Developments in Indiana Employment Law

Leland B. Cross, Jr.*
Douglas Craig Haney**

I. Introduction

During the survey period, several significant employment law issues were decided by the federal and state courts in Indiana. This Article will focus on only those court decisions that deal with "at-will" employment and those that deal with the exclusivity of the Indiana Workmen's Compensation Act as a bar to employee tort actions for workplace injuries.

II. Employment At Will

A. Exceptions to the "At-Will" Rule Based in Tort

In 1973, the Indiana Supreme Court created, in its *Frampton v. Central Indiana Gas Co.*[1] decision, a narrow exception to Indiana's "at-will" rule of employment. In *Frampton*, the court concluded that an employer's act of discharging an at-will employee in retaliation for the employee's filing a workmen's compensation claim constituted "an intentional, wrongful act on the part of the employer for which the injured employee is entitled to be fully compensated in damages."[2] The court based its ruling on a statutory mandate in the Indiana Workmen's Compensation Act,[3] which then stated that: "No contract or agreement, written or implied, no rule, regulation *or other device* shall, in any manner, operate to relieve any employer . . . of any obligation created by this act."[4] In the court's opinion, the discharge of an at-will employee for filing a workmen's compensation claim thus constituted a statutorily forbidden "device."[5]

Thus, with its *Frampton* decision, the Indiana Supreme Court carved out a narrow exception to the "at-will" rule in instances where an at-

---

* Partner, Ice Miller Donadio & Ryan, Indianapolis, Member of Indiana and Michigan Bars. B.A., Denison University, 1952; LL.B., University of Michigan, 1955.

** Associate, Ice Miller Donadio & Ryan, Indianapolis. Member of Indiana and Wisconsin Bars. B.A., University of Wisconsin-Madison, 1978; J.D., University of Wisconsin School of Law, 1981; LL.M., Georgetown University, 1985.

1. 260 Ind. 249, 297 N.E.2d 425 (1973).
2. *Id.* at 253, 297 N.E.2d at 428.
3. Ind. Code §§ 22-3-1-10 to -10-3 (1988).
4. Ind. Code § 22-3-2-15 (1982) (emphasis added).
5. *Frampton*, 260 Ind. at 252, 297 N.E.2d at 428.

will employee brought an action in tort for retaliatory discharge following discharge on account of his exercising a personal, statutorily conferred right to file a workmen's compensation claim.

In 1986, the scope of the *Frampton* exception was tested before the supreme court in *Morgan Drive Away, Inc. v. Brant*.[6] In *Morgan Drive Away*, the court *refused* to extend its *Frampton* exception to include a claim of retaliatory discharge brought by plaintiff Brant, in which he alleged that he had been terminated in retaliation for having filed a small claims action against his employer. In refusing to extend its *Frampton* exception, the court noted that, since *Frampton* had been decided, Indiana courts had consistently refused to extend the at-will exception beyond those cases in which an employee had allegedly been discharged in retaliation for having filed a workmen's compensation claim.[7] The court concluded in *Morgan Drive Away* that, if its narrow *Frampton* exception were to be broadened, such revision was "better left to the legislature."[8]

Following *Morgan Drive Away*, there appeared to be a clear judicial policy in Indiana that, absent legislative action, the scope of Indiana's "public policy exception" to the at-will rule would be limited *solely* to cases in which an employee was alleging retaliatory discharge for having filed a workmen's compensation claim. However, despite *Morgan Drive Away*, this survey period has seen several court decisions which have further eroded the at-will rule in Indiana.

