




QUINN JOHNSTON
HENDERSON - PRETORIUS - CERULO



GOVERNMENT & LIABILITY SEMINAR


WEDNESDAY, SEPT 16, 2015
PAR-A-DICE HOTEL, EAST PEORIA, IL


Law Enforcement Liability Update



Law Enforcement Liability Update


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Monell Progeny


- ❖ Assumed plenty
- ❖ Not in 2015
- ❖ *Rossi v. City of Chicago, et. al.*, 790 F.3d 729 (7th Cir. 2015)
 - Case based upon failure to allow access to information due to police “code of silence”
 - District Court found lack of evidence as to widespread practice on part of department
 - Seventh Circuit affirmed


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Excessive Force


- ❖ BUSY year
- ❖ *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015)
 - Claim based upon excessive force during forcible removal of inmate from cell
 - Jury found in officers’ favor
 - Seventh Circuit affirmed holding that standard was subjective inquiry as to state of mind of officers
 - Supreme Court vacated/remanded - objective standard


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 **Qualified Immunity**

D.Z. v. Buell, 2015 WL 4652778 (7th Cir. 2015)


- Wrongful seizure concerning detention in connection with burglary
- District Court granted summary judgment based upon qualified immunity
- Seventh Circuit affirmed


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 **Exceptions To Qualified Immunity (growing)**

Milan v. Bolin, 2015 WL 4597953 (7th Cir. 2015)


- Claim of excessive force in search of home
- District Court denied summary judgment as to Evansville police officer
- Seventh Circuit affirmed

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 **Weinmann v. McClone**

Weinmann v. McClone, 787 F.3d 444 (7th Cir. 2015)


- Claim of excessive force in shooting of suicidal individual
- District Court found lack of qualified immunity
- Seventh Circuit affirmed

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Unlawful Seizure

Mucha v. Jackson, 786 F.3d 1064 (7th Cir. 2015)


- Emergency detention of mental health patient
- Award of damages against officers by trial court
- Reversal by Appellate Court - qualified immunity

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Much More Significant Case (To Me)

Bruce v. Guernsey, et. al., 777 F.3d 872 (7th Cir. 2015)


- Claim based upon unlawful seizure by policemen of potential mental health patient
- Summary judgment in favor of Rochester police officer
- Seventh Circuit affirmed Rochester police officer summary judgment but reversed with respect to Springfield police officers


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False Arrest

Hurem v. Tabares, et. al., 793 F.3d 742 (7th Cir. 2015)


- False arrest claim based upon individual removed by police officers but not subsequently charged
- District Court granted summary judgment in favor of officers
- Seventh Circuit affirmed


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 **Hart v. Mannina**


Hart v. Mannina, et. al., 2015 WL 4882405 (7th Cir. 2015)

- False arrest claim based upon filmed reality television program
- Summary judgment in favor of defendants
- Seventh Circuit affirmed

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 **Miscellaneous Cases**
(since *Monell* did not pan out)

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 **Standing To Seek Damages**

Hill v. Murphy, 785 F.3d 242 (7th Cir. 2015)


- Case based upon standing to seek damages
- District Court dismissed suit due to Heck case
- Seventh Circuit affirmed

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Due Process

Davis v. Wessel, 792 F.3d 793 (7th Cir. 2015)


- Claim based upon failure to remove hand restraints while using restroom
- Jury found in favor of plaintiff - \$1,000.00 compensatory damages
- Seventh Circuit vacated judgment

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Malicious Prosecution

❖ *Wade v. Collier*, 783 F.3d 1081 (7th Cir. 2015)


- Claim based upon malicious prosecution involving criminal drug conspiracy
- Summary judgment in favor defendants
- Seventh Circuit affirmed decision
- Good update of case law

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Conspiracy


Dawson v. Brown, et. al., 2015 WL 887901 (C.D. Ill. 2015)

- Conspiracy claim based upon involvement of various officers/departments during arrest of son
- Summary judgment in favor of all officers by District Court
- Pending appeal in Seventh Circuit of co-defendant only

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Body Cameras




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Public Sector Labor Law Basics:
From Bargaining to Grievances to Unfair Labor Practices (ULP)

**Public Sector Labor Law Basics:
From Bargaining to Grievances to
Unfair Labor Practices (ULP)**


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Public Sector Labor Law

Historical Perspective

- Starting in 1940 the IL General Assembly annually made efforts to enact a collective bargaining law
 - Collective Bargaining took place through “meet and confer”
 - No legal obligation to bargain or recognize public employee union
 - Executive Order No. 6 (Gov. Dan Walker, 1973)
- Finally, in 1984 two laws were enacted:
 - Illinois Educational Labor Relations Act (Jan. 1, 1984)
 - Illinois Public Labor Relations Act (July 1, 1984)

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<p>Illinois Public Labor Relations Act (IPLRA)</p> <ul style="list-style-type: none">• Declares it to be the public policy of IL to grant public employees full freedom of association, self-organization and representation for purpose of negotiating wages, hours and conditions of employment• Applies to “Public Employers”<ul style="list-style-type: none">– State of Illinois– Units of local governments– <u>Sec. 20</u>: Not applicable to units of local governments employing less than 5 employees– IL General Assembly not included	<p>Illinois Educational Labor Relations Act (IELRA)</p> <ul style="list-style-type: none">• Purpose to regulate labor relations between educational employers and educational employees, including negotiations of wages, hours and conditions of employment• Applies to “Educational Employers”<ul style="list-style-type: none">– Governing body of a public school district, public community college district, or State college or university– Any State agency whose major function is providing educational services
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Public Sector Labor Law Basics:
From Bargaining to Grievances to Unfair Labor Practices (ULP)

Public Sector Labor Law


Illinois Labor Relations Board (ILRB)

- Administers the ILPRA
 - **State Panel**
 - Jurisdiction over state agencies, RTA, local governments with population under 2 million (excluding General Assembly)
 - **Local Panel**
 - Jurisdiction over local governments with population over 2 million [City of Chicago, Chicago Bd. Of Ed., CHA, etc.]
- Authorized Powers
 - Issues procedural rules and regulations, conducts representation elections and proceedings, investigates and hears ULP charges, takes testimony, determines whether a strike poses a clear and present danger to public health and safety

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Public Sector Labor Law


- Illinois Educational Labor Relations Board (IELRB)
 - Administers the IELRA
 - Like the ILRB, the IELRB conducts representation proceedings, issues procedural rules and regulations, investigates and hears ULP charges, provides impasse resolution services, and takes testimony
 - Also, like the ILRB, the IELRB has broad authority to employ personnel to carry out and implement the provisions of the governing Act

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Public Sector Labor Law

- “Public Employees” under IPLRA
 - Any individual employed by a public employer
 - **Except:**
 - Confidential Employees
 - Managerial Employees
 - Supervisory Employees
 - Professional Employees
 - Short-Term Employees


* Not an Exhaustive List of possible exclusions

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Public Sector Labor Law Basics:
From Bargaining to Grievances to Unfair Labor Practices (ULP)


Public Sector Labor Law

- IPLRA exceptions to “public employees” (cont.)
 - Confidential Employee: employee who assists and acts in confidential capacity to persons who determine and carry out labor relations policies, or have authorized access to employer’s collective bargaining policies
 - Managerial Employee: employee engaged predominately in executive and management functions, and responsible for directing and implementing management policies

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Public Sector Labor Law

- IPLRA exceptions to “public employees” (cont.)
 - Professional Employee: employee engaged in work predominately intellectual and varied, involving the consistent exercise of discretion, and requiring advanced knowledge [acquired by course of specialized study]
 - May not be in same bargaining unit except by majority vote
 - Supervisory Employee: employee whose principal work is substantially different than subordinates, and who has authority to hire, promote, discipline and discharge, and who devotes preponderance of time to the exercise of that authority
 - Police Supervisors: rank is not determinative and do not need to spend preponderance of time to exercise of supervisory authority

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- IPLRA exceptions to “public employees” (cont.)
 - Short Term Employees: employee who is employed for less than 2 consecutive calendar quarters during a calendar year and who does not have a reasonable assurance that he/she will be rehired for the same service in a subsequent year.


