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Labor & Employment Law

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Another source for discovery: Ethical and legal issues in communication with former employees of an adverse employer

By Kyle Orne

Introduction

For litigation in a federal court in Illinois between corporations, one of the most fruitful sources of information is former employees. However, whether an attorney can ethically or legally speak with those former employees is often a grey-area for many practicing attorneys. In the federal courts of Illinois, the strict rule preventing communication with an employee without consent of an organization's attorney probably does not apply to former employees. As soon as an employee becomes a former employee, the organization's attorney's consent is no longer required to communicate with her. Attorney-client privilege does still apply though to the former employee, barring her from discussing any privileged information to which she was privy. In this article I will demonstrate how to properly discover information from former employees, and when attorney-client privilege still applies.

Communication with Former Employees

An attorney probably can communicate with former employees of an adverse, represented

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Supreme Court upholds arbitration agreement with class action waiver "congressional mandate" must be clear to trump

By Marji Swanson

FAA. American Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, 186 L.Ed.2d 417 (2013)

In *American Express*, merchants brought a class-action claim under the Sherman Act against American Express and its subsidiary alleging antitrust violations for using its monopoly power to charge fees 30 percent higher than those charged by competing cards. American Express' agreements with these merchants provided that all disputes would be resolved by arbitration and that there, "shall be no right or authority for any Claims to be arbitrated on a class action basis." Despite this provision, the merchants formed a class seeking treble damages under §4 of the Clayton Act.

American Express filed a motion to compel individual arbitration under the Federal Arbitration Act (FAA), 9 U.S.C.S. §1 *et. seq.* In response, the plaintiffs submitted a declaration from an economist estimating the cost of an expert needed to prove the antitrust claims would be "at least several hundred thousand dollars" and that the

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corporation. The federal courts in Illinois apply the Model Rules and the Illinois Rules of Professional Conduct. *See, eg.,* U.S. Dist. Ct. Rules N.D.Ill., LR 83.50 (West 2011). Therefore, in Illinois federal courts, lawyers are generally prohibited from communicating about the subject matter of their representation with a person or corporation who is represented without consent of their lawyer. Ill. Sup. Ct. R. Prof'l Conduct 4.2 (West 2010); Model Rules of Prof'l Conduct R. 4.2 (West 2011). Consent of the corporation's lawyer is not required, however, for communication with a former employee. Ill. Sup. Ct. R. Prof'l Conduct 4.2 cmt. n.7 (West 2010); Model Rules of Prof'l Conduct R. 4.2 cmt. n.7 (West 2011). A formal ABA opinion confirmed that a lawyer may communicate with an unrepresented former employee without the consent of the corporation's attorney. *Breedlove v. Tele-Trip Co., Inc.,* 1992 WL 202147 (N.D.Ill. Aug. 14, 1992) (citing ABA Formal Op. 91-359, (Mar. 22, 1991)).

While former employees may damage a corporation by "divulging facts which ultimately give rise to liability," Rule 4.2 still does not apply to former employees. *Ahern v. Board of Educ. of City of Chicago*, 1995 WL 680476 at *2 (N.D.Ill. Nov. 14, 1995). The Seventh Circuit has not ruled on the issue, but the lower courts have consistently held that an attorney can speak with a corporation's former employees. *Id.* at *1. As soon as an employee becomes a former employee, the corporation's attorney's consent is no longer needed to speak with them. *Devenport v. Sam's Club West,* 2009 WL 3738468 (N.D.Ill. Nov. 5, 2009). While the employee is still employed, Rule 4.2 applies and communication with the employee is sanctionable. *Id.*

When the employee no longer works for the employer, an attorney can speak freely with him regarding the matter, regardless of the employee's former position with the corporation. *Orlowski v. Dominick's Finer Foods, Inc.,* 937 F.Supp. 723 (N.D.Ill. 1996). In *Orlowski*, plaintiff's counsel spoke with former managers of the defendant through a mass letter and then over the phone. *Id.* The court held that former employees could freely engage in communications with the plaintiff's counsel. *Id.* at 728. They reasoned that Rule 4.2 does not apply to an organization's former employees. *Id.* at 728. The court further reasoned that former employees are outside the scope of protection, because they cannot bind the corporation, and requiring consent of the employer's counsel would only increase the cost of litigation and decrease the amount of information shared. *Id.* at 728. However, the former employees were still barred from discussing any privileged information with the plaintiff's attorney. *Id.* at 728.

