MONTHLY LUNCHTIME SEMINAR SERIES

43rd Session:

HIRE & FIRE AT WILL: JUST DON'T GET SUED OR SENT TO THE ARDC

Judge Lynn M. Egan
Judge Patricia O'Brien Sheahan
Mr. Matthew J. Egan (Pretzel & Stouffer)

August 16, 2016

JUDGE LYNN M. EGAN

Judge Lynn M. Egan became a Cook County Circuit Court judge in 1995 and has served in the Law Division for over 19 years. She has presided over high volume motion calls, an Individual Commercial Calendar, an Individual General Calendar and bench and jury trials. She is currently the only Cook County judge assigned to a General Individual Calendar in the Law Division, which includes every type of case filed in the Division, specifically including personal injury actions such as medical & dental malpractice, product liability, infliction of emotional distress, defamation/slander, premises liability, construction & motor vehicle accidents, as well as commercial disputes such as breach of contract, fraud, conspiracy, breach of fiduciary duty, wrongful termination, employment discrimination and legal & accounting malpractice. She manages these cases from time of filing until final disposition, including all motion practice, case management, settlement conferences and trials. Additionally, Judge Egan is committed to assisting parties with the voluntary resolution of cases. As a result, hundreds of cases pending on other judges' calls in the Law & Chancery Divisions & the Municipal Districts are transferred to Judge Egan each year for settlement conferences and she has helped facilitate settlements totaling over 250 million dollars.

Judge Egan has also served as a member of several Illinois Supreme Court Committees, including the Executive Committee, Discovery Procedures Committee, Civil Justice Committee and Education Committee. She has also been a faculty member at dozens of judicial seminars throughout the state, including the annual New Judges' Seminar, regional conferences and the mandatory Education Conference. She has authored numerous articles on subjects such as discovery, requests to admit, restrictive covenants, Day-In-The-Life films, directed verdicts, jury selection & instructions, Dead Man's Act, Supreme Court Rule 213, expert witnesses, reconstruction testimony, court-ordered medical exams, attorney-client/work product privileges, sanctions and damages. She also serves as a mentor for new judges and was recently appointed to the Illinois Courts Commission, a seven-member panel responsible for rendering final decisions on matters of judicial discipline.

Judge Egan has served on Bar Association committees and Boards of Directors and has been a frequent speaker at Bar Association seminars. She has taught law school classes and judged trial & appellate advocacy competitions. In 2012, she became a registered CLE provider through the Illinois MCLE Board and provides free CLE seminars for attorneys and judges every month. Since her monthly seminar series began in August 2012, Judge Egan has awarded over 10,000 hours of CLE credit to Illinois attorneys.

Prior to joining the bench, Judge Egan was an equity partner at Hinshaw & Culbertson, where she focused her practice on medical negligence cases. In addition to trial work, she argued before the Illinois Supreme Court on a matter of first impression in the country in *Cisarik v. Palos Community Hospital*. Similarly, during her earlier career in the Cook County State's Attorney's Office, she worked in the criminal and juvenile divisions and argued before the Illinois Appellate and Supreme Courts on matters of first impression in Illinois.

JUDGE PATRICIA O'BRIEN SHEAHAN

Judge Sheahan is a Cook County Circuit Court judge, currently assigned to the First Municipal District, where she presides over a post judgment and miscellaneous remedies call. She previously covered a civil non-jury trial courtroom and a civil jury motion call. Judge Sheahan serves on the Board of Directors of the Illinois Judges Association.

Prior to her election in 2014, Judge Sheahan served as Associate General Counsel of the Rehabilitation Institute of Chicago (RIC), where she oversaw all litigation and claims against RIC, including case investigations, pre-trial discovery and settlement negotiations. Additionally, she handled and defended all employment/labor matters and claims before the EEOC, the NLRB and the IDHR, including fact conferences, mediations and evidentiary hearings. She also represented RIC in a wide variety of other complex disputes ranging from employment contracts, insurance coverage and probate matters.

Before joining RIC, Judge Sheahan worked as a litigation associate at Baker & McKenzie, LLP and gained extensive federal and state court experience in a wide range of complex civil litigation matters, including medical malpractice, employment, products liability, and class action suits. She also represented clients at the appellate level, including the Illinois Supreme Court and multiple appellate districts throughout the state of Illinois.

Throughout her career, Judge Sheahan devoted substantial time to pro bono and public interest work. She has been active with the Center for Disability and Elder Law and served for 12 years as a member of its Governing Board of Directors, as well as its Advisory Board. She also served as Vice President of the Easy K Foundation, which is a not-for-profit residential home for individuals with developmental disabilities.

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Matthew J. Egan is a partner at Pretzel & Stouffer, Chartered, in Chicago. He is a graduate of the University of Illinois in Champaign-Urbana and of Loyola University of Chicago Law School.

He has successfully tried a wide variety of cases to verdict in state and federal courts and before administrative agencies throughout the state of Illinois. The focus of his practice is the defense of employment discrimination claims, medical and non-medical professional liability claims, and serious personal injury claims.

He began his legal career in 1982 with the Cook County State's Attorney's Office in the Criminal Appeals Division. From 1983 – 1988, he worked as a trial and appellate attorney in the Chicago Regional Counsel's Office of Hartford Insurance Company. He joined Pretzel & Stouffer in 1988 and was elected a partner in 1991. He serves on the firm's executive, finance and ethics committees.

Additionally, he has been active with the ARDC for nearly 25 years. He was appointed by the Illinois Supreme Court as a member of the ARDC's Inquiry Board from 1989 to 1991 and from 1991 to 2012, he served as a member of the ARDC's Hearing Board. In 2013, he was appointed as a Special Counsel to the ARDC.