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Public Sector Labor Law Basics:
From Bargaining to Grievances to Unfair Labor Practices (ULP)

Public Sector Labor Law

- “Public Employees” under IELRA
 - Any individual employed full or part time by an educational employer
 - **Excluding:***
 - Supervisors
 - Managerial Employees
 - Confidential Employees
 - Short-Term Employees
 - Professional Employees
 - Student
 - Part-time Academic Employees of Community Colleges

* Not an Exhaustive List

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How/When is it determined which employees should be in a particular Bargaining Unit?


- Petition for Representation Election/Unit Certification
 - Board will investigate to determine whether the bargaining unit is appropriate [Factors]:
 - Historical pattern of recognition
 - Community of interest, including skills and function of employees
 - Common wages, hours, working conditions, supervision
 - Employee desires, degree of functional integration, contact among employees
- Unit Clarification Petition
 - Used to add or remove employees from a bargaining unit when jobs are added, or when employees have been mistakenly placed in or removed from a bargaining unit.

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Employee Rights under both ILPRA and IELRA

- 1) Right to engage in “Concerted Activity”
 - a) For purposes of bargaining, mutual aid and protection
 - b) May not violate laws: trespass, violence, block access
- 2) Right to refrain from “Concerted Activity”
 - a) May not force an employee to join union or participate in union activity
 - b) But, may still require payment of “fair share”
- 3) Right to Bargain Collectively
- 4) Right to present Grievances


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Public Sector Labor Law

Collective Bargaining: **Duty to Provide Information**


- Both the ILRB and IELRB require that, upon request by certified bargaining agent, public employers provide the agent with information that is relevant to the bargaining agent's function
- Must be relevant:
 - Employer's refusal to provide copy of promotional exam upheld because exam was not subject to bargaining nor relevant to union agent's function in representing union
 - Employer found to have violated ILRA when it refused to provide info regarding policy on job classification and salary ranges

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Collective Bargaining: **Duty to Bargain in Good Faith**


- IPLRA Section 7: requires the parties to meet at reasonable times . . . *and to negotiate in good faith with respect to wages, hours and other conditions of employment*
- IELRA Section 10: requires the parties to . . . *meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment*

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- **Duty to Bargain in Good Faith**
- Both the IPLRA and IELRA expressly provide that duty to bargain in good faith **“does not compel either party to agree to a proposal or require the making of a concession”**




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- Management/Employer Rights: an exception to the Duty to Bargain
 - IPLRA (Section 4) and IELRA (Section 4)
 - Employers **shall not** be required to bargain over **matters of inherent managerial policy**, which shall include such areas of discretion or policy as the functions of the employer; standards of services, its overall budget, organizational structure and selection of new employees, examination techniques and direction of employees
 - “Effects Bargaining” – employers are required to bargain over any **effects** its managerial decisions may have on wages, hours and conditions of employment

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Collective Bargaining: Examples of Issues found to be Mandatory Subjects of Bargaining:


- 1) Residency requirements for employees
- 2) Seniority bidding for job vacancies and transfers
- 3) Cross-training police officers as paramedics/EMTs and assigning them such duties
- 4) Loudermill hearing procedures (due process)
- 5) Lunch and break periods
- 6) Fingerprinting employees
- 7) Retirement health insurance subsidies

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Collective Bargaining: Examples of issues **not** subject to Mandatory Bargaining:


- 1) Elimination of the position of captain
- 2) Promotion of patrol officers to sergeants (non-bargaining unit position)
- 3) Decision to change job classification titles as relates to organizational structure
 - But any “effect” on wages, hours or working conditions resulting from the change in classification is a mandatory subject of bargaining

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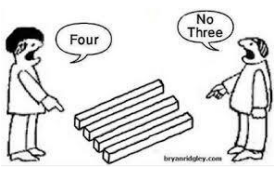
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- To bargain or not: Wages/Hours/Terms vs. Mgmt Rights
- *Central City Ed. Assoc. v. IELRB*, Ill. Sup. Ct. 1992
 - Created a three-part balancing test to determine if an issue is subject to mandatory bargaining
 - 1) Is the matter a question of wages, hours or conditions?
 - a) If no – no duty to bargain
 - b) If yes – see question #2
 - 2) Is the matter also a question of inherent managerial authority?
 - a) If no – issue is a mandatory subject of bargaining
 - b) If yes – Board must proceed to part #3
 - 3) Balance the benefits of bargaining on the decision-making process with the burden of bargaining on the employer's managerial authority.

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What happens when the union and employer cannot agree (Impasse)?

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Impasse Resolution: **MEDIATION**

- Both the IPLRA and IELRA provide for mediators to be available to parties on issues of contract resolution
- Parties must mediate any contract dispute before being allowed to strike under both IPLRA and IELRA
- Mediator cannot force parties to agree, and only attempts to offer ideas, suggestions and explanations in effort to reach resolution
- Mediation ends when agreement reached, OR when parties determine that it is unsuccessful


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Impasse Resolution: **FACT-FINDING**


- If mediation is unsuccessful, parties **may** mutually agree to engage in Fact-Finding to resolve dispute (procedures set out in both IPLRA and IELRA)
- Not required to engage in Fact-Finding
- Parties select the Fact-Finder, who conducts a hearing on issues in dispute (hears testimony and takes evidence)
- Fact-Finder must make written findings of fact and recommendations for resolution of dispute
- Not required to accept findings/recommendations

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Impasse Resolution: **INTEREST ARBITRATION**


- IPLRA requires Interest Arbitration to resolve impasse for police, paramedics/firefighters, and security employees
 - **No right to strike for police, firefighters, security employees**
- Optional for other employees under IPLRA and IELRA to include Interest Arbitration provisions in their CBAs
- Conducted before panel of 3 arbitrators, unless parties agree to use single arbitrator
- Panel must choose final position of one party, may not rule in manner that is a compromise between two positions
- Public Employer may veto/reject the findings of the panel within 20 days of award, and if so unacceptable issues are returned to arbitration [if no rejection, award terms become part of contract]

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STRIKE

- **IPLRA Sec. 17:** allows public employees to strike [except police, firefighters and security officers] if certain conditions are met:
 - 1) Employees are represented by bargaining rep;
 - 2) CBA between employer and union has expired or the CBA does not prohibit strikes;
 - 3) Employer and union have not agreed to submit dispute to final and binding arbitration;
 - 4) Parties have previously attempted to mediate the dispute; and
 - 5) 5 days have elapsed after Notice of Intent to Strike has been given by union to the employer