The court in *Thorn v. Sunstrand* outlined how to effectuate communication with a corporation's former employees. *Thorn v. Sunstrand*, 1997 WL 627607 (N.D.Ill. 1997). In *Thorn*, the former employee was a management employee at the time the litigation was initiated. *Id.* at *1. Two years after the suit was filed, the former employee retired, and plaintiff's counsel then contacted and interviewed him without notifying defendant's counsel. *Id.* at *1. Prior to speaking with the former employee, plaintiff's counsel ensured that he was no longer employed, not represented by counsel, advised him of his right to an attorney, explained attorney-client privilege, and warned him not to disclose privileged information. *Id.* at *1. The court held that counsel is not restricted from communicating with former employees. *Id.* at *3. They also concluded that the plaintiff's counsel had taken adequate precautions against disclosure of privileged information. *Id.* at *3.

Even though the Seventh Circuit has yet to decide, the Northern District of Illinois has consistently held that an attorney can communicate with former employees of an adverse, represented corporation, and the Model Rules of Professional Conduct and the Illinois Rules of Professional Conduct both support that conclusion.

Attorney-Client Privilege for Former Employees

While communication with former employees of an adverse corporation is allowed, attorney-client privilege probably still applies regarding information that would usually be covered by attorney-client privilege.

In general, attorney-client privilege applies where legal advice is sought from a professional legal adviser, and the communications for that purpose were made in confidence by the client. *U.S. v. Evans,* 113 F.3d 1457 (7th Cir. 1997). Attorney-client privilege is specifically limited to situations where the attorney is acting as a legal advisor. *Rehling v. City of Chicago,* 207 F.3d 1009 (7th Cir. 2000). Privilege with corporate clients becomes more complicated. The Supreme Court has rejected the narrow "control-group test," finding attorney-client privilege broadly where the "communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice." *Upjohn Co. v. U.S.,* 449 U.S. 383, 395, 101 S.Ct. 677, 685 (1981). The court also held that privilege does not protect disclosure of the underlying facts. *Id.* at 395. In the Seventh Circuit, privilege applies to an employee of a corporation when "the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought. . . is the performance by the employee of the duties of his employment." *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487, 491-2 (7th Cir. 1970).

The Seventh Circuit has yet to determine whether attorney-client privilege applies the same to former employees as it does to current employees. One case noted, without deciding the issue, that an argument could be made that attorney-client privilege does not apply to former employees, but the court also noticed that every circuit to address the issue has found no distinction between current and former employees. *Sandra T.E. v. South Berwyn School Dist. 100,* 600 F.3d 612 n. 4 (7th Cir. 2009).

While the Supreme Court has not addressed the issue of former employees, Chief Justice Burger's concurrence in *Upjohn* concluded that the rule should be the same for current and former employees. *Upjohn Co. v. U.S.,* 449 U.S. 383, 101 S.Ct. 677 (1981) (Burger, C.J., concurring). The circuits that have addressed the issue have come to the same conclusion. *See, eg., In re Allen*, 106 F.3d 582 (4th Cir. 1997); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.,* 658 F.2d 1355, 1361 n. 7 (9th Cir. 1981); *Admiral Ins. Co v. U.S. Dist. Court for Dist. Of Arizona*,

881 F.2d 1486 (9th Cir. 1989); *In re Richard Roe, Inc.,* 168 F.3d 69 (2d Dist. 1999). The Northern District of Illinois has also instructed that the attorney should advise the former employee of attorney-client privilege, because a former employee is barred from discussing privileged information. *Orlowski v. Dominick's Finer Foods, Inc.,* 937 F.Supp. 723 (N.D.Ill. 1996); *Thorn v. Sunstrand*, 1997 WL 627607 (N.D.Ill. 1997).