Mr. Egan is a Fellow of the American College of Trial Lawyers and is AV peer review rated by Martindale-Hubbell. He's been recognized by his peers as an Illinois Super Lawyer and as an Illinois Leading Lawyer each year since 2006. In 2010, he was one of the initial recipients of the Cook County Jury Verdict Reporter's recognition for Trial Lawyer Excellence.

SECTION A

- *Illinois Rule of Professional Conduct 8.4(a) & (j)*

- *Attorney Liability As Employer – "At Will" Employment May Not Be What You Think," by Mr. Matthew J. Egan, August 2016.*

- *Illinois Personnel Record Review Act: Employer Beware!, by Mr. Matthew J. Egan, August 2016.*

ILLINOIS RULES OF PROFESSIONAL CONDUCT

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so through the acts of another.

j) **violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer.** Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities. No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer was engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

See, In re Griffin, 838 N.W.2d 792 (2013)(Minnesota Supreme Court suspended attorney for sexual harassment of student at law school clinic where attorney served as adjunct professor and supervisor.).

ATTORNEY LIABILITY AS EMPLOYER – "AT WILL" EMPLOYMENT MAY NOT BE WHAT YOU THINK

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Introduction

In addition to the obligations attorneys owe to their clients and the courts under the Rules of Professional Conduct and the professional and legal liability that may arise therefrom, attorneys who employ others have obligations to their employees (and job applicants) and face liability under Illinois statutory and common law, just like any other employer.

It is settled law that unless specified otherwise, employment relationships in Illinois are "at will" - meaning that either the employer or the employee can terminate the relationship at any time and for any reason, or for no reason at all, and either with or without prior notice. *Kelsay v Motorola, Inc.*, 74 Ill.2d 172, 182 (1978). Illinois law is equally clear, however, that the at will employment relationship is subject to, and limited by, the rights conferred upon both employees and job applicants by our state's statutes and common law, as well as by federal law.

The Illinois Human Rights Act, 775 ILCS 5/1-101, *et seq.*, is the primary statutory source of rights and remedies for employees and of liability for attorneys as employers. The Human Rights Act prohibits discrimination in employment and defines what constitutes "unlawful discrimination" at all stages of the employment relationship, including the hiring process.

Section 2-102(A-5) of the Human Rights Act also states that it is a civil rights violation for an employer to prohibit employees from and to deny an employee's request to work alternative hours in order to make up time that the employee missed from work in order to

practice religious beliefs, provided that doing so would not interfere with the "operational needs of the employer."

The Human Rights Act was enacted to give force to the provisions of Article I, § 17 of the Illinois Constitution, which states that "all persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer."

Scope of the Human Rights Act

The Act applies to a private person, entity or organization that employs 15 or more persons in Illinois for at least 20 weeks at any time during a calendar year. (Sec. 2-101(B)(1)(a)). Part time or season employees are counted for purposes of determining if the threshold has been met. Local public entities are not subject to the 15 employee jurisdictional threshold. (Sec. 2-101(B)(1)(c)). In addition, the 15 employee threshold does not apply to claims of sexual harassment or physical disability (handicap) discrimination. (Sec. 2-101(B)(1)(b)).

Protected Classes/Activities Under the Human Rights Act – Sec. 1-103(Q)

Race

Color

Age (40 years of age or older; between 18 – 39 for a training or apprenticeship)

Sex (gender)

National origin (the place where the employee or one of her/his ancestors was born)

Religious belief

Sexual orientation

Pregnancy

Disability

Sexual harassment

Military status

Citizenship status

Order of Protection Status (issued per the Domestic Violence Act or by another state)

Marital status (Sec. 1-103(J))

Military/Veteran Status (Sec. 1-103(J-1))

Arrest History (Sec. 2-103(A))

Speaking a foreign language in communications not related to the employee's duties

(Sec. 2-102(A-5)

Procedures Under the Human Rights Act – Charge Filing With IDHR and Subsequent Steps

Sec. 8-111(D) of the Act specifies that "except as otherwise provided by law, no court of this state shall have jurisdiction of an alleged civil rights violation other than as set forth in this Act." A Charge of Discrimination alleging one or more violations of the Act must be filed with the Illinois Department of Human Rights (IDHR) within 180 days after the conduct constituting the civil rights violation occurred. (Sec. 7A-102(A)(1). Filing a charge at the EEOC within the 180 period will suffice.

If IDHR does not issue a report with the result of its investigation within 365 days after the Charge was filed, the complainant has 90 days thereafter within which to either file suit in the circuit court or file a complaint with the Human Rights Commission. Sec. 7A-102(G)(2). The complainant may also file suit in the circuit court within 90 days after IDHR issues a finding dismissing the Charge for lack of substantial evidence (Sec. 7A-102(D)(3) or if IDHR issues a finding of substantial evidence. (Sec. 7A-102(D)(4)).

Bypass IDHR - common law claims for violation of clear mandate of public policy

Retaliatory discharge for terminating employee for exercising rights under Worker's Compensation Act. *Kelsay v Motorola, Inc.*, 74 Ill.2d 172 (1978).

Retaliatory discharge for terminating employee for reporting illegal or improper conduct of the employer. *Palmateer v International Harvester Co.*, 85 Ill.2d 124 (1981); *Michael v Precision Alliance Group, LLC*, 2014 IL 117376.

Ethical Issues – Misconduct under Rule 8.4(a) – (d)

In re Griffin, 838 N.W.2d 792 (2013): Minnesota Supreme Court suspends attorney for 90 days for engaging in sexual harassment of a student at a law school clinic at which the attorney served as an adjunct professor and supervisor.