On August 5, 1987, the United States District Court for the Northern District of Indiana issued its decision in *Sarratore v. Longview Van Corp.*[9] In *Sarratore*, the plaintiff was an at-will employee who had been discharged after refusing to participate in his employer's unlawful scheme to set back vehicle odometers in violation of the federal Motor Vehicle Information and Cost Savings Act.[10] In determining the Indiana law to apply to this claim of retaliatory discharge, brought in federal court under diversity of citizenship jurisdiction, the federal district court examined the interplay of *Morgan Drive Away* with the Second District Court of Appeals of Indiana decision in *McClanahan v. Remington Freight Lines, Inc.*,[11] a case that was then pending review by the Indiana Supreme Court.[12]

---

6. 489 N.E.2d 933 (Ind. 1986).
7. *Id.* at 934.
8. *Id.*
9. 666 F. Supp. 1257 (N.D. Ind. 1987).
10. *Id.* at 1258-59. *See* 15 U.S.C. §§ 1901-2012 (1982).
11. 498 N.E.2d 1336 (Ind. Ct. App. 1986), *aff'd in part*, 517 N.E.2d 390 (1988).
12. *Sarratore*, 666 F. Supp. at 1260.

McClanahan involved an interstate truck driver who had, in 1981, been hired by Remington Freight Lines as an at-will employee. In early 1982, McClanahan had been assigned to drive a truck weighing approximately 78,000 pounds from New York to Minnesota, via Illinois. At that time, Illinois law forbid trucks weighing over 75,000 pounds from traveling on its highways. When McClanahan informed Remington that his truck was too heavy to drive on Illinois roads, he was told to make the haul anyway, and that Remington would reimburse him for any overweight fines he incurred in driving through Illinois. When McClanahan continued to refuse to violate Illinois law and drive an overweight truck through Illinois, he was informed that his employment with Remington was terminated. McClanahan then brought suit against Remington for retaliatory discharge.[13]

In overturning the trial court's entry of summary judgment for Remington on McClanahan's claim of retaliatory discharge, the Indiana Court of Appeals rejected Remington's argument that the supreme court's *Frampton* decision, as clarified by *Morgan Drive Away*, limited Indiana's exception to the "at-will" rule *solely* to instances in which an employee had been discharged in retaliation for having filed a workmen's compensation claim.[14] In this regard, the court of appeals noted that:

> While the Supreme Court's decision in *Morgan Drive Away* may indicate that not all statutorily conferred rights are entitled to the protection of the *Frampton* exception, we do not believe that the court meant to hold that an employee discharged for refusing to breach a statutorily imposed duty is to be left without redress. We simply cannot accept an interpretation of the *Morgan Drive Away* decision which would allow an employer to force an employee to choose between breaking the law and losing his job.[15]

The court of appeals then went on, in *dictum*, to establish factors it felt ought to be considered by Indiana courts in determining what statutorily-created rights, *in addition* to the filing of workmen's compensation claims, might also be subject to the *Frampton* exception to the "at-will" rule. In so doing, the court noted that:

> Our Supreme Court clearly does not wish the Frampton door through the employment at will barrier opened so wide as to allow entry to every discharged and disgruntled employee. *Morgan Drive Away* makes clear that the statutorily conferred right

13. *McClanahan*, 498 N.E.2d at 1336.
14. *Id.* at 1340-41.
15. *Id.* at 1340.

> to wages will not give passage through the door, but the decision *does not state what, if any, other statutorily conferred rights will be unavailing. Such determinations must be made on a case by case basis, taking into account such factors as the legislative intent, whether the statute actually confers a right or merely a privilege, and the extent to which exercise of the statutorily conferred right interferes with the employee's performance of those duties which the employer may legally require of him.*[16]

In *Sarratore*, the federal district court quoted, with approval, the above portions of the Indiana Court of Appeal's reasoning in its *McClanahan* decision.[17] The district court then ruled that *Morgan Drive Away* did not, as a matter of Indiana law, prevent plaintiff Sarratore from maintaining an action in tort against his employer for retaliatory discharge.[18] The court specifically held that *Morgan Drive Away* did not limit the scope of an employee's claim under the *Frampton* exception "to situations where an employee files a workmens' compensation claim and is discharged in retaliation therefor."[19]