Following the trend of case law at the appellate level, Chief Justice Burger's concurrence in *Upjohn*, and inferences from the Northern District, for federal cases in Illinois attorney-client privilege likely applies equally to former employees as it does to current employees. Therefore, since the corporation holds the privilege not the employees, a former employee probably cannot discuss or waive attorney-client privilege related to matters regarding the corporation.

Conclusion

Generally, communications with a corporation's former employees are allowed in federal case law and rules of professional conduct in Illinois. Communication does not have to be formal discovery either but can simply be a phone call or a letter to the former employee. When dealing with former employees it is still important to advise them of their right to counsel and that you are not their attorney. Since attorney-client privilege applies equally to former employees as it does to current employees, you should also advise the former employee not to disclose privileged information, and explain to him when attorney-client privilege usually applies. In general, you must also follow the rules regarding communication with unrepresented parties. *See* Ill. Sup. Ct. R. Prof'l Conduct 4.3 (West 2010); Model Rules of Prof'l Conduct R. 4.3 (West 2011). Before speaking to any former employees of an adverse corporation, be sure to consult that jurisdiction's applicable rules of professional conduct for the relevant rules and any updates or changes. ■

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Supreme Court upholds arbitration agreement with class action waiver "congressional mandate" must be clear to trump

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maximum recovery for an individual plaintiff would only be $12,850, $38,549 when trebled. The District Court granted American Express' motion to compel individual arbitration under the FAA; however, the Second Circuit reversed finding the class-action waiver unenforceable because individual arbitration would be cost prohibitive. The Supreme Court granted certiorari to determine "whether the Federal Arbitration Act permits courts…to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim."

Latest in pro-arbitration decisions by the Court

The Supreme Court's jurisprudence in this area is strongly in favor of strictly enforcing the FAA. It has held that arbitration is a matter of contract and the courts should "rigorously enforce" arbitration agreements according to its terms, including with whom the parties will choose to arbitrate and by what rules it will be conducted. This is true for claims of a violation of a federal statute, unless the FAA's mandate has been "overridden by a contrary congressional command." See *CompuCredit v. Geenwood*, 132 S.Ct. 665, 181 L.Ed.2d 586 (2012); *Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp* 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010); *A&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2010); and *Rent-A-Center,W.,Inc. v. Jackson*, 130 S.Ct. 2772, 177 L.,Ed.2d 403 (2010).

In this 5-3 Scalia opinion, the Supreme Court again found in favor of arbitration in holding that the FAA does not permit courts to invalidate a contractual waiver of class arbitration, even if doing so forgoes the class arbitration of a federal-law claim. The Court also rejected the, "judge-made," "effectively vindicate" defense to the FAA as a way of defeating class action waivers. The Court found that "effective vindication" refers to a prospective waiver of a party's *right* to pursue statutory remedies. High costs in *proving* a case does not equate to eliminating a right to purse that remedy. The Court then determined that waiver of class-action merely limits arbitration to the two contracting parties. It does not, however, eliminate those parties' right to pursue a federal claim because the procedural posture of class action proceedings was eliminated noting that there is, "no entitlement to class proceedings for the vindication of statutory rights." A "clear command" from Congress overriding the FAA must be more that a mere generalized congressional intent to vindicate statutory rights. The Court noted that, "No legislation pursues its purposes at all costs" and that, "[t]he Sherman and Clayton Acts make no mention of class action."

Impact of Court's Decision

Although this was an antitrust claim, the decision is so broadly written that it could also have implications on class-action waivers in the labor and employment arena. Most notably will be the continued stability of the NLRB's decision in *In re D.R. Horton, Inc,* 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012). According to *D.R. Horton*, class action waivers, in all forums, as a condition of employment, interfere with employees' right to engage in concerted action for mutual aid or protection. The Board reached this conclusion, "notwithstanding the Federal Arbitration Act (FAA), which generally makes employment-related arbitration agreements judicially enforceable." The Board also noted that "any contention that the Section 7 right to bring a class or collective action is merely 'procedural' must fail. The right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."