This outline is provided for informational purposes only and should not be construed as legal advice or opinion on any specific facts.

ILLINOIS PERSONNEL RECORD REVIEW ACT: EMPLOYER BEWARE!

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I. Overview

The Illinois Personnel Record Review Act, 820 ILCS 40/1, *et seq.*, ("the Act") confers employees with the right to inspect and to obtain a copy of all of their "personnel documents" up to twice every calendar year at reasonable intervals unless otherwise provided in a collective bargaining agreement. The Act also confers former employees with the right to obtain, upon written request, a copy of their personnel documents. The Act sets a short deadline - - 7 working days - - within which an employer (or former employer) must comply with a request for these documents.

The Act also permits an employee to file a complaint with the Illinois Department of Labor, if the employer has not complied with the requirements of the Act. The Department of Labor is empowered to investigate the complaint, issue a search warrant or subpoena to inspect the employer's files, or file an action in a circuit court to enforce the provisions of the Act. If the Department of Labor does not take action to obtain an employer's compliance with the Act, the employee may file a separate lawsuit against the employer to compel compliance and to recover actual damages, costs, and (for a willful and knowing violation of the Act) attorneys fees.

Further, unlike similar personnel records statutes in other states, the Act imposes an evidentiary sanction if the employer does not provide the employee with all responsive records in a timely fashion. Because the consequences of noncompliance can permanently impair the employer's ability to defend a subsequent employment discrimination claim, it is essential that employers in Illinois understand what the Act requires and when and how to comply with these requirements.

II. Scope of the Act

Section 1(a) of the Act defines "employee" to include any current employee, any employee who is on lay-off and subject to recall, any employee who is on a leave of absence with a right to return to work, and any former employee who has been terminated within the past year.

Section 1(b) of the Act has an equally broad definition of "employer," which extends to any individual, corporation, partnership, labor organization, unincorporated association, governmental entity, or business or commercial entity which has five employees.

The Act broadly defines "personnel documents," which an employer must permit an employee to inspect and must produce to the employee upon request. Section 2 of the Act defines "personnel documents" as any documents which "are, have been or are intended to be used in determining

[the] employee's qualifications for employment, promotion, transfer, additional compensation, discharge or other disciplinary action . . ."

The Act does not define what documents an employer must maintain as part of an employee's "personnel file;" nor does the Act require that an employer create and maintain any personnel records at all. In fact, the Act specifically states that its provisions do not apply to an employer that does not maintain any personnel records.

III. Exceptions

Section 10 of the Act enumerates 7 situations as exceptions to an employee's statutory right to inspect and obtain a copy of his or her personnel documents pursuant to Section 2 of the Act. These exceptions are as follows:

(a) Letters of reference for the employee or external peer review documents for academic employees of institutions of higher education;

(b) Any portion of a test document, although the employee may inspect a cumulative total test score for either a section of the test or the entire test document;

(c) Documents related to the employer's staff planning, business development, expansion, and closing or operational goals if those materials relate to or affect more than one employee, as long as the employer does not use or intend to use these documents in determining an individual employee's qualifications for either employment, promotion, transfer, additional compensation, discipline, or discharge;

(d) "Information of a personal nature" about a person other than the requesting employee "if disclosure of the information would constitute a clearly unwarranted invasion of the other person's privacy;"

(e) An employer who does not maintain any personnel records;

(f) Records which are relevant to "any other pending claim between the employer and employee which may be discovered in a judicial proceeding;" and

(g) Investigatory or security records the employer maintains to investigate criminal conduct by an employee or "other activity by the employee which could reasonably be expected to harm" the employer's property, operations or business, or which could cause the employer to incur financial liability on account of the employee's activity – unless and until the employer takes adverse personnel action toward the employee based on the information in these records.

IV. Time for Compliance

Section 2 of the Act requires the employer to provide the employee with an opportunity to inspect the employee's personnel documents within 7 working days after the employee makes a request for inspection. Section 2 of the Act also allows the employer to have an additional 7 days (presumably seven working days, although that is not specified) to comply with the employee's request for inspection if the employer can "reasonably show" that the original deadline cannot be met.

V. Sanction for Noncompliance

Section 4 of the Act, imposes a severe sanction on an employer who fails to provide the employee with all a copy of all personnel documents within the scope of the Act. Specifically, Section 4 states that personnel record information which was not, but which should have been, included in the employee's personnel record "shall not be used by an employer in a judicial a quasi-judicial procedure. Section 4 further states that material which should have been, but was not, included in the employee's personnel record "shall be used" in a subsequent judicial or quasi-judicial proceeding at the employee's request.

The evidence-barring sanction under Section 4 is not automatic. An employer may be allowed to use personnel record information in a subsequent judicial or quasi-judicial proceeding, but only if the judge or hearing officer concludes that the information "was not intentionally excluded from the [employee's] personnel record by the employer," but only if the employee agrees to such use or the employee has been "given a reasonable time to review the information." As a practical matter, this limited exception to Section 4 imposes a burden on the employer to establish, to the satisfaction of a judge, administrative law judge or hearing officer that its failure to include all of the required "personnel documents" in the materials it originally provided to the employee was inadvertent and not intentional.

Both the District Court here in Chicago and the Seventh Circuit Court of Appeals have ruled that evidence barring sanction codified in Section 4 of the Act does not apply to proceedings in federal court in which the plaintiff's claim is based on federal law. These courts have ruled that the provisions of federal law concerning the admissibility of evidence apply, and not Section 4 of the Act. *Park v. City of Chicago*, 297 F.3d 606 (7th Cir. 2002); *Reineke v. Circuit City Stores, Inc.*, 2004 U.S. Dist. Lexis 3495 (N.D.Ill. 2004).

