenched in American jurisprudence that courts frequently accept it without serious analysis and occasionally without citation.\textsuperscript{18}

While the employer's power to terminate an at-will employee generally is considered absolute under the common law, statutory exceptions are found in federal\textsuperscript{19} and state\textsuperscript{20} legislation that prohibit discharges based on the

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\textsuperscript{15} The cases best representing this laissez-faire approach are Adair v. United States, 208 U.S. 161 (1908), and Coppage v. Kansas, 236 U.S. 1 (1915). In both cases the Supreme Court invalidated legislation forbidding yellow-dog (anti-union) contracts. The reasoning supporting these decisions was that both parties to the employment contract should be free to leave at any time and, therefore, legislation forbidding the discharge of employees for their refusal to sign yellow-dog contracts was unconstitutional. The challenged statutes forced employers to retain the services of unwanted employees when the employers should have been free to discharge. One author has explained that the Supreme Court's extreme laissez-faire position was representative of the prevalent 19th century belief that rapid economic growth was socially desirable because, theoretically, all society would enjoy the benefits of such growth. See A Common Law Action, supra note 13, at 1441. Another reason advanced for these laissez-faire beliefs was that the late 19th century was a period when business failure was common and the courts consequently felt compelled to protect industry and the employer. The terminable-at-will rule was formulated to this end. Id. at 1440.

\textsuperscript{16} One writer has shown that the four cases Wood cited as authority for his rule, supra note 14, did not support his position. See Note, Implied Contract Rights to Job Security, 26 STAN. L. REV. 335, 341-42 (1974) [hereinafter cited as Job Security]. See also, Blumrosen, Employer Discipline: U.S. Report, 18 RUTGERS L. REV. 428, 432-33 (1964) (after Wood's treatise, application of the at-will rule spread rapidly throughout the country and the rule remains the standard text statement of the common law).

\textsuperscript{17} The cases cited in note 15 supra were later "sapped of their authority" by NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), according to Professor Blades. For a more thorough discussion of these Supreme Court decisions, see Blades, supra note 4, at 1415-19.

\textsuperscript{18} The Kelsay decision is a good example. The court did not cite authority for the employer's "traditional right to discharge at will," yet a major issue in Kelsay was whether the right should be a limited one. Automatic acceptance of the rule without analysis was a common occurrence when the rule first was announced at the beginning of the 20th century. See Job Security, supra note 16, at 342 nn. 57 & 58.

\textsuperscript{19} Some examples of federal legislation are: Veterans Preference Act, 5 U.S.C. § 7512(a) (1976) (agency may take adverse action against eligible employee only for such cause as will promote the efficiency of the agency's service); Consumer Credit Protection Act, 15 U.S.C. § 1674(a) (1976) (no employer may discharge any employee simply because the employee's earnings have been subjected to garnishment); Labor Management Relations Act, 29 U.S.C. § 148(a) (1976) (employer's power to discharge restricted in certain circumstances); Fair Labor Standards Act of 1938, 29 U.S.C. § 215(a)(3) (1976) (unlawful for employer to discharge any employee
race, sex, or age of an employee. Case law also has established exceptions to this "inflexible"\(^{21}\) rule, usually on the ground that it violates public policy.\(^{22}\) Many courts, however, have not modified the rule,\(^{23}\) resulting in a


20. For examples of state laws limiting the employer's absolute discharge power, see [1979] 1 LAB. L. REP. (State Laws) (CCH) ¶¶ 43045, 43055. See also [1979] GOV'T EML. REL. REP. (BNA) 51:501-23. For similar Illinois laws, see note 105 infra.

21. See note 14 supra.


An interesting case, Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974), held that bad faith discharges constituted a breach of the at-will employment contract. The discharged female employee in the Monge case refused to be sexually "nice" to her foreman in order to secure a promotion. She did not exhaust available union grievance and arbitration remedies before bringing her suit, although she was a union member. The exhaustion of these remedies is required before a union employee may bring a separate wrongful discharge action, unless the union employee can prove the union arbitrarily or discriminatorily settled the employee's claim. See Vaca v. Sipes, 386 U.S. 171 (1967). Thus the Monge decision does not establish a common law discharge action for union employees, although its reasoning does support a discharge action for non-union employees. For a more detailed discussion of the Monge decision's impact on state discharge actions for organized employees, see A Common Law Action, supra note 13, at 1457-63.

The Monge decision was not mentioned by the Illinois Supreme Court in Kelsay, although the New Hampshire decision was raised by the appellant. Brief for Appellant at 19. This does not imply that the Kelsay court disagrees with the Monge court's conclusion that bad faith discharges are not in the best interest of the economic system or the public good. More probably the Kelsay majority omitted any reference to the Monge decision because no breach of contract allegations were made by the appellant. See note 31 infra. But see Sargent v. Illinois Inst. of Tech., 78 Ill. App. 3d 117, 397 N.E.2d 443 (1st Dist. 1979) (retaliatory discharge action based on express and implied contract allegations dismissed for failure to allege tort violation).

23. These courts usually reason that the employer's absolute power to discharge should be modified by the legislature, not the judiciary. See Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960).
split of authority.\textsuperscript{24} This split of authority over the at-will doctrine’s status recently arose between two panels of the Illinois Appellate Court and was resolved by the Illinois Supreme Court in \textit{Kelsay}.

\textbf{The Facts}

Marilyn Jo Kelsay, a Motorola employee whose employment contract was terminable at-will, was injured\textsuperscript{25} while working in the defendant’s factory. She received the necessary medical attention\textsuperscript{26} and later filed a workmen’s compensation claim based on the injury.\textsuperscript{27} After receiving notice of the claim, the personnel manager approached Kelsay and told her that she would be “more than adequately compensat[ed]” by Motorola if she did not advance her claim.\textsuperscript{28} Kelsay also was informed of the company’s policy of terminating employees who pursue workmen’s compensation claims.\textsuperscript{29} She