The employer's appeal of the NLRB's finding in *D.R. Horton* is still pending with the 5th Circuit, which heard oral argument on February 5, 2013. Since the *D.R. Horton* decision was issued, most federal district courts have declined to follow it. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, note 3 (8th Cir. 2013) stating that, "nearly all of the district courts to consider the decision have declined to follow it." The Court's insistence, in *American Express*, on a "clear congressional mandate" to override the FAA and its recognition that a collective action is a procedural posture further questions the viability of the NLRB's position. ■

Illinois Human Rights Commission decision summaries

By Laura D. Mruk, WilliamsMcCarthy LLP

Keely Ellis and The Board of Trustees of the University of Illinois, Charge No. 2007SF3281 (Feb. 14, 2013) (Judge William J. Borah, Presiding) Decision on Motion for Summary Decision

Complainant was hired by the Cable Installation and Maintenance Services (CIMS) for Respondent, the University of Illinois, as a Communications Technician I trainee. As a Communications Technician, and, therefore, logically as a trainee for that position, Complainant's duties included traveling to "service areas" on campus. CIMS's hub office was located several miles from the campus and its employees congregated there to be given their daily assignments. Because Communications Technicians needed to travel about the campus to make necessary repairs and needed to carry repair equipment, both the Communications Technician I job description and the Communications Technician I trainee job description required an active Illinois driver's license.

Complainant reported to Respondent that she suffered from "panic disorder." Complainant's doctor, through his deposition, concluded, as a "practical matter," that "panic disorder is a subtype of anxiety disorder." About six months after being hired, Complainant told her supervisor that she could not drive because of her panic attacks. Shortly after telling her supervisor that she could not drive because of panic attacks, Complainant submitted a note to her supervisor from her doctor stating that she was starting a new medication for her panic disorder that would take 4-6 weeks "to be helpful." Complainant described her physical "symptoms" to her supervisor as "numbness in my legs, arms, hands and feet while driving vehicles. . ." Complainant's requested accommodation was not to have to drive.

Initially, Complainant was assigned service areas within walking distance of one another and within walking distance of other CIMS vehicles driven by other employees, but Respondent alleged that this accommodation could not be long term because it hindered Complainant's availability to make emergency repairs on a last minute basis.

Complainant alleged Respondent failed to accommodate her disability, "panic attacks." Respondent filed a motion seeking summary decision. As a preliminary matter, Judge Borah admonished Respondent for including "a separate section, titled, 'Undisputed Material Facts,' comparable to United States District Court, Northern District of Illinois, Local Rule 56.1" because Section 5/8-106.1 of the Illinois Human Rights Act ("the Act") provides the proper procedure required by a party prior to filing a motion for summary decision with the Illinois Human Rights Commission ("the Commission") and Section 5/8-106.1 does not require any comparable LR 56.1 Statement. Judge Borah explained that "[t]he unilateral use of this created section [referring to the 'Undisputed Material Facts' section filed by Respondent] is neither sanctioned nor correct, and added an unnecessary response." Judge Borah, however, did not hold this procedural error against Respondent as he ultimately found in Respondent's favor and recommended that Complainant's claim be dismissed in its entirety, with prejudice.

Judge Borah's analysis began with recitation to Section 1-103(Q) of the Act defining unlawful discrimination to include "discrimination against a person because of his [her]. . . disability. . . as defined in this Section. Judge Borah went on to explain that "'[d]isability' is defined under the Act as 'a determinable physical or mental characteristic of a person . . . which may result from disease, injury, congenital condition of birth or functional disorder and which characteristic . . . is unrelated to the person's ability to perform the duties of a particular job description.'" Judge Borah further explained that "[u]nlike the federal Americans with Disabilities Act, the Illinois Human Rights Act's definition of 'disability' has a 'lower standard" citing *Courtney v. Oak Forest Hospital,* IHRC, ALS No. 4627, August 12, 1996. Judge Borah further explained that under the Act many disabilities are defined by "common sense." "With many claims of physical handicap, it is relatively easy to identify the cause of the handicapping condition. If someone is deaf, blind, cannot walk or speak, or suffers from a well known disease such as cancer, asthma, or renal failure, it is apparent that the person so afflicted has a condition which rises to the level of a physical handicap and thus is entitled to protection under the Act." *Lake Point Tower, Ltd. v. Illinois Human Rights Commission,* 291 Ill. App.3d 897 (1st Dist. 1997).

