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February 18, 2009

I am honored to be invited to testify before the Joint Committee on Government Reform. My law practice at Katz, Friedman, Eagle, Eisenstein, Johnson & Bareck is focused on employment law and whistleblower claims. I am also a Trustee of West Deerfield Township in Lake County, Illinois. My remarks before this Committee are personal and not on behalf of Katz, Friedman or West Deerfield Township.

**I. SUMMARY OF THE LAW**

The Whistleblower Act was enacted by the General Assembly by P.A. 93-544. It became effective on January 1, 2004. The Whistleblower Act prohibits an employer from retaliating against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of a State or federal law, rule, or regulation. 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.

The Act provides employees the following remedies: (1) reinstatement with the same seniority status that the employee would have had, but for the violation; (2) back pay, with

Joint Committee on Government Reform Testimony  
February 18, 2009

interest; and (3) compensation for any damages sustained as a result of the violation, including litigation costs, expert witness fees, and reasonable attorney's fees.

The General Assembly strengthened the Act by broadening the definition of “employer.” Effective January 1, 2008, the Act also applies to:

“a political subdivision of the State; a unit of local government; a school district, combination of school districts, or governing body of a joint agreement of any type formed by two or more school districts; a community college district, State college or university, or any State agency whose major function is providing educational services; any authority including a department, division, bureau, board, commission, or other agency of these entities.” 740 ILCS 174/5 amended by P.A. 95-128, § 5, eff. Jan. 1, 2008).

## **II. WEAKNESSES IN THE LAW**

### **A. Sovereign Immunity**

It appears that State employees are limited to filing claims under the Act in the Court of Claims because the Act does not include a Sovereign Immunity waiver. Realistically, this means that State employees do not have an effective remedy under the Act because of the long delays that are commonplace at the Court of Claims.

### **B. Status of Common Law**

The claim of retaliatory discharge was recognized by the Illinois Supreme Court in *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 384 N.E.2d 353 (1978). It is an exception to the general rule of employment law in Illinois that ‘at-will’ employment is terminable for good reason, bad reason or no reason at all. A retaliatory discharge claim is established by an employee showing that he or she was (1) discharged; (2) in retaliation for her activities; and (3) that the discharge violates a clear mandate of public policy. *Blount v. Stroud*, (Ill. Sup. Ct. Jan. 23, 2009).

Joint Committee on Government Reform Testimony  
February 18, 2009

Some courts have held that the Whistleblower Act preempts the common law of retaliatory discharge. *See* The Illinois Whistleblower Act's Impact on Common Law Claims, Illinois Bar Journal (February 2009). The holdings of these decisions are mistaken because the intent of the Legislature was to provide additional remedies to employees rather than restrict their rights and remedies.

### **III. RECOMMENDATIONS**

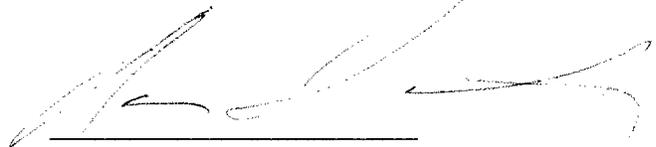
#### **A. Sovereign Immunity**

The General Assembly should give strong consideration to amending the Whistleblower Act and waive Sovereign Immunity. Employees who engage in whistleblowing may ultimately be seen as heroes. But being a whistleblower means jeopardizing one's job and perhaps even a career. A swift and effective remedy is needed for State employees to be protected when they blow the whistle.

#### **B. Status of Common Law**

The General Assembly should (1) amend the Whistleblower Act to make clear that the common law remedy of retaliatory discharge has not been preempted and (2) declare that this was always the intent of the Legislature.

Thank you for giving me the opportunity to testify before the Committee today.



Ronald B. Schwartz