VI. Recommendations

The provisions of the Act are a trap for an unwary employer. Too often, an employer's HR staff responds to a current or former employee's request for a copy of records under the Act by simply copying whatever documents happen to be in the "personnel file" without verifying whether the file contains all of the employee's "personnel documents" as defined by Section 2 of the Act.

In doing so, the employer, although acting in good faith, has set itself up for the evidence-barring sanction under Section 4 of the Act if it attempts to defend a subsequent employment-related claim by relying on documents evidencing the employee's poor performance, violation of policy, misconduct, poor attendance, etc., when those documents were not included with the records the employer produced in response to the employee's request under the Act.

It is therefore essential that HR personnel be well informed of the broad scope of Section 2 of the Act and the severe sanction Section 4 of the Act imposes if all relevant "personnel documents" are not produced to the employee.

Because of the sanction the Act imposes on an employer in a subsequent legal proceeding in either state court or before a state or local governmental administrative agency, the employer's legal counsel should review all pertinent "personnel documents" before an employee is provided an opportunity to inspect the records and before any records are produce to the employee or the employee's attorney.

This outline is provided for informational purposes only and should not be construed as legal advice or opinion on any specific facts. Matthew J. Egan and his colleagues at Pretzel & Stouffer, Chartered are available to provide advice and assistance tailored to address particular circumstances.

HIRE & FIRE AT WILL: JUST DON'T GET SUED OR SENT TO THE ARDC

Judge Lynn M. Egan

Judge Patricia O'Brien Sheahan

Mr. Matthew J. Egan (Pretzel & Stouffer)

August 16, 2016

PURPOSE OF ARDC PROCEEDINGS

- The goal is NOT to punish, "but rather to safeguard the public, maintain the integrity of the profession & protect the administration of justice from reproach."

- "Another factor for consideration is the deterrent value of attorney discipline and the need to impress upon others the repercussions of errors…"

In re Tyer, 04 CH 90 (May 4, 2005)

ILLINOIS RULES OF PROFESSIONAL CONDUCT

Rule 8.4 Misconduct.

"It is professional misconduct for a lawyer to:

j) violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status *by conduct that reflects adversely on the lawyer's fitness as a lawyer."*

RELEVANT CRITERIA

Must consider all the circumstances, specifically including:

- Seriousness of the act;
- Whether the lawyer knew the act was prohibited by statute or ordinance;
- Whether the act was part of a pattern of prohibited conduct;
- Whether the act was committed in connection with the lawyer's professional activities. (*Ill.R.Prof.Conduct 8.4(j)*)

NOTE: No charge may be brought under Rule 8.4(j) "until a court or administrative agency…has found that the lawyer was engaged in an unlawful discriminatory act, & the finding of the court or administrative agency has become final & enforceable & any right of judicial review has been exhausted."

ALSO KEEP IN MIND...

- Failure to participate in ARDC proceedings is a bad decision.

- Not only do you forfeit the opportunity to present any mitigating circumstances, but it is considered an aggravating factor. *In re Brody, 65 Ill.2d 152 (1976).*

- "Failure to put forth any effort on his own behalf is a clear indication of his inability to fulfill obligations owed to clients." *In re Tyler, 04 CH 90 (May 4, 2005)*

LEARN FROM THE PAST

- "Prior misconduct weighs most heavily in aggravation when it is similar to present misconduct."

- "The fact that an attorney had been previously disciplined amounts to a serious aggravating factor, especially if previously disciplined for similar conduct."

In re Weiss, 08 CH 116, MR 27547 (November 17, 2015)