\begin{footnotes}
\item[\textsuperscript{24}] See Annot., 63 A.L.R.3d 979, 981-82 (1975).
\item[\textsuperscript{25}] The plaintiff commenced employment with the defendant company on January 3, 1973. On February 28, 1973, while operating an unfamiliar machine, Kelsay cut her thumb. Record at 5-7.
\item[\textsuperscript{26}] The plaintiff’s injury apparently was minor. She returned to work the same day she received stitches in her thumb. 74 Ill. 2d at 178, 384 N.E.2d at 355-56. Kelsay eventually was compensated for her injury and her medical expenses were paid. Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 1017, 366 N.E.2d 1141, 1142 (4th Dist. 1977), rev’d, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).
\item[\textsuperscript{27}] Workmen’s compensation is a statutory creation. See note 7 supra. Prior to the Workmen’s Compensation Act, injured employees had considerable difficulty recovering under negligence theory because of the common law defenses of assumption of risk, contributory negligence, and the fellow-servant rule. See 1 T. Angerstein, Illinois Workmen’s Compensation § 2 (rev. ed. 1952); 81 AM. Jur. 2d Workmen’s Compensation § 2 (1976). Unable to work or recover damages, injured workers experienced financial hardship due to medical and family maintenance expenses. The Workmen’s Compensation Act was passed to remedy these problems by providing speedy and inexpensive relief. For a recent analysis of the present state of the Illinois workmen’s compensation system, see Stevenson, The Illinois Workmen’s Compensation System: A Description and Critique, 27 DePaul L. Rev. 675 (1978) [hereinafter cited as Stevenson]. For some comments on the economic impact of Illinois’ Workmen’s Compensation Act, see Parrish, Workmen’s Compensation Law in Illinois: Some Economic Consequences of Recent Changes, 27 DePaul L. Rev. 715 (1978).
\item[\textsuperscript{28}] 74 Ill. 2d at 179, 384 N.E.2d at 356.
\item[\textsuperscript{29}] After being informed of the policy to terminate employees who pursue workmen’s compensation claims, Kelsay was told to “think about it.” Id. at 179, 384 N.E.2d at 356. According to the defendant’s personnel manager, no written company policy of terminating such employees existed, nor was he ever actually told of this policy. Record at 64. Motorola’s policy of dismissing workmen’s compensation claimants apparently was inferred from its awareness of the reason underlying Kelsay’s termination. The personnel manager submitted a form to Motorola’s divisional office for Kelsay’s removal from the payroll. On this form appeared “w/c,” indicating a workmen’s compensation suit. Record at 61. Thus, future retaliatory discharge plaintiffs should examine company payroll records and employee time cards in addition to questioning company personnel. The existence of written records informally documenting the reasons for discharge could be crucial to establish that the employee’s wrongful discharge contention is not just a bald assertion.
\end{footnotes}
proceeded with her claim and later was discharged.\textsuperscript{30} Although the workmen's compensation action eventually was settled, the plaintiff sought relief for her retaliatory discharge in the circuit court.\textsuperscript{31} The trial court found for Kelsay, awarding $25,000 punitive damages in addition to $749 compensatory damages.\textsuperscript{32} The appellate court reversed and held that an at-will employee had no cause of action against an employer for retaliatory discharge.\textsuperscript{33} In another case, however, a different panel of the appellate court heard essentially the same issue but reached an opposite result.\textsuperscript{34} Thus, a certificate of importance was issued to the Illinois Supreme Court to resolve the conflict.\textsuperscript{35} The supreme court, in \textit{Kelsay}, held that a cause of action existed for retaliatory discharge. The court stated in dicta that, in the future, punitive damages would be recoverable in similar cases, but denied Kelsay that form of relief.\textsuperscript{36}

\textbf{THE DECISION}

After reviewing the facts, the court stated the three questions presented in \textit{Kelsay}: first, whether the state should recognize a cause of action for retaliatory discharge;\textsuperscript{37} second, if retaliatory discharge was actionable,

\begin{itemize}
\item \textsuperscript{30} The discharge occurred on June 6, 1973, immediately after Kelsay told the personnel manager her decision. The parties had engaged in several conversations on the subject before the June 6 encounter. Record at 10-15.
\item \textsuperscript{31} The plaintiff's complaint was framed solely in tort. \textit{Kelsay v. Motorola, Inc.}, 51 Ill. App. 3d at 1016, 366 N.E.2d at 1142. In paragraph 10 of plaintiff’s second amended complaint the following allegation appeared: "The discharge of the Plaintiff by the Defendant was for no cause other than the fact that she had filed an application for adjustment of her claim arising under the Workmen's Compensation Act and had refused to withdraw that claim after Defendant's threats and intimidation." Plaintiff's Second Amended Complaint at 2. By framing the complaint solely in tort, the plaintiff avoided the problems of establishing retaliatory or abusive discharge as a contract action. For analysis of the problems with contract theory as a basis for retaliatory discharge, see Blades and Summers, \textit{supra} note 4, and note 66 \textit{infra}. See also \textit{Job Security}, \textit{supra} note 16.
\item \textsuperscript{32} The jury originally awarded $1000 compensatory damages, but the trial court remitted the amount to $749. 74 Ill. 2d at 178, 384 N.E.2d at 355.
\item \textsuperscript{33} 51 Ill. App. 3d at 1020, 366 N.E.2d at 1144-45. The appellate court reviewed other employment legislation and concluded the legislature's omission of a civil remedy was intentional; therefore, any change had to be effected by the legislature.
\item \textsuperscript{34} \textit{Leach v. Lauhoff Grain Co.}, 51 Ill. App. 3d 1022, 366 N.E.2d 1145 (4th Dist. 1977) (retaliatory discharge for pursuing workmen's compensation held actionable). Justice Craven, dissenting in \textit{Kelsay v. Motorola, Inc.}, 51 Ill. App. 3d at 1021, 366 N.E.2d at 1145, noted that the Blades article, \textit{supra} note 4, was "most persuasive." He cited the article again in the \textit{Leach} decision, which he authored for the majority. 51 Ill. App. 3d at 1025, 366 N.E.2d at 1147.
\item \textsuperscript{35} 58 Ill. 2d R. 316. Illinois Supreme Court Rule 316 states: "Appeals from the Appellate Court shall lie to the Supreme Court upon 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."
\item \textsuperscript{36} 74 Ill. 2d at 189, 384 N.E.2d at 361.
\item \textsuperscript{37} \textit{Id.} at 179, 384 N.E.2d at 356.
\end{itemize}
whether punitive damages were recoverable; 38 and if so, whether the punitive damages award was proper in the instant case. 39

Arguing the first issue, Motorola urged that no cause of action should be recognized because at the time Kelsay was injured the Workmen's Compensation Act (Act) contained no limitation on the employer's right to discharge. 40 Motorola also contended that the exclusivity provision of the Act, 41 limiting the employer's responsibility for compensation to certain enumerated situations, indicated the legislature's intention that the Act should be the sole measure of employee rights and remedies. 42 This provision, it argued, barred the implication of additional rights or remedies. The defendant's final contention was that the Act's 1975 amendment criminalizing retaliatory discharge 43 demonstrated the General Assembly's intention to exclude civil actions because they were not considered an appropriate remedy. 44

The Illinois Supreme Court rejected all of Motorola's contentions and allowed a private cause of action for retaliatory discharge. 45 The court explained that the Act's purpose was to provide automatic recovery to employees for injuries arising out of and in the course of employment. 46 Efficient remedies for the protection of injured employees were found to promote the general welfare and, consequently, were in furtherance of sound public policy. 47 In view of the Act's purpose and the public policy it

38. Id.
39. Id.
41. Ill. Rev. Stat. ch. 48, § 138.11 (1973) provides: "The compensation herein provided, together with the provisions of this Act, shall be the measure of the responsibility of any employer engaged in any of the enterprises or businesses enumerated in Section 3 of this Act. . . ."
42. 74 Ill. 2d at 184, 384 N.E.2d at 358.
43. Ill. Rev. Stat. ch. 48, § 138.4(h) (1975) provides:
   It shall be unlawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights or remedies granted to him by this Act. . . .
   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.
44. 74 Ill. 2d at 184-85, 384 N.E.2d at 358.
45. Id. at 185, 384 N.E.2d at 358-59.
46. Id. at 180-81, 384 N.E.2d at 356.
47. Id. at 181, 384 N.E.2d at 357. See Deibeikis v. Link-Belt Co., 261 Ill. 454, 104 N.E. 211 (1914) (the Workmen's Compensation Act is a declaration by the legislature of the public policy of the state). Although the court relied on the public policy declared by the legislature, see note 45 infra, other factors can be considered when determining the public policy. One authority states:
   There are formal expressions and manifestations of public policy in the mandates, norms, and guidelines declared in federal and state constitutions, statutes, judicial
expressed, the majority reasoned that allowing employers to exercise their unlimited discharge power could force employees to choose between employment and rights under the Act. This result was considered untenable. The court therefore concluded that this result could not have been intended by the legislature, even in the absence of an explicit proscription against such employer conduct.

