ILLINOIS STATE
BAR ASSOCIATION

EMPLOYMENT AND LABOR LAW SECTION COUNCIL SEMINAR
December 14, 2002

Presented by: Glenn R. Gaffney
1771 Bloomingdale Road
Glendale Heights, IL. 60139
(630) 462-1200

1981 - J.D. with Honors from Southern Illinois University. 1990 – 1994, Committee Chairperson of DuPage County Bar Association Labor and Employment Section. ISBA Labor & Employment Law Section Council (1999 – 2002). Member of National Employment Lawyers Association and NELA – Illinois. ISBA Assembly. Sole practitioner largely representing plaintiffs in state and federal court.

Topic: Contractual Exceptions to the Employment At Will Doctrine and Other Common Law Causes of Action

CONTRACT EXCEPTIONS TO EMPLOYMENT AT-WILL

I. Presumption of Employment at Will

- If employment agreement does not specify definite duration, either party may terminate relationship without liability at any time and for any reason. *Martin v. Federal Life Insurance Co.,440 N.E.2d 998 (1st Dist., 1982).*

- An employer may terminate an at will employee for any reason, good reason, bad reason or for no reason at all. *Jacobson v. Knepper & Moga, 706 N.E.2d 491 (Ill. 1998); Clemons v. Mechanical Devices Co., 704 N.E.2d 403 (Ill. 1998).*

- In Illinois, courts do not recognize the distinct cause of action for "good faith and fair dealing." *Miller v. Ford Motor Co., 152 F.Supp.2d 1046 (N.D.Ill. 2001); Vickers v. Abbott Laboratories, 719 N.E.2d 1101 (1st Dist., 1999).*

II. Hiring letters and Express Contractual Modifications

- Letter which provided, "It is scheduled that your assignment in Saudi Arabia will continue for a period of eighteen months" did not constitute clear enough promise for guarantee of a specific term of employment. *Buian v. JL Jacobs & Co., 428 F.2d 531, 533 (7th Cir., 1970).*

- Employers letter which provided that employer would guarantee minimum pay of $5,500.00 per month for employee's first two years was enforceable contract and nothing within hiring letter required former employee to satisfy any performance requirements. *Pokora v. Warehouse Direct, Inc., 751 N.E.2d 1204 (2nd Dist., 2001).*

- Former employee breached contract in terminating her employment for a "better offer" elsewhere even though employee alleged that working conditions were intolerable. *Equity Ins. Managers of Illinois, LLC v. McNichols, 755 N.E.2d 75 (1st Dist., 2001).*

- Vague representation that employer expected overseas employment would continue for two years deemed insufficient to overcome at will presumption. *Payne v. AHFI/Netherlands, BV, 522 F.Supp 18, 22-23 (N.D.Ill.. 1980).*

- Letters to employees expressing the intent that a new park district board would not engage in wholesale employment terminations did not

constitute a firm offer of continued employment. *Corcoran v. Chicago Park District, 875 F.2d 609, 612 (7th Cir., 1989).*

- Employment letter, which provided for "guaranteed salary for twelve months," constituted enforceable promise. *Berutti v. Dierks Foods, Inc., 496 N.E.2d 350, 353-54 (2nd Dist., 1986).*

- AT&T's "transition team letter" overcame the presumption of at will employment and demonstrated that a durational term was intended by the parties. The transition team letter committed the employer to placing the employee in another assignment when his work on a transition team was finished and promised the employee the choice of his next assignment was an enforceable promise. *Maier v. Lucent Technologies, Inc. 120 F.3d 730 (7th Cir., 1997).*

- Contract indicating that the parties contemplated employee work through the end of a project provides a sufficiently specific durational term. *Johnson v. George J. Ball, Inc., 617 N.E.2d 1355 (1993).*

- Employment contract which provided three-year term was modified by subsequent provision, which paid employee six months of severance pay arising out of termination "for reasons other than those stated elsewhere in the agreement." *Perry v. Community Action Services, 82 F.Supp.2d 892 (N.D.Ill. 2000).*

III. Employee handbooks and Employer Policy Statements

- An employee handbook can modify the at will status if the language within the policy statement contains a clear promise such that the employee would reasonably believe that an offer has been made. Secondly, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. Third, the employee must accept the promise by commencing or continuing to work after learning of the policy statement. *Duldulao v. St. Mary of Nazareth Hospital Center, 505 N.E.2d at 318.*

- Illinois law treats employment handbooks as having the potential to form contracts between employers and workers. *Garcia v. Kankakee County Housing Authority, 279 F.3d 532 (7th Cir., 2002).*

- Exception to the Employment At Will Doctrine exists where an employee handbook or other policy statement creates enforceable contractual rights

if the traditional requirements for contract formation are present. *Vickers v. Abbott Laboratories, 719 N.E.2d 1101 (1st Dist., 1999).*

- Where traditional requirements for contract formation are present, employee handbook or other policy statement creates binding contractual rights. *Hentosh v. Hermam M. Finch University of Health Services/The Chicago Medical School, 734 N.E.2d 125 (2nd Dist., 2000).*

A. Requirement that employers' policy statement constitute a clear promise

- Jewel Food Store policy which provides that employee who had been with company for more than 90 days "shall not be suspended, discharged or otherwise disciplined without just cause" constituted a clear and enforceable promise. *Mitchell v. Jewel Food Stores, 568 N.E.2d 827 (Ill. 1990).*

- Corrective action policy in handbook outlining progressive disciplinary procedures constituted clear promise in *Harden v. Playboy Enterprises, Inc., 633 N.E.2d 764 (1st Dist., 1993).*

- Disciplinary procedure constituted sufficiently clear promise that plaintiff could reasonable believe that policy created contractual rights. *Wood v. Wabash County, 722 N.E.2d 1176 (5th Dist., 1999).*

- Promise to pay disability benefits in group benefit booklet constitutes enforceable contractual promise. *DeFosse v. Cherry Electrical Products Corp., 510 N.E.2d 141 (2nd Dist., 1987).*

- Employee had enforceable contractual right to receive payment for unused sick days. *Dow v. Columbus – Cabrini Medical Center, 655 N.E.2d 1 (1st Dist., 1995).*

- Employers sexual harassment policy did not constitute an employment contract as nothing in policy contained mandatory language, which would constitute a promise. *Zakaras v. United Airlines, Inc., 121 F.Supp.2d 1196 (N.D.Ill. 2000).*

- Provision in employer's manual, which set forth procedures for dispute resolution and appeals process did not create binding contractual exception to at will doctrine as manual's language was permissive and advisory, which reserved employer's discretion. *Vickers v. Abbott Laboratories, 719 N.E.2d 1101 (1st Dist., 1999).*

