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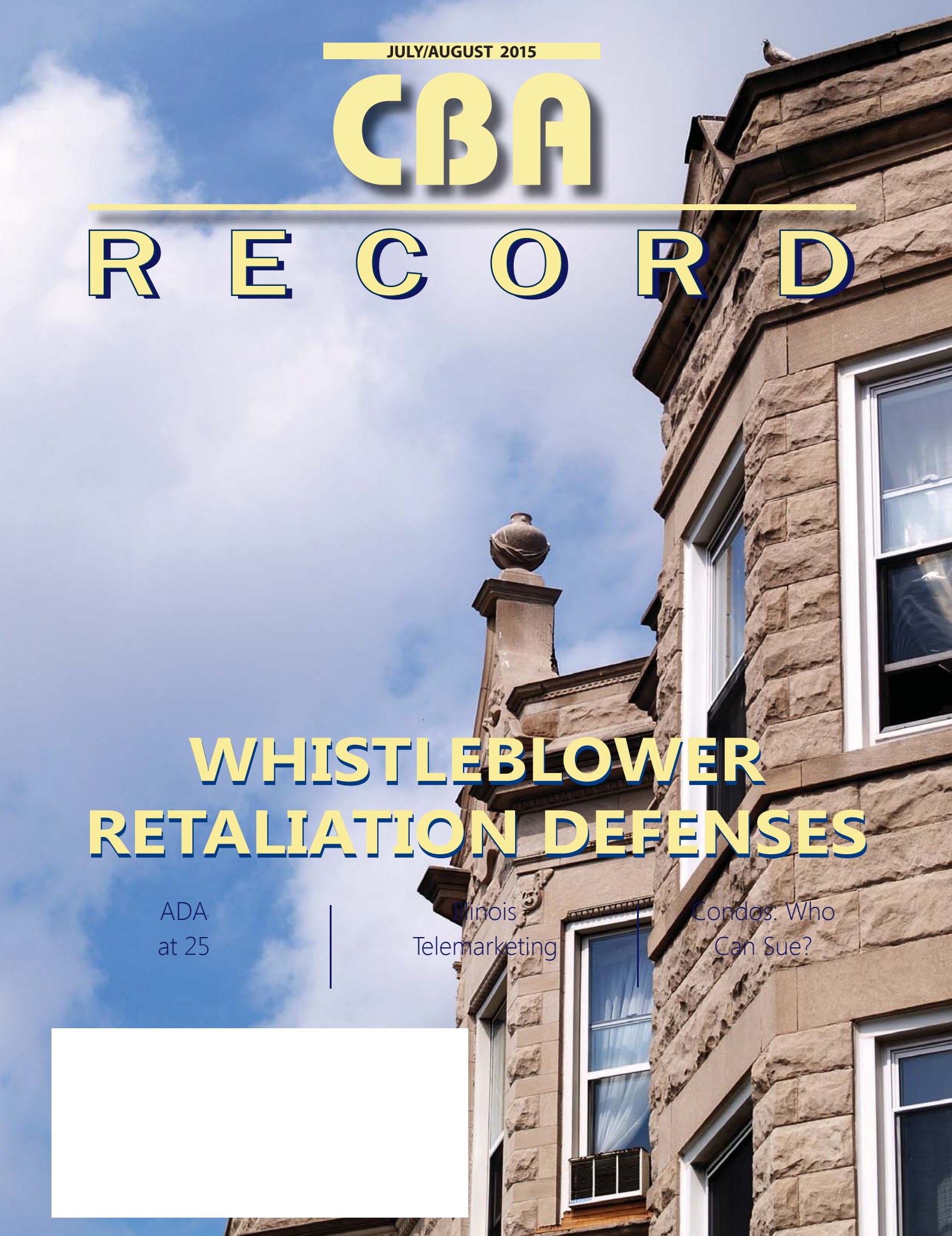

WHISTLEBLOWER RETALIATION DEFENSES

ADA at 25

Illinois Telemarketing

Condos: Who Can Sue?

By Goli Rahimi

The Illinois Whistleblower Act

Defending Against a Retaliation Claim

John, a low-level employee, is not having a good day. His boss is standing over his shoulder, demanding that he sign a document he has not reviewed. Company protocol requires a supervisor with direct knowledge about the document's contents to review the document before signing it. John is neither a supervisor nor familiar with the paper before him. John is worried; by not signing the paper, he may be headed straight for unemployment. Should he blow the whistle on his boss?