To support its conclusion that a cause of action existed prior to the 1975 amendment criminalizing retaliatory discharge, the Kelsay court examined relevant case law. The supreme court rejected a Seventh Circuit Court of Appeals decision that denied a cause of action for retaliatory discharge, Loucks v. Star City Glass Co. The Loucks court reasoned that no cause of action should exist because the Act contained no limitation on the employer's traditional right to discharge at the time of Loucks' dismissal. In rejecting Loucks, the Kelsay majority noted that the Loucks court lacked the guidance of Illinois precedent in its interpretation of the Act. The supreme court also noted that federal decisions construing state statutes were not binding on state courts, concluding that the Loucks court's construction of the Act contravened Illinois public policy.

decisions, and sundry other avenues through which the official decisions and actions of organized society are registered. In a larger and less formalized sense, countless manifestations of public mores, attitudes, and sentiments may be, in effect, judicially noticed as sources on the basis of which to declare public policy. Policy directives may be perceived, moreover, as imperatives derived from modern economic, social and political conditions.

2A. J. SUTHERLAND, STATUTORY CONSTRUCTION § 56.01, at 401 (4th ed. 1973). See also Marchlik v. Cornet Ins. Co., 40 Ill. 2d 327, 239 N.E.2d 799 (1968) (public policy includes judicial decisions, legislation, constitutions, customs, morals, and notions of justice prevailing within the state). Based on the factors enumerated by Professor Sutherland, the Kelsay court's realistic appraisal of the injured employee's plight, that of having to choose between employment and rights under the Act, was a legitimate consideration because such a plight is a modern economic condition.

48. Id. The Act's preamble expresses the public policy that compensation should be available to injured workers. The preamble declares the Workmen's Compensation Act to be "[A]n Act to promote the general welfare of the People of this State by providing compensation for accidental injuries or death suffered in the course of employment within this State...." ILL. REV. STAT. ch. 48, § 138 (1977).

49. 74 Ill. 2d at 182, 384 N.E.2d at 357.

50. Id.

51. 551 F.2d 745 (7th Cir. 1977) (court of appeals, construing the Illinois Workmen's Compensation Act, held that a civil cause of action for retaliatory discharge would not have been omitted from such comprehensive and integrated legislation if intended and that its omission therefore precluded a civil action). Accord, Green v. Armerada-Hess Corp., 612 F.2d 212, 214 (5th Cir. 1980) (court of appeals construed the Mississippi Workmen's Compensation Law and held that the absence of an explicit statutory provision of a civil remedy argued against recognition of a cause of action for retaliatory discharge).

52. 551 F.2d at 748.

53. 74 Ill. 2d at 182, 384 N.E.2d at 357.

54. Id. Referring to the plaintiff, the Loucks court stated that though his "claims have a certain appeal to notions of fairness," the matter was a legislative determination against Loucks. The Loucks court was urged to consider Kelsay, but declined as Kelsay was then only a trial decision and therefore not necessarily the law of Illinois. 551 F.2d at 746.
The Kelsay court also examined opinions by the Indiana and Michigan state courts, Frampton v. Central Indiana Gas Co. and Sventko v. Kroger Co. Without analyzing these decisions in depth, the Kelsay court mentioned that both state courts relied on public policy in recognizing retaliatory discharge. The majority in Kelsay explained that "the overriding principle


57. The court probably discussed the Frampton and Sventko decisions because they were the only workmen's compensation cases supporting the court's position. Several decisions, however, do not favor the court's reasoning in Kelsay. See Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122 (1956) (Missouri Workmen's Compensation Act was considered so comprehensive that the inclusion of criminal penalties for discharge was construed to mean civil remedies were intentionally omitted); Dockery v. Lampart Table Co., 36 N.C. App. 293, 244 S.E.2d 272, petition for discretionary review denied, 295 N.C. 465, 246 S.E.2d 215 (1978); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974).

58. 74 Ill. 2d at 181-84, 384 N.E.2d at 357-58. The Frampton case involved a woman employee who was injured on the job, but returned to work apparently recovered. Nineteen months after her return, she discovered she had lost 30% use of her injured arm. 260 Ind. at 250, 297 N.E.2d at 426. One month after she received a settlement for her subsequent arm problem, Frampton was dismissed with no reason given for her termination. Id. After noting that the Workmen's Compensation Act should be construed liberally, the Indiana Supreme Court interpreted the statutory prohibition against "devices" relieving the employer of its obligation to compensate injured employees to include retaliatory discharges. Id. at 252, 297 N.E.2d at 427-28. For the text of the Indiana statute, see note 60 infra. The Frampton court analogized retaliatory discharge to retaliatory eviction because there was no case law recognizing retaliatory discharge. The court reasoned that "[t]he fear of retaliation for reporting [housing] violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy [that of compensating injured workers]." Id. at 253, 297 N.E.2d at 428. Retaliatory discharge therefore was recognized as an exception to the at-will rule. Id. Frampton is the landmark case establishing retaliatory discharge as an exception to the at-will rule. See 2A A. Larson, WORKMEN'S COMPENSATION § 68.36 (Supp. 1979) [hereinafter cited as Larson].
that compensation should be available to injured workers” was the critical aspect of the Frampton decision, not the Indiana court’s express reliance on the statutory language prohibiting employer devices for avoiding liability. The Kelsay court reasoned that the absence of a similar prohibition in the Illinois Act did not mean that retaliatory discharge was any less offensive to the public policy of Illinois. The supreme court therefore held that the public policy underlying the Act limited the employer’s absolute power to discharge at-will employees.

Having determined that the employer’s discharge power was not absolute, the court considered the effects of both the Act’s exclusivity provision and the 1975 amendment on the availability of a civil remedy. The majority decided that neither precluded the implication of a civil remedy. The exclusivity provision, although limiting the employer’s compensation responsibility arising under the Act, was held to apply only to work-related injuries, not to independent torts such as retaliatory discharge.

The Sventko case arose three years after the Frampton decision. Judge Allen, concurring in Sventko, cited Frampton, Monge, and Peterman v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959) (employee’s dismissal for refusing to commit perjury violated public policy). Sventko suffered a back injury, received compensation, and later was terminated. Sventko alleged her discharge was solely because she filed a workmen’s compensation claim. Id. at 649, 245 N.W.2d at 154. For the similar complaint filed by the plaintiff in Kelsay, see note 31 supra.

The Sventko court declared that it was impossible to retaliatorily discharge an employee and not contravene the public policy, reasoning that “[a]n employer cannot accept that benefit [freedom from common law liability provided by the Act] for himself and yet attempt to prevent the application of the act to the work-related injuries of his employees without acting in direct contravention of public policy.” Id. at 648, 245 N.W.2d at 153-54. The Illinois Supreme Court adopted similar reasoning in Kelsay. 74 Ill. 2d at 182, 384 N.E.2d at 357.