- Employer's policy providing that employees who requested assistance in dealing with personal problems without jeopardizing continued employment did not establish contractual rights as policy did not guarantee or offer continued employment. *Quigley v. Austeel Lemont Co., Inc. 79 F.Supp 2d 941 (N.D.Ill. 2000).*

- Handbook provision which provided for progressive discipline, but allowed discharge on first offense for certain serious conduct did not mandate use of progressive discipline. *Frank v. South Suburban Hospital Foundation, 628 N.E.2d 953 (1st Dist., 1993).*

- No clear promise stating that employees would be fired only for specifically enumerated reasons. *Toombs v. City of Champagne, 615 N.E.2d 50 (4th Dist., 1993).*

- The first question in considering whether employers' policy statements are contractual is whether the policy statement contains a clear and explicit promise of an arrangement other than at will employment. *Accurso v. United Airlines, Inc., 109 F.Supp.2d 953 (ND Ill 2000).*

- Whether a policy statement constitutes a clear and definite promise is a threshold question of law to be determined by the Court. *Mansourou v. John Crane, Inc., 618 N.E.2d 689 (1st Dist., 1993).*

- Hiring an employee on a monthly or annual basis is considered to be an at will employment relationship if no duration is specified. *Pokora v. Warehouse Direct, Inc., 751 N.E.2d 1204 (2nd Dist., 2001).*

B. Requirement that employers' handbook or policy statement be disseminated.

- Policy book available to all employees within the company's human resources department was held to be "disseminated" to employees. *Belsanti v. CFS Holdings, Inc., 632 N.E.2d 10 (1st Dist., 1992).*

- Employees did not receive copies of sexual harassment regulations, but only had access to review the provisions therefore negating contractual liability. *Zakaras v. United Airlines, Inc., 121 F.Supp.2d 1196 (N.D.Ill.. 2000).*

- Insufficient evidence that documents relied upon by plaintiff were disseminated or read by plaintiff. *Jacobs v. Mundelein College, Inc., 628 N.E.2d 201 (1st Dist., 1993).*

- Employers guidelines distributed only to management and not to employees was not sufficiently disseminated to establish a contract under *Duldulao. Koch v. Illinois Power Co., 529 N.E.2d 281 (3rd Dist., 1988), appeal denied, 124 Ill.2d 555 (1989).*

C. Requirement that employee accept offer and provide consideration.

- The reasonable belief element is used to bar contract formation when the underlying facts are, on their face, outside the realm of what an ordinary person would believe to be an enforceable promise. *Thierry v. Carver Community Action Agency of Knox County, Inc., 571 N.E.2d 484 (3rd Dist., 1991).*

- It was unreasonable for plaintiff to believe language in Illinois Bell's incentive plan was a contractual offer as the plan provided that the statement was only "management's intent" and not a "contract or assurance of compensation". *Moore v. Illinois Bell Telephone Co., 508 N.E.2d 519 (2nd Dist., 1987).*

- Handbook language did not contain clear enough promise so that an employee could reasonable believe an offer had been made to discharge him only for just cause. *Daymon v. Hardin County General Hospital, 569 N.E.2d 316 (5th Dist., 1991).*

- Former employee failed to state a claim for breach of an oral contract under Illinois law absent allegation of specific promise of duration and employee did not allege that he relinquished secure employment elsewhere or was solicited by another employer, relocated or forewent a favorable job offer elsewhere. *Shelton v. Ernst & Young, LLP, 143 F.Supp.2d 982 (N.D.Ill. 2001).*

- Under Illinois law, no adequate consideration existed to support existence of oral contract where employer gave employee choice of accepting $50,000.00 and resigning or remaining employed in position that would eventually be phased out at which time he would be eligible for severance worth only $25,000.00. Employee gave up nothing of value and as much as employer encouraged her to take the first severance package and there was no mutuality of

obligation inasmuch as employee was free to quit at any time. *Kalush v. Deluxe Corp., 171 F.3d 489 (7th Cir., 1999).*

- Employee did not accept any offer of new employment contract after employee received summary of compensation and benefits where employee subsequently wrote employer letter pressing for more than 50 reservations concerning draft of proposal. *Glass v. Kemper Corp., 133 F.3d 999 (7th Cir., 1999).*

- Adequate consideration for oral contract for permanent employment is some sacrifice plaintiff probably would have made absent guarantee of permanent employment (i.e., plaintiff lured away from position with promise of permanent employment). *Bakke v. Cutter & Co., 984 F.Supp 1167(N.D. Ill. 1997).*

- Employee accepts a unilateral offer by taking up or continuing his or her employment after receiving a handbook that contains a clear promise in which a reasonable employee would rely. *Campbell v. City of Champagne, 940 F.2d 1111 (7th Cir., 1991).*

- Employee provided consideration by accepting offer of employment and commencing work. *Hicks v. Methodist Medical Center, 593 N.E.2d 119 (3rd Dist., 1992).*

- Employee accepted offer by continuing to work after employee manual was adopted. *Land v. Michael Reese Hospital & Medical Center, 505 N.E.2d 1261 (1st Dist., 1987).*

D. Employer disclaimers.

- In determining whether employee handbook gives rise to a binding contractual obligation, disclaimers of any contractual intent are inconsistent with traditional requirements of contract formation and thus weigh against finding of binding contract. *Hawthorne v. St. Joseph's Carondelet Child Center, 982 F.Supp. 586 (N.D.Ill.. 1997).*

- Employers disclaimer language, which reserved right to amend, modify or delete any provision of handbook, precluded formation of employment contract. *Davis v. Times Mirror Magazines, Inc., 697 N.E.2d 380 (1st Dist., 1998), appeal denied, 179 Ill.2d 580.*

- Disclaimer negated existence of contract. *Chesnick v. St. Mary of Nazareth Hospital, 570 N.E.2d 545 (1st Dist., 1991).*

- The three factors that establish contractual rights under *Duldulao* also apply equally in analyzing disclaimer language. *Anders v. Mobile Chemical Co., 559 N.E.2d 1119 (4th Dist., 1990).*

- Enforceable contract cannot exist in light of a clear and unequivocal disclaimer. *Finnane v. Pentel of America, Ltd., 43 F.Supp.2d 891, 900 (N.D.Ill.. 1999).*

- Plaintiffs that sign a written acknowledgement of the disclaimer are particularly vulnerable. *Habighurst v. Edlong Corp., 568 N.E.2d 226, 229 (1st Dist., 1991).*

