

Survey of Recent Developments in Indiana Employment Law

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I. INTRODUCTION

Indiana employment law evolves continuously and, at times, unpredictably. Although this survey period (June 1989 to October 1990) did not provide Indiana employers and employment law practitioners with any single landmark issue, Indiana courts, the Unemployment Insurance Review Board of the Indiana Department of Employment and Training Services, and the state and federal legislatures continued the evolutionary process through several noteworthy decisions and pieces of legislation. This Article focuses on developments in: (1) the employment-at-will doctrine, (2) Indiana's unemployment compensation, wage payment, and child labor statutes, (3) public sector employment, and (4) handicap discrimination.

II. THE EMPLOYMENT-AT-WILL DOCTRINE: THE "PUBLIC POLICY" EXCEPTION FURTHER DEFINED

Although common-law exceptions to employment-at-will in Indiana remain limited, the Indiana Court of Appeals provided further definition to those exceptions during this survey period.

A. *Divergent Signals From The Court Of Appeals*

1. *Call v. Scott Brass, Inc.*—A careful reading of *Call v. Scott Brass, Inc.*¹ suggests that the Fourth District Court of Appeals dealt a solid blow to the "narrow" public policy exceptions created by the Indiana Supreme Court in *Frampton v. Central Indiana Gas Co.*² and *McClanahan v. Remington Freight Lines.*³ Call claimed that she was

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1. 553 N.E.2d 1225 (Ind. Ct. App. 1990).
2. 260 Ind. 249, 297 N.E.2d 425 (1973).
3. 517 N.E.2d 390 (Ind. 1988).

terminated from her position as Corporate Human Resource Manager for Scott Brass because she complied with a summons and appeared for jury duty. The Starke County Circuit Court granted Scott Brass's motion for summary judgment, holding that Indiana Code section 34-4-29-1⁴ provides the exclusive remedy for an employee discharged because she responded to a jury summons, and Call had not filed her claim within the statute's ninety-day limitation period.⁵

The Court of Appeals framed the issue as whether Indiana Code section 34-4-29-1 is the exclusive remedy for an at-will employee discharged for compliance with a summons to appear for jury service.⁶ To guide its course through the murky and often uncharted waters of Indiana's employment-at-will doctrine, the court proffered an oft-cited principle of statutory construction: "[W]hen the legislature enacts a statute which creates a right, which did not exist previously, and prescribes a remedy for the infringement of that right, the statutory remedy is exclusive."⁷ The court's mission was: Determine which came first, the 1987 enactment of section 34-4-29-1 or the common-law public policy exception to employment-at-will.⁸

In ruling that the public policy exception for employees discharged for refusing to violate a statutory duty predated the statutory enactment,⁹ the court rejected Scott Brass's arguments that the Indiana Supreme Court's 1973 *Frampton* decision was limited either to its specific facts (discharge for filing a worker's compensation claim)¹⁰ or, at most, to

4. IND. CODE § 34-4-29-1 (1990).

5. *Call*, 553 N.E.2d at 1226.

6. *Id.* at 1226, 1227. IND. CODE § 34-4-29-1 provides:

A person who is dismissed from employment [because the employee has received or responded to a summons, served as a juror, or attended court for prospective jury service] may bring a civil action, within ninety [90] days of the dismissal, against the employer who dismissed him:

- (1) To recover the wages he lost as a result of the dismissal; and
- (2) To obtain an order requiring reinstatement by the employer.

If the person obtains a judgment against the employer, the court shall award a reasonable attorney's fee to the person's attorney.

7. *Call*, 553 N.E.2d at 1227 (citing *Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (1956); *City of Fort Wayne v. Bishop*, 228 Ind. 304, 92 N.E.2d 544 (1950); *Environmental Properties v. City of Fort Wayne*, 178 Ind. App. 645, 383 N.E.2d 481 (1978); *Richmond Power & Light v. Indiana & Michigan Elec. Co.*, 170 Ind. App. 458, 353 N.E.2d 467 (1976)).