59. 74 Ill. 2d at 184, 384 N.E.2d at 358.

60. IND. CODE ANN. § 22-3-2-15 (Burns 1974) provides: “[N]o 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).

61. 74 Ill. 2d at 184, 384 N.E.2d at 358.

62. Id. at 185, 384 N.E.2d at 357-58.

63. See notes 41 and 43 supra.

64. 74 Ill. 2d at 184-85, 384 N.E.2d at 358-59.

65. See note 41 supra.

66. 74 Ill. 2d at 184, 384 N.E.2d at 358. By characterizing retaliatory discharge as an independent tort, the Kelsay court not only avoided the Act’s exclusivity provision, but also the problems involved in a contract analysis. The contract concepts of mutuality of obligation and consideration inhibit the modification of the harsh at-will rule, the major obstacle to recognizing retaliatory discharge. Mutuality of obligation requires that the employer be free to fire at any time for any reason because the employee is free to quit at any time for any reason. See Blades, supra note 4, at 1419. See, e.g., Meadows v. Radio Indus., 222 F.2d 347 (7th Cir. 1955). Illinois, however, recognizes that mutuality of obligation is not essential to the validity of a contract. See Armstrong Paint & Varnish Works v. Continental Can Co., 301 Ill. 102, 133 N.E. 711 (1921) (consideration is essential to the validity of a contract but mutuality of obligation is not).

While mutuality of obligation can be overcome, separate consideration is needed to support a promise of continued employment because the employee’s wages are regarded as full compensation for his or her efforts. See generally Blades, supra note 4, at 1419-21; Note, Employment
The *Kelsay* majority similarly concluded that the 1975 amendment providing criminal penalties for retaliatory discharge does not prevent the implication of a civil remedy. The court reasoned that the omission of a civil remedy does not reflect a conscious decision by the legislature that no such remedy should exist. Rather, the criminal sanctions were considered insufficient to deter unscrupulous employers from risking the small statutory fine in order to escape their responsibility under the Act. The court also pointed out that a small state fine does not alleviate the plight of employees threatened with retaliatory discharge for pursuing their rights. In addition, the supreme court stated that where a statute is enacted for the benefit of a particular class of individuals, the mere provision of criminal penalties does not necessarily bar the implication of civil remedies, even where civil remedies are not expressly mentioned in the statute. The *Kelsay* majority thus determined that the absence of a civil remedy in the Workmen's Compensation Act did not preclude the court from creating such a remedy.

Addressing the two remaining issues, the *Kelsay* court stated that although punitive damages would be appropriate in future retaliatory discharge...
actions, punitive damages were not proper in the instant case. The supreme court considered punitive damages a form of punishment, serving as a warning to deter others from engaging in proscribed conduct. The function of dissuading employers from attempting such discharges in the future was not served in Kelsay because Illinois lacked precedent warning the defendant that retaliatory discharge practices were actionable. In fact, precedent in other states indicated such practices were legitimate. The supreme court therefore concluded that allowing punitive damages in Kelsay would be unfair because the cause of action was novel, but stated that punitive damages would be proper in similar cases in the future.

overruling. At common law, new decisions were given retroactive effect based on the theory that the new decision announced or discovered the preexisting law. The overruled decision was not the law at all; therefore, the overruling decision was applied to past cases. See Note, Retroactivity in Civil Suits: Linkletter Modified, 42 FORDHAM L. REV. 653, 655 (1974). For the historical development of retroactivity in judicial decisions, see generally Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 YALE L.J. 907, 907-12 (1962).

In contrast, the objective of prospective overruling is "to rid the law of an unsound rule and at the same time preclude undue hardship to a party that has justifiably relied on it." See Traynor, Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility, 28 HASTINGS L.J. 533, 543 (1977). This was the case in Kelsay because the defendant relied on the terminable at-will rule conferring absolute discharge power upon the employer. The Kelsay court concluded that imposing punitive damages on the defendant would be "extremely unfair" because the defendant reasonably could have believed that firing Kelsay was a legitimate exercise of its termination power. 74 Ill. 2d at 189, 384 N.E.2d at 361.

76. The Supreme Court recently explained that "[e]xcepting the cause in which the decision is rendered has consistently been the practice [of the Illinois Supreme Court] in cases involving [the recognition of new] torts." Silver Mfg. Co. v. General Box Co., 76 Ill. 2d 413, 416, 392 N.E.2d 1343, 1344 (1979). After citing several cases, the Silver Mfg. court discussed the Kelsay decision. The Silver Mfg. court noted that the reason for prospective application in Kelsay and the other tort decisions cited was that those awards were penal in nature. In Silver Mfg. the defendants sought an exemption from the prospective application of the rule of contribution announced in Skinner v. Reed-Prentice Packaging Co., 70 Ill. 2d 1, 374 N.E.2d 437 (1978). The Silver Mfg. court distinguished Skinner from Kelsay, stating that the contribution involved in Skinner was not penal in nature. 76 Ill. 2d at 417, 392 N.E.2d at 1345. The Silver Mfg. court therefore concluded the defendant was not exempted as the award against the defendant was civil in nature. Id. For other Illinois decisions prospectively applying new torts and exempting the parties involved in the case establishing the new tort see Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (tort recognized for pre-natal injuries brought on behalf of infant); Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965) (tort responsibility for hospital beyond its liability insurance coverage was recognized); Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 163 N.E.2d 89 (1959) (recognized that school district would be liable in tort for negligence of its employee).

77. Dissenting in Churchill v. Norfolk & Western Ry. Co., 73 Ill. 2d 127, 150, 383 N.E.2d 929, 939 (1978), Justice Ryan explained his view of punitive damages in the Kelsay decision: In Kelsay v. Motorola, Inc., [citation omitted] I authored an opinion which created a cause of action for punitive damages in a factual situation wherein I felt they were required. In situations where conduct is reprehensible and the penalties otherwise provided are inadequate to either deter or to punish, punitive damages may serve a useful public purpose.

Id. at 159, 383 N.E.2d at 943 (emphasis added).

78. 74 Ill. 2d at 188-89, 364 N.E.2d at 360-61.

79. Id. at 189-90, 364 N.E.2d at 361.
Although Kelsay establishes an important and necessary cause of action, several aspects of the decision appear questionable because of the majority's inadequate reasoning. For example, the dissent's concern that employees may abuse this new tort is not even discussed by the majority. Further, the majority's single-sentence rejection of contrary decisions by some state courts is unpersuasive in light of the court's reliance on other state court decisions. Moreover, the dissent's accusation that the legislature's function is usurped by the majority is left unanswered.

The final flaw in Kelsay is the court's failure to articulate factors to be considered by Illinois courts when implying civil remedies. Employee abuse of a common law discharge action is not a new concern. In addition to the dissenting opinion, the problem also was raised in two cases reviewed by the majority, Loucks and Sventko. This recurring concern over potential employee abuse reflects an unwarranted assumption that courts cannot distinguish spurious allegations from valid claims.