- Disclaimers which are not unequivocal or vaguely attempt to negate other specific promises can be held to be ineffective. *Perman v. Arc Ventures, Inc., 554 N.E.2d 982 (1st Dist., 1990).* When there is inconsistent or conflicting contractual language, the courts will give effect to the interpretation of the language that best reconciles and harmonizes each provision with the remainder of the parties contract. *Seehawer v. Magnecraft Electric Co., 714 F.Supp. 910 (N.D.Ill.. 1989).*

- Disclaiming language which was not distinctly set out separate and apart and hidden within text will not circumvent other unequivocal and direct promises. *Long v. Tazewell/Pekin Consolidated Communication Center, 574 N.E.2d 1191 (3rd Dist., 1991).*

- Revised personnel handbook, which contains disclaimer which is not conspicuous does not negate promises made in earlier handbook provisions. *Hicks v. Methodist Medical Center, 593 N.E.2d 119 (3rd Dist., 1992).*

- Disclaimer which did not acknowledge that the progressive disciplinary policy otherwise published did not create contractual rights and which did not explicitly say that handbook did not create contractual rights was deemed ineffective to negate other handbook policies. *Wheeler v. Phoenix Company of Chicago, 658 N.E.2d 532, 537 (2nd Dist., 1995).*

IV. Oral Promises and Representations

- Under Illinois law, oral employment contracts are viewed with more skepticism than their written counter parts. *Shelton v. Ernst & Young, LLP, 143 F.Supp 2d 982 (N.D.Ill.. 2001).*

- Under Illinois law, an oral employment contract must be supported by consideration adequate to suggest that the alleged agreement involved a bargained for exchange of mutual obligations. *Kalush v. Deluxe Corp., 171 F.3d 489 (7th Cir., 1999).*

- Employers representation to employees expression of concern regarding his job security that, "You can work here until you retire" was deemed sufficiently clear and definite to create contract for permanent employment if supported by adequate consideration. *Bakke v. Cutter & Co., 984 F.Supp 1167 (N.D.Ill.. 1997).*

- Employee failed to state claim under Illinois law for breach of oral contract for permanent employment based upon alleged statement that employee could keep his position "for as long as he wished." Statement deemed insufficiently cleared and definite to create enforceable contractual rights and also barred by Statute of Frauds. *Razdan v. General Motor Corp., 979 F.Supp 755 (N.D.Ill.. 1997), affirmed, 234 F.3d 1273.*

- Employers statement that employment was "long term proposition" and that company had gone to "a lot of expense" to hire employee did not constitute a definite promise of permanent employment. *Kercher v. Forms Corporation of America, 630 N.E.2d 978 (1st Dist., 1994).*

- The Illinois Supreme Court held in *McInerney v. Charter Golf, Inc. 680 N.E.2d 1347 (Ill. 1997)* that foregoing another lucrative opportunity in exchange for a promise of permanent employment constitutes sufficient consideration to modify an existing employment at will relationship.

- The Illinois Statute of Frauds (740 ILCS 80/1) bars enforcement of a contract if it is impossible to perform that contract within one year. *Sherwin v. Ault, 579 N.E.2d 425, 426 (3rd Dist., 1991).*

- If a contract is "capable of being performed within one year" it will be enforced even if not in writing. *Vajda v. Arthur Anderson & Co., 624 N.E.2d 1343, 1351 (1st Dist., 1993).*

- Part performance by one party in reliance upon the promise of the party may preclude application of the Statute of Frauds. *Johnson v. George J. Ball, Inc., 617 N.E.2d 1355, 1360 (2nd Dist., 1993).*

V. Employers Attempts to Unilaterally Modify Prior Representations

- Employers unilateral modification of employee handbook to include contract disclaimer lacked consideration and thus was not enforceable against existing employees, even though employees continued to work for employer after disclaimer was issued where employer provided nothing of value and did not incur any disadvantage. *Doyle v. Holy Cross Hospital, 708 N.E.2d 1140 (Ill. 1999).*

VI. Application of Promissory Estoppel

- Illinois recognizes the Doctrine of Promissory Estoppel based upon satisfaction of the following four elements:
  A. an unambiguous promise;
  B. plaintiff's actual reliance;
  C. plaintiff's reliance was foreseeable;
  D. plaintiff relied upon the promise to his or her detriment. *Quake v. Construction, Inc. v. American Airlines, Inc., 565 N.E.2d 990 (Ill.1990).*

- Promise of continued employment and "all is well" statements actionable under Promissory Estoppel theory. *Dawson v. W & H Voortman, Ltd., 853 F.Supp. 1038 (N.D.Ill. 1994).*

- Promises of three warnings in firing only for good cause was sufficient to avoid summary judgment in *Vajda v. Arthur Anderson & Co., 624 N.E.2d 1343, 1348 (1st Dist., 1993).*

VII. Rules of Construction and Application

- Alleged agreement to continue employment under terms of expired written contract constituted extension of contract and not the creation of a new contract and thus was subject to provision requiring modifications and amendments be in writing. *Czapla v. Commerz Futures, LLC, 114 F.Supp.2d 714 (N.D.Ill.. 2000).*

- Under Illinois law, employee that was terminated for poor performance did not have cause of action for breach of oral contract of employment. *Kalush v. Deluxe Corp., 171 F.3d 489 (7th Cir., 1999).*

- Employer is not obligated to retain employee who is medically unable to return to his position nor is employer obligated to reassign such employee to another position. *Paz v. Commonwealth Edison, 732 N.E.2d 696 (2nd Dist., 2000).*

- Medical center operator did not breach employment contract as employer had "reasonable belief" that health or safety of patients was endangered by physician who was reported to often smell of alcohol. *Bekker v. Humana Health Plan, Inc., 229 F.3d 662 (7th Cir., 2000), rehearing en banc denied, cert denied, 532 U.S. 972.*

- Whether undisputed facts of a case establish "just cause" for termination is a question of law for the court. The term "just cause" is a flexible concept embodying notions of equity and fairness and the penalty to be just must be in keeping with the seriousness of the offense. *Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238 (7th Cir., 1997).*

- To say that employment is "at will" does not mean that the employer randomly or maliciously discharges good workers, but rather the term of employment is open ended and there are no legal remedies for bringing that arrangement to a close. *Garcia v. Kankakee County Housing Authority, 279 F.3d 532 (7th Cir., 2002).*

- Under Illinois law, there is no cause of action for "negligent investigation" in at will employment relationship. *Miller v. Ford Motor Co., 152 F.Supp.2d 1046 (N.D.Ill. 2001).*