ATTORNEY LIABILITY AS EMPLOYER – "AT WILL" EMPLOYMENT MAY NOT BE WHAT YOU THINK

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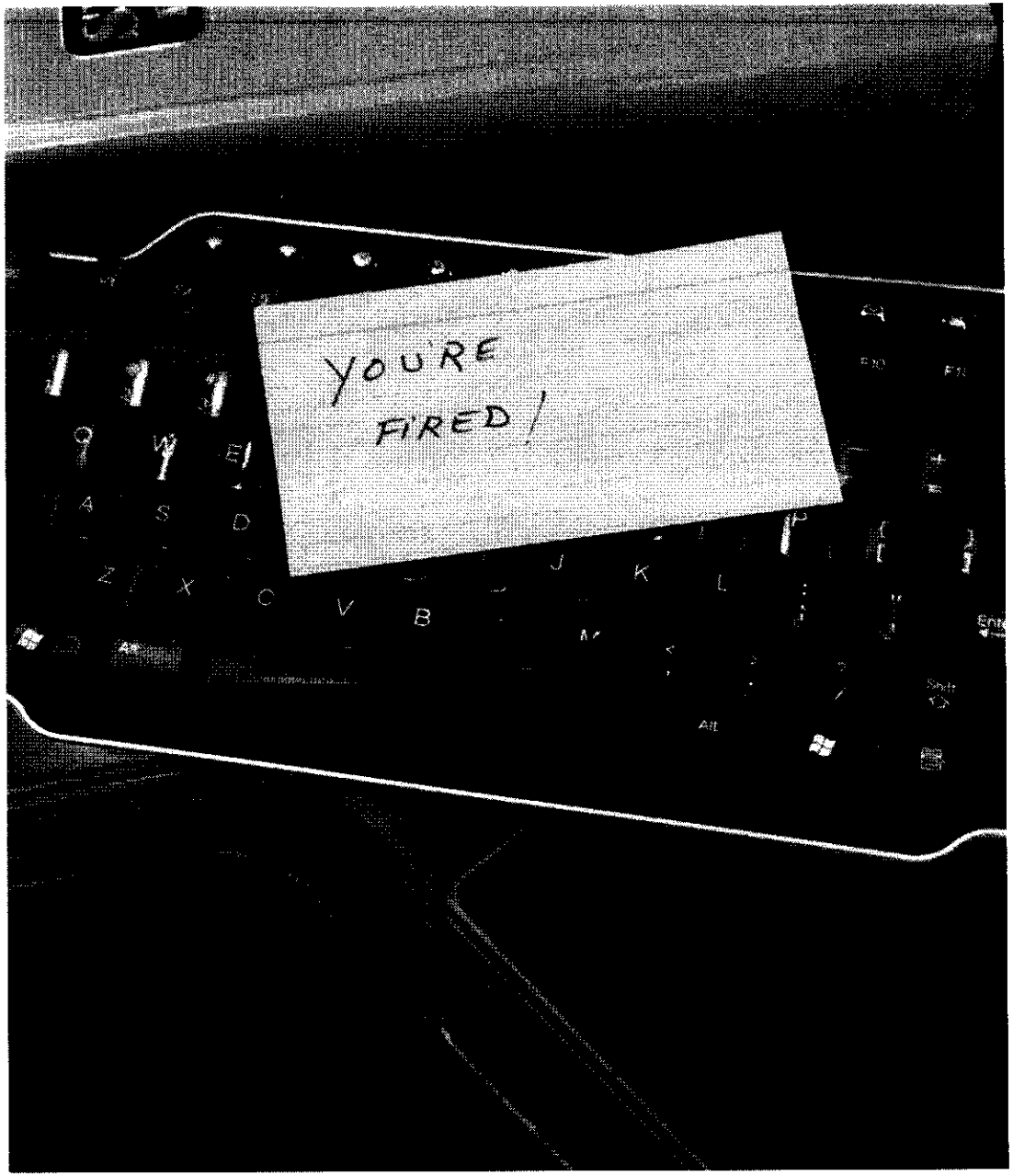

YOU'RE
FIRED!

Attorney as Employer

- Employees AND Job Applicants
- Liability under Illinois statutory law
- Liability under common law
- Ethical obligations under the Illinois Rules of Professional Conduct
  - Rule 8.4(j): violating federal, state, or local anti-discrimination law

At Will Employment

- Unless specified otherwise, either the employer or the employee can terminate the relationship at any time and for any reason, ***or for no reason at all***, without prior notice.

Turner v. Memorial Medical Center, 233 Ill.2d 494, 500 (2009).

LIMITATION: subject to the rights conferred upon employees and job applicants by our state's statutes, common law, and federal law.

State Law: The Illinois Human Rights Act

- 775 ILCS 5/1-101, *et seq*
- Prohibits discrimination in employment.
- Defines what constitutes "unlawful discrimination" at all stages of the employment relationship, including the hiring process.
- **Purpose**: Give force to Article I, § 17 of the Illinois Constitution, which states that "all persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer."

Human Rights Act: Scope

Applies to a private person, entity or organization that employs 15 or more persons in Illinois for at least 20 weeks at any time during a calendar year. (§2-101(B)(1)(a)).

- Part time or season employees included
- Local public entities not subject to the 15 employee jurisdictional threshold. (§2-101(B)(1)(c))
- 15 employee threshold does not apply to claims of sexual harassment, pregnancy discrimination, or physical or mental disability discrimination. (§2-101(B)(1)(b))

§1-103(Q):
Protected Classes/Activities

- Race
- Color
- Age (40 or +, between 18-36 if training/apprenticeship)
- Sex
- National origin (where employee or ancestors born)
- Ancestry
- Religion
- Sexual Orientation
- Pregnancy
- Disability
- Military status
- Citizenship status
- Order of Protective Status (issued per the Domestic Violence Act or by another state)
- Arrest History (§2-103(A))
- Speaking a foreign language in communications not related to employee's duties (§2-102(A-5))

Human Rights Act: Procedure

Step One: Illinois Department of Human Rights

1. "Except as otherwise provided by law, no court of this state shall have jurisdiction of an alleged civil rights violation other than as set forth in this Act." (§8-111(D)).

2. Charge of Discrimination alleging violations of the Act **must be filed with the IDHR within 180 days** after the conduct constituting the civil rights violation occurred. (§7A-102(A)(1)).

3. Filing a charge with the EEOC within 180 days that includes allegations of violating the Human Rights Act will suffice.

Human Rights Act: Procedure

Step Two: Circuit Court or Human Rights Commission

1. If IDHR does **not issue report within 365 days** after Charge filed: **90 days to file suit in circuit court** OR a complaint with the Human Rights Commission. (§7A-102(G)(2)).

2. If IDHR issues a finding **dismissing the Charge** for lack of substantial evidence: **90 days to file suit in circuit court**. (§7A-102(D)(3)).

3. If IDHR issues a **finding of substantial evidence**: **90 days to file suit in circuit court**. (§ 7A-102(D)(4)).

Bypass IDHR: Common Law & Whistleblower Act

- Retaliatory discharge for terminating employee for exercising rights under Worker's Compensation Act. *Kelsay v Motorola, Inc.*, 74 Ill.2d 172 (1978).

- Retaliatory discharge for terminating employee for reporting illegal or improper conduct of the employer. *Palmateer v International Harvester Co.*, 85 Ill.2d 124 (1981); *Michael v Precision Alliance Group, LLC.*, 2014 IL 117376.