80. 74 Ill. 2d at 192, 384 N.E.2d at 362 (Underwood, J., concurring in part and dissenting in part). See notes 85-90 and accompanying text infra.
81. 74 Ill. 2d at 183, 384 N.E.2d at 358.
82. See notes 91-97 and accompanying text infra.
83. 74 Ill. 2d at 193, 384 N.E.2d at 362-63 (Underwood, J., concurring in part and dissenting in part).
84. See notes 103-13 and accompanying text infra.
85. 74 Ill. 2d at 192, 384 N.E.2d at 362 (Underwood, J., concurring in part and dissenting in part). Justice Underwood argued that one potential negative effect of this new cause of action allowing punitive damages was that small businesses might retain unqualified employees rather than risk punitive damages. He speculated that these unqualified employees merely have to file workmen's compensation claims to secure tenured employment during the time the claim is pending. Id.
86. 551 F. 2d at 745, 746-47 (7th Cir. 1977).
87. 69 Mich. App. at 649-52, 245 N.W.2d at 151 (Allen, J., concurring). After noting that spurious allegations could lead to trials before sympathetic juries, Judge Allen suggested that a possible solution may be for the employer to set forth, at the time of discharge, the reasons supporting the discharge. These reasons would demonstrate that the discharge was not intended to discourage the employee from filing a claim and was in no way retaliatory. Id. at 650-51, 245 N.W.2d at 154-55.
88. This fear of fictitious claims was a reason one court refused to abrogate the at-will rule. See Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174 (1974) (court refused to allow a private cause of action for wrongful discharge, but indicated it might modify the at-will rule where some recognized facet of public policy was threatened). For thorough discussions of Geary, see Summers, supra note 4, at 481-84, and A Common Law Action, supra note 13, at 1451-54.

The fear of groundless claims has been raised as a reason for not recognizing the tort of intentional infliction of mental distress. Dean Prosser's response to such reasoning in mental distress cases is applicable to retaliatory discharge:

So far as distinguishing true claims from false ones is concerned, what is required is rather a careful scrutiny of the evidence supporting the claim; and the elimination of trivialities calls for nothing more than the same common sense which has distinguished serious from trivial injuries in other fields of law.

an assumption overlooks the complex evidentiary rules and procedural practices that courts have developed to discern the truth. Indeed, courts are expert at separating real from imagined wrongs. The possibility of employees successfully advancing unsupported discharge claims is therefore minimal, a fact the majority should have emphasized.

The *Kelsay* court’s summary rejection of contrary holdings by other state courts is another shortcoming of the Illinois decision. One of these cases, *Christy v. Petrus*, is factually identical to *Kelsay* but reaches an opposite result. The Missouri Supreme Court in *Christy* refused to imply a civil cause of action for retaliatory discharge because the Missouri’s Workmen’s Compensation Act included criminal penalties for such practices.

89. The same conclusion is reached in *A Common Law Action*, supra note 13, at 1452-53. See also *Blades*, supra note 4, at 1427-31, where the problem of proof is carefully analyzed. Professor Blades concludes that, although there is the possible problem of juries sympathizing with employees who make fictitious claims, "[t]he problem of proof is not insurmountable, for there are a number of evidentiary techniques available to the courts by which the genuineness of a claim might be reasonably guaranteed and serious infringement of the employer's normal right of discharge avoided." *Id.* at 1429. He recommends a high burden of proof for the employee as an example of such evidentiary techniques. *Id.*

90. Other factors which tend to prevent fictitious claims are court delays and attorney’s fees. The more unsupported the discharge claim, the less likely an attorney would accept the case on a contingency fee basis. Because most unemployed workers would face financial limitations resulting from their reduced income after their discharge, few would waste money on litigation they have little or no hope of winning.

91. 74 Ill. 2d at 183, 384 N.E.2d at 358. Several of these cases were noted by the dissent. 74 Ill. 2d at 197, 384 N.E.2d at 364 (Underwood, J., concurring in part and dissenting in part), *citing* *Loucks v. Star City Glass Co.*, 551 F.2d 745 (7th Cir. 1977) (retaliatory discharge not actionable); *Narens v. Campbell Sixty-Six Express, Inc.*, 347 S.W.2d 204 (Mo. 1961) (retaliatory discharge not actionable); *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956) (retaliatory discharge not actionable); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950) (retaliatory discharge not actionable). The dissent did not cite two other recent cases holding that retaliatory discharge is not actionable: *Martin v. Tapley*, 360 So. 2d 708 (Ala. 1978), and *Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *petition for discretionary review denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). In all six of the above cases the plaintiffs sought relief for their retaliatory discharge after filing a workmen’s compensation claim, but were denied relief.

92. 295 S.W.2d 122 (Mo. 1956).

93. The *Christy* court concluded that the absence of a civil remedy for wrongful discharge was an intentional omission by the Missouri legislature because it carefully provided for the rights and compensation of injured employees covered by the Missouri Act. 295 S.W.2d at 126. The plaintiff in *Christy* sought to recover actual and punitive damages for his alleged wrongful discharge, purportedly a direct result of plaintiff filing a workmen’s compensation claim. *Id.* at 123. For the plaintiff’s allegation in *Kelsay*, see note 31 *supra*.

94. Mo. Ann. Stat. § 287.780 (Vernon 1949) provided:

*Every 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.*

Quoted in 295 S.W.2d at 126. The *Christy* court reasoned that the criminal penalties listed above only dealt with the consequences of wrongful discharge and placed no affirmative duty upon the employer to refrain from such discharges. *Id.*
scholar, however, has demonstrated that Christy is analytically unsound. Moreover, the Christy decision was delivered 23 years ago and no longer is an accurate reflection of the Missouri Legislature's intention to omit a civil remedy, if that ever was the legislature's intention. The Missouri Act was subsequently amended to provide a civil cause of action for the wrongful discharge of an employee who files a workmen's compensation claim. By noting this significant change in the Missouri statute and the Christy court's unsound analysis of case law, the Kelsay majority could have demonstrated convincingly that the Christy holding is obsolete. In contrast, Kelsay represents the progressive view that a civil action is necessary to prevent retaliatory discharges.

An argument more vigorously asserted by the dissent is that the majority usurped the legislature's function when it implied a civil remedy. The dissent's basic premise that "the law-making function is vested in the legislative branch" is inaccurate. This argument overlooks the well-established common law power of the judiciary to create the law.

Since the Missouri Workmen's Compensation Act did not expressly provide a civil remedy, the remaining issue was whether a civil remedy could be implied. The Missouri court relied on the rule "that a statute which creates a criminal offense and provides a penalty for its violation [should not] be construed as creating a new civil cause of action independently of the common law, unless such appears by express terms or by clear implication [from] the legislative intent." Id., citing Everett v. Littleton Const. Co., 94 N.H. 43, 46 A.2d 317 (1946). Illinois, however, follows a different, more liberal rule when implying civil actions. The Kelsay court relied on the Illinois rule stated in Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955), that:

"[t]he fact that an act is penal in nature does not bar a civil remedy, and where a statute is enacted for the benefit of a particular class of individuals a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned (emphasis added).

Quoted in 74 Ill. 2d at 185, 384 N.E.2d at 359. Because Illinois follows a different implied action rule, Kelsay is distinguishable from Christy.