- An employer non-enforcement of a contractual provision as to other employees is insufficient to constitute waiver of the provision as to subsequent employees. *Pochopien v. Marshall, O'Toole, Gerstein, Murray & Borun, 733 N.E.2d 401 (1st Dist., 2000).*

- Employee hired on a year to year basis has an individual cause of action to recover wages, which accrue at the close of each year. *Zic v. Italian Government Travel Office, 149 F.Supp.2d 473 (N.D.Ill. 2001).*

- Employee was damaged by employers failure to provide clear written notice of intent not to offer job restoration after employee returned from maternity leave for purposes of her breach of contract claim. *Thomas v. Pearle Vision, Inc., 251 F.3d 1132 (7th Cir., 2001).*

- Public officials cannot enter into contract, which violates Illinois Municipal Code or otherwise unenforceable on public policy grounds. *Jordan v. Civil Service Commission, 617 N.E.2d 142 (1st Dist., 1993); Harris v. Johnson, 578 N.E.2d 1326, 1329 (2nd Dist., 1991).*

- When contractual language is ambiguous, it must be construed against the drafter. *Mitchell v. Jewel Food Stores, 568 N.E.2d 827 (Ill. 1990).* However, rules of contract interpretation cannot establish the existence of a contract. *Chesnick v. St. Mary of Nazareth Hospital, 570 N.E.2d 545, 548 (1st Dist., 1991).*

- The parol evidence rule prevents oral modifications of a fully integrated written contract, but is not applicable if the contract is not intended to incorporate the entire agreement between the parties. *Johnson v. Figgie International, Inc., 477 N.E.2d 795, 799 (2nd Dist., 1985).*

VIII. Limitations and Damages

- The statute of limitations on an oral contract is five years. 735 ILCS 5/13-205. Written contracts have a statute of limitations of ten years. 735 ILCS 5/13-206.

- The measure of damages is the amount of salary and value of employment benefits that would have been acquired by the employee less the sum that the employee earned by reasonable diligence. The employer has the burden of showing that the employee could or did have other earnings subsequent to the wrongful discharge or that the employee failed to mitigate damages. *Bessler v. Board of Education of Chartered School District No. 150 of Peoria County, 370 N.E.2d 1050, 1053-54 (Ill. 1977).*

- Unemployment compensations do not reduce the plaintiff's award. *Harden v. Playboy Enterprises, Inc.,633 N.E.2d 764, 769-770 (1st Dist., 1993).*

EMPLOYMENT TORTS AND COMMON LAW CAUSES OF ACTION

I. Intentional Infliction of Emotional Distress

- Three requirements necessary to demonstrate intentional infliction of emotional distress (IIED) under Illinois law are:

    1. Conduct involved must be truly extreme and outrageous;
    2. Actor must either intend that his conduct inflict severe emotional distress or know that there is at least a high probability that his conduct will cause severe emotional distress and;

3. Conduct must in fact cause severe emotional distress. *Honaker v. Smith, 256 F.3d 477 (7th Cir., 2001).*

- Cause of action does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities, but must go beyond all bounds of decency and must be considered intolerable in a civilized community. *Restatement (2nd) of Torts §46.*

- One factor to be considered in determining extreme and outrageous conduct is the degree of power or authority, which defendant has over plaintiff and the more control defendant has, the more likely that defendant's conduct will be deemed outrageous particularly when the conduct involves either a veiled or explicit threat to exercise such authority. *Honaker v. Smith, supra.*

- Another consideration is whether plaintiff is particularly susceptible to emotional distress because of some physical or mental condition and defendant knows that the plaintiff has a particular susceptibility. *Honaker v. Smith, supra.*

- Neither physical injury nor the need for medical treatment is a necessary prerequisite to establish the claim. *Honaker v. Smith, supra.*

- Comments by co-employee referring to plaintiff's mental condition was preempted by Illinois Human Rights Act as they referred to employee's disability and were therefore inextricably linked to plaintiff's disability discrimination claim. *Krocka v. City of Chicago, 203 F.3d 507 (7th Cir., 2000).*

- Former teacher terminated amidst rumors of sexual misconduct failed to establish requisite elements of IIED claim. *Strasburger v. Board of Education of Harden County Community Unit School District No. 1, 143 F.3d 351 (7th Cir., 1998), cert denied, 525 U.S. 1069.*

- Under Illinois law, the court judges whether the conduct is so extreme and outrageous as to state a cause of action on an objective standard based upon all facts and circumstances of a particular case. Defendant's conduct must be such that a recitation of the facts to an average member of community would arise resentment and lead him to exclaim, "Outrageous!" *VanStan v. Fancy Colours & Co., 125 F.3d 563 (7th Cir., 1977).*

- Defendant's awareness of plaintiff's susceptibility to emotional distress is a factor in determining whether conduct is extreme and outrageous, but does not alter objective standard by which court judges whether conduct

is outrageous, but merely impacts objectively reasonably person's reaction to defendant's conduct. *VanStan, supra.*

- Supervisor's refusal to remove from workplace picture depicting African American employee as a monkey was not so extreme and outrageous as to support a claim of IIED. *Oates v. Discovery Zone, 116 F.3d 1161 (7th Cir., 1997).*

- Emotional distress caused by employer's outrageous conduct toward employee after employee terminated sexual relationship with him was sufficient to support IIED claim as she had physical reactions such as hives, stomach pains, vomiting, and other elements of depression. *Bristow v. Drake Street, Inc., 41 F.3d 345 (7th Cir., 1994).*

- Corporate officer's actions in terminating 78-year-old executive director, including locking her out of her office and posting sign on her office door, were merely insults and indignities, which did not support IIED claim. *Hegy v. Community Counseling Center of Fox Valley, 158 F.Supp.2d 892 (N.D.Ill. 2001).*

- Employee failed to allege extreme and outrageous conduct by employer or human resources manager where employee alleged that employer terminated his employment when employee failed to return to work when his medical leave ran out and manager backdated employee's leave application solely to cause employee to be fired. *Hamros v. Bethany Homes & Methodist Hospital of Chicago, 894 F.Supp. 1176 (N.D.lll. 1995).*

- Waitress stated cause of action for IIED against restaurant president due to his alleged abuse of position and that he repeatedly made sexually offensive remarks and emotional distress incurred by waitress was severe due to its duration and the fact that waitress was seeking medical counseling related to the allegations. *Curcio v. Chinn Enterprises, Inc., 887 F.Supp. 190 (N.D.Ill. 1995).*