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STRIKE


- IPLRA Sec. 17(b) provides that an Employer may discipline any employee participant in a strike, work stoppage or slowdown that violates the IPLRA
- Section 17(b) also provides that an Employer may not pay any Employee wages for the period during which the Employee illegally participates in the strike/work stoppage
- Injunctions: If an Employer believes a strike poses a "clear and present danger" to health and safety of the public the Employer may petition the ILRB to investigate
 - ILRB may then petition circuit court for an injunction if the Board finds such a clear and present danger

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STRIKE


- IELRA Sec. 13: Prohibits strikes during term of an existing CBA, but allows educational employees to strike if:
 - 1) Employees represented by a bargaining rep;
 - 2) Mediation is unsuccessful, and 14 days have elapsed since final offers made public [30 days from Fact-Finding report if invoked];
 - 3) Three-Fourths (3/4) of bargaining unit employees vote to authorize strike;
 - 4) Ten (10) days have elapsed since Notice of Intent to Strike given;
 - 5) CBA has expired or been terminated; and
 - 6) Employer and union have not agreed to submit issues to arbitration

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STRIKES

- Unlike IPLRA, the IELRA does not contain any provisions on the right to discipline employees in illegal strike or any provision requiring no pay to employee during illegal strike
- Injunctions: Sec. 13(b) of IELRA allows an employer to petition the circuit court directly for an injunction if it believes the strike poses a "clear and present danger" to the health and safety of the public.
 - BUT: the IELRA also references the Illinois **Labor Dispute Act** which expressly limits a circuit court's ability to issue injunctions related to strikes and pickets


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Public Sector Labor Law Basics: From Bargaining to Grievances to Unfair Labor Practices (ULP)

Public Sector Labor Law

GRIEVANCE PROCEDURES

- **ILRA Sec. 8:** Requires CBAs to contain a grievance procedure, including final and binding arbitration of disputes related to the administration and interpretation of the CBA
- **IELRA:** No provision requires a grievance procedure, but Sec. 14 dealing with ULPs addresses the IELRB's deferral of disputes when a CBA contains a grievance arbitration provision




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MEMORANDUM PASTORIS CEBALDO

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GRIEVANCE PROCEDURES/ARBITRATION


- Very common method of dispute resolution in public sector contracts
 - Grievances address questions of *contract interpretation* [what does the contract language mean, was the contract breached, and how is the contract to be applied/ implemented]
 - Grievances also serve as a means of resolving disputes over *discipline* imposed by an employer on an employee
- Most contracts contain multiple steps in Grievance Procedure leading up to final and binding arbitration of dispute
 - Steps include informal discussion, written grievance, written response by employer, mediation and ultimately binding arbitration

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GRIEVANCE ARBITRATION

- Conducted in accord with IL Uniform Arbitration Act
- Parties select the arbitrator through agreed process, share costs of arbitration equally
- **Burden of Proof**
 - *Contract Interpretation Cases:* Burden of proving violation of contract language is on party bringing the grievance (typically the union)
 - *Discipline Cases:* Burden is on Employer to show cause or just cause for the discipline (even when employee or union brings the grievance)


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GRIEVANCE ARBITRATION

- Rules of Evidence more relaxed than court proceeding
- Contract Interpretation:
 - Is the language at issue ambiguous?
 - If no, plain language should control
 - But arbitrators will often consider intent of parties (look to evidence/notes of bargaining process to determine intent)
 - Is language at issue consistent with other provisions of contract?
 - General v. Specific contract provisions
 - Are terms defined in other provisions of contract?
 - Is there a Past Practice between Employer and Employees?
 - Does it clarify an ambiguity?
 - Does it create new benefits/obligations?

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Vacating an Arbitration Award


- Governed by Uniform Arbitration Act, very limited grounds:
 - Award resulted from fraud or corruption;
 - Arbitrator demonstrated partiality or bias for one of the parties;
 - Arbitrator exceeded his authority under the CBA (looked outside of CBA to resolve dispute)
 - Award is contrary to law (must show manifest error)
 - Award violates public policy as defined by statute or common law
- Courts apply great deference to Arbitration Awards, very reluctant to overturn/vacate an award particularly in labor arbitration setting.

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Public Sector Labor Law

UNFAIR LABOR PRACTICE (ULP)

- IPLRA Sec. 10(a): Identifies 7 ULPs by an **Employer:**
 - 1) Interfere with an employee's exercise of rights under Act;
 - 2) Discriminate in hiring or conditions of employment to discourage/encourage membership in a union;
 - 3) Discharge or discriminate against employee for filing charge or providing testimony under ILRA;
 - 4) Refuse to bargain in good faith or to discuss grievances;
 - 5) Violate any rules or regulations of ILRB regarding representation elections;
 - 6) Expend public funds to influence outcome of representation election; and
 - 7) Refuse to reduce a CBA to writing or refuse to sign a CBA

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From Bargaining to Grievances to Unfair Labor Practices (ULP)

Public Sector Labor Law

UNFAIR LABOR PRACTICE (ULP)

– IPLRA Sec. 10(b): Identifies 8 ULPs by a **Union**:

- 1) Interfere with an employee's exercise of rights under Act;
- 2) Restrain or coerce an employer in the selection of its bargaining representative;
- 3) To cause or attempt to cause an employer to discriminate against an employee in violation of Sec. 10(a)(2);
- 4) Refuse to bargain in good faith;
- 5) Violate any rules or regulations of ILRB regarding representation elections;
- 6) Discriminate against any employee for filing charge or providing testimony under ILRA;
- 7) To picket or cause an employer to be picketed for the purpose of forcing the employer to recognize or bargain with a labor organization . . . unless the labor organization is currently certified
- 8) Refuse to reduce a CBA to writing or refuse to sign a CBA


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Public Sector Labor Law

UNFAIR LABOR PRACTICE (ULP)

– IELRA Sec. 14(a): Identifies 9 ULPs by an **Employer**:

- 1) Interfere with an employee's exercise of rights under Act;
- 2) Interfering with the formation or existence of any employee organization;
- 3) Discriminate in hiring or conditions of employment to discourage/encourage membership in a union;
- 4) Discharge or discriminate against employee for filing charge or providing testimony under IELRA;
- 5) Refuse to bargain in good faith or to discuss grievances;
- 6) Refuse to reduce a CBA to writing or refuse to sign a CBA;
- 7) Violate any rules or regulations of IELRB regarding representation elections;
- 8) Refusing to comply with the provisions of a binding arbitration award; and
- 9) Expend public funds to influence outcome of representation election.


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Public Sector Labor Law

UNFAIR LABOR PRACTICE (ULP)

– IELRA Sec. 14(b): Identifies 6 ULPs by a **Union**:

- 1) Restraining or coercing employees in the exercise of rights under Act [must be intentional conduct by union];
- 2) Restrain or coerce an educational employer in the selection of its bargaining representative;
- 3) Refusing to bargain in good faith;
- 4) Violating any rules or regulations of IELRB regarding representation elections;
- 5) Refusing to reduce a CBA to writing or refuse to sign a CBA; and
- 6) Refusing to comply with the provisions of a binding arbitration award.