FOR MANY, THE ILLINOIS WHISTLEBLOWER ACT casts a shadow over employers and their defense counsel. In fact, the act affords "far greater relief than the common law to employees retaliated against in violation of its provisions." *Callahan v. Edgewater Care & Rehab. Ctr., Inc.*, 374 Ill. App. 3d 630, 634, 872 N.E.2d 551, 553 (1st Dist. 2007). Illinois encourages the reporting of unlawful behavior, and many interpret this policy to mean that Illinois welcomes whistleblowers with open arms.

This article will address that concern and provide employers sturdy defenses and supportive case law to overcome employee whistleblower claims in Illinois.

Illinois Whistleblower Act

Illinois is an at-will employment state, allowing employers to terminate their employees at any time for any reason or no reason. In recent years, several exceptions to the at-will employment rule have emerged, among them a public policy exclusion known as the Illinois Whistleblower Act (IWA).

The IWA is a guardian of employees, providing workers three types of protection when it comes to whistleblowing. First, it prohibits employers from adopting policies that prevent employees from disclosing suspected violations of state or federal law to a government or law enforcement agency. Rarely is this an issue, and, therefore, will not be the focus of this article. Second, the IWA forbids an employer from retaliating against an employee who refuses to participate in an activity that violates state or federal law. Finally, the statute prohibits employers from retaliating against an employer for disclosing information to a government or law enforcement agency. For this third protection, the employee need only have a reasonable belief that the information discloses a violation of a state or federal law, rule, or regulation.

Section 15: External Disclosure

Section 15 of the IWA provides that an employee may not be retaliated against for disclosing information to a government or law enforcement agency. 740 ILCS 174/15. The employee need only have a reasonable belief that a violation of a state or federal law, rule or regulation occurred; the employee's suspicion does not need to be true. However, the statute requires the disclosure to be made to a government or law enforcement agency, as disclosures to other individuals are not protected under this section of the law. *See Brame v. City of N. Chi.*, 2011 IL App (2d) 100760, ¶ 9, 955 N.E.2d 1269, 1272 (noting that courts that have interpreted Section 15 "have consistently found that an employee reporting within that employee's own company about an alleged criminal violation falls outside the Act."); *Washington v. Ass'n for Individual Dev.*, 2009 U.S. Dist. LEXIS 101591, *9 (N.D. Ill. Oct. 29, 2009) (finding that the plaintiff failed to plead a violation of the IWA because his complaint "does not allege that he reported any information to a government or law-enforcement agency.").

The language of this section "focuses on the employee's belief; the focus is not on what the government agency already knows or could discover." *Willms v. OSF Healthcare Sys.*, 2013 IL App (3d) 120450, ¶ 14, 984 N.E.2d 1194, 1196. In addition, "[t]here is no language in the statute to support an interpretation that the employee's disclosure has to be the first, or only, disclosure of the violation."

Pignato

Regrettably for employers who find themselves in the midst of an IWA Section 15 lawsuit, it is easier for a plaintiff to prove retaliation under this section than other provisions of the statute. Nevertheless, the plaintiff still bears the initial burden of showing the court that his disclosure was the reason behind the adverse employment action taken by the employer.

In *Pignato v. Givaudan Flavors*, the Northern District of Illinois emphasized the plaintiff's burden in alleging an IWA violation. In granting summary judgment in favor of the defendant employer, the court stated that plaintiff had not met his burden in establishing an IWA violation. Specifically, the court stated "although [Pignato] has submitted evidence that defendant *might* have had knowledge of his call to the customer, he does not offer any circumstantial evidence that defendant *knew* of his call to the FDA. Plaintiff therefore has not provided circumstantial evidence in support of a violation of 740 ILCS 174/15." *Pignato v. Givaudan Flavors Corp.*, 2013 U.S. Dist. LEXIS 34431, *13 (N.D. Ill. Mar. 13, 2013) (emphasis added).