Judge Borah identified the threshold inquiry as whether the complainant meets the Act's definition of 'handicap' and, therefore, invokes the reasonable accommodation requirement. *Id.* Complainant claimed she suffered from a panic disorder. Respondent was aware of Complainant's doctor's diagnosis. Respondent did not require any further medical information and relied on Complainant's doctor's diagnosis and Complainant's description of her disability, as well as its manifestations. Therefore, Judge Borah concluded, using the "common sense test" of *Lake Point*, Complainant had a disability.

Judge Borah then began his accommodation analysis by identifying what Complainant must show for failure to accommodate a disability. Complainant must show that (1) she has membership in a protected class; (2) the disability is unrelated to her ability to perform the job with reasonable accommodation; and (3) Respondent refused to provide such accommodation.

The only accommodation requested by Complainant was to be released from driving. Judge Borah noted, however, that an accommodation must be reasonable, "not satisfaction of an employee's every desire." *Anderson v. U.S.F. Logistics, Inc.,* 274 F.3d 470 (7th Cir. 2001). Further, the accommodation does not relieve the employee of performing the work required for the position. *Constant v. Turris Coal Company,* 199 Ill.App.3d 214 (4th Dist. 1990).

Judge Borah made the following finding:

> It was Complainant who took it upon herself to define the extent of the diagnosis, describe the physical manifestations, summarize and paraphrase the doctor's conversations, as she understood them, and select her accommodation, which made driving not an employment option. Respondent took her at her word, relied on her "judgment" at the time that she could not drive.

The question then became whether Complainant's disability was unrelated to her ability to perform the job. Respondent argued that driving was an "essential element" of

the job and to eliminate it from the job description would be an undue hardship. Complainant has the burden of going forward with some evidence that she is "qualified" to perform the "essential functions" of the job she holds or seeks, "with or without reasonable accommodations." *Tropinski and Chicago and Northwestern Transportation Company,* IHRC, ALS No. 3219, June 28, 1996; *Trolia and Archer Daniels Midland Company,* IHRC, ALS No. 3501, November 18, 1992; *Bay v. Cassens Transport Company,* 212 F.3d 969 (7th Cir. 2000). Looking to the employer's judgment, written job description, the amount of time spent on the function, and the experience of those who previously or currently hold the position, Judge Borah found that driving was an essential job function of Complainant's position.

Complainant tried to argue that the job description indicated that she was required to have a valid driver's license, but did not indicate that she was required to drive. The plaintiff in *Budde v. Kane County Forest Preserve* made a similar argument that was rejected by the Seventh Circuit. 597 F.3d 860 (7th Cir. 2010). Judge Borah agreed with the decision in *Budde* and rejected this argument. Since driving was an essential function of the job and, based on the limitations articulated by Complainant herself, the accommodation she requested would have created an undue hardship to Respondent.

Further, Complainant's own description of her symptoms to include numbness in her limbs while driving created safety concerns. "[A] person's condition is related to his/her ability if it would make employment of the person in the particular position demonstrably hazardous to the health or safety of the person or others." 56 Ill.Adm.Code Section 2500.20(d)(2). It is well established that an employer does not have to wait for a ticket or an accident, or "retain an employee who is likely to harm someone as a result of his disability because that would put 'employer on a razor's edge in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone." *Timmons v. General Motors Corporation,* 469 F.3d 1122 (7th Cir. 2006).

Ultimately, Judge Borah found that driving was an essential job function of Complainant's position and the responsibility of driving cannot be eliminated as a reasonable accommodation. Accordingly, Complainant's disability was related to her ability to perform her job.

Judge Borah recommended that the case should be dismissed in its entirety, with prejudice.