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Free Speech allowed


- Both IPLRA [Sec. 10(c)] and IELRA [Sec. 14(c)] allow the expression of any views, arguments or opinions on issues so long as they contain no threats of reprisals or force or promise of benefit

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ULP Procedures generally under IPLRA and IELRA

- Charges must be filed with the Board by an employer, union or employee within 6 months of occurrence of ULP
- Staff will investigate, if found to have merit, Board will issue a complaint and notice of hearing
 - Respondent must answer within 15 days after service or be deemed to admit to facts and waive right to hearing
- Hearing conducted, hearing officer's decision must contain findings of fact, conclusions of law and a recommended order
- Parties may file exceptions to recommended order within 30 days; Board then reviews all relevant documents and issues a final decision (including a sanction)

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Public Sector Labor Law


- **Judicial Review of ULP Orders**
 - Both the IPLRA and IELRA provide for judicial review of Orders entered by the Board in ULP matters
 - Conducted in accordance with Illinois Administrative Review Law
 - Standard of review is "manifest weight of the evidence"
 - Action for judicial review must be filed within 35 days of date that a copy of Order was served on party
 - Filed directly in Appellate Court (not circuit court)
- **Judicial Enforcement of ULP Orders**
 - Board may file an action in Appellate Court seeking compliance with Order (punishable by contempt)
 - May also apply to circuit court for temporary relief (restraining orders)

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FOIA: Navigating the Minefield of Transparency Legislation

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FOIA




TRUTH?
DID YOU FILE
A FREEDOM
OF INFORMATION
ACT REQUEST?


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FOIA 5 ILCS 140/1 et. seq.

- A general right of access to information held by public entities
- Sets out the procedures for public entities and citizens to make or respond to FOIA requests
- Provides for administrative (the PAC) and judicial review of public entity decisions


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 **FOIA 5 ILCS 140/1 et. seq.**

Who does it govern?


- Public Bodies - all legislative, executive, administrative, or advisory bodies of the State, state universities and colleges, counties, townships, cities, villages, incorporated towns, school districts and all other municipal corporations, boards, bureaus, committees, or commissions of this State, any subsidiary bodies of any of the foregoing including but not limited to committees and subcommittees thereof, and a School Finance Authority created under Article 1E of the School Code.
- Individual governmental officers


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 **FOIA 5 ILCS 140/1 et. seq.**

Who can access information?


- any individual, corporation, partnership, firm, organization or association, acting individually or as a group

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 **FOIA 5 ILCS 140/1 et. seq.**

What can they access?

- All "public records"
- Public record - pertains to the transaction of public business and having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body


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 **FOIA 5 ILCS 140/1 et. seq.**


What don't you have to do?


- YOU DO NOT HAVE TO CREATE RECORDS
- YOU DO NOT HAVE TO ANSWER QUESTIONS
- YOU DO NOT HAVE TO EXPLAIN THE DOCUMENTS
- YOU DO NOT HAVE TO COMPILE DATA YOU DON'T MAINTAIN

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 **FOIA Exemptions (commonly used)**

- Prohibited from disclosure by federal or state laws
- Private Information
- Personal Information
- Interfere with administrative or law enforcement proceedings
- Preliminary drafts, note, recommendations...
- Proposals and bids
- Records relating to collective negotiating matters between public bodies and their employees or representatives


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 **FOIA Requests**

- In writing
- You can decide to honor oral requests
- Directed to the Public Body


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FOIA Requests


- Commercial Requests 5 ILCS 140/3.1


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FOIA Requests


- Recurrent requestors 5 ILCS 140/3.2

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FOIA Requests


- Voluminous requests 5 ILCS 140/3.6

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FOIA Responses


Presumption of Openness

- Prove by clear and convincing evidence that a record is exempt
 - State whether you possess the record responsive to the request
 - Cite the exemption(s) that apply
 - Explain why the exemption should apply

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FOIA Responses


- 5 Days to Respond
 - Business Days (Does not Include State Holidays)
 - Delays in getting the request to the FOIA officer does not extend the time to respond
- Going Rogue
- Failing to Respond –OOPs!
- Redactions


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FOIA Responses


Costs/charges


- Can charge for the actual cost of purchasing the medium electronic records are stored on (i.e. CDs)
- No fee for first 50 pages of black/white copies, less than 15 cents per page afterwards
- Can charge actual cost of color or alternative size records
- Waiver or Reduction of Fees

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 **PAC & Judicial Review**


- The Public Access Counselor
 - Requests for view by persons denied records
 - Consultations with public bodies
- Judicial Review

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 **When you get back to your office...**


- Designate FOIA officer(s) and get them trained within 30 days and every year
- Public Body Information Displayed 5 ILCS 140/4
- List of Records Available 5 ILCS 140/5
- Make a template for responses: grants, partial denials, and full denials


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Eminent Domain, Takings, and Right-of-Ways

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MEMORANDUM PASTORIS CERAUD




What is Eminent Domain?

Background


The Fifth Amendment to the United States Constitution provides that private property shall not be taken for public use without just compensation. U.S.Const., amend.V. This restriction has been made applicable to the states through the Fourteenth Amendment. *Chicago B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897). Article I, Section 15 of the Illinois Constitution contains a similar restriction. Ill.Const., Art. I, § 15.

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What is Eminent Domain?

- Eminent domain is the inherent right of the sovereign to condemn or appropriate private property for public use.
- The power is inherent in the sovereign and exists separately from any constitution or statutory laws. *Department of Public Works & Buildings v. Kirkendall*, 415 Ill. 214, 112 N.E.2d 611 (1953).

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Supreme Court's landmark decision in 2005:

KELO v. CITY OF NEW LONDON, CT

Kelo v. City of New London, Connecticut, 545 U.S. 469 (2005)

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What happened in Kelo?

- Susette Kelo's home and land were condemned and given to Pfizer Corporation so it could build a new research and development base.
- In the infamous 5-4 decision, the Court ruled that New London, CT was in compliance with the takings clause of the 5th amendment, because the "public" would benefit economically.
- The ruling gave the government an unprecedented amount of power over the property of private citizens, thus leaving many homeowners feeling threatened.
- According to the Institute of Justice, 43 state legislatures "passed new laws aimed at curbing the abuse of eminent domain for private use." Illinois was one of them.




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The Irony...



Susette Kelo's home. Photo courtesy of USA Today.

Today, the land that Susette Kelo's house once stood upon is now barren, and the supposed economic benefits never materialized because Pfizer never built the base in New London.


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2007 Illinois Eminent Domain Act

How did Illinois' Eminent Domain Act originate?

After the U.S. Supreme Court decision in *Kelo v. City of New London, Connecticut*, Illinois adopted the Eminent Domain Act (EDA), 735 ILCS 30/1-1-1, et seq., which became effective January 1, 2007.


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Under Illinois Law...

The Eminent Domain Act provides that “a condemning authority may not take or damage property by the exercise of the power of eminent domain unless it is for public use ...”

735 ILCS 30/5-5-5(a).

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5 categories of Takings in Illinois

The Eminent Domain Act classifies takings into five separate categories, which are determined by the ultimate purpose for the taking.

