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Two state high court cases have lawyers and employers on alert

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Lawyers and employers are the focus of two of the seven petitions for leave to appeal the Illinois Supreme Court accepted during its May term, and these groups likely will be watching closely.

First, the court will decide on the proper forum for attorneys to settle fee disputes arising out of referral agreements in workers' compensation cases.

The court also will examine the legal standards for common-law retaliatory discharge claims. The court long ago rejected the familiar burden-shifting analysis used in federal courts, first announced in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), but is poised to revisit that decision in a coming term.

In *Ferris, Thompson and Zweig Ltd. v. Esposito*, No. 117443, the issue is whether the Workers' Compensation Commission has jurisdiction to resolve a fee dispute arising out of a referral agreement between two attorneys involved in prosecuting a workers' compensation claim.

Ferris, Thompson & Zweig and Anthony Esposito agreed to share the attorney fees awarded after resolution of their clients' claims. Ferris would receive 45 percent of the fees for performing certain administrative and translation tasks, and Esposito would receive the remaining 55 percent for prosecuting the claims before the commission.

After the claims were resolved, Esposito failed to pay Ferris, Thompson its share of the fees and the firm brought a breach of contract claim.

Esposito moved to dismiss, arguing the circuit court lacked jurisdiction because under the Workers' Compensation Act, the commission has jurisdiction to hear "any and all disputes regarding attorneys' fees," including the division of fees between several attorneys or "any other disputes concerning attorneys' fees or contracts for attorneys' fees."

The court denied Esposito's motion and following trial, ordered him to pay the fees to Ferris, Thompson & Zweig with interest.

Esposito appealed, and the 2nd District Appellate Court affirmed, concluding that the commission had jurisdiction only to resolve fee disputes involving attorneys who represent clients before the commission.

Because Ferris, Thompson & Zweig never appeared before the commission, and the dispute essentially was a garden-variety breach of contract claim, the commission lacked jurisdiction.

The court also held that allowing the commission to resolve such disputes would thwart the legislature's intent to have workers' compensation claims resolved expeditiously to allow claimants to recover more of their award.

In his petition to the Supreme Court, Esposito argues that the appellate opinion conflicts with *Alvarado v. Industrial Commission*, 216 Ill.2d 547, 559 (2005), in which the court held that the commission retains jurisdiction to resolve fee disputes after settlement of the underlying claim as long as the disputes are collateral to the final award.

Esposito also argues that the appellate court improperly read in exceptions to the commission's jurisdiction in contravention of the plain language of the act.

Given that approximately 50,000 cases are filed with the commission each year, and that representation often results from attorney referrals, the *Ferris* decision has the potential to affect many practitioners.

In *Michael, et al. v. Precision Alliance Group*, No. 117376, the high court must decide who bears the burden of proof on whether an employer retaliated against an employee in a common-law retaliatory discharge claim.

Three laborers sued Precision Alliance Group, a purveyor of agricultural seed, claiming that they were fired for alerting the Illinois Department of Agriculture that Precision may have been selling bags of seed that were underweight.

After a three-day bench trial, the court found that Precision had legitimate reasons for firing each of the men, either for misconduct or due to a reduction in force.

It specifically found that the plaintiffs failed to sustain their burden of showing that Precision's reasons for termination were merely a pretext for retaliation.

In an unpublished order, the 5th District Appellate Court reversed. 2014 IL App (5th) 120517-U.

It held that the circuit court applied the wrong legal standard in evaluating the evidence because it required the plaintiffs to disprove Precision's stated reasons for termination.

In sum, the court held, instead of requiring Precision to prove that it fired the plaintiffs for legitimate reasons, the circuit court required the plaintiffs to both prove causation and disprove Precision's defense, which improperly enhanced their burden of proof.

On appeal to the Supreme Court, Precision argues that the 5th District's opinion expands the tort of retaliatory discharge by reducing the employee's burden of proof, an approach the court expressly rejected in *Clemons v. Mechanical Devices Co.*, 184 Ill.2d 328 (1998).

Precision argues that because retaliatory discharge is treated as any other tort claim, the burden of proving causation rests entirely with the plaintiff.

Precision noted that the court rejected the *McDonnell Douglas* test, in which the employee first establishes a prima facie case of retaliation, the employer then rebuts the presumption of retaliation with evidence of a legitimate reason for discharge and the employee then proves that the employer's stated reason is merely a pretext for retaliation.

The *Clemons* court stated that the *McDonnell Douglas* analysis placed a burden of production on employers that reduced the employees' burden of proof and, in essence, expanded the tort of retaliatory discharge.

Thus, Precision argues, if the court was unwilling to impose a burden of production on employers, "it certainly would not countenance the 5th District's imposition of a burden of proof" on employers.

The impact of the court's decision is clear: It could fundamentally alter the legal landscape for employers facing common-law retaliatory discharge claims.

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