Subsequent to the federal district court's decision in *Sarratore*, the Indiana Supreme Court reviewed and upheld, in relevant part, the court of appeals decision in *McClanahan*.[20] In finding a second exception to the "at-will" rule in cases where an employee is discharged for refusing to violate a statutorily-conferred duty, the court held that: "[F]iring an employee for refusing to commit an illegal act for which he would be personally liable is as much a violation of public policy [as] declared by the legislature as firing an employee for filing a workmen's compensation claim."[21] However, while the court upheld the court of appeal's creation of a new exception to the "at-will" rule for employees discharged in retaliation for refusing to violate statutorily-conferred *duties*, the Court declined the lower court's implicit invitation in *McClanahan* to expand the *Frampton* exception to include statutorily-conferred *rights*, other than, and in addition to, the right to file a workmen's compensation claim.[22]

---

16. *Id.* at 1341 (emphasis added).
17. *Sarratore*, 666 F. Supp. at 1262.
18. *Id.* at 1262-63.
19. *Id.* at 1263.
20. McClanahan v. Remington-Freight Lines, Inc., 517 N.E.2d 390 (Ind. 1988).
21. *Id.* at 393.
22. *Id. But see* Helman v. AMF, Inc., 675 F. Supp. 1163, 1164 (S.D. Ind. 1987), where the United States District Court for the Southern District of Indiana failed, in *dicta*, to limit Indiana's at-will exception to the statutorily-conferred *right to file a workmen's compensation claim*, stating that: "Indiana has, however, recognized an exception to the general [at-will] rule and that is for the tort of wrongful discharge in retaliation for exercising *a statutory right* or performing a statutory duty." *Id.* (emphasis added).

In *Wilmington v. Harvest Insurance Cos.*,[23] the First District Court of Appeals of Indiana rejected an argument that the *Frampton* exception to the "at-will" rule should be extended to include claims of retaliatory discharge by independent contractors.[24] In *Wilmington*, an insurance agent working as an independent contractor for an insurance company was discharged after he violated the terms of his exclusive agency contract by also selling insurance for another insurance company.[25] Citing *Frampton* and *McClanahan*, the plaintiff argued that, because Indiana Code section 27-4-3-2 generally permits insurance agents to sell insurance for more than one insurance company at a time, he had been wrongfully discharged for exercising this statutorily conferred right when he was terminated for violating the terms of his exclusive agency contract.[26]

The court of appeals was unpersuaded by the plaintiff's argument, noting that Indiana Code section 27-4-3-2 expressly *permitted* insurance agents to enter into exclusive agency contracts with insurance companies.[27] The court then went on to state, in *dictum*, that: "[T]he narrow exception [to the "at-will" rule] created in *Frampton* and extended in *McClanahan*, being humanitarian in purpose, did not apply to independent contractors . . . but applied to employees only. No Indiana case is cited which applies the exception beyond the narrow limits of *Frampton* and *McClanahan*."[28] The court of appeals affirmed the trial court's entry of summary judgment against the plaintiff on his cause of action for retaliatory discharge.

B. Exceptions to the "At-Will" Rule Based in Contract

In addition to a judicial broadening of the *Frampton* exception to the Indiana "at-will" rule, the survey period also saw further judicial erosion of that rule through inroads made under the contract theory of law.

The first such inroad was made as a result of the supreme court's decision in *Romack v. Public Service Co.*[29] In *Romack*, the plaintiff had been employed by the Indiana State Police for 25 years at the time he was recruited by Public Service Company of Indiana (PSI) to fill an open security supervisor job position.[30] In responding to PSI's job offer, Romack told PSI that he had "permanent employment" with the Indiana

---

23. 521 N.E.2d 953 (Ind. Ct. App. 1988).
24. *Id.* at 956.
25. *Id.* at 954.
26. *Id.* at 955-56.
27. *Id.* at 956.
28. *Id.*
29. 499 N.E.2d 768 (Ind. Ct. App. 1986), *aff'd in part*, 511 N.E.2d 1024 (1987).
30. *Romack*, 511 N.E.2d at 1025.