- A pattern or course of conduct and an accumulation of acts may make conduct sufficiently extreme to be actionable under IIED. *Pavlik v. Cornhaber, 761 N.E.2d 175 (1st Dist., 2001).*

- A reasonable belief that the defendant's objective was legitimate does not automatically allow the defendant to pursue that objective by outrageous means, but is a substantial factor in evaluating the outrageousness of the conduct. Behavior that would not normally be considered outrageous may be actionable if the defendant knows that the plaintiff is particularly

susceptible. Employers temporary assignment and demotion were not extreme and outrageous, but rather employer's conducted involved the everyday stress of the workplace. However, employee's allegations that after he had reported safety violations at nuclear power station, employer retaliated by conducting a sham investigation and made false and defamatory statements that employee had falsified documents, planted radioactive material outside the posted area and was a leader of a gang stated a claim for IIED. *Graham v. Commonwealth Edison Co., 742 N.E.2d 858 (1st Dist., 2000), appeal denied, 195 Ill.2d 551, appeal denied, 195 Ill.2d 577.*

- Professor failed to establish IIED claim based upon a memorandum that was embarrassing to professor, but did not reach level of "extreme and outrageous" conduct. *Wynne v. Loyola University of Chicago, 741 N.E.2d 669 (1st Dist., 2000).*

- Employee's stress and distrust of employer upon discovering that employer had placed private detectives posing as employees in workplace to solicit highly personal information about employees was insufficient to establish claim. *Johnson v. K-Mart Corp., 723 N.E.2d 1192 (1st Dist., 2000), appeal allowed, 729 N.E.2d 496.*

- Actions of employer and coworkers in connection with investigation of complaints that employee had sexually harassed coworkers did not rise to the level of IIED. *Vickers v. Abbott Laboratories, 719 N.E.2d 1101 (1st Dist., 1999).*

- Claim of female employee of fast food restaurant against coworkers and supervisors that made hole in ceiling of woman's bathroom and viewed female employees disrobing and using restroom facilities were not inextricably linked to a claim of sexual harassment and therefore not preempted by Illinois Human Rights Act. *Benitez v. KFC National Management Company, 714 N.E.2d 1002 (2nd Dist., 1999).*

- Clinic employee was denied recovery on IIED claim under allegation that she was terminated after 44 years of service, not given a reason for termination, summarily escorted from clinic without an opportunity to pack her personal belongings and executive board hinted that reason for termination was something "really bad". *Brackett v. Galesburg Clinic Association, 689 N.E.2d 406 (3rd Dist., 1997).*

- Doctrine of Absolute Privilege did not bar mother's IIED claim against father and father's attorney based upon alleged defamatory statements made by father's attorney to mother's spouse concerning pending child

custody dispute between father and mother. *Thompson v. Frank, 730 N.E.2d 143 (3rd Dist., 2000), rehearing denied, appeal denied, 191 Ill.2d 561.*

II. Invasion of Privacy

- Allegation of former female employee that coworkers and supervisors viewed her undressing in bathroom supported a claim for unreasonable intrusion upon the seclusion of another. *Benitez v. KFC National Management Company, 714 N.E.2d 1002 (2nd Dist., 1999).*

- Examples of actionable intrusion upon seclusion includes invading someone's home, illegally searching someone's shopping bag in store, eavesdropping by wiretapping, peering into windows of private area or making persistent and unwanted telephone calls. *Lovgren v. Citizens First National Bank, 534 N.E.2d 987 (Ill. 1989); Restatement (2nd) of Torts §652B through E.*

- The Second, Third and Fifth Districts have recognized the tort. *Melvin v. Burling, 490 N.E.2d 1011 (3rd Dist., 1986); Davis v. Temple, 673 N.E.2d 737 (5th Dist., 1996).* The cause of action is not governed by the one-year statute of limitations for defamation and is not barred by the Exclusivity Doctrine of the Illinois Human Rights Act. *Benitez, supra.*

- The Right of Seclusion protects an individual from legal surveillance. *Muick v. Glenayre Electronics, 280 F.3d 741 (7th Cir., 2002); Schmidt v. Ameritech Illinois, _____N.E.2d _____ (1st Dist., 2002).*

- The tort of False Light Invasion of privacy, the plaintiff must prove the following elements:

  1. He was placed in a false light before the public as a result of the defendant action;
  2. The false light in which he was placed would be highly offensive to a reasonable person and;
  3. The defendant acted with knowledge and that the information he published was false or in reckless disregard for the truth or falsity of the information. *Parker v. House Corp., 756 N.E.2d 286 (1st Dist., 2001); Kurczaba v. Pollock, 742 N.E.2d 425 (1st Dist., 2000).*

- For purpose of public disclosure requirement of tort, "publicity" means communicating the matter to the public at large or if plaintiff has a special relationship with the individuals to whom the matter was

disclosed, the publicity requirement may be satisfied by disclosure to a small number of people. *Wynne v. Loyola University of Chicago, 741 N.E.2d 669 (1st Dist., 2000).*

III. Intentional Interference with Employment Relationship

- Illinois law permits a corporate officer to be sued for tortious interference with a contract with the firm that employs him if the interference is solely for the persons own gain or is solely for the purpose of harming the plaintiff since such conduct would not have been done to further the corporation's interests. *Dickieson v. DER Travel Service, Inc., 149 F.Supp.2d 1011 (N.D.Ill. 2001); Chapman v. Crown Glass Corp., 557 N.E.2d 256, 263 (1990).* The elements of the claim are:

    1. The existence of a valid and enforceable contract between plaintiff and another;
    2. Defendant's awareness of a contractual relation;
    3. Defendant's intentional and unjustified inducement of a breach;
    4. Subsequent breach by the other caused by defendant's wrongful conduct and;
    5. Damages. *HPI Healthcare v. Mt. Vernon Hospital, 545 N.E.2d 672, 676 (Ill. 1989).*

- Former employer's claim that new employer tortiously interfered with its confidentiality agreement with former employee based upon employee's alleged misappropriation of confidential information was deemed preempted by Illinois Trade Secrets Act. 765 ILCS 1065/8. *Thomas & Betts Corp., v. Panduit Corp., 108 F.Supp.2d 1968 (N.D.Ill. 2000).*

- Under Illinois law, officers of a corporation have a qualified privilege against liability for tortuous interference with a contract with the corporation; to overcome a qualified privilege, the plaintiff must prove that the corporate offices acted with malice and without justification. Bare allegations unsupported by facts to show that the officers acted with malice are insufficient to disregard the privilege. *In re Securities Investor Protection Corp., v. RD Kushnir & Co., 274 B.R. 768 (N.D.Ill. Bankruptcy 2002).*