Jose A. Espiritu and Randall Metals Corporation, Charge No. 2001CF2597 (Dec. 15, 2005) (Judge Reva S. Bauch, Presiding) Decision on Complainant's Fee Petition

On October 5, 2005, the Illinois Human Rights Commission entered a Recommended Liability Determination ("RLD") finding that Respondent had terminated Complainant in retaliation for his having filed a discrimination charge and awarding Complainant $15,500. Following the RLD, Complainant filed a Petition for Attorneys' Fees and Costs. Respondent filed written objections to the fee petition.

In the fee petition, Complainant sought $95,053.80 in attorney's fees and costs. Although Respondent did not object to the hourly rates charged, Respondent did make the following objections: (1) the fees exceeded the award by six times; (2) the incremental fees between the date that liability was determined and the date the petition was filed was in excess of $25,000; (3) Complainant represented in the Joint Pre-Hearing Memorandum that attorney's fees were then slightly in excess of $40,000, but the fee petition represented that the fees through the same point in time were over $53,000; (4) the time-sheet entries were only supported by a general statement in the affidavit that all of the time was necessary; and (5) the statement of fees/costs listed various costs, but failed to include supporting documentation of those costs.

Complainant argued that Respondent's litigation strategies, the complex nature of the case (whether discrimination based on linguistic characteristics constitutes national origin discrimination), the length of the case and the fact that many witnesses, including Complainant, spoke primarily Spanish supported the Petition for Fees and Costs.

Judge Bauch began her findings of fact with the simple statement that "Complainant is entitled to attorney's fees and costs in accordance with the RLD entered in this case on October 5, 2005." In the discussion, Judge Bauch emphasized that every fee petition must be scrutinized to ensure that the amount recovered is fair and reasonable. Citing *Bard and Cassidy Tire Company,* 60 Ill. HRC Rep. 97 (1990), Judge Bauch pointed out that the concept of reasonableness requires not only that excessive fees be cut but also that fees awards be adequate to ensure competent counsel. She further held that when considering attorney fees petitions, doubts are to be resolved in favor of a respondent. *Lieber and Southern Illinois University Board of Trustees,* 34 Ill. HRC Rep. 206 (1987).

The Human Rights Commission's landmark case of *Clark and Champaign National Bank,* 4 Ill. HRC Rep. 193 (1982), sets forth the approach to evaluating a fee petition. Under the *Clark* approach, the tribunal must first determine the appropriate hourly rate for the attorney's work. Then, the tribunal must determine the number of hours reasonably expended on the case. Finally, the tribunal must decide if it is necessary that any additional adjustments be made to the fee award.

Respondent did not object to the various hourly rates charged by Complainant's attorneys and paralegals and Judge Bauch found them to be reasonable. Judge Bauch also pointed out that Complainant's counsel were seeking their *current* hourly rates. Relying on *Wilger and Rest Haven Illiana Christian Convalescent Homes, Inc.,* ____ Ill. HRC Rep. ___ (Charge No. 1988CF3442, Oct. 5, 1992), Judge Bauch found it appropriate to award attorney's fees at current rates to compensate for the delay in such fees.

Next, Judge Bauch analyzed whether the hours claimed were justified. Judge Bauch found the time responding to discovery to be excessive and reduced it by 7 hours ($1,500). She also found the time spent preparing for depositions to be excessive and should be reduced by 4 hours ($960). She reduced the time spent on the Motion for Summary Decision by 20 hours ($3,900) finding that the time entries revealed a duplication of work by the attorneys and excessive time researching, drafting and revising the response brief. She also found the number of hours spent on trial preparation to be high, but balanced it by the fact that Complainant won the case, and reduced trial preparation time by 7 hours ($1,680). Judge Bauch awarded Complainant $56,134 in fees finding $7,590 of the requested amount to be unreasonable.

Additionally, Judge Bauch found that some entries were too vague and gave no indication of work actually performed or whether such work was necessary. For example, she found entries such as "research," "draft documents, and "review documents" to be vague and disregarded an additional

$1,207.50 in fees.