State Police and that he would not consider leaving that job unless PSI offered him the same job "permanency." After PSI gave Romack an oral assurance of similar job "permanency," he quit his job with the State Police and began working for PSI.[31] Approximately three years later, Romack was discharged from employment by PSI. He then filed suit against PSI, claiming, in part, that his discharge was wrongful because PSI's oral promise of "permanent employment" had changed his status from that of an "at-will" employee to that of an employee who was only subject to discharge for "good cause."[32]

In affirming the trial court's entry of summary judgment against Romack, the Fourth District Court of Appeals of Indiana stated that, under current Indiana law, an employment relationship was "at-will" unless there existed "a promise of employment for a fixed duration or the employee has given independent consideration beyond his services in exchange for the employment."[33] The court went on to state, however, that an "at-will" employment relationship in Indiana could be "converted to one requiring good cause before termination if the employee, in exchange for permanent employment, provides independent consideration that results in a detriment to him and a corresponding benefit to the employer."[34]

The appellate court then applied the Indiana "at-will" rule to the facts surrounding Romack's termination, and concluded that PSI's oral assurances of "permanent employment" did not establish for Romack a fixed duration of employment.[35] The court also concluded that Romack had not provided PSI with any significant independent consideration, beyond his services, in exchange for his employment.[36] Based on these findings, the court ruled that summary judgment for PSI on Romack's wrongful discharge claim was appropriate, as he had been an employee terminable "at-will" under Indiana law during his period of employment with PSI.[37]

In a vigorous dissent to the majority opinion, Judge Conover asserted that the facts surrounding Romack's discharge created an issue of substantial public importance which required a *change* in current Indiana case law and a denial of PSI's motion for summary judgment.[38] In Judge Conover's opinion, the factors which distinguished Romack's case from earlier Indiana "at-will" rule cases were that:

---

31. *Id.*
32. *Id.*
33. *Romack*, 499 N.E.2d at 772.
34. *Id.*
35. *Id.* at 773.
36. *Id.*
37. *Id.* at 776.
38. *Id.* at 776-78 (Conover, J., dissenting).

1. Romack had 25 years of training with the Indiana State Police that "uniquely qualified" him for the PSI job position;

2. He had "lifetime employment" with the Indiana State Police;

3. He was "recruited" by PSI to fill a job position that required a person with his unique skills and abilities;

4. He had advised PSI that he would leave his State Police job only if his new job with PSI offered the same "permanency of employment;" and,

5. PSI had assured him that he would have "permanent employment" if he came to work for PSI.[39]

Judge Conover argued that these factors established "independent consideration" of sufficient detriment to elevate Romack from the status of an "at-will" employee to that of an employee terminable only for "good cause" under Indiana law.

Judge Conover went on to state that, after reviewing decisions from other jurisdictions on the issue of whether an employee who gave up "permanent" employment to accept a "permanent" job offer by a new employer had provided "independent consideration," he had concluded that: "[A]n employer cannot arbitrarily fire an employee when (1) the employer knows the employee had a former job with assured permanency (or assured nonarbitrary firing policies) and (2) was only accepting the new job upon receiving assurances the new employer could guarantee similar permanency."[40] Judge Conover then concluded that Romack had provided sufficient independent consideration to PSI to have obtained the status of an employee dischargeable only for "good cause," that Romack had not been discharged by PSI for "good cause," and that PSI's motion for summary judgment as to Romack's wrongful discharge claim should have therefore been denied.[41]

On appeal, the Indiana Supreme Court adopted and incorporated by reference Judge Conover's dissenting opinion in *Romack* as it applied to Romack's breach of employment contract claim, and reversed the trial court's entry of summary judgment for PSI on that issue.[42]