8. *Id.*

9. *Id.* at 1229.

10. *Id.* at 1228. The court observed that no Indiana appellate court interpreting *Frampton* has restricted *Frampton* to worker's compensation claimants. In *Indiana Department of Highways v. Dixon*, 512 N.E.2d 1113 n.1 (Ind. Ct. App. 1987), the First District Court of Appeals noted that the supreme court's decision in *Morgan Drive Away*,

employees discharged for exercising a statutory right.¹¹ Thus, the court rejected the argument that a *separate* exception for refusing to violate a statutory duty did not exist until the Indiana Supreme Court's 1988 *McClanahan* decision.¹²

According to the court, *Frampton* created a broad public policy exception for employees discharged either for exercising a statutory right or for refusing to violate a statutory duty.¹³ The court deemed that discharge for complying with a jury summons fell within the broadly stated *Frampton* exception.¹⁴ Thus, the court held that the statutory remedy was not exclusive.¹⁵

The court did not stop there. It further held that even if the statute had preceded *Frampton*, it would not be inclined to consider the statute exclusive because Indiana Code section 34-4-29-1 does not specify its exclusivity, and the jury is an indispensable part of the justice system.¹⁶ The court's dicta is surprising, and unnecessary, given the ascribed unequivocal character of the "which came first" principle of statutory construction underlying the court's holding.

Scott Brass also argued that Call, who was eligible to seek redress under the statute, could not state a cause of action because the public policy exceptions to employment-at-will are limited to remediless plaintiffs.¹⁷ In a rather remarkable exercise of statutory interpretation, the court rejected this argument by concluding that because the statutory remedies in section 34-4-29-1 are not stated in the disjunctive and Call did not seek all of the remedies therein, Call had no statutory remedy.¹⁸

Once again the court saw fit to add questionable dicta to its holding. The court stated that neither *Frampton* nor *McClanahan* discussed whether the existence of an employee's cause of action depended upon the

Inc. v. Brant, 489 N.E.2d 933 (Ind. 1986) "appears to limit actions for retaliatory discharge to cases where the plaintiff was fired for seeking worker's compensation as in *Frampton*." See also Reeder-Baker v. Lincoln Nat'l Corp., 644 F. Supp. 983, 984-85 (N.D. Ind. 1986).

11. *Call*, 553 N.E.2d at 1228-29.

12. *Id.* at 1229. The court appears to ignore the Indiana Supreme Court's statement in *McClanahan* that "[a] *separate* but tightly defined exception to the employment at will doctrine is appropriate under these facts." *McClanahan*, 517 N.E.2d at 393 (emphasis added). However, prior to *McClanahan*, two Indiana federal district courts had recognized an exception to the at-will doctrine for an employee discharged for fulfilling a statutory duty. See Sarratore v. Longview Van Corp., 2 Individual Empl. Rts. Cas. (BNA) 922 (N.D. Ind. 1987); Perry v. Hartz Mountain Corp., 537 F. Supp. 1387 (S.D. Ind. 1982).

13. *Call*, 553 N.E.2d at 1229.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 1230.

employee's ability to obtain a statutory remedy.¹⁹ This pronouncement leads one to wonder whether the court read *Frampton* carefully.

In *Frampton*, the Indiana Supreme Court emphasized the dilemma in which an employee finds herself because of the threat of discharge for filing a worker's compensation claim.²⁰ Because of the fear of discharge, employees "will not file claims for justly deserved compensation — opting, instead, to continue their employment without incident."²¹ The court emphasized that "[o]nce an employee knows he is remediless if retaliatorily discharged, he is unlikely to file a claim."²² Without a cause of action for wrongful discharge, therefore, employers would be free to undermine the purpose of the worker's compensation statute.²³