Defenses under Section 15

It is important for employers and their counsel to be aware that

it is not a valid defense that the outside agency learned of the employer's supposed violations by someone other than the plaintiff; the plaintiff can disclose information to the outside entity at anytime before the retaliatory action to have a plausible cause of action. Nonetheless, as evidenced by *Pignato*, absent clear evidence that an employer had actual knowledge of the plaintiff's disclosure to an outside agency, a plaintiff's IWA Section 15 claim will most likely wither.

While Section 15 may seem all-encompassing, employers can draw their defense from the "reasonableness" standard required under the Act. Employees who wish to seek refuge under section 15 assume the responsibility to consider the reasonableness of their belief before disclosing such belief to an outside entity. Employers sued under this section should attack the reasonableness of the plaintiff's belief, and argue that such belief was not possessed in good faith. *See e.g. Woodley v. RGB Grp., Inc.*, 2006 U.S. Dist. LEXIS 43862, *19 (N.D. Ill. June 13, 2006) (denying plaintiff's motion for summary judgment because plaintiff's "convoluted" argument did not clearly establish reasonable belief); *Sicilia v. Boeing Co.*, 775 F. Supp. 2d 1243, 1254 (W.D. Wash. 2011) (granting defendants summary judgment under the IWA because the plaintiff's belief that his employer was engaged in fraud was "objectively unreasonable.").

Section 20: Internal Disclosure

The majority of the complexities of the IWA arise from the single paragraph that is Section 20, which specifies that an employer "may not retaliate against an employee for refusing to participate in an activity that would result in a violation of a State or federal law, rule, or regulation." 740 ILCS 174/20

To state a cause of action under Section 20, the employee must (1) clearly **refuse** to participate in the activity; (2) the refused activity would result in a **violation** of a state or federal law, rule, or regulation; and (3) the employee was **retaliated** against because of her refusal to participate. *Sardiga v. N. Tr. Co.*, 409 Ill. App. 3d 56, 62, 948 N.E.2d 652, 657 (1st Dist. 2011) (emphasis added). The term "refusing" under section 20 of the Illinois Whistleblower Act means "refusing; it does not mean 'complaining' or 'questioning.'" *Sardiga*, 409 Ill. App. 3d at 62.. Also, the activity must actually violate a state or federal law, rule, or regulation. *Lucas v. Cnty of Cook*, 2013 IL App (1st) 113052, ¶ 28, 987 N.E.2d 56, 67 (finding that plaintiff did not have a cause of action under the IWA because the activity in which she refused to participate was not illegal or prohibited by the Illinois Administrative Medical Code).

While there is no clear test as to what constitutes a "refusal" to participate, courts interpreting the IWA have found that "refuse" as used in the statute is unambiguous and is given its plain and ordinary meaning. *See Collins v. Bartlett Park Dist.*, 2013 IL App (2d) 130006, ¶ 28, 997 N.E.2d 821, 828 (dismissing plaintiff's whistleblower claim where plaintiff only showed that he complained about defendant's operation of a defective chair lift and failed to allege that the defendant ordered him to do something he had refused to do); *Brandl v. Superior Air-Ground Ambulance Serv.*, 2012 U.S. Dist. LEXIS 72078, *16 (N.D. Ill. Apr. 25, 2012) (granting summary judgment for the employer as the plaintiff "never said anything about refusing a direction from [her supervisor] to submit improper bills."); *Robinson v. Alter Barge Line, Inc.,* 513 F.3d 668 (7th Cir. 2008) (finding that plaintiff did not have a cause of action under the IWA even though he was fired after making three complaints of coworkers using illegal drugs. The court stated that the "point is that he did not refuse to use [the drugs]."); *Sardiga,* 409 Ill. App. 3d at 62 ("An employee who does not perform either of the specifically enumerated actions under the Act cannot qualify for its protection.").