What's the Standard?


Different standards are placed on eminent domain actions undertaken within each separate category. Since some of the standards are more onerous than previous standards, in some situations the EDA will make it more difficult, if not impossible, to acquire property through use of the eminent domain power. Prior to enactment of the EDA, any type of taking was subject to the same type of restrictions.

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Traditional Takings

The first category of takings we will discuss are your “traditional takings.” Here, where the exercise of eminent domain authority is to acquire property for public ownership and control, the condemning authority must prove two things:


- 1) the acquisition of the property is necessary for a public purpose;
- 2) the acquired property will be owned and controlled by the condemning authority or another governmental authority. 735 ILCS 30/5-5(b).

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The most disfavored takings...

Subsection (c) takings are the most disfavored takings and impose the highest standards. Where the exercise of authority is to acquire property for private ownership and control, the condemning authority must prove by clear and convincing evidence that the acquisition of the property is:

- 1) primarily for public benefit, use, or enjoyment;
- 2) is necessary for a public purpose. 735 ILCS 30/5-5(c).


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Elimination of Blight

Under the third category, the Eminent Domain Act covers situations in which a public entity condemns private property for private ownership or control, but the primary basis for the acquisition is the elimination of blight. An acquisition of property primarily for the purpose of the elimination of blight is rebuttably presumed to be for a public purpose.


Under these circumstances, the condemning authority must prove that the taking meets several requirements by a “preponderance of the evidence.”

Interesting to note, many states, including Illinois, have failed to establish a definition of what constitutes a blighted area. This has allowed municipalities to acquire properties for economic development when the original use of the property was in no way detrimental to society.



CREDIT: Eduardo Dreyfus/The New York Times

Blight is found in many cities across America.

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Acquisition to be used for utilities

In the case of an acquisition of property for private ownership or control to be used for utilities for which no certificate or finding of public convenience and necessity by the Illinois Commerce Commission is required, evidence that the acquisition is one for which the use of eminent domain is authorized by one of the following laws creates a rebuttable presumption that the acquisition is 1) primarily for the benefit, use, or enjoyment of the public, and 2) necessary for a public purpose:

- the Public Utilities Act,
- the Telephone Company Act,
- the Electric Supplier Act,
- the Railroad Terminal Authority Act,
- the Grand Avenue Railroad Relocation Authority Act,
- Section 4-505 of the Illinois Highway Code,
- Section 186-7501 of the Illinois Vehicle Code.



735 ILCS 30/5-5-5

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Takings for Quasi-Public Purposes

Under the fourth category of takings, Subsection (e) of the Eminent Domain Act covers situations in which the public entity condemns private property for private ownership or control and the primary purpose of the taking falls within a series of favored categories listed within subsection (e). These categories include takings for:

- (a) utility purposes;
- (b) railroad purposes;
- (c) waste water facilities; and
- (d) public airport, road, parking, or mass transportation purposes and sold or leased to a private party. 735 ILCS 30/5-5-5(e).

These types of takings were considered to be quasi-public in nature with a more evident public purpose, although the condemned property would be under private ownership or control. In this category, the condemning authority must prove "by a preponderance of the evidence" that the acquisition is necessary for a public purpose and that an enforceable written agreement or encumbrance insuring the use of the property for that public purpose for a period of at least 40 years will be recorded against the property.

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Takings with Public Ownership but Private Control

The fifth category of takings created by the Eminent Domain Act is found in subsection (f). This category covers certain specified situations in which the acquired property will remain in public ownership, but will be controlled by private entities. In these situations, the condemning authority must prove by a "preponderance of the evidence" that:


- (a) the acquisition is necessary for a public purpose,
- (b) the property will be owned by the condemning authority or other governmental entity, and
- (c) the property will be controlled by a private entity that operates certain types of businesses related to the condemning authority's operations as specified in this subsection. These include university operations, airport operations, hospital operations, etc.

735 ILCS 30/5-5-5(f).


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 The Power Of Eminent Domain:
A Typical Eminent Domain Action


Authority
Public Purpose
Necessity


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 Authority

First, the condemning authority must have the statutory authority to acquire private property.

Town of Libertyville v. Bank of Waukegan, 152 Ill.App.3d 1066, 504 N.E.2d 1305, 105 Ill.Dec. 787 (2d Dist.), appeal denied, 116 Ill.2d 560 (1987).




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 Authority

Second, the taking must be for a public purpose.


Lake Louise Improvement Ass'n v. Multimedia Cablevision of Oak Lawn, Inc., 157 Ill.App.3d 713 (1987).

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Necessity

Third, the taking must be necessary, although the condemning authority has broad discretion in determining necessity.

City of Chicago v. St. John's United Church of Christ, 404 Ill.App.3d 505 (2010).


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Good Faith Attempt

Negotiation with the Property Owner

735 ILCS 30/10-5-10 requires the condemning authority to make a good-faith (bona fide) attempt to negotiate with the property owner before filing a condemnation complaint. *County of Wabash, Illinois v. Partee*, 241 Ill.App.3d 59 (1993).

Negotiation in good faith is a condition precedent to initiating eminent domain. *Forest Preserve District of DuPage County v. First National Bank of Franklin Park*, 961 N.E.2d 775 (2011).

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How does a property owner compel eminent domain proceedings?




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How to compel...


In order to compel eminent domain proceedings a property owner must show an actual physical invasion to his property. Damages to an owner of land, no part of which has been physically taken by the State, are not within the purview of the Illinois Eminent Domain Act.


Department of Transp. v. Veach Oil Co., 22 Ill.App.3d 229, 232 (1974).

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Well...what is a "Physical Invasion?"

A "physical invasion," in turn, can take place even though there has been no attempt by the sovereign authority to appropriate and use the real estate for public purposes, if as a necessary result of the construction, maintenance, or operation of public improvement, the real estate is physically invaded by superintended additions or water, earth, sand, or other materials so as to effectually destroy or impair its usefulness.



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Damage to Property

The Illinois Constitution recognizes that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law."




Ill. Const., Art. I, § 15

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Damage to Property

Where there has not been an actual physical taking of the owner's property, the landowner has only an action at law for damages to the property. In other words, an action for damages resulting from the construction of a public improvement is a common-law action for damages and not a proceeding under the Eminent Domain Act. These damages are referred to as "consequential damages."

Department of Transp., for and in Behalf of People v. Veach Oil Co., 22 Ill.App.3d 229, 232 (1974).

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Owners' Rights

Property Owner's Rights

The constitution recognizes the right of the owner of property damaged by a public work to recover the amount of such damages. *Hoekstra v. County of Kankakee*, 48 Ill.App.3d 1059, 1062 (1977). This right may be asserted by the owner as a plaintiff in an action at law where none of his property is actually taken, or as a defendant to an eminent domain proceeding for the condemnation of property actually taken.


In either case the right to damages is the same, and its basis is the constitutional prohibition of taking one's property without just compensation. Where a right to damages is guaranteed by the constitution, neither common law public official immunity nor the tort immunity statute can be a defense to an action against those responsible.

Thus, under an eminent domain proceeding, the statute of limitations is the same as that for property damage, 5 years. 735 ILCS 5/13-205.