Shortly after the Indiana Supreme Court issued it decision in *Romack*, that decision was interpreted and, at least in *dictum*, further broadened by the Third District Court of Appeals of Indiana in *Whiteco Industries, Inc. v. Kopani*.[43] In *Whiteco*, an employee named Richard Kordos was hired into the "executive producer" job position and assigned to run Whiteco's theatre operations. In recruiting Kordos, Whiteco had ap-

---

39. *Id.* at 776-77.
40. *Id.* at 778.
41. *Id.* at 778, 780.
42. Romack v. Public Serv. Co., 511 N.E.2d 1024 (Ind. 1987).
43. 514 N.E.2d 840 (Ind. Ct. App. 1987).

parently promised him the executive producer job position for an entire year. In accepting Whiteco's employment offer, Kordos gave up his current job, and came to Whiteco already possessing the qualifications necessary to work in the executive producer job position.[44]

Appealing the trial court's grant of judgment on the evidence for Whiteco, Kordos argued that the facts present in his case were sufficiently similar to those found in *Romack* so as to make the trial court's granting of judgment on the evidence against him in error.[45] The court of appeals disagreed, concluding that neither the job Kordos forfeited nor the one-year assurance of employment Whiteco had promised him sufficiently paralleled the "permanent" employment forfeited by and promised to the employee in *Romack*, so as to elevate Kordos to the status of an employee dischargeable only for "good cause" under the *Romack* exception to Indiana's at-will employment rule.[46] However, in reaching its conclusions, the court of appeals went on to interpret *Romack*, in *dictum*, as *not necessarily* being limited to cases in which an employee had been promised "permanent employment" or had given up "permanent employment." The court stated that *Romack* could also be applied to promised employment for "a term of years,"[47] or to employment given up which had "provided unique features of tenure [or] retirement rights . . . to which the employee was then entitled."[48] After so interpreting *Romack*, the court of appeals upheld the trial court's judgment on the evidence against Kordos.

In *Shannon v. Bepko*,[49] the United States District Court for the Southern District of Indiana may have created yet another exception to the "at-will" rule in instances where an "implied contract of continued employment" can be found to exist based on the "common law" of a particular industry or plant. In *Bepko*, Indiana University-Purdue University at Indianapolis (IUPUI) hired the plaintiff, Shannon, as an "at-will" employee for an indefinite term of employment. Twelve years later, IUPUI summarily terminated Shannon for allegedly falsifying his time sheet.[50] In response, Shannon brought suit in federal district court alleging that he had a protectable interest in his continued employment with IUPUI and that his discharge without any form of predeprivation hearing violated his procedural due process rights under the Fourteenth Amendment to the United States Constitution.[51] Shannon claimed that the

---

44. *Id.* at 842-43.
45. *Id.* at 846.
46. *Id.*
47. *Id.*
48. *Id.*
49. 684 F. Supp. 1465 (S.D. Ind. 1988).
50. *Id.* at 1467-68.
51. *Id.* at 1468.

protectable property interest he had in his continued employment with IUPUI was created by the "rules and understandings" contained in his employee handbook. The district court rejected this contention, stating that Indiana courts "have been unequivocal in their rejection of alleged property rights based on employee handbooks."[52]

However, the district court then went on to find that, *despite* the absence of an express employee contract between Shannon and IUPUI *and* the fact that Shannon's employee handbook did not create an implied employment contract under Indiana law, there might *still* exist an "implied contract" which gave Shannon a property interest in his job.[53] In support of this ruling, the district court quoted the United States Supreme Court's declaration in *Perry v. Sindermann*[54] that:

> Just as this Court has found there to be a "common law of a particular industry or a particular plant" that may supplement a collective-bargaining agreement, Steelworkers v. Warrior & Gulf Co., 363 U.S. 574, 579, *so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure.*[55]