Respondent also objected to costs requested by Complainant for failure to submit documentation. In his Reply, Complainant submitted documentation for deposition expenses and Spanish interpreting service fees. Judge Bauch did, however, find that because copying was done in-house and thus considered overhead, copy fees of $122.50 were disallowed. *Kaiser v. MPEC American Properties,* 164 Ill.App.3d 978 (1st Dist. 1987).

Respondent asked the tribunal to evaluate the final fee award and scrutinize it carefully through a hearing (as opposed to on written arguments alone) because the fees exceed the damage award by six times and because Respondent's fees were less than Complainant's fees.

Pointing out that hearings to resolve contested issues regarding fees are discretionary and exceedingly rare, and finding that Respondent had not offered anything to require a change from normal procedure, Judge Bauch denied the request for a hearing on fees. *Raintree Health Care Center v. Illinois Human Rights Commision,* 173 Ill.2d 469 (1996).

Although Judge Bauch recognized the disparity between the damage award ($15,500) and the total fees recommended by her ($86,134), she also noted that Complainant's attorneys expended considerable time on the case over a long period of time (since 2001). Judge Bauch also pointed out that the case was made more difficult because an atypical issue was litigated (whether discrimination based on linguistic characteristics constitutes national origin discrimination) and because Complainant and witnesses spoke primarily Spanish.

Judge Bauch reprimanded Respondent and called its objections disingenuous noting that "scorched earth litigation" is expensive and paying Complainant's large fees in the event of a loss is a risk Respondent assumed.

Judge Bauch also found that Respondent's suggestion that low damages awards require low fee awards was inconsistent with Commission precedent. Finding that awarding attorney's fees in a manner tying that award to the damages award would subvert the Illinois Human Rights Act goal of opening the hearing process to all who have meritorious claims. Judge Bauch conceded that attorney fees awards are intended to help eradicate discrimination, not to make prevailing attorneys rich, but she also noted that failing to award large attorney's fees when warranted acts as a dangerous disincentive that will cause lawyers to hesitate to take on these types of cases, especially if damages are nominal or non-pecuniary in nature.

Ultimately, Judge Bauch recommended that Respondent pay Complainant $86,134 as and for reasonable attorney fees. ■

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Tuesday, 11/5/13- Live Webcast, ISBA Studio—Children and Trauma; A Guide for Attorneys. Presented by the ISBA Child Law Section. 11-12.

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Thursday, 11/7/13 – Webinar—Advanced Tips for Enhanced Legal Research on Fastcase. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Friday, 11/8/13- Chicago, ISBA Regional Office—Successfully Navigating Civil Litigation Evidence and Theory Involving Topics of Expert Testimony. Presented by the ISBA Civil Practice & Procedure Section. 8:50-4:00.

Thursday, 11/14/13- Chicago, ISBA Regional Office—SETTLE IT!- Resolving Financial Family Law Conundrums. Presented by the ISBA Family Law Section and the ISBA Alternative Dispute Resolution Committee. 8-5.

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Friday, 11/15/13- Chicago, ISBA Regional Office—Collection Issues You Don't Know About…But Should. Presented by the ISBA Commercial Banking, Collections and Bankruptcy Section. 9-4:30.

Wednesday, 11/20/13 – Webinar—Introduction to Boolean (Keyword) Search. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 1:30 – 2:30 p.m. CST.

Friday, 11/22/13- Chicago, ISBA Regional Office—Drug Case Issues and Specialty Courts. Presented by the ISBA Criminal Justice Section. 9-4.

December

Thursday, 12/5/13- Chicago, ISBA Regional Office—Civility in the Courtroom. Presented by the ISBA Bench and Bar Section. 1-5.

Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)—Speaking to Win: Building Effective Communication Skills. Master Series presented by the ISBA. 8:30-11:45.

Thursday, 12/12/13- Chicago, Sheraton Hotel (Midyear)—Legal Writing in the Smartphone Age. Master Series presented by the ISBA. 1:00-4:15.

January

Tuesday, 1/7/14- Webinar—Introduction to Fastcase Legal Research. Presented by the Illinois State Bar Association – Complimentary to ISBA Members Only. 4:00 Eastern. ■

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