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Trial by Jury

The Jury



A party having private property taken is entitled to trial by jury as to just compensation.

735 ILCS 5/7-101

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Eminent Domain case law in Illinois

Pro-government decisions:

City of Chicago v. Eychaner, 2015 IL App (1st) 131833, 26 N.E.3d 501 (1st Dist. 2015).

Southwestern Illinois Development Authority v. Al-Muhajirum, 318 Ill.App.3d 1005, 744 N.E.2d 308 (5th Dist. 2001).


Friends of Parks v. Chicago Park Dist., 203 Ill.2d 312, 768 N.E.2d 161 (2003).

Pro property owner decisions:

City of Naperville v. Old Second National Bank of Aurora, 327 Ill.App.3d 734, 763 N.E.2d 951, (2d Dist. 2002).

Forest Preserve Dist. of DuPage Co. v. First National Bank of Franklin Park, 961 N.E.2d 775, 356 Ill.Dec.386 (2011).

Southwestern Illinois Development Authority v. National City Environmental, L.L.C., 199 Ill.2d 225, 768 N.E.2d 1 (2002).

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New legislation in the works...


Do you own a home or business near a public university in Illinois? Should you be forced to sell your property the moment the university wants to take it, even if its plan is not based on a true public need?

Some university administrators think so. Northeastern Illinois University, or NEIU, located in the North Park neighborhood on Chicago's far northwest side, has filed eminent-domain proceedings against six nearby property owners on the 3400 block of Bryn Mawr Avenue who don't want to give up their businesses and homes.


A new bill introduced by state Rep. Robyn Gabel, D-Evanston, would put a stop to NEIU's land grab. HB 2558 would amend the state's eminent-domain law to limit public universities' use of eminent domain in two ways:


- Allowing universities to use eminent domain only when their current land reserves are insufficient for a development
- Restricting universities from using eminent domain to give land for the ownership or use of private third parties

www.illinoispolicy.org


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**The Takings Clause:
Takings and the Power of
the 5th Amendment**

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 **5th Amendment**

The Fifth Amendment provides a right to due process by requiring that “[n]o person shall be . . . deprived of life, liberty or property, without due process of law,” and then protects against an improper government taking of property by continuing, “nor shall private property be taken for public use, without just compensation.” U.S.CONST. amend.V.


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MEMORANDUM FIDELITUDIS CEREALIS


 **Due Process and Takings**

The two concepts are interconnected and often confused, but they act to restrict government power in different ways:

1) The Due Process Clause places substantive and procedural limits on the exercise of police power, including all types of government regulations that affect or limit the use of private party.

2) The Takings Clause, on the other hand, provides the foundation for eminent domain law, whereby a government entity can sue to take the private property it needs for public purposes with the amount of just compensation to be set by the court, and for the development of inverse condemnation law, whereby a private property owner can sue a government entity for just compensation damages when the entity interferes with the owner's rights so much that the owner is effectively ousted from ownership.


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 **Federal Taking / Illinois Taking**


The Illinois takings clause is broader than the federal clause. Article I, section 15 of Illinois' constitution provides that “property shall not be taken or damaged for public use without just compensation.”


“Taken” is defined as under federal law . . . but “damaged” connotes merely “a direct physical disturbance” of the plaintiff's property that causes a loss of value. *Muscarello v. Winnebago County Board*, 702 F.3d 909, 913 (7th Cir. 2012).

By adding the words “or damaged” to its constitutional provision, Illinois also elected to provide a greater guarantee for compensation than that found in the Fifth Amendment to the United States Constitution, which refers only to property taken, not to property damaged. *Equity Associates, Inc. v. Village of Northbrook*, 171 Ill.App.3d 115, 524 N.E.2d 1119, 121 Ill.Dec. 71 (1st Dist. 1988).

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What is inverse condemnation, or a “taking,” under the Illinois Constitution?



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Inverse Condemnation

In an inverse condemnation, as opposed to an eminent domain action, the property owner seeks compensation for property taken when a condemnation proceeding has not been initiated.


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Taking

How to state a claim for inverse condemnation?

In order to state a claim for inverse condemnation, or a “taking” under the Illinois Constitution, a plaintiff must allege that either there is an actual physical intrusion on the plaintiff’s property or that government regulation of the property is so severe that it amounts to a taking of the private property.

See *Stahelin v. Forest Preserve Dist. Of Du Page County*, 376 Ill.App. 3d 765, 771 (2nd Dist. 2007).


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Taking

How does governmental regulation amount to a taking?

The government regulation must be so severe that it serves as a denial of all economically beneficial or productive use of the land.


Tim Thompson, Inc., v. Village of Hinsdale, 247 Ill.App.3d 863 (2nd Dist. 1993). See also Muscarello v. Ogle Cnty. Bd. of Comm'rs, 610 F.3d 416, 421-22 (7th Cir. 2010).

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Taking

What is the date of a Taking?

The standard recognized rule of condemnation for the date of taking and valuation of property being condemned had been the date of the filing of the suit to condemn. However, the Eminent Domain Act set the rule that if the condemnation case does not go to trial within two years, the court, in its discretion, may set a new valuation date that may be a date between the original filing and the trial date.

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What is Just Compensation?

Both the Fifth Amendment of the United States Constitution and Article I, §15, of the Illinois Constitution require payment of "just compensation" when the government acquires private property rights.

This restriction places two obligations on municipalities:

- 1) a municipality must pay just compensation when it exercises its eminent domain power, and
- 2) a municipality cannot attempt to acquire private property rights without paying just compensation.

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What is Just Compensation?

The Illinois state courts have accepted fair market value as the standard for determining just compensation. In 1977, the Illinois Supreme Court, through Justice Clark, observed: "Just compensation is the fair market value of the property at its highest and best use on the date of filing of the petition."

Department of Public Works & Buildings v. Association of Franciscan Fathers of State of Illinois, 69 Ill.2d 308, 371 N.E.2d 616, 618 (1977).

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Historical Note:

The first case decided under the Eminent Domain Act of the Illinois Supreme Court alluded to "fair market value."

In that case, the court stated: "Of course the true test as to the damages to be paid, is the market value of the land."

Haslam v. Galena & Southern Wisconsin R.R., 64 Ill. 353, 355 (1872)

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MEMORANDUM PRACTICE COURTESY

What is "Quick Take"


Under Illinois law, certain governmental entities are allowed to acquire property by quick-take. Quick-take allows the expeditious acquisition of title without waiting for the final determination of fair market value. This process allows the condemning authority to enjoy the immediate use of the property during the frequently time-consuming proceedings to establish the value of the property.

735 ILCS 30/25-7-103.1, et seq


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MEMORANDUM PRACTICE COURTESY




Utility Permits and Right-of-Ways

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Utilities

Municipal Relations with Public Utilities

Nearly every municipality in Illinois has a regulated public utility operating within its corporate limits. In addition to providing services to the residents of the community, the utility provides services to the municipality as well. This puts municipalities in the unique position of being the local sovereign, the representative of its residents, and a consumer of the utility's services.