In addition, there can be no claim under Section 20 if the activity at issue is not actually unlawful. Indeed, courts routinely dismiss IWA claims where the refused activity is not unlawful. *See e.g.*, *Day v. Inland SBA Mgmt. Corp.*, 2013 U.S. Dist. LEXIS 133605, *17 (N.D. Ill. Sept. 18, 2013) ("The loan which [the plaintiff] refused to approve was investigated by the Office of Credit Risk Management and no fraud or illegality was found."); *Lucas*, 2013 IL App (1st) 113052 at ¶ 28 ("Here, [the plaintiff] failed to establish that either treating male patients or attending training to treat male patients violated a law, rule, or regulation," and therefore, the court found that the plaintiff did not have a cause of action under the IWA because the activity in which she refused to participate was not illegal or prohibited by the Illinois Administrative Medical Code); *Ulm v. Mem'l Med. Ctr.*, 2012 IL App (4th) 110421, ¶ 29, 964 N.E.2d 632, 639-40 (granting summary judgment in favor of the defendant because the "plaintiff fail[ed] to persuade [the court that] defendant breached the Whistleblower Act because she cites no law, rule, or regulation which she would have violated by participating in the refused activity."); *Baham v. Packaging Corp. of Am.*, 2013 U.S. Dist. LEXIS 10483, *8 (W.D. La. Jan. 25, 2013) (in analyzing the IWA, the court stated that "Illinois' Whistleblower Statute requires that a plaintiff demonstrate that plaintiff refused to participate in an *actual* violation of state or federal law, rule or regulation.") (emphasis added).

Sardiga

Sardiga v. Northern Trust Co. demonstrates the two key elements of a Section 20 IWA claim: refusal and actual violation. In *Sardiga*, the plaintiff brought suit under the IWA alleging that he was fired as a result of "his repeated complaints and questions to supervisors which expressed his belief that Northern Trust was engaged in deceptive illegal practices." *Sardiga,* 409 Ill. App. 3d at 56.

The court rejected Sardiga's claim under the IWA, stating:

> Here, the language of the statute is unambiguous. "Refusing to participate" means exactly what it says: a plaintiff who participates in an activity that would result in a violation of a state or federal law, rule, or regulation cannot claim recourse under the Act. 740 ILCS 174/20 (West 2004). Instead, the plaintiff **must actually refuse to participate**.
> (emphasis added).

The court also found that Sardiga failed to satisfy the other elements of a Section 20

IWA claim, as the "pleadings, briefs, and the evidentiary material in the record" did not establish that Northern Trust's actions violated any state or federal law, rule or regulation. In fact, a simple "[r]efusal to participate in a poor business practice is not sufficient to satisfy the requirements of the Act." *See also Klinger v. BIA, Inc.*, 2011 U.S. Dist. LEXIS 119842, *18 (N.D. Ill. Oct. 18, 2011) ("[L]iability under the Act is civil in nature, not criminal, and in order to be held liable under the Act, an employer must know that the employee refused to participate in the illegal activity.").

Defenses under Section 20

Employers should take note of a major nuance between each section: "reasonable belief" was only included in the IWA where the employee reports an activity to an outside agency or organization. Section 20 of the IWA is silent on "reasonable belief." In other words, it is to the employer's, and its counsel's, advantage to discover whether the activity reported violates any laws or rules, or whether it is simply a poor business practice or plaintiff's less-than-ideal responsibility. Section 20 also provides an additional safeguard, as it requires the employee to actually refuse to participate. Complaints are insufficient, and so a plaintiff who voices her disagreement with an activity, but grudgingly continues to perform it, will most likely lose in a court. *See Sardiga*, 409 Ill. App. 3d at 62 ("'[R]efusing' means refusing; it does not mean 'complaining' or 'questioning.'").

Employer Defenses

The Illinois Whistleblower Act is more intricate than its rather simple title lets on. While the two sections providing a cause of action both prohibit retaliation, Section 15 prohibits retaliation against an employee who discloses information reasonably believed to be unlawful, while Section 20 prohibits retaliation against an employee for refusing to participate in an activity that would violate the law. Each section supports specific arguments, and, at times, a defense under Section 20 is irrelevant under Section 15. Nevertheless, defenses available under common law retaliatory discharge will often be appropriate to defend a whistleblower claim, as it is the plaintiff's responsibility to prove causation. This burden can often be rebutted by showing that the employer had no knowledge of plaintiff's disclosure or by providing valid, non-pretexual reasons for the adverse employment decision.

Employers and defense counsel alike should familiarize themselves with the nuances embedded within the Illinois Whistleblower Act. One error on plaintiff's part, whether it's the fact that the activity complained of is not unlawful or that the plaintiff was a bad employer, can tip the scales strongly in defendant's favor. ■

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