As the parties in *Bepko* had not addressed this "common law" theory of property interest in their arguments to the court, the district court refused to grant summary judgment for IUPUI on that issue.[56]

III. Exclusivity of Remedy Under Workmen's Compensation Act as Bar to Employee Actions in Tort

Indiana courts have long held that the rights and remedies afforded employees by the Indiana Workmen's Compensation Act should extend to *all* situations in which an injured employee would have had a remedy at common law were it not for the Act.[57] Such reasoning has been based on the Act's "exclusivity of remedy" provision, Indiana Code section 22-3-2-6, which provides that:

> *The rights and remedies herein granted to an employee subject to this Act on account of personal injury or death by accident shall exclude all other rights and remedies of such employee,*

---

52. *Id.* at 1478.
53. *Id.* at 1479.
54. 408 U.S. 593 (1972).
55. *Id.* at 602 (emphasis added).
56. *Bepko*, 684 F. Supp. at 1479.
57. *See* Burkhart v. Wells Electronics Corp., 139 Ind. App. 658, 662, 215 N.E.2d 879, 881 (1966), (quoting *In re* Bowers, 65 Ind. App. 128, 132, 116 N.E.2d 842 (1917)).

> his personal representatives, dependents or next of kin, at common-law or otherwise, *on account of such injury or death*.[58]

In 1986, the Indiana Supreme Court, in *Evans v. Yankeetown Dock Corp.*,[59] expressly interpreted the "exclusivity provision" of the Indiana Workmen's Compensation Act as excluding:

> [A]ll rights and remedies of an employee against his employer for personal injury or death if the following three statutory jurisdictional prerequisites are met:
> A. personal injury or death *by accident*;
> B. personal injury or death *arising out of employment*;
> C. personal injury or death *arising in the course of employment*.[60]

During the survey period, Indiana courts generally continued to interpret the scope of the Act's "exclusivity provision" very broadly, holding that injuries with arguably tenous causal connections to an employment relationship were nonetheless compensable only under the Act.

In *Consolidated Products, Inc. v. Lawrence*,[61] an employee was injured after she had remained on her employer's premises past the end of her work shift in order to purchase a milk shake, and then had been abducted and assaulted in the employer's parking lot while waiting for a ride home from work. The employee subsequently brought and prevailed in a suit in tort against her employer for negligence.[62] On appeal by the employer from the trial court's denial of its motion for summary judgment, the Second District Court of Appeals of Indiana followed the jurisdictional prerequisites set forth by the Indiana Supreme Court in *Yankeetown Dock*, and concluded that the employee's injuries were compensable solely under the Workmen's Compensation Act.[63] The court thus reversed the trial court's denial of the employer's motion for summary judgment as to the employee's personal injury action for negligence. In reaching its decision, the court of appeals held that the employer had met the first *Yankeetown Dock* prerequisite by showing that the employee's injury was "unexpected" and had thus occurred "by accident."[64] The court held that the second *Yankeetown Dock* prerequisite had been met because the employee, in agreeing to work

---

58. IND. CODE § 22-3-2-6 (1988) (emphasis added).
59. 491 N.E.2d 969 (Ind. 1986).
60. *Id.* at 973 (emphasis added).
61. 521 N.E.2d 1327 (Ind. Ct. App. 1988).
62. *Id.* at 1328.
63. *Id.* at 1331.
64. *Id.* at 1329.

nights for an employer whose establishment was located in an unsafe area, increased her risk of harm and made that risk "incident to" her late night employment.[65] Therefore, the court reasoned that the employee's injuries "arose out of" her employment because they were causally related to her employment.[66] The third *Yankeetown Dock* prerequisite had been met, in the court's opinion, because the employee's injuries occurred in the employer's parking lot as the employee was leaving work. The court rejected the employee's argument that her stop for a milk shake served to "remove" her from her "employee status" and caused her injuries to arise outside the course of her employment.[67]