In contrast, when plaintiffs have alternative remedies available, courts consistently have refused to recognize a cause of action for retaliatory discharge. In *Vantine v. Elkhart Brass Mfg. Co.*, the Federal District Court for the Northern District of Indiana held that *Frampton* should not apply when the existence of a collective bargaining agreement provides the plaintiff with a remedy for unjust discharge.²⁴ Likewise, in *Reeder-Baker v. Lincoln National Corp.*, the same court held that *Frampton* should not apply to a plaintiff alleging that she was fired for filing a discrimination charge with the Equal Employment Opportunity Commission.²⁵ The court stated, "[T]he *Frampton* exception to the at will doctrine was intended to protect an employee without a remedy."²⁶ Reeder-Baker had a statutory remedy: Title VII's retaliation provisions.²⁷

Most recently, in *Lawson v. Haven Hubbard Homes, Inc.*, the Fourth District Court of Appeals (the same court that decided *Call*) refused to extend *Frampton* to an employee on medical leave who was discharged for filing a claim for unemployment compensation.²⁸ The court reasoned that the employee would receive unemployment compensation benefits either way.²⁹ In other words, she was not without remedy.

Call's significance in the evolution of Indiana's employment-at-will doctrine may lie beyond its substantive holdings. In its closing remarks, the court clarified its approach to the application of the public policy

19. *Id.*

20. *Frampton*, 260 Ind. at 249, 297 N.E.2d at 425.

21. *Id.* at 251, 297 N.E.2d at 427.

22. *Id.* at 252, 297 N.E.2d at 428.

23. *Id.* at 251-52, 297 N.E.2d at 427.

24. 572 F. Supp. 636 (N.D. Ind. 1983), *aff'd*, 762 F.2d 511 (7th Cir. 1985).

25. 644 F. Supp. 983 (N.D. Ind. 1986).

26. *Id.* at 986.

27. 42 U.S.C. § 2000e-3 (1988).

28. 551 N.E.2d 855 (Ind. Ct. App. 1990).

29. *Id.* at 860.

exception to employment-at-will.³⁰ Given the opportunity, the Fourth District appears ready to erode further Indiana's employment-at-will doctrine.

2. *Lawson v. Haven Hubbard Homes, Inc.*—Two months prior to deciding *Call*, the same court decided *Lawson v. Haven Hubbard Homes, Inc.*³¹ Reading the majority opinions in *Call* and *Lawson* may lead one to question whether they were issued from the same court. While Judge Chezem's opinion in *Call* reflects a desire to be at the forefront of employment-at-will doctrine erosion, Judge Miller's majority opinion in *Lawson*, in which Judge Chezem dissented, is a refusal to expand *Frampton* to an unusual, but sympathetic, set of facts.

Lawson was injured on the job and was unable to work for several months, during which time she received worker's compensation benefits. On August 2, 1982, a doctor hired by Haven Hubbard's worker's compensation insurance carrier released Lawson to return to work without restriction. However, the chiropractor who treated Lawson indicated that Lawson should not lift objects weighing more than twenty-five pounds. Haven Hubbard refused to re-employ Lawson until she secured a release from the chiropractor. For several months, Lawson contacted Haven Hubbard in an attempt to return to work but was consistently advised that she could not return. During this time, she was maintained on medical leave of absence status. When Lawson filed for unemployment compensation benefits, Haven Hubbard terminated her employment. Lawson claimed that she had been discharged in retaliation for exercising a statutory right.³²

The St. Joseph County Circuit Court granted Haven Hubbard's motion for summary judgment, holding that the public policy exception to the employment-at-will doctrine announced in *Frampton* was specifically limited to employees discharged for filing worker's compensation claims.³³ Although the court of appeals acknowledged that the *Frampton* exception applied beyond the worker's compensation context, it refused to extend *Frampton* to the facts before it.³⁴ The court stated that the *Frampton* exception is limited to those situations in which the fear of discharge would have a deleterious effect upon the exercise of the

30. *Call*, 553 N.E.2d at 1230 ("Violation of state statutes will not be tolerated, in either criminal or civil forums. A violation of state public policy by employers, as expressed by the statutes enacted by the legislature, should carry with it attendant civil liability where it invades an employee's legally protected interests.').