- Action for damages under the Illinois Whistleblower Act, 740 ILCS 174/1 *et seq.*
  - Employer violates if it creates work rules which prevent employees from disclosing information to government or law enforcement agencies if the employee has reasonable cause to believe the information disclosed is a violation of state or federal law and/or if it retaliates against employees who report actual or potential violations of state or federal laws to the legal authorities or who refuse to participate in employer-sanctioned illegal activity. *Young v. Alden Gardens of Waterford, LLC*, 2015 Ill.App. (1st) 131887; *Sardiga v. Northern Trust Co.*, 409 Ill.App.3d 56, 62 (1st Dist. 2011).

Ethical Issues: Misconduct as Employer under Rule 8.4(j) (former 8.4(a)(9))

Rule 8.4: It is professional misconduct for a lawyer to:

(j) violate a federal, state or local statute or ordinance that **prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status** by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities.

No charge of professional misconduct may be brought pursuant to this paragraph **until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act**, and the finding of the court or administrative agency has become **final and enforceable** and any right of judicial review has been exhausted.

Rule 8.4(j)(eff. 2010)

In re Weiss, 08 CH 116, MR 27547
(November 17, 2015) (Disbarment):

-Assault and battery of 5 female employees, unlawful restraint and telephone harassment of 3 female employees

-Charged with violating 8.4(a)(3) for committing *criminal acts* of a sexual nature bringing the profession into disrepute

-Not charged with violating 8.4(a)(9) because such a charge would have been improper without a final court/agency determination conduct.

-8.4(a)(3) charge did not circumvent the requirements of Rule 8.4(a)(9)

In re Jones, 14 PR 0045, M.R. 26769
(September 12, 2014) (Disbarment):

-Reciprocal discipline after Supreme Court of Washington disbarred him for sexually exploiting office staff

-Victims reasonably feared jobs in jeopardy if they resisted or told others in a position of authority about his conduct

-Violated sex discrimination prohibited by Washington Law Against Discrimination, by creating a hostile work environment via sexual harassment of the female employees.

-Bases of reciprocal discipline was Illinois Rules 8.4(b) and Rule 8.4(j).

Rule 8.4(a)(9)(eff. 1993)

In re Tyer, 04 CH 90 (September 26, 2005) (Disbarment)

-District court entered judgment finding that Respondent engaged in sexual harassment and retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964.

-7th Circuit held that only Respondent's companies could be liable for the Title VII violations, and not Respondent individually, even though it was *his conduct that gave rise to liability*.

-Hearing Board concluded that the 7th Circuit clearly found that Respondent engaged in sexual harassment, despite the fact court could not impose liability upon him for his actions.

-Hearing Board found this sufficient to satisfy Rule 8.4(a)(9) requirements and Supreme Court affirmed.

In re Fishman, 01 CH 109, M.R. 19462 (October 15, 2004) (Suspension for one year)

-No violation of Rule 8.4(a)(9) where verdict in Title VII sexual discrimination action was entered against the law firm rather than the attorney individually.

-Verdict against attorney was for tortious interference with a contractual relationship. Review Board could not determine from civil case whether attorney's actions, as opposed to other actions by the law firm, actually formed the basis for the Title VII verdict

-Reserved judgment as to whether an attorney could be found to violate Rule 8.4(a)(9), based on a violation of Title VII, under different proofs. Supreme Court never issued formal opinion.

-Review Board reversed findings of misconduct as to Rule 8.4(a)(9), but affirmed as to Rule 8.4(a)(3)

Rule 8.4(a)(9)(eff. 1993)

In re Greenstein, 02 RC 1501, M.R. 17978 (March 22, 2002) (Censure)

-Petition for reciprocal discipline where attorney disciplined in California for touching a subordinate female employee and making inappropriate comments, including sexual requests and personal questions

-Respondent conceded that he violated the California Code; was disciplined by public reproval

-Censure in Illinois amounts to public reproval

In re Orner, 94 CH 533, M.R. 10435 (September 23, 1994) (Censure)

-Partner engaged in pattern of sexual harassment towards two female secretaries

-Employees filed charges with the EEOC which issued a reasonable cause finding

-Respondent, the firm, and EEOC entered into a conciliation agreement

-First Illinois case brought before the supreme court pursuant to former Rule 8.4(a)(9)

- Supreme Court held that the conciliation agreement, which was entered into as a result of the EEOC's reasonable cause finding, was a final and enforceable contract and