- In a claim for tortuous interference with a contract or business expectancy, the tortfeasor must be a third party to the contractual or expectancy relationship as a party cannot tortiously interfere with its own contract. *Bass v. SMG, Inc. 765 N.E.2d 1079 (1st Dist., 2002).*

- Until the contractual relationship between a law firm and a client is terminated, the at will contract is of value to the law firm and therefore intentionally causing the termination of that at will relationship may be an actionable tort. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk and Western Ry. Co., 748 N.E.2d 153 (Ill. 2001).*

- Appellate court research attorney's allegations that Illinois Supreme Court Justice tortiously interfered with her oral employment contract by directing Administrative Office of Illinois Courts to reduce her salary or inextricably linked to Human Rights Act or the allegations could not stand alone without improper motive of age or sex discrimination. *Welch v. Illinois Supreme Court, 751 N.E.2d 1187 (3rd Dist., 2001).*

IV. Libel and Slander

- If a cause of action for defamation arises out of the employment relationship, defendant may be under certain circumstances entitled to a "conditional privilege." *Zeinfeld v. Hayes Freight Lines, Inc.*, 41 Ill.2d 345 (1968). Assuming for the sake of discussion that a qualified privilege exists, the privilege is overcome when the employee pleads and proves that the statement was made with knowledge of its falsity or in reckless disregard of its truth or falsity. *Krasinski v. United Parcel Service, Inc.*, 124 Ill.2d 483, appeal after remand, 208 Ill.App.3d 771 (1988).

- The qualified privilege can be lost by a demonstration that the defendant had a direct intent to injure plaintiff or a reckless disregard of plaintiff's rights and the consequences that may result from the defamatory statement. *Cianci v. Pettibone Corp.*, 298 Ill.App.3d 419 (1st Dist., 1998).

- A privilege renders an otherwise defamatory statement not actionable because of either the circumstances or the occasion in which the statement was made. *Troy L. Vickers v. Abbott Laboratories*, 308 Ill. App.3d 393, 719 N.E.2d 1101 (1st Dist. 1999).

- Defamatory statements motivated by legitimate business or employment interest may be protected by a qualified privilege. *Larson v. Decatur Memorial Hospital*, 236 Ill.App.3d 796, 602 N.E.2d 864 (4th dist. 1992).

- In *Judge v. Rockford Memorial Hospital*, 17 Ill.App.2d 365, 150 N.E.2d 202 (2°d Dist. 1958) the court held the following in regard to when a qualified privilege exists:

"Such a privilege will apply, where circumstances exist, or are reasonably believed by the Defendant to exist, from which he has an interest or a duty, or in good faith believes he has an interest or a duty, to make a certain communication to another person having a corresponding interest or duty, and the Defendant is so situated that he believes, in the discharge of his interest or duty or in the interests of society, that he should make the communication, and if he makes the communication in good faith under those circumstances believing the communication to be true, even though it may not be true, then the communication is qualifiedly or conditionally privilege, even though the Defendant's interest or duty be not necessarily a legal one but only moral or social and imperfect character."

- The elements that must be satisfied in order for the above privilege to exist include the following: (1) good faith on the part of the defendant; (2) an interest or duty to be upheld; (3) a statement limited in its scope to that purpose; (4) a proper occasion; and (5) publication in a proper manner and to proper parties only. *Lori Kuwik v. Starmark Star Marketing & Administration, Inc*., 156 I11.2d 16, 619 N.E.2d 129 (1993).

- The Innocent Construction Rule states that "a written or oral statement is to be considered in context with the words and the implications therefrom given their natural and obvious meeting; if, as so construed, the statements may reasonably be innocently interpreted . . . it cannot be actionable *per se. Chsapski v. Copley Press, 92111.2d 344, 352, 442* N.E.2d *195, 199 (1982).* Therefore, even if a challenged statement imputes inability to perform, want of integrity or lack of ability in one's trade, business or profession, recovery for defamation will not be allowed if the statement can be given an innocent construction. *Anderson v. Vanden Dorpel,* 172 HL2d 399, 667 N.E.2d 1296, 1301 (Ill. 1996). Whether a statement is reasonably susceptible to an innocent construction is a question of law to be decided by the trial court. *Rosner v. Field Enterprises* Inc., 205 I11.App.3d 769,804 564 N.E.2d 131, 152 (1st Dist. 1990). A trial court can apply the Innocent Construction Rule when ruling on a 2-615 motion to dismiss. *Taradash v, Adelet/Scott-Fetzer Co., 260* II1.App.3d 313, 318, 628 N.E.2d 884, 888 (1st Dist. 1993). Illinois case law also holds that the trial court must adopt an innocent construction if reasonable in defamation per se actions, and there is no balancing of a reasonable constructions. *Mittelman v.* Witous , 135 I11.2d 220, 232, 552 N.E.2d 973, 979 *(1990); Harte v. Chicago Council of Lawyers, 220 II1,App.3d 255, 260, 581 N.E.2d 275 (1st* Dist. 1991).

- Illinois courts have consistently dismissed defamation actions pursuant to the Innocent Construction Rule. The Illinois Supreme Court recently addressed the innocent construction rule in the context of a defamation *per se* action. In *Anderson v. Vanden Dorpel,* 172 ll1.2d 399, 667 N.E.2d at 1296 (Ill. 1996), plaintiff employee sued her supervisor and employer for defamation *per se.* Plaintiff alleged that her supervisor told a prospective employee that "she did not follow up on assignments" and that "she could not get along with co-workers." The trial court dismissed the plaintiff's defamation *per se* count with prejudice pursuant to the Innocent Construction Rule. Id. 172 I11.2d at 405, 667 N. E.2d at 1298. The appellate court affirmed the trial court's holding that the statement the plaintiff could not get along with others was subject to an innocent construction and, therefore, not actionable. Id., 172 111.2d at 406, 667 N.E.2d at 1298-99. The appellate court, however, reversed the trial court's decision that the alleged comment regarding the plaintiff's failure to follow assignments was subject to an innocent construction. Id., 172 Ill.2d at 406, 667 N.E.2d at 1299.The Illinois Supreme Court reversed the Appellate Court's decision, and held that neither alleged statement could form the basis of a defamation *per se* action under Illinois law because a reasonable innocent construction was available. The Illinois Supreme Court reasoned that both remarks may be understood to mean that the Plaintiff did not fit in with the employer's organization and failed to perform in that particular job setting, and not as a comment on her ability to perform in other positions. *Id.*, 172 Ill.2d at 413-`5, 667 N.E.2d at 1302-03. Consequently, the Illinois Supreme Court affirmed the trial courts dismissal of the Plaintiff's defamation count with prejudice.