31. 551 N.E.2d 855.

32. *Id.* at 856.

33. *Id.* at 857.

34. *Id.* at 859-60.

statutory right in question.³⁵ The court reasoned that an employee will not file an unemployment compensation claim unless he or she is unemployed or unless the employer is refusing to allow the employee to return to work. In either case, the employee will receive unemployment compensation benefits. The court opined that the fear of discharge has no effect on the exercise of the right to file for unemployment compensation.³⁶

3. *Bowlen v. ATR Coil Company, Inc.*—In *Bowlen v. ATR Coil Company, Inc.*,³⁷ the court readily dismissed the plaintiffs' wrongful discharge claim on federal preemption grounds. In *Bowlen*, supervisory workers alleged that they were discharged for engaging in union activity, and brought suit against ATR for wrongful discharge and intentional infliction of emotional distress. The supervisors claimed that their termination violated the express statutory public policy reflected in section 22-7-1-2 of the Indiana Code.³⁸

The Monroe Superior Court granted ATR's motion to dismiss; the First District Court of Appeals affirmed. Noting that federal labor law denies protection to supervisors discharged for union activity,³⁹ the court held that the alleged state statutory cause of action was preempted by federal labor law.⁴⁰ The supervisors' claim of intentional infliction of emotional distress failed because it was not supported by an underlying wrongful act.⁴¹

4. *Smith v. Electrical System Division of Bristol Corp.*—Most recently, the Third District Court of Appeals had an opportunity to provide onlookers with insight into its employment-at-will tendencies. Like the Fourth District in *Lawson*, the Third District was faced with an unusual and sympathetic set of facts in *Smith v. Electrical System Division of Bristol Corp.*⁴² In May 1986, Smith sustained a serious injury in an industrial accident. She applied for and received worker's compensation

35. *Id.* at 860.

36. *Id.*

37. 553 N.E.2d 1262 (Ind. Ct. App. 1990).

38. IND. CODE § 22-7-1-2 (1990). This section provides:

No worker or group of workers who have a legal residence in the state of Indiana shall be denied the right to select his or their bargaining representative in this state, or be denied the right to organize into a local union or association to exist within and pursuant to the laws of the state of Indiana

39. See National Labor Relations Act, 29 U.S.C. §§ 152(3), 152(11) (1988) (as amended). Sections 152(3) and 152(11) exclude supervisors from the definition of "employees" protected under § 7.

40. *Bowlen*, 553 N.E.2d at 1264.

41. *Id.* at 1265.

42. 557 N.E.2d 711 (Ind. Ct. App. 1990).

benefits. She was allowed a medical leave of absence until February 1989, when her employment was terminated pursuant to Bristol's absence control policy. The policy provided that a leave of absence for illness or injury could continue for one year or an amount of time equal to the employee's length of service, whichever was less. Smith brought suit against Bristol for wrongful discharge, alleging that her discharge had been in retaliation for her pursuit of worker's compensation benefits.

It was clear from her deposition testimony that Smith's was not the classic *Frampton* case it had initially appeared to be. Smith was not alleging that she was discharged *because* she filed for worker's compensation. Rather, Smith claimed that Bristol's absenteeism policy *indirectly* penalized the exercise of a statutory right. She contended that the absenteeism policy discouraged employees from applying for worker's compensation for fear of discharge. The St. Joseph Superior Court granted Bristol's motion for summary judgment; the Court of Appeals affirmed.⁴³

The court held that to come within either the *Frampton* or *McClanahan* exceptions to Indiana's employment-at-will doctrine, an employee must prove

that his or her discharge was *solely* in retaliation for the exercise of a statutory right or the fulfillment of a statutorily imposed duty. [citation omitted]. . . .