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Utilities

Preemption with Local Regulation

Municipalities have long been without general regulatory control over public utilities. Shortly after the Public Utilities Act became effective, the Illinois Supreme Court held that the Public Utilities Commission, now the Illinois Commerce Commission, had exclusive authority over public utilities and therefore held that an ordinance requiring street railroad cars to have brightly lit headlights became unenforceable as soon as the Public Utilities Act went into effect.

Northern Trust Co. v. Chicago Rys., 318 Ill. 402, 149 N.E. 422 (1925).


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Utility Permits

IDOT requires a permit when working within the right-of-way of an Interstate, U.S. State route, Illinois state route, or state maintained roadway. A permit must be obtained prior to the start of any work and a copy of the approved permit must be at the work site at all times.

605 ILCS 5/9 113


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Permits and Right-of-Ways

The holder of a state-issued authorization is required to comply with all the applicable construction and technical standards and right-of-way occupancy standards that are set forth in a local unit of government's ordinances relating to the use of public right-of-way and permit obligations.


220 ILCS 5/21-1001(a).

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MEMORANDUM - PRACTICUS - CERAUDO



Right-of-Way Precondemnation Requirements

When a telephone company, or its agent, initially contacts any landowner to negotiate the acquisition of a land right-of-way easement, either in person or in writing, the landowner shall be advised in writing that if the landowner has any questions about his rights or the rules of the Commission pertaining to the authority of a telephone company to acquire right-of-way easements, inquiry can be directed to the Illinois Commerce Commission.

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MEMORANDUM - PRACTICUS - CERAUDO


Public Employee Free Speech: Can I fire them for that?



Public Employee Free Speech: Can I fire them for that?


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U.S. Const. Amendment I


Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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Common Law Doctrine

- “The common law doctrine that an employer may discharge an employee-at-will for any reason or for no reason is still the law in Illinois, except for when the discharge violates a clearly mandated public policy...
- the constitutional guarantee of free...does not provide protection or redress against private individuals or corporations which seek to abridge the free expression of others.”
- *Barr v. Kelso-Burnett Co.*, 106 Ill. 2d 520, 525, 478 N.E.2d 1354, 1356 (1985)


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Barr v. Kelso-Burnett Co.


In *Barr*, several foreman working construction at the Clinton nuclear power plant alleged that they were fired for alleged “intimidation of fellow employees” after they “peaceably, informed fellow employees of layoff procedures being utilized.”

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How much control does a government employer have over its employee’s speech?

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McAuliffe v. Mayor of New Bedford

“A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”

-- Judge Oliver Wendell Holmes


McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220 (1892).

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Public Employee Free Speech: Can I fire them for that?


The Pickering case.

- An Illinois was teacher fired for writing a letter to the editor of a local newspaper criticizing the school board's tax proposal and spending plan, particularly spending on athletics. The Board held a hearing and found that the teacher's actions were "detrimental to the efficient operation and administration of the schools of the district."
- The Supreme Court held that the teacher could not be fired for writing a letter to the editor.
- *Pickering v. Bd. Education Twp. H.S. Dist. 205, Will Co.* (S.Ct. 1968)

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Balancing of Interests

- "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a **balance between the interests of the teacher**, as a citizen, in commenting upon matters of public concern **and the interest of the State, as an employer**, in promoting the efficiency of the public services it performs through its employees."
- *Pickering v. Bd. Education Twp. H.S. Dist. 205, Will Co.* (S.Ct. 1968)

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Public Concern


- "...statements by public officials on **matters of public concern** must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors."
- "...absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."
- *Pickering v. Bd. Education Twp. H.S. Dist. 205, Will Co.* (S.Ct. 1968)

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Public Employee Free Speech: Can I fire them for that?


Perry v. Sindermann

- Professor and president of the Texas Junior College Teachers Association, testified before the Texas Legislature, and had public disagreements with the college's Board of Regents. He advocated elevation of the college to four-year status.
- The college could not refuse to renew his contract based upon that speech.
- *Perry v. Sindermann* (S.Ct. 1972)

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Perry v. Sindermann

- “The respondent has alleged that his nonretention was based on his testimony before legislative committees and his other public statements critical of the Regents’ policies...Plainly, these allegations present a bona fide constitutional claim.”
- *Perry v. Sindermann* (S.Ct. 1972)


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Givhan v. Western Line Consolidated School District

- Even if protected speech is expressed privately to the employer, it remains protected speech. “The First Amendment forbids abridgment of the ‘freedom of speech.’ Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”
- *Givhan v. Western Line Consolidated School District* (1979)

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DEFENDING FREEDOM • RESTORING ORDER


Public Employee Free Speech: Can I fire them for that?



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Connick v. Myers

- Assistant D.A. Myers objected to a job transfer and expressed concerns about other intra-office issues.
- “Myers prepared a questionnaire soliciting the views of her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns.” She questioned whether employees “had confidence in and would rely on the word” of supervisors.
- *Connick v. Myers* (S.C.t. 1983)

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Public Concern


- “if Myers’ questionnaire cannot be fairly characterized as constituting speech on a **matter of public concern**, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary...”
- *Connick v. Myers* (S.C.t. 1983)

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Public Employee Free Speech: Can I fire them for that?


Public Concern

- “We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon **matters only of personal interest**, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior”
- *Connick v. Myers* (S.C.t. 1983)

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What is “a matter of public concern”?

- “Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement...”
- *Connick v. Myers* (S.C.t. 1983)

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Connick v. Myers


- One question in Myers’ questionnaire, however, does touch upon a matter of public concern. Question 11 inquires if assistant district attorneys “ever feel pressured to work in political campaigns on behalf of office supported candidates.”
- *Connick v. Myers* (S.C.t. 1983)

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Public Employee Free Speech: Can I fire them for that?


Connick v. Myers

- the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests.
- The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public... a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern...
- Also relevant is the manner, time, and place in which the questionnaire was distributed...
- Finally, the context in which the dispute arose is also significant... When employee speech concerning office policy arises from an employment dispute... additional weight must be given to the supervisor's view...
- *Connick v. Myers* (S.C.t. 1983)

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Connick v. Myers

- If that was not unhelpful enough, the Supreme Court concluded with this:
“we do not deem it either appropriate or feasible to lay down a general standard against which all such statements may be judged.”
- Myers speech was not protected.
- *Connick v. Myers* (S.C.t. 1983)

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Independent Contractors

- “independent contractors are protected... the *Pickering* balancing test, adjusted to weigh the government's interests as contractor rather than as employer, determines the extent of their protection.”
- *Board of County Commissioners, Wabaunsee County v. Umbehr* (1996)

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Public Employee Free Speech: Can I fire them for that?

What is the “Connick-Pickering Balancing Test”?

If the employee speaks on a matter of public concern, the court must balance the interests of the employee in speaking against the employer’s interest in controlling the speech.


Garcetti !

- When public employees make statements pursuant to their official duties, they are not speaking as citizens and the Constitution does not insulate their communications from employer discipline.
- *Garcetti v. Ceballos* (S.Ct. 2006)


Garcetti v. Ceballos


- Ceballos was a deputy D.A. in Los Angeles. A defense attorney contacted him with concerns about a search warrant. Ceballos investigated and concluded that there were serious misrepresentations in the affidavit supporting the warrant. Ceballos wrote a memo and told his supervisors, but the prosecution proceeded despite his concerns. Ceballos was later transferred to a less desirable position and denied a promotion.
- *Garcetti v. Ceballos* (S.Ct. 2006)

Public Employee Free Speech: Can I fire them for that?