96. MO. ANN. STAT. § 287.780 (Vernon Cum. Supp. 1979) now provides: "No employer or agent shall discharge or in any way discriminate against any employee for exercising any of his rights under [the Workmen's Compensation Act]. Any employee who has been discharged or discriminated against shall have a civil action for damages against his employer."


98. 74 Ill. 2d at 193, 384 N.E.2d at 362-63.

99. Id. at 190-91, 384 N.E.2d at 361.

100. This topic was analyzed extensively by former Illinois Supreme Court Justice Walter V. Schaefer, who authored the Teale decision, discussed in notes 103-13 and accompanying text infra. See Schaefer, Precedent and Policy, 34 U. CHI. L. REV. 3 (1966) (common law adopted by reception statute enables courts to utilize the common law system's capacity for growth and its ability to abandon outdated precedents). Dean Prosser's comment is particularly appropriate
Dooley expressed precisely this point when he stated that "[o]bviously courts create law. If it were otherwise the common law would be as out of touch with life as a corpse."\footnote{1} Thus, the dissent's sweeping generalization about the law-making function of the legislative branch should have been countered by the majority with comments regarding the court's common law heritage, particularly because \textit{Kelsay} creates a common law tort independent of the Act.\footnote{102}

Perhaps the most justified criticism of the \textit{Kelsay} decision is the supreme court's superficial analysis of \textit{Teale v. Sears, Roebuck and Co.}\footnote{103} In \textit{Teale}, the court refused to imply a private civil cause of action for discharge under the Illinois Age Discrimination Act,\footnote{104} reasoning that the language adopted by the legislature indicated an intentional omission of a civil remedy.\footnote{105} Strongly here: "New . . . torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which [courts have] struck out boldly to create a new cause of action, where none had been recognized before." W. PROSSER, \textsc{Handbook of The Law of Torts} § 1, at 3 (4th ed. 1971).


101. Renslow v. Mennonite Hosp., 67 Ill. 2d at 361, 367 N.E.2d at 1257. Justice Benjamin Cardozo shared a similar view concerning the nature of the judicial function:

A rule which in its origin was made the creation of the courts themselves, and was supposed in the making to express the \textit{mores} of the day, may be abrogated by courts when the \textit{mores} have so changed that perpetuation of the rule would do violence to the social conscience. . . . \textit{This is not usurpation.} It is not even innovation. It is the reservation for ourselves of the same power of creation that built up the common law through its exercise by the judges of the past.

B. CARDOZO, \textsc{The Growth Of The Law} 136-37 (Greenwood Press Reprint 1973) (emphasis added).

102. 74 Ill. 2d at 187, 384 N.E.2d at 360.

103. 66 Ill. 2d 1, 359 N.E.2d 473 (1976).


105. 66 Ill. 2d at 5, 359 N.E.2d at 474-75. In the \textit{Teale} case a discharged employee brought an action for alleged age discrimination in his discharge under the Illinois Age Discrimination Act, ILL. REV. STAT. ch. 48, §§ 881-87 (1975). The statute provided no civil remedy, so the plaintiff urged the Illinois Supreme Court to imply one. The court refused, citing various other employment acts that included civil remedies, then noting that the Age Discrimination Act made no such provision. Further, the \textit{Teale} court noted that the statute stated that the right it created "shall be protected as provided herein." 66 Ill. 2d at 5, 359 N.E.2d at 474, \textit{quoting ILL. REV. STAT. ch. 48, § 881(c) (1975)}. The \textit{Teale} court concluded this provision "strongly militate[d] against, if indeed [did] not preclude, expansion of the statutory sanction by implication." 66 Ill. 2d at 5, 359 N.E.2d at 474.

To be consistent, the \textit{Kelsay} majority should have examined the relevant employment statutes concerning discharges noted in the \textit{Teale} decision. See ILL. REV. STAT. ch. 48, §§ 884, 886 (1977) (unlawful to discharge employee because of age or for exercising employee rights under
relying on the Teale decision, the Kelsay dissent concluded that the absence of a civil remedy in the 1975 amendment to the Workmen's Compensation Act also indicated a deliberate omission by the legislature, precluding the civil remedy sought by Kelsay.\(^{106}\) In view of the Teale court's comprehensive examination of relevant employment statutes providing or omitting civil remedies, the factual similarity of the Kelsay and Teale decisions warranted more than the majority's brief conclusion that the Teale case involved a different statute.\(^{107}\)

The Kelsay-Teale dichotomy demonstrates the need for the Illinois Supreme Court to establish a consistent approach to the implied action problem.\(^{108}\) The court should have articulated what factors need to be considered when determining whether a cause of action may be implied, and the relative importance of these factors.\(^{109}\) The court could consider, for exam-

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\(^{106}\) See supra note 103.

\(^{107}\) The problem is not unique to the Illinois Supreme Court. The problem of state supreme courts failing to establish or adhere to any particular standards when implying civil actions is prevalent throughout the United States. See Note, Implied Causes of Action in State Courts, 30 Stan. L. Rev. 1243 (1978) [hereinafter cited as Implied Actions]. The author presents an overview of the implied action problem, contrasts the developed technique for implying actions in the federal courts with the unsystematic method used in state courts, and then recommends some approaches to the various factual situations in which the implied cause of action issue arises. Interestingly, the Implied Actions author noted the case underpinning the Kelsay-Teale division, Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955). Implied Actions at 1244 n.8. Although he did not mention Heimgaertner, Justice Schaefer also was aware of the implied action problem. See Schaefer, Precedent and Policy, 34 U. Chi. L. Rev. 3, 21-22 (1966).

\(^{109}\) Because the Kelsay court analyzed different factors than the Teale court the Kelsay decision appears to overrule the Teale decision, as the dissent noted. 74 Ill. 2d at 194, 384 N.E.2d at 363. Yet this appearance is misleading because in reality the court was simply adopting a different approach to the implied action dilemma. In the Teale decision, the court exclusively relied on statutory language for guidance in deriving the legislature's intent behind the Age Discrimination Act. In the Kelsay decision, however, the court examined not only the statutory language of the Workmen's Compensation Act, but also that statute's long history, beneficient purpose, and the public policy it embodied. These are clearly legitimate considerations, as note 47 supra demonstrates. The Teale approach shows that statutory language is an important factor when implying or refusing to imply a civil action, but the Kelsay analysis indicates that language alone is not determinative of legislative intent. Thus, because the Age Discrimination Act is newer and less litigated, the narrow approach of the Teale court was appropriate. The Work-
Employing some of these factors, the Kelsay court could have reasoned that the purpose of and voluminous litigation under the Workmen's Compensation Act enabled the court to perceive more clearly the intent underlying the Act's 1975 amendment than the intent behind the newer, less litigated Age Discrimination Act construed in the Teale decision. Absent articulated guidelines, implied action cases such as Kelsay and Teale appear to be inconsistent, ad hoc decisions.113

110. The legislative history of the 1975 amendment to the Workmen's Compensation Act is scant and inconclusive. The amendment did not delete any pre-existing civil action. See Workmen's Compensation Act, Pub. Act No. 79-79, 1975 Ill. Laws 224. In fact, the entire provision appearing in note 44, supra, was new in 1975. Further, the legislative debates on Senate Bill 235 (the 1975 Workmen's Compensation Act amendment) never concerned the provision construed in Kelsay. See Senate Debates (available on microfiche at the DePaul University College of Law Library, 1975 Senate Debates, Index Card Numbers 38, 53, 55, 58, 75, 77, 123, 139 and 142). It is noteworthy that all previous amendments to the Workmen's Compensation Act were formulated by an agreed bill process, wherein members of the legislature representing both industry and labor arrived at compromise legislation. See Stevenson, supra note 27, at 709-13. In 1975 the agreed bill process was abandoned, apparently because labor-oriented Democrats controlled both houses of the legislature and the executive branch. Id. Thus, the absence of a civil action in the 1975 amendment may have been an oversight. See Recent Decisions, 68 ILL. BAR J. 287, 290 (1979). This inference, however, is contrary to the Kelsay dissent's conclusion that "it is unrealistic to suppose that . . . the members of the General Assembly . . . simply ignored the question of civil remedies. . . . " 74 Ill. 2d at 193, 384 N.E.2d at 362.