[A]bsent evidence of retaliatory intent, a neutral policy effecting an incidental detriment to an employee . . . [does not] constitute[] a violation of Indiana law.⁴⁴

Applying this principle to the facts before it, the court ruled that Smith had been penalized for excessive absences, a penalty that would have been incurred even if she had decided to take unpaid leave. As a result, her discharge had not been "*solely*" because of her exercise of a statutory right.⁴⁵

B. The Future Of The Employment-At-Will Doctrine

It is unlikely that the plaintiff bar's enthusiasm for chipping away at the employment-at-will doctrine will diminish during the next survey period. The divergent signals sent by the courts during the survey period and the willingness of at least one court to ignore the underlying rationale in *Frampton* and to add "the threat of common law suits in tort" to

43. *Id.* at 712.

44. *Id.* at 712-13 (emphasis added).

45. *Id.* at 713.

"the statutory remedy" provides encouragement for the plaintiff bar.⁴⁶ On the other hand, those who represent employers may need to steer more carefully as they navigate the waters of employment-at-will litigation, for the waters may prove more turbulent in the future.

III. HANDICAP DISCRIMINATION IN INDIANA

In May 1990, the Indiana Supreme Court examined an employer's obligations under the handicap discrimination provisions of the Indiana Civil Rights Law (the "Act").⁴⁷ In *Indiana Civil Rights Commission v. Southern Indiana Gas and Electric Co.*,⁴⁸ a five-foot one-inch tall, 124-pound female applied for the job of "meter man" with Southern Indiana Gas and Electric Co. ("SIGECO"). The position required heavy lifting. After the company physician examined the applicant and concluded that she had a congenital back disorder that made her "unfit for heavy work," SIGECO denied her employment.⁴⁹ The applicant's own physician confirmed the back disorder but concluded that it would cause her no more problems than a normal back.⁵⁰

The applicant filed a handicap discrimination charge with the Indiana Civil Rights Commission ("ICRC"), which determined that SIGECO had violated the statute. SIGECO appealed and the Pike County Circuit Court found in its favor. The ICRC appealed; the Fourth District Court of Appeals reversed the lower court.⁵¹ SIGECO appealed to the Indiana Supreme Court, which ruled in SIGECO's favor.

The Indiana Supreme Court concluded that both the ICRC and the court of appeals had ignored the Act's provision that handicap discrimination does not occur when an employer refuses to employ a person who, because of a handicap, is physically unable efficiently and safely to perform the duties required in the job.⁵² The court found that the applicant's small size, coupled with her back disorder, placed her in a category of persons whom SIGECO was well within its rights in finding could not efficiently and safely perform the duties required in the meter man position.⁵³

This case is significant to Indiana employers for two reasons. First, the Indiana Supreme Court has recognized a good faith defense to

46. See *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225, 1230 (Ind. Ct. App. 1990).

47. IND. CODE §§ 22-9-1-3(q), -13 (1990).

48. 553 N.E.2d 840 (Ind. 1990).

49. *Id.* at 841.

50. *Id.*

51. *Id.*

52. IND. CODE § 22-9-1-13(a) (1990).

53. *Southern Ind. Gas and Elec. Co.*, 553 N.E.2d at 842.

allegations of handicap discrimination in screening prospective employees. The court stated:

If a physical examination engenders in a qualified expert's opinion an applicant for employment is physically unfit to perform the work required and the employer in good faith refuses to hire the applicant for that reason, the employer has a good defense to a later action, even though the initial expert's opinion is later proven wrong.⁵⁴

Second, the Indiana Supreme Court, in dicta, implicitly approved the lower court's conclusion that persons who are discriminated against because they are perceived as having handicaps are protected even if they, in fact, are not "handicapped."⁵⁵ Adopting the rationale of other state courts and federal law,⁵⁶ the court of appeals held that "persons who are discriminated against because they are perceived as having handicaps are protected by the Act."⁵⁷ This adoption extended Indiana's narrow statutory definition of a handicapped person.⁵⁸ The federal definition of a handicapped individual is significantly broader because it includes persons who had a handicap in the past as well as those individuals who do not have a handicap but are simply "regarded" as having a handicap as, for example, when an employer believes that an individual has AIDS simply because the employer knows the individual is a homosexual.⁵⁹