In *K-Mart Corp. v. Novak*,[68] the First District Court of Appeals of Indiana rejected an employer's argument that an "increased risk" analysis had to be used by the court in determining whether an employee's injuries "arose out of" his employment. In *Novak*, K-Mart employee Margaret Novak was shot to death by a lunatic. At the time she was shot, Novak was working at her station inside her employer's store.[69] K-Mart appealed the Industrial Board's initial grant of workmen's compensation death benefits to Novak's widower, claiming that her death did not "arise out of" her employment with K-Mart.[70] K-Mart argued that the court of appeals was required to use an "increased risk" analysis in determining whether Novak's death "arose out of" her employment. Under such an "increased risk" analysis, K-Mart asserted that the court could not find that Novak's death "arose out of" her employment, so as to be covered by the Indiana Workmen's Compensation Act, unless there was proof of an "increased risk" to Novak as a result of her employment by K-Mart.[71]

The court of appeals rejected K-Mart's argument that an "increased risk" analysis was required under Indiana law in order to find that an employee's injury "arose out of" employment, stating that the policy of the Workmen's Compensation Act favored "a liberal construction" that would also grant compensation to employees in cases involving "neutral risks."[72]

The court of appeals then concluded that Novak was at her work station because of her employment; that absent her employment she would not have been subjected to a risk of death by the lunatic; and

---

65. *Id.*
66. *Id.*
67. *Id.* at 1330.
68. 521 N.E.2d 1346 (Ind. Ct. App. 1988).
69. *Id.* at 1347.
70. *Id.*
71. *Id.* at 1349-50.
72. *Id.* at 1350.

that, therefore, her risk of death was causally connected to and an incident of her employment with K-Mart.[73] Based on this reasoning, the court found that the Industrial Board had not erred in finding that Novak's death "arose out of" her employment with K-Mart and that her death was compensable under the Indiana Workmen's Compensation Act.

In *National Can Corp. v. Jovanovich*,[74] an employee injured in the workplace was successful in *avoiding* the summary dismissal of his claim against his employer in tort for intentional injury, despite the "exclusivity provision" of the Indiana Workmen's Compensation Act. In *National Can*, employee Jovanovich claimed that his previous back injury had been aggravated by his employer's refusal to assign him light duties, after receiving a note from Jovanovich's doctor requesting that he be temporarily assigned such work.[75] Jovanovich argued before the LaPorte Superior Court that, under these circumstances, National Can had acted out of malice in intentionally refusing to assign him such work, and had, therefore, *intentionally* injured him. The trial court agreed with Jovanovich, and awarded him compensatory and punitive damages.[76]

On appeal to the Third District Court of Appeals, National Can argued, in part, that Jovanovich's claim of intentional injury was barred by the "exclusivity provision" of the Indiana Workmen's Compensation Act. Jovanovich responded by claiming that, while his back injury "arose out of" his employment with National Can, the injury fell *outside* the jurisdiction of the Workmen's Compensation Act because Jovanovich had "anticipated" the injury and therefore it could not have occurred "by accident."[77]

The court of appeals rejected Jovanovich's argument, stating that even in instances where an employee "expects or anticipates an injury," that injury may nevertheless arise "by accident" within the meaning of the Act.[78] However, the court of appeals then went on to note that:

> [B]oth the plain language of the compensation statute and the opinion in *Yankeetown* recognize that if an employer intentionally injures an employee, the Act does not apply.
>
> Public policy reinforces this conclusion since it would be a total perversion of the humanitarian purposes of the Act to permit an employer to use the Act as a shelter against liability for an intentional tort.

---

73. *Id.*
74. 503 N.E.2d 1224 (Ind. Ct. App. 1987).
75. *Id.* at 1225-26.
76. *Id.* at 1227.
77. *Id.* at 1232.
78. *Id.*

> Thus, the trial court had jurisdiction to entertain Jovanovich's claim alleging an intentional tort.[79]

Having thus found an exception to the "exclusivity provision" of the Indiana Workmen's Compensation Act in cases where an employer *intentionally* injures an employee, the court of appeals went on to find that Jovanovich's intentional injury claim failed, as a matter of law, because there was no proof of the required "specific intent" element of this claim brought outside the scope of the Act.[80] The court of appeals reversed the trial court's judgment in favor of Jovanovich.