111. The federal courts consider similar factors when implying civil actions from complex regulatory schemes created by federal statutes. See Implied Actions, supra note 108, at 1245-51. See generally Gamm, supra note 95 (general discussion of implied actions and the need for the Missouri courts to liberalize their approach to this doctrine); McMahon and Rodos, Judicial Implication of Private Causes of Action: Reappraisal and Retrenchment, 80 DICK. L. REV. 167 (1976) (history of judicial implication of private causes of action traced and trend away from liberal implication under present United States Supreme Court discussed); Note, Implying Civil Remedies from Federal Regulatory Statutes, 77 HARV. L. REV. 285 (1963) (comprehensive examination of the implied action doctrine in the federal courts).

112. See Stevenson, supra note 27, at 678-85. Mr. Stevenson states that the number of cases filed at the Illinois Industrial Commission has nearly quadrupled since 1950, from 15,000 in that year to 57,500 in 1977. Id. at 676. This increase in litigation has been of particular concern to insurance companies writing workmen's compensation insurance in Illinois, as evidenced by the 88% premium increase sought and received by insurers filing with the Illinois Department of Insurance in 1976. Id. at 711. The Kelsay decision, however, will probably have little or no effect on workmen's compensation premiums because the tort is separate and independent of the Act. 74 Ill. 2d at 184, 187, 384 N.E.2d at 358, 360. The tort of retaliatory discharge necessarily involves willful and wanton conduct, because it would be impossible to negligently terminate an employee. Torts involving willful and wanton conduct, or in this case, illegal conduct due to the 1975 amendment, cannot be insured against because insurance policies covering the commission of an illegal act are void as against public policy. See London Guar. & Accident Co. v. Morris, 156 Ill. App. 533 (1st Dist. 1910).

113. A recent Illinois Appellate Court decision addressed the problem of the supreme court's inconsistent approach to implying actions. Sherman v. Field Clinic, 74 Ill. App. 3d 21, 392 N.E.2d 154 (1st Dist. 1979). The Sherman court cited six supreme and appellate court deci-
Now that the Illinois Supreme Court has recognized that in the workmen's compensation context retaliatory discharge contravenes public policy, it is possible that the courts will find other abuses of the discharge power actionable in the presence of similar public policy considerations. Legislation, however, may be a more optimal approach to limiting the employer's power to discharge employees. The problems of inconsistent judicial interpretations and overwhelming case loads can be reduced by comprehensive legislation. Further, a general definition of the employer's duty not to discharge employees abusively would make the application of this newly created common law tort more predictable. Courts and litigants could focus their discussions on the statute rather than on broad public policy notions.

Numerous scholars have suggested various legislative alternatives for abusive discharges, such as expanding the authority of agencies already hearing discharge disputes to include at-will employee terminations. A simpler
solution would be to amend the Workmen's Compensation Act to include civil remedies for retaliatory discharge, although such a change has been rendered unnecessary in Illinois by the Kelsay decision. A more comprehensive approach, however, might be more suitable in order to prevent retaliatory discharges in other contexts. A statute might contain the following broad language:

Section 1: Definition—Retaliatory discharge includes, but is not limited to, any discharge intended to discourage or prevent an employee from pursuing a right or remedy authorized by the laws of Illinois or to penalize an employee who has initiated any action in pursuit of such right or remedy. The burden of proof shall be on the employee.

Section 2: Remedies and Sanctions—(a) An employee shall have a civil action for compensatory and exemplary damages for any discharge as defined in Section 1; (b) an employee shall have the right to be reinstated with back pay from the date of the discharge as defined in Section 1; (c) an employer shall be subject to a $10,000 fine for each discharge defined in Section 1, to be enforced in a criminal proceeding brought by the Attorney General or State's Attorney, or by any other agency empowered to bring such action.

Section 3: Statutory Construction—Sections 1 and 2 shall be liberally construed to effectuate the policy of employee protection from retaliatory discharge.

By adopting such a general statute, Illinois would extend vital protection to an area of increasing importance, the employee's need to be free from arbitrary or unlawful dismissal. The employee has the burden of proof in order to shield employers from fraudulent claims. Except for the burden of proof, the employee is afforded considerable protection because the sample statute provides private civil remedies capable of enforcement independent of any executive agency action. The employee also has job

119. Missouri has taken this step. See note 96 supra.
120. Texas has a similar statute, which provides:

Section 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act, or has testified or is about to testify in any such proceeding.

Section 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

121. See notes 85-90 and accompanying text supra.
122. See Gamm, supra note 95, at 298; Implied Actions, supra note 108, at 1260. Both articles discuss the problem of executive agency inaction and unresponsiveness. The inaction of an executive agency effectively deprives an injured citizen of a remedy. Agency inaction therefore is a reason for courts to imply a private cause of action.
security through the provision for reinstatement with back pay. More importantly, the statutory definition covers a broad spectrum of employer misconduct in terminating employees, rather than just objectionable practices occurring in the workmen's compensation context. The mounting scholarly attack on the employer's right to discharge, the proliferation of lawsuits challenging unjust dismissals in recent years, and the volume of legislation regulating employment practices are compelling evidence that the time has come for a comprehensive statute protecting the employee's right to seek redress without fear of employer reprisal.

**IMPACT OF KELSAY**

The *Kelsay* decision obviously modifies prior law by creating an exception to the old Illinois rule that an employer's power to discharge an at-will employee is absolute. The new rule limits an employer's otherwise absolute power to discharge at-will employees where its exercise contravenes the public policy of the Workmen's Compensation Act. It seems logical that the supreme court will advance the public policy theory to other instances of retaliatory discharge if an applicable statute evinces strong public policy considerations. Further, it is possible that the court will extend the public policy exception to situations not covered by legislation if the court is convinced that some established public policy is undermined by an employer's discharge practices.

An example of a logical extension based on a statute would be the discharge of a white-collar employee for refusing to commit a criminal act.

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123. Reinstatement with back pay is a remedy commonly provided by collective bargaining agreements and is authorized by the National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976). Professor Blades also suggested reinstatement with back pay as a remedy for abusive discharge. See Blades, *supra* note 4, at 1414.