- Illinois appellate courts have also consistently applied the Innocent Construction Rule to defamation actions. In *Taradash v. Adelet/lScott Fetzer Co., 260 111.App.3d 313, 315,* 628 N.E.2d 884, 886 (1st Dist, 1993), plaintiff sales representative filed a defamation suit against his employers for allegedly stating to third parties that people: "refused to deal with him;" "refused to place orders with him as they had in the past;" and "did not enter into contracts with him." Defendants filed a motion to dismiss arguing that all the alleged remarks were subject to the Innocent Construction Rule. The trial court granted the defendants' motion to dismiss. The appellate court affirmed the trial court's motion to dismiss the defamation count, and held that the Innocent Construction Rule precluded plaintiff from stating, a viable cause of action against the defendants. *Id.*, 260 11l.App.3d at 318, 628 N.E.2d at 887. The appellate court reasoned that there were several plausible non-defamatory constructions that could be given to defendants' alleged comments, such

as: (1) the economic conditions in the industry made it impossible for plaintiff to perform his job; (2) the defendants' performance standards may not have been reasonable, or (3) the work environment made it difficult for plaintiff to perform his job. Because these alternative explanations were reasonable, the Appellate Court concluded that the plaintiff could not state a cause of action for defamation *per se*. *Id*., 260 II1.App.3d at 318, 628 N.E.2d at 887.

- A general statement that someone is a liar, not being put in the context of specific facts, is merely opinion and not actionable. *Piersall v. Sports Vision of Chicago,* 230 Ill.App.3d 503, 510-11, 595 N.E.2d 103, 107 (1992). The terms "lying" and "liar" fit into a category of vague terms, which could be interrupted to mean an intentional creation of a false or misleading impression. As such, those words are not actionable. *Costello v.Capital Cities Communications, Inc.*, 505 N.E.2d 701, 722 (5th Dist. 1987). Accusations of lying, which refer only to criticism of an alleged dishonest statement, is capable of being read innocently and is not actionable. *Wade v.Sterling Gazette Co.,* 56 Ill.App.2d 101, 205 N.E.2d 44 (3rd Dist. 1965); *Britton v. Winfield Public Library,* 101 Ill.App.3d 546, 428 N.E.2d 650 (2nd Dist. 1981). Statements of a general nature such as "trouble maker" or "intimidating" are such that they cannot objectively be verified as true or false and thus, must be construed as non-actionable opinion. *Hopewell v.Vitullo,* 299 Ill.App.3d 513, 518, 701 N.E.2d 99, 103 (1998).

- Defamatory statements motivated by legitimate business or employment interest may be protected by a qualified privilege. *Larson v. Decatur Memorial Hospital,* 236 Ill.App.3d 796, 602 N.E.2d 864 (4th dist. 1992).

- Under Illinois law, reckless disregard in defamation action results from making statements knowing those statements to be false or despite a high degree of awareness that statements were false or despite entertaining serious doubts as to their truth, failing to properly investigate truth. *Dawson v. New York Life Ins. Co.*, 135 F.3d 158 (7th Cir. 1998).

- To prove actual malice, plaintiff need not show malice in moral sense of hate, vindictiveness or animosity but may prove a wanton disregard of plaintiff's rights by defendant. The question of whether plaintiff has met this burden is a question of fact for the jury. *Erickson v. Aetna Life & Casualty Co.,* 127 Ill.App.3d 753 (2nd Dist. 1984).

- Under Illinois law, whether defamation defendant has qualified privilege is question of law for court but whether defendant abused that qualified

privilege is a question of fact for the jury. *Hollymatic Corp. v. Daniels Food Equipment, Inc.*, 39 F.Supp.2d 1115 (N.D.Ill. 1999).

- Where matters of privilege are under consideration in libel suit and involve factual dispute as to existence of good faith, qualified privilege is no longer a question of law but rather one of fact that lies within the province of the fact-finder. *Kuwik v. Starmark Star Marketing and Admin., Inc.*, 156 Ill.2d 16 (2nd Dist. 1993). Under Illinois law, factual questions relating to privilege such as Defendant's good faith, scope of privilege and Defendant's choice of recipient are left for the jury to determine. *Jones v. Western & Southern Life Ins. Co., 91 F.3d 1032 (7th Cir., 1996).* Defendant has the burden of proof on this affirmative defense. *Quinn v. Jewel Food Stores, Inc., 276 Ill.App.3d 861 (1st Dist., 1995).*

V. Retaliatory Discharge

- In order to make out a claim for retaliatory discharge, Plaintiff must allege:
  1. That he or she has been discharged;
  2. In retaliation for his or her activities;
  3. That the discharge violates a clear mandate of public policy. *Stebbings v. University of Chicago, 312 Ill.App.3d 360, 365, 726 N.E.2d 1136, 1140 (1st Dist., 2000).*

- In defining the term "public policy" in this context, the Illinois Supreme Court has stated, "There is no precise definition of the term. In general, it can be said that public policy concerns what is right and just and what affects the citizens of the state collectively." P*almateer v. International Harvester Co., 85 Ill.App.2d 124, 130, 421 N.E.2d 876, 878 (Ill. 1981).*

- Plaintiff states a cause of action for retaliatory discharge when she alleges that as an employee, she was discharged for reporting illegal or improper conduct. *Wheeler v. Caterpillar Tractor Co. 108 Ill.2d 502, 485 N.E.2d 372 (Ill.1985).* Two branches of cases have emerged from the "whistle-blowing" retaliatory discharge cause of action. One branch is identified as the "citizen crime fighter" line of cases and the other line of cases relates to "health and safety" issues, which underlie the retaliatory discharge. *Stebbings, 312 Ill.App.3d 366-70 (citizen crime fighter); and, at 373 (health, safety and other regulations).*

- In *Howard v. Zach Co., 264 Ill.App.3d 1012, 637 N.E.2d 1183 (1st Dist, 1994),* the Plaintiff reported violations of record keeping requirements mandated by the Code of Federal Regulations. The rules were promulgated to

ensure that materials used in the construction of nuclear power plants met minimum quality standards. The Court held that public policy favored the reporting of a good-faith that records relating to the construction of nuclear power plants were being falsified, tampered, misplaced and/or generally maintained under conditions which violated the Federal Regulations and thus a discharge after reporting such conditions contravened public policy giving rise to a cause of action for retaliatory discharge. *Howard, 264 Ill.App.3d, 1023.*