Indiana courts have had few occasions to interpret the Act's handicap discrimination provisions which are much narrower in scope than federal handicap discrimination law.⁶⁰ On July 26, 1990, the President signed

54. *Id.* at 843 (quoting with approval *Indiana Civil Rights Comm'n v. Southern Indiana Gas and Elec. Co.*, 544 N.E.2d 536, 542 (Ind. Ct. App. 1989) (Conover, J., dissenting)). The court of appeals had imposed "an affirmative duty upon employers, once the opinion of their medical expert is challenged, to double check, and correct when necessary, the decisions based on their medical expert's opinions." *Indiana Civil Rights Comm'n*, 544 N.E.2d at 541.

55. *Southern Ind. Gas and Elec. Co.*, 553 N.E.2d at 842.

56. Rehabilitation Act of 1973, 29 U.S.C. § 701-7961 (1988). The Rehabilitation Act prohibits employers who have federal contracts in excess of \$2,500, or who receive federal financial assistance, from discriminating against handicapped individuals. *Id.* § 793.

57. *Indiana Civil Rights Comm'n*, 544 N.E.2d at 539-40.

58. "'Handicap or handicapped' means the physical or mental condition of a person that constitutes a substantial disability [and] also means the physical or mental condition of a person that constitutes a substantial disability unrelated to the person's ability to engage in a particular occupation." IND. CODE § 22-9-1-3(q) (1988).

59. The Rehabilitation Act defines an "individual with handicaps" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(8)(B).

60. For example, Indiana's statute, unlike the Rehabilitation Act, does not require

into law the Americans With Disabilities Act of 1990 ("ADA").⁶¹ The ADA is likely to diminish further the impact of the state discrimination law because the ADA's protection of handicapped or disabled individuals is broader than that provided by Indiana law. With three exceptions,⁶² the ADA will eventually prohibit *all* employers with fifteen or more employees from discriminating against disabled individuals.⁶³ Therefore, it is unlikely that employees will seek relief under state law unless their employers are outside the coverage of the ADA.⁶⁴

Any attorney who counsels clients with respect to employment discrimination matters is well advised to become familiar with the provisions of the ADA. The ADA is frequently referred to as the most significant piece of civil rights legislation since the passage of the Civil Rights Act of 1964.⁶⁵ On the ADA's effective date, more than 40 million Americans with disabilities will come within its protections.

IV. INDIANA'S WAGE PAYMENT STATUTE

Indiana's wage payment statute mandates that employers pay "wages" semi-monthly and pay, within ten days, to an employee whose employment has terminated, all "wages" earned to the date of the termination.⁶⁶

Since its enactment, the wage payment statute has received little judicial interpretation. The most important case interpreting the statute

an employer to provide reasonable accommodation to handicapped individuals. *Compare* 41 C.F.R. § 60-741.2 (A "[q]ualified handicapped individual" means a handicapped individual . . . who is capable of performing a particular job, with reasonable accommodation to his or her handicap.") *with* IND. CODE §§ 22-9-1-13(b), (c) ("[T]he employer shall not be required . . . to promote or transfer such handicapped person to another job or occupation, unless, prior to such transfer, such handicapped person by training or experience is qualified This section shall not be construed to require any employer to modify any physical accommodations or administrative procedures to accommodate a handicapped person.").

61. Americans With Disabilities Act, 42 U.S.C. § 12101 (1990).

62. The ADA excludes from the definition of "employer" the United States government, a *bona fide* private membership club (other than a labor organization) exempt under § 501(c) of the INTERNAL REVENUE CODE of 1986, and Indian tribes. 42 U.S.C. § 12111(5)(B) (1990).

63. The ADA's employment discrimination provisions become effective July 26, 1992, for employers with 25 or more employees. After July 26, 1994, all employers with 15 or more employees are subject to the ADA. 42 U.S.C. § 12111(5)(A) (1990).