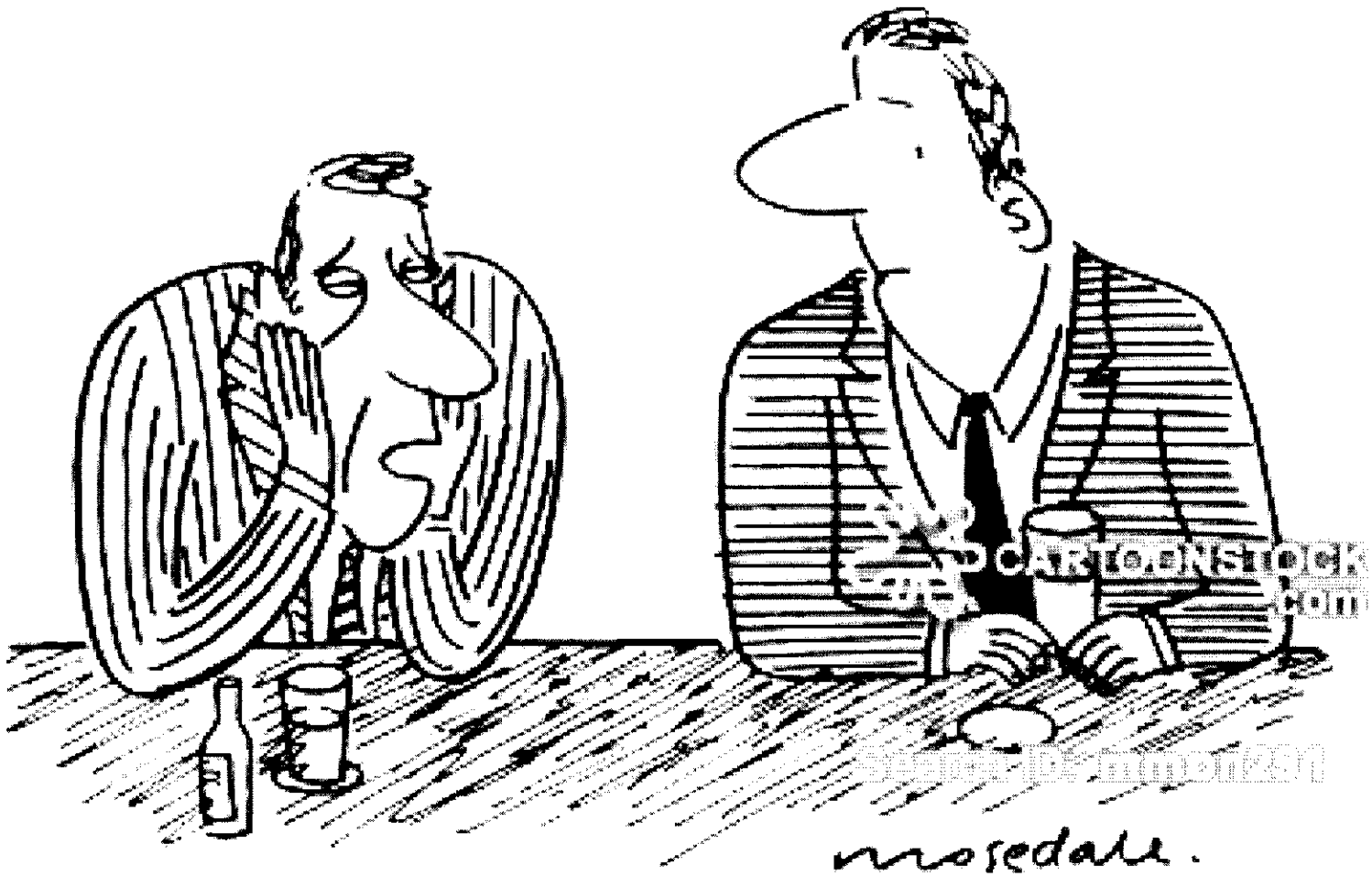
Not Just Employees: Clients & Students

Iowa Supreme Court Attorney Disciplinary Board v. Moothart, 860 NW.2d 598 (2015):

-30 month suspension of attorney for engaging in sexual harassment of several clients, including 18 and 22 year old female clients whom the attorney was representing in DUI and license suspension cases, and engaging in multiple instances of sexual harassment of an employee (and former client).

In re Disciplinary Action against Griffith, 838 N.W.2d 792 (2013):

-Minnesota Supreme Court suspends attorney for 90 days and until reinstated for engaging in sexual harassment of a student at a sports law clinic at which the attorney served as an adjunct professor.



'Where's the fun in being an employer if you can't spontaneously sack someone anymore.'

Beyond IHRA and Rule 8.4: Federal Laws Also Apply:

- **Civil Rights Act of 1964 (Title VII)** – prohibits employment discrimination on the basis of race, color, religion, national origin and sex;

- **Age Discrimination in Employment Act of 1967(ADEA)** (minimum employee threshold of 20 vs. 15 for the IHRA; liquidated damages available under the ADEA, but not under the IHRA);

- **Americans with Disabilities Act (ADA)** - prohibits discrimination against people with disabilities in the hiring process.

HIRING LANDMINES

Do not make any pre-employment inquiry about a candidate's race, color, religion, national origin, sex, age or disability or request information that is *likely to elicit* information about these areas.

See, e.g., *EEOC v. Celadon Trucking Servs.*, *2015 U.S. Dist. Lexis 84639 (S.D. Ind. June 30, 2015).*

Beware of Using Social Media in Making Hiring Decisions.

See, e.g., Gaskell v. Univ. of Kentucky, 2010 U.S. Dist. Lexis 124572 (E.D. Ky. Nov. 3, 2010)

Plaintiff was rejected for employment after details of plaintiff's religious views - visible on plaintiff's website -- were made available to the hiring committee. Court denied defendant's motion for summary judgment on plaintiff's Title VII claims of religious discrimination, finding that plaintiff raised a triable issue of fact as to whether his religious beliefs were a motivating factor in the decision to not hire him.

WHAT NOT TO ASK:

Potentially problematic questions:

- Is Spanish your native language?
- Do you have any children?
- Can you work on Fridays, Saturdays or Sundays?
- When did you graduate from high school (or college)?
- Will you leave this job if your spouse is transferred?
- Have you ever been treated for drug abuse/addiction or alcoholism?
- Will you need a reasonable accommodation to perform this job?

Consistency and Job Relatedness

- Ask all applicants for the same position the same questions.
- Requests for information must be job-related.
- If the applicant volunteers information which would be illegal to request, the employer may not use that information as a basis for rejecting the applicant.

Review Your Policies – Even Those That Appear "Facially Neutral"

- Candidate shows up for an interview wearing a hijab.
- Corporate policy prohibits all sales associates from wearing any head coverings.
- During the interview, candidate did not say she was Muslim or ask for an accommodation.
- Candidate scored high enough that she qualified for hiring, but was not offered the position.