- The tort of retaliatory discharge will protect the reporting of any violation of the criminal code, be it as minor as the theft of a $2.00 screwdriver. *Palmateer v. International Harvester Co., 85 Ill.2d.24, 133-34, 421 N.E.2d 876, 880 (Ill. 1981).* The tort of retaliatory discharge also protects the reporting of the violation of regulations and statutes other than the criminal code. *Paskarnis v. Darien-Woodridge Fire Protection District, 251 Ill.App.3d 585, 623 N.E.2d 383 (1993).*

- In *Stebbings v. University of Chicago, 312 Ill.App. 3d 360, 726 N.E.2d 1136 (1st Dist., 2000),* the Appellate Court reversed Judge Lichtenstein's dismissal pursuant to §2-615. The Appellate Court analyzed and collected cases under both the "citizen crime fighter" rationale as well as conduct, which contravenes a clearly mandated public policy, but not necessarily a law. In describing the "citizen crime fighter" type of claim, the Appellate Court in *Stebbings*, stated:

> As mentioned above, in a 'citizen crime fighter' type of retaliatory discharge claim, two layers of law are involved. First, there must be statutes, constitutional provisions, or judicial decisions that clearly mandate a public policy in favor of the reporting of crime. As it happens, in light of *Palmateer*, there is little question that such a policy has been clearly mandated and so this layer of law will rarely be at issue in a 'citizen crime fighter' suit. Second, there is the layer of law that allegedly prohibits the conduct that the employee reports or refuses to engage in. This layer of law must apply in that the employee must have a good-faith belief that it prohibits the conduct in question. It does not need to apply in the sense of providing a clearly mandated public policy. The public policy in favor of 'citizen crime fighters' is established by law, such as *Palmateer*, and its progeny. *Stebbings, 312 Ill.App.3d 370-71, 726 N.E.2d 1144.*

- In the *Stebbings* case, the Plaintiff "blew the whistle" to the administration at Argonne Laboratories regarding the Defendant University's violation of federal regulations. The University defended by alleging that the regulation cited did not apply to the research, which was the subject of the suit. The Appellate Court stated:

> However, what matters is what Stebbings believed in good-faith that the University was violating federal regulations. *Howard, 264 Ill.App.3d 1024, 202 Ill.DEC.447, 637 N.E.2d 1192.* The Plaintiff need not plead facts that conclusively show such a violation. *Johnson v. World Color Press, Inc. 147 Ill.App.3d 6746, 751, 101 Ill.DEC.251, 498 N.E.2d 575, 578 (1986).* A reasonable person could interpret the regulations, as Stebbings allegedly did, as covering the research at Argonne. *Stebbings, 312 Ill.App.3d 371, 726 N.E.2d 1144.*

The *Stebbings* Court also addressed two other arguments of the Defendant University. First, the *Stebbings* Court confirmed that the reporting of violations to supervisors in a company as well as reporting to outside agencies is protected. *Petrik v. Monarch Printing Corp., 111 Ill.App.3d 502, 508, 444 N.E.2d 588, 592-93, (1982); Lanning v. Morris Mobile Meals, Inc., 308 Ill.App.3d 490, 720 N.E.2d 1128 (1999).* Secondly, federal law can provide a basis of liability. "An Illinois citizens' obedience to the law, including federal law, is a clearly mandated public policy of the State under the principles enunciated in *Wheeler*". *Russ v. Pension Consultants Co., 182 Ill.App.3d 769, 776, 538 N.E.2d 693, 697 (1989), Johnson v. World Color Press, Inc., 147 Ill.App.3d at 749-50,* (Plaintiff stated a valid retaliatory discharge claim arising out of the employee's informing his employer that certain accounting practices of the Company violated federal security's law).

- In *Petrik v. Monarch Printing Corp., 111 Ill.App.3d 502, 444 N.E.2d 588 (1st Dist., 1982),* the Plaintiff alleged that in the course of performing his duties, he discovered a discrepancy in the corporation's financial records, which might have been due to criminal conduct. The employee reported his suspicions to management and alleged that he was discharged in retaliation for his efforts to ensure management's compliance with the financial requirements of law. The Appellate Court held that the public policy considerations underlying *Palmateer* supported Petrik's conduct and held that he stated a cause of action for retaliatory discharge. *Petrik, 111 Ill.App.3d 508, 444 N.E.2d 588.*

- In the *Palmateer* case, International Harvester complained about a "lack of specificity of Palmateer's complaint". The Illinois Supreme Court cited the Illinois Code of Civil Procedure for the proposition that "no pleading is bad in substance, which contains such information as reasonably informs the opposite party of the nature of the claim or defense, which he is called upon to meet." *Palmateer, 85 Ill.2d, 134.* The Illinois Supreme Court further stated that although the complaint was less specific than it could be, it adequately informed I.H. of the crux of the claim and stated a cause of action.

VI. Negligence and Fraud

- One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. *Rozny v. Marnul, 250 N.E.2d 656, 662-63 (Ill. 1969); Restatement (2nd) of Torts, §552(1).*

- In *McAfee v. Rockford Coca-Cola Bottling Co., 352 N.E.2d 50 (2nd Dist., 1976),* plaintiff resigned from his former position to accept a new offer and later discovered that the employer's officer did not have authority to make a hiring decision and the offer was withdrawn. The court held that plaintiff stated a viable cause of action pursuant to the *Rozny v. Marnul* negligent misrepresentation theory.

- The cause of action for negligent misrepresentation is limited to false information, which results in physical injury to a person or harm to property or one who is in the business of supplying of information for the guidance of others in their business transactions. *Brogan v. Mitchell International Inc., 692 N.E.2d 276 (Ill. 1998).* The limited nature of negligent misrepresentation liability serves to "preserve the proper sphere of contractual base recovery and prevents the creation of tort liability, which could unduly impeded the flow of communication in society." *629 N.E.2d at 278.*

- A few Illinois employment related cases have recognized fraud as a potential theory of recovery. *Bower v. Jones, 978 F.2d 1004 (7th Cir., 1992; Kula v. JK Schofield & Co., 668 F.Supp. 1126 (N.D.Ill. 1987).*

- Fraud must be pleaded with factual particularity. *Zic v. Italian Government Travel Office, 130 F.Supp.2d 991 (N.D.Ill. 2001).*

- Illinois courts are reluctant to find fraud regarding statements of potential future or contingent events, expectations or probabilities. *Wilde v. First Federal Savings & Loan Association of Wilmette, 480 N.E.2d 1236 (1st Dist., 1985).*