 **Garcetti v. Ceballos**


- The controlling factor in Ceballos' case is that his **expressions were made pursuant to his duties** as a calendar deputy... We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
- *Garcetti v. Ceballos* (S.Ct. 2006)

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 **When does an employee speak as a citizen?**

- “Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth.”
- *Lane v Franks* (S.Ct. 2014)

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 **Lane v Franks**


- Lane terminated a “ghost employee” who collected a salary from his agency, but rarely reported to work. He later testified before a grand jury and at two federal trials regarding ghost payrolling. Lane was later terminated amid budget problems and claimed that his termination was in retaliation for his testimony. The Court found that his testimony was protected speech, even though it related to his employment.
- *Lane v Franks* (S.Ct. 2014)

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Lane v Franks

- The Court also held that Lane’s testimony was on a matter of public concern: “corruption in a public program and misuse of state funds—obviously involves a matter of significant public concern.”
- *Lane v Franks* (S.Ct. 2014)

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Connick-Pickering-Garcetti-Lane test

1. Did the employee speak as a citizen?
– If not, you can fire them.
2. Did the employee speak on a matter of public concern?
– If not, you can fire them.
3. If the employee spoke as a citizen on a matter of public concern, does the government employer “an adequate justification for treating the employee differently from any other member of the public based on the government’s needs as an employer.”
– If so, you can fire them.


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Balancing Test


- The factors in the balancing test:
(1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee’s ability to perform her responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.
- *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir.2002)


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Public Employee Free Speech: Can I fire them for that?


 **Balancing Test**


- Or, conversely, if an employee speaks as a citizen on a matter of public concern and the employer does not have adequate justification, you cannot fire them.
- Got it?

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 **The Mount Healthy defense**

- Even if the employee's speech played a "substantial part" in their termination, the "Mount Healthy" defense protects employers who can demonstrate that they would have reached the same conclusion and terminated the employee regardless of the protected speech.
- *Mt. Healthy City Board of Ed. v. Doyle* (S.Ct. 1977)

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 **The Mount Healthy defense**


- Doyle's contract was not renewed after a series of incidents, including his complaint to a local radio station regarding the new dress code for teachers, which the radio station ran as a news item. Doyle established that his nonrenewal was motivated in substantial part by this protected speech, but the Supreme Court concluded that "the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."
- *Mt. Healthy City Board of Ed. v. Doyle* (S.Ct. 1977)

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Public Employee Free Speech: Can I fire them for that?


Are you ready to play...

Can I fire them for saying that?

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Can I fire them for saying that?


- A male public school guidance counselor self-published a relationship advice book entitled "It's Her Fault" based upon his work as a counselor and with a foreword written by one of his fellow teachers. The book contained sexually explicit terminology and advice. The school board learned about the book and heard concerns from the community.
- Could they fire him?

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Can I fire them for saying that?

YES!

- 1. Did the employee speak as a citizen? Not addressed (Yes).
- 2. On a matter of public concern? YES.
- 3. Does balancing favor the employee? NO.
- 4. Does the *Mt. Healthy* defense apply? Not addressed (No).
- *Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110 (7th Cir. 2013)

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Public Employee Free Speech: Can I fire them for that?

Can I fire them for saying that?

- On-duty police officer told anti-abortion protesters not to impede traffic or to stop anyone from entering the abortion clinic. He also told the demonstrators that he would arrest them if they did not comply. One protester claimed that the officer referred to her as a “fat f***ing cow,” acting like the Taliban, and intimidating her. The officer conceded that the conversation was “adversarial” but denied the allegations. He returned later off-duty and in plain clothes. When protesters refused to remove pictures of aborted fetuses, he called the a “fat f***ing cow” and a “sinner of gluttony,” sarcastically asked whether she was hiding food, and touched her.
- Can the city fire him?

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Can I fire them for saying that?

1. Did the employee speak as a citizen? Yes, at least part of the time.
 2. On a matter of public concern? Yes, at least some of the time.
 3. Does balancing favor the employee? NO.
 4. Does the *Mt. Healthy* defense apply? Not discussed (No).
- “The state’s interests in running an efficient and effective police department outweighed Lalowski’s speech interests.” *Lalowski v. City of Des Plaines*, 789 F.3d 784 (7th Cir. 2015)

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Can I fire them for saying that?

- After receiving complaints from parents and teachers, a new principal was given a performance improvement plan. Upon learning the school district planned to terminate her contract, a principal presented the school administration with allegations of misconduct by her supervisor, the former principal at her school, including misuse of a school credit card, improper payment of a student teacher, and circumventing residency rules. Both the district and the principal reported the allegations to the police.
- Can the school board exercise the buy-out in her contract?

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Public Employee Free Speech: Can I fire them for that?

Can I fire them for saying that?

1. Did the employee speak as a citizen? NO. End of discussion.
 2. On a matter of public concern? Not addressed (probably yes).
 3. Does balancing favor the employee? Not addressed (probably not).
 4. Does the *Mt. Healthy* defense apply? Not addressed (yes).
- *McArdle v. Peoria Sch. Dist. No. 150*, 705 F.3d 751 (7th Cir. 2013)

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Can I fire them for saying that?

- Police detective actively supported the losing candidate for mayor and spoke to a reporter about it, venting his frustration with the paper's coverage for his candidate. He also criticized the sheriff for supporting the winning candidate. The city contended that his behavior on duty was "disruptive, profane, and insubordinate."
- Can the city transfer him out of the detective bureau to an undesirable position because he "made the mayor mad"?

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Can I fire them for saying that?

- Probably not.
1. Did the employee speak as a citizen? Yes.
 2. On a matter of public concern? Yes.
 3. Does balancing favor the employee? Yes.
 4. Does the *Mt. Healthy* defense apply? Disputed.
- The facts were hotly disputed. The city admitted that his speech was protected, but argued that he was transferred because of his own misconduct rather than his speech.
 - *Peele v. Burch*, 722 F.3d 956 (7th Cir. 2013)

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Public Employee Free Speech: Can I fire them for that?

Can I fire them for saying that?

- A prison casework supervisor called the State's Attorney from his personal phone. He told the secretary that, as a citizen, he did not believe that any term of incarceration should be pursued against another officer who brought a phone into the prison, and that the matter should be handled internally through the IDOC disciplinary process. He stressed that he was expressing his opinion as a citizen. The State's attorney returned that call and the employee reiterated his opinion.
- Can the prison give the casework supervisor a written reprimand and 5-day suspension?

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Can I fire them for saying that?

Yes.

1. Did the employee speak as a citizen? Yes.
 2. On a matter of public concern? Yes.
 3. Does balancing favor the employee? No.
 4. Does the *Mt. Healthy* defense apply? Not addressed (No).
- *Volkman v. Ryker*, 736 F.3d 1084 (7th Cir. 2013)

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Claims

Plaintiffs will often join First Amendment claims with other claims, such as

- Contract claims under a collective bargaining agreement
- Whistleblower statutes,
- Retaliation claims (for filing work comp claims, reporting discrimination)
- Due process claims

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