

Chicago Daily Law Bulletin

Volume 149, No. 58

Tuesday, March 25, 2003

Court: Can't axe workers who gave testimony

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Two construction laborers who were laid off after testifying at a fellow employee's workers' compensation proceeding engaged in a "protected activity" and can proceed with their retaliatory discharge case, a state appeals court ruled Tuesday.

The 1st District appellate Court, in a ruling of first impression, held that a discharge after an employee participated in a workers' compensation proceeding as a witness, if proven, violates the public policy contained in Illinois' Workers' Compensation Act.

"Our research reveals that other states have addressed this issue by defining 'protected activity' under their workers' compensation acts to include testifying in a proceeding, in addition to filing or pursuing a claim," Justice Robert Cahill wrote for the three-judge panel, citing Ohio statute.

The panel reserved a ruling by Cook County Circuit Judge James F. Henry granted summary judgment to the defendant and returned the matter to the lower court for trial.

"This is a huge victory for injured employees and employees in general," said plaintiff attorney **Eugene K. Hollander** of Chicago. "They don't have to fear testifying on behalf of themselves or a co-worker."

The underlying case was brought on behalf of Alan and Tim Pietruszynski against The McClier Corp., Architects and Engineer's Inc. the two workers as laborers for McClier in 1999, as did another brother, Scott.

In early January 1999, Scott Pietruszynski suffered injuries when he fell from a scaffold while working on a project at the Chicago Sun-Times building downtown. Alan and Tim Pietruszynski were working at the Sun-Times building on the day their brother was injured but did not witness the accident, according to court records.

The day after the accident, both Alan and Tim Pietruszynski were transferred to another project. Scott Pietruszynski filed a workers' compensation claim for injuries sustained in the construction accident.

Alan and Tim Pietruszynski were subpoenaed to testify at their brother's workers' compensation hearing. McClier officials laid them off a month after their testimony.

The two then filed a complaint against McClier contending that the company had engaged in retaliatory discharge. Attorneys for McClier countered that the two were laid off because no jobs were available, not because they had testified at their brother's proceeding.

McClier's attorneys also asserted that the plaintiffs failed to establish a prima facie case for a retaliatory discharge. Henry also agreed with McClier's contention that statements by one of the company's superintendents, repeating what he allegedly had been told by McClier supervisors, were inadmissible hearsay.

After Henry ruled in favor of McClier charge the plaintiffs pursued their appeal in the 1st District.

"We must determine whether a discharge based on participation in a workers' compensation proceeding as a witness, if proven, falls within the narrow class of cases recognized by our Supreme Court as violating public policy," the panel said. "We conclude that it does."

The panel added, "We conclude that protecting participation in workers' compensation hearings is consistent with public policy and promotes the purpose of the act as recognized in" *Kelsay v. Motorola Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978).

Justices Margret Stanton McBride and Anne M. Burke concurred in the 14- page opinion. The case is *Alan Pietruszynski and Tim Pietruszynski v. The McClier Corp., Architects and Engineers Inc.*, No. 1-02-1371.

The appeals court also found that Henry erred by making credibility determinations at the summary judgement stage.

McClier's attorney, Kathy Pinkstaff Fox, a Wildman, Harrold, Allen & Dixon partner, said that the panel failed to apply an Appellate Court decision, *Lewis v. Zachary Confections Co.*, 153 Ill.App.3d 311, 505 N.E.2d 1087 (1987), regarding appellate review of the sufficiency of evidence after trial.

"The fact that the evidence was present at the summary judgment stage should not make a difference," Fox said.

The panel also did not address the defendant's contention that the plaintiffs did not prove that McClier's failure to recall them for jobs was a mere pretext for retaliation, Fox said. The record in the case showed that there were no laborer jobs at work sites that the plaintiffs contended they were to be assigned to, she added.

Paul D. Cranley, an associate with the Wildman, Harold firm, also represents McClier. Attorneys would review Tuesday's ruling before deciding whether to seek further appeal, Fox said.