IV. Summary

The survey period saw three significant developments in Indiana employment law. First, both the federal district court's decision in *Sarratore v. Longview Van Corp.*[81] and the Indiana Supreme Court's decision in *McClanahan v. Remington Freight Lines, Inc.*[82] eroded further the "at-will" rule in Indiana, by recognizing employee actions in tort for retaliatory discharge based on refusals to violate *any* statutorily-imposed *duty*. However, the Supreme Court's refusal in *McClanahan* to include statutorily-conferred *rights*, other than the right to file a workmen's compensation claim, within its *Frampton*[83] exception apparently signifies that an "at-will" employee in Indiana is not protected from discharge based on his exercise of such rights. The Third District Court of Appeals, in *Wilmington v. Harvest Insurance Cos.*,[84] also refused to broaden the scope of the *Frampton* exception to include claims of wrongful discharge brought by independent contractors.

Second, the Indiana Supreme Court created a separate and distinct exception to the "at-will" rule in its *Romack v. Public Service Co.*[85] decision. In *Romack*, the court held that an employee's abandonment of "permanent employment" in reliance on a new employer's assurances of similar "permanent employment" constitutes sufficient independent consideration to convert the employee from the status of an "at-will" employee to that of an employee who can be discharged only for "good cause." In *Whiteco Industries, Inc. v. Kopani*,[86] the Third District Court of Appeals, in *dictum*, broadened the Supreme Court's *Romack* decision

---

79. *Id.*
80. *Id.* at 1234.
81. 666 F. Supp. 1257 (N.D. Ind. 1987).
82. 498 N.E.2d 1336 (Ind. Ct. App. 1986), *aff'd in part*, 517 N.E.2d 390 (1988).
83. Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973).
84. 521 N.E.2d 953 (Ind. Ct. App. 1988).
85. 499 N.E.2d 768 (Ind. Ct. App. 1986), *aff'd in part*, 511 N.E.2d 1024 (1987).
86. 514 N.E.2d 840 (Ind. Ct. App. 1987).

to include, within the potential group of employees eligible for elevation from an "at-will" to a "good cause" status as a matter of law, those employees who are promised employment for a "term of years" and who thereafter abandon previous employment that had provided them with unique tenure or retirement rights. Furthermore, in *Shannon v. Bepko*,[87] the federal District Court may have created another exception to the Indiana "at-will" rule in cases where an employee is able to show that he has an "implied contract of employment" on the basis of the "common law" present in his place of work.

Third, Indiana courts have continued to interpret the Indiana Workmen's Compensation Act broadly so as to encompass any injuries arguably arising out of an employee's employment, as shown by the recent court of appeals decision in *Consolidated Products, Inc. v. Lawrence*.[88] Furthermore, in *K-Mart v. Novak*,[89] the First District Court of Appeals rejected the notion that an employee's "risk of injury" must have been increased as a result of employment in order for such employee's workplace injury to "arise out of" employment and be subject to the "exclusivity provision" of the Act. Finally, the Third District Court of Appeals ruled, in *National Can Corporation v. Jovanovich*,[90] that injuries to an employee which are intentionally caused by his employer fall outside the scope of the Act's "exclusivity provision" and can be remedied through a private action for damages based in tort.

---

87. 684 F. Supp. 1465 (S.D. Ind. 1988).
88. 521 N.E.2d 1327 (Ind. Ct. App. 1988).
89. 521 N.E.2d 1346 (Ind. Ct. App. 1988).
90. 503 N.E.2d 1224 (Ind. Ct. App. 1987).