Think Through Hiring Decisions and "Motivating Factors"

- Title VII makes it unlawful for an employer to discharge an individual "because of such individual's . . . religion." 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

- The Supreme Court provided guidance on Title VII's "because of" causation standard, noting that it is broader than the typical but-for causation standard because it requires only that the religious practice be a "motivating factor" of the employer's employment decision.

See EEOC v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 2032, 2033 (2015)("In evaluating causation, the question is not what the employer knew about the employee's religious beliefs. Rather the critical question is what motivated the employer's employment decision.")

Keep Religion (or any other unlawful bases) Out of the Hiring Process.

The Supreme Court held that plaintiff/applicant could show discrimination under Title VII simply by showing that her religion – or the desire to avoid accommodating her religion – played a **motivating part** in the decision not to hire her.

NOTE: The Court's decision prohibits employers from taking an applicant's religion into account **at all** in the decision not to hire.

Objectivity & Individuality

Antidiscrimination laws like Title VII and the IHRA require:

- That workers be "evaluated as individuals rather than as members of groups having certain average characteristics."

Lust v. Sealy, 383 F.3d 580, 583 (7th.Cir. 2004)(sex-stereotyping found where decisionmaker admitted he did not promote plaintiff "because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that").

Fact of an Arrest

Illinois Human Rights Act prohibits employers from "[using] the fact of an arrest" as a basis to discriminate in employment.

Arcadia Murillo v. The City of Chicago, 2016 IL App (1st) 143002 (insufficient "other information" indicating commission of the crime(s)).

"Ban the Box" Laws

- Laws limit when an employer may ask an applicant to disclose criminal history on employment applications.
- Illinois and Chicago's "ban the box" laws took effect last year. *See, Job Opportunities for Qualified Applicants Act* (JOQAA).
- Prohibits Illinois employers, with certain exceptions, from inquiring into, considering, or requiring disclosure of a job applicant's criminal record or criminal history **until:**
  - ➢the applicant has been determined qualified for the position sought and notified that he/she has been selected for an interview or, if there is no interview, until after a conditional offer of employment is made.

TERMINATION CHECKLIST:

Before terminating, consider the following:

- Does the employee have a written employment contract? That likely will govern.
- Is the employee a member of a protected group under Title VII of the Civil Rights Act or other federal, state or local nondiscrimination laws?
- Has the employee at any point in time disclosed a disability or medical condition?
- Has the employee requested leave or recently returned from leave under the FLMA or the Illinois Workers Compensation Act?
- Has the employee requested an accommodation under the ADA?
- Is the employee a member of the military?
- Is the employee pregnant?
- Is the employee a long term employee?
- Has the employee complained of discrimination or harassment , unfair treatment or unsafe working conditions?
- Has the employee been given positive employee evaluations?
- Has the employee participated in an investigation involving other employees or themselves?

OTHER TERMINATION CONSIDERATIONS

- The element of surprise usually translates into a higher likelihood the employee will sue.
- Communication, documentation and progressive discipline are key.
- Do not call a termination a “reduction in force” when the true reason is something else.

EXPENSIVE LESSONS

A 2012 CareerBuilder survey found that 41% of the nearly 2,700 employers surveyed estimated that a bad hire could cost $25,000, while a quarter believed it was much higher—$50,000 or more.

Harvard Business Review, Dec. 2015

SCENARIO #1

- Two receptionists at attorney's law firm filed complaints against him at the Equal Employment Opportunity Commission (EEOC), alleging repeated inappropriate actions, such as sexual comments, staring at their breasts while making growling noises & inquiring about their sex lives.

- After the EEOC found in favor of the receptionists, the attorney entered into a "conciliation agreement," which provided specific ways in which the attorney would eliminate unlawful employment practices in the future.

ARDC RESULT?

SCENARIO #1

Result: Censure. (This was the first ARDC case brought pursuant to Rule 8.4(a)(9)).

Important Points:

- A prerequisite to a Rule 8.4(j) charge is "a final & enforceable finding by a Court or administrative agency that a lawyer has engaged in an unlawfully discriminatory act." (The "conciliatory agreement" qualified.)

- "Conduct outside of the attorney-client relationship can result in discipline." *In re Orner, 94 CH 533 (September 1994).*

SCENARIO #2

Attorney engaged in a pattern of sexually exploiting four members of his office staff by subjecting them to sexual groping, embraces, kisses, touching their private parts & sexually explicit conversations & demands. He was criminally charged by Washington state authorities and plead guilty to four counts of assault with sexual motivation.

The Supreme Court of Washington entered an order disbarring the attorney & the Illinois ARDC seeks reciprocal discipline in Illinois. The attorney had no prior disciplinary record.

ARDC RESULT?

SCENARIO #2

Result: Attorney disbarred in Illinois. Being convicted in Washington state violated Illinois Rules of Professional Conduct 8.4(a)(3) & (a)(9)(A), which is now (j).

SCENARIO #3

- Attorney was charged with battery after reaching inside his paralegal's clothing & touching her breast. Although he initially denied the charge when questioned by police, he ultimately pled guilty & received court supervision.

- The employee then filed a civil suit against the attorney, alleging sexual harassment & retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964. Judgment was entered against the attorney in the amount of $152,000 & the 7th Circuit Court of Appeals issued an opinion finding the attorney had engaged in battery & that his companies were financially responsible for the Title VII violations.

ARDC RESULT?

SCENARIO #3

Result: Attorney disbarred in Illinois. Even though the Title VII sexual discrimination verdict was entered against his law firm, rather than the attorney individually.

Why? Because there was no uncertainty "regarding Respondent's culpability" given the fact that the appellate court contained an express finding that the attorney was the cause for the hostile environment & career repercussions that befell the paralegal.

NOTE: It was considered an aggravating factor that the attorney made no attempt to satisfy the civil judgment.