124. See Blades, *supra* note 4, at 1432.

125. See articles cited in notes 4, 13, 16, 22, and 97 *supra*.

126. See cases cited in notes 22 and 55 *supra*.

127. See legislation cited in notes 19, 20, and 105 *supra*.


129. See note 1 *supra*.

130. The most obvious example of a statute evincing clear public policy considerations is the criminal code, *Ill. Rev. Stat.* ch. 38 (1977). The key will be the clarity of the public policy, not its source. One author persuasively argues that the public policy exception will be expanded only in areas concerning the public interest, largely because of the prevailing judicial attitude that the economic freedom of both the employer and employee is fundamental in our society. See *Protecting the Private Sector At Will Employee*, *supra* note 22, at 777-806. One Illinois judge, however, already has called for the extension of the *Kelsay* public policy exception. See *Collier v. Wagner Castings Co.*, 70 Ill. App. 3d 233, 244-45, 388 N.E.2d 265, 273 (4th Dist. 1979) (Craven, J., dissenting). Another appellate court decision recognized that retaliatory discharges are actionable, but refused relief because the plaintiff alleged violations of express and implied contracts, rather than the commission of a tort. See *Sargent v. Illinois Inst. of Technology*, 78 Ill. App. 3d 117, 397 N.E.2d 443 (1st Dist. 1979).

131. See notes 137-39 and accompanying text *infra*.

Before the *Kelsay* decision, an honest accountant whose employer demanded falsification of financial records would have the unenviable choice of either risking his or her job for objecting to the request or engaging in criminal activities.\(^{133}\) After the *Kelsay* decision, the same accountant could comply with the law without suffering the same extreme economic burdens following termination. The employee could recover compensatory damages against the former employer, assuming the discharge resulted from the accountant’s refusal to alter the financial records as directed.

In addition to compensatory damages, the accountant could seek punitive damages for his or her retaliatory discharge, as per the *Kelsay* majority’s dicta.\(^{134}\) Punitive damages would be particularly appropriate in this example because they would punish and deter this outrageous employer conduct, as well as encourage employees to reveal to prosecutors criminal evidence that otherwise may be unobtainable.\(^{135}\) These salutary effects are made possible by the economic incentives of compensatory and punitive damages authorized in the *Kelsay* decision. As this hypothetical demonstrates, the common law tort of retaliatory discharge easily can be extended beyond the facts of the *Kelsay* case. The public policy against criminal activity is at least as strong as that manifested in the Workmen’s Compensation Act.\(^{136}\)

Extension of the public policy exception will not depend solely on the existence of a statute. As in the *Kelsay* decision, the supreme court can exercise its law-making power to extend the exception where there is no statute. Indeed, expansion of the exception via judicial activism seems more likely than a legislative response because powerful interest groups probably would oppose such legislation.\(^{137}\) Judicial expansion is appropriate here because retaliatory discharge is a common law tort,\(^{138}\) and the development of common law torts is one of the most recognized and legitimate functions of the courts.\(^{139}\)

Assuming future Illinois decisions or legislation expand the scope of employee rights in retaliatory discharges, the new remedy recognized in the *Kelsay* decision could become a major factor in employer-employee rela-

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133. A more detailed discussion of a similar hypothetical appears in *Professional Ethics*, supra note 116.
134. 74 Ill. 2d at 189, 384 N.E.2d at 361.
135. Reporting of employer violations by employees is known as “whistleblowing.” See generally *Protecting the Private Sector At Will Employee*, supra note 22, at 777-806.
136. In *Professional Ethics*, supra note 116, it is argued that the public policy exception should extend to cover situations where employers force employees to commit ethical violations because of the tremendous impact professional employees have on the everyday affairs of society. See *Professional Ethics*, supra note 116, at 808-09, 826-29.
137. See *Some Kind of Hearing*, supra note 4, at 316-17. Professor Peck contends that legislation occurs because of efforts by interested and effective lobbying groups. *Id.* at 317. Employers would not support such a proposal, nor would organized labor. *Id.* Labor unions would oppose a bill outlawing unjust dismissal because job protection is one of a labor union’s most persuasive benefits. *Id.* See generally *Unjust Employment Discharges*, supra note 19, at 3.
138. 74 Ill. 2d at 185, 384 N.E.2d at 358.
139. See generally *Day*, supra note 100.
At-will employees comprise well over half the United States work force. This category of employees, often unorganized, appears to be losing its bargaining power as economic control becomes more concentrated in corporate employers. Unable to present a united front, at-will employees cannot demand the contractual protection from retaliatory discharge present in nearly all union collective bargaining agreements. With labor unions representing a declining percentage of the total work force, the protection provided by collective bargaining agreements will not be available to an increasing number of employees. Absent statutory or contractual protection, the tort recognized in the *Kelsay* decision becomes an important remedy for at-will employees in Illinois.

**CONCLUSION**

Illinois has followed a judicial trend emerging throughout the United States that seeks to limit an employer's absolute power to discharge at-will employees. By recognizing the tort of retaliatory discharge, the Illinois Su-

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140. See generally *A Dangling of the Economic Apple*, supra note 97.

141. This is a conservative estimate. Professor Peck estimates that "between [60] and [65%] of [the nonagricultural] work force is employed under contracts of employment that are terminable at will and hence terminable without cause." *Unjust Employment Discharges*, supra note 19, at 9.

142. See *Blades*, supra note 4, at 1405 n.6.

143. See *Summers*, supra note 4, at 499 n.104, where the author notes that in 1975 it was estimated that 79% of all collective bargaining agreements surveyed had provisions for dismissal only with "cause" or "just cause."

144. The U.S. Department of Labor published the following information on Sept. 3, 1979:

> When Canadian members are excluded from the total, membership in U.S. labor organizations increased to 22.8 million in 1978 (Table 2). As a proportion of total labor force, however, membership declined by more than one percentage point between 1976 and 1978, continuing the decline that had been briefly reversed in 1974. Membership in the U.S. represented 22.2 percent of the labor force in 1978 and 26.6 percent of employment in nonagricultural establishments.

U.S. Dept. of Labor, Bureau of Labor Statistics release on Sept. 3, 1979, at 2 (emphasis added). Table 2 is printed below.

<table>
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<th>Year</th>
<th>Total Membership</th>
<th>Number</th>
<th>Percent Union Members</th>
<th>Number</th>
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<td>96,917</td>
<td>23.4</td>
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<td>102,537</td>
<td>22.2</td>
<td>85,763</td>
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</tr>
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</table>
preme Court has provided an effective remedy for a segment of the labor force that is unable to protect itself from employer abuse. Although the Kel-
say decision relied on broad public policy considerations, legislation could overcome any confusion regarding this new cause of action by focusing on
the nature of the employer's conduct, rather than solely emphasizing public policy determinants. Even in the absence of legislation, the scope of prohi-
bited employer conduct subject to retaliatory discharge actions can be expanded by the judiciary exercising its law-making power. Considering the
obvious importance of secure employment, one scholar's comment regarding Frampton seems equally appropriate for Kelsay: "It is odd that such a deci-
sion was so long in coming." 145

William Lynch Schaller

145. Larson, supra note 58, at 57, quoted in Kelsay v. Motorola, Inc., 74 Ill.2d at 183, 384 N.E.2d at 358.