64. With three limited exceptions (not-for-profit organizations with exclusive fraternal or religious purposes, church-related institutions, and not-for-profit exclusively social organizations), the state statute covers employers with six or more employees within Indiana. IND. CODE § 22-9-1-3(h) (1988).

65. 42 U.S.C. § 2000e (1964).

66. IND. CODE §§ 22-2-5-1 to -3 (1990).

is *Die & Mold, Inc. v. Western*.⁶⁷ In *Die & Mold*, the court of appeals held that vacation pay is deferred compensation in lieu of wages and, absent a clear policy to the contrary, accrues as services are rendered. Upon termination, therefore, accrued vacation pay constitutes wages owed to the employee under the statute.⁶⁸ *Die & Mold* teaches Indiana employers who do not wish to pay terminated employees accrued vacation pay to include express language in their employee handbooks clearly indicating that (1) their vacation programs are intended only to compensate employees *during* the period spent on vacation; (2) unused vacation time is lost and may not be taken as compensation in lieu of time off; and (3) terminated employees will not be paid for any earned, but unused, vacation.

During the survey period, the First District Court of Appeals revisited the definitional breadth of the statutory term "wages."⁶⁹ In *Jeurissen v. Amisub, Inc.*,⁷⁰ two employees who quit their employment with Amisub in September claimed they were entitled to the incentive bonus that was tied to the employer's performance as of August 31. The court ruled that the amounts in question were a "bonus" which, in contrast to vacation pay, was not tied to regular work done on a periodic basis. As such, the court held that the incentive payments were not "wages" within the meaning of the statute.⁷¹

V. INDIANA'S UNEMPLOYMENT COMPENSATION STATUTE

Indiana's Employment Security Act⁷² provides that an unemployment compensation claimant is disqualified from receiving benefits if he or she voluntarily leaves his or her employment without good cause in connection with the work or is discharged for just cause.⁷³

67. 448 N.E.2d 44 (Ind. Ct. App. 1983).

68. *Id.* at 46-48.

69. IND. CODE § 22-2-5-1.

70. 554 N.E.2d 12 (Ind. Ct. App. 1990).

71. *Id.* at 13.

72. IND. CODE §§ 22-4-1-1 to -38-3 (1990).

73. "Discharge for just cause" is defined to include separation initiated by an employer for: (a) falsification of an employment application; (b) knowing violation of a reasonable and uniformly enforced rule; (c) unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness; (d) damaging the employer's property through willful negligence; (e) refusing to obey instructions; (f) reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on the employer's premises during working hours; (g) conduct endangering the safety of the employee or his co-workers; (h) incarceration in jail following the conviction of a misdemeanor or felony by a court of competent jurisdiction; or (i) any breach of duty in connection with the work that is reasonably owed by the employee to the employer. IND. CODE § 22-4-15-1(d) (1988).

During the survey period, the court of appeals discovered that it is not always clear whether a claimant has quit or has been fired. Even when it is clear that the claimant terminated the employment voluntarily, an issue may arise as to whether or not the claimant left the employment for good cause. Also, the Unemployment Insurance Review Board of the Indiana Department of Employment and Training Services (the "Review Board") issued three significant survey period decisions addressing discharges related to drug testing.

A. *Voluntary Terminations*

In *Cheatem v. Review Board of the Indiana Department of Employment and Training Services*,⁷⁴ the claimant appealed the Review Board's determination that she be denied benefits because she voluntarily quit her employment. Cheatem was a retail store employee who was informed on a Wednesday afternoon that she was being placed on a three-day disciplinary suspension. Cheatem replied, "No, you might as well fire me,"⁷⁵ then departed her supervisor's office, clocked out, and left the store before the end of her shift. Later that afternoon, Cheatem telephoned her union steward to request a hearing on her suspension. The steward denied the request. The following Monday, Cheatem reported for work and was informed that she was no longer employed.⁷⁶

The Fourth District Court of Appeals held that Cheatem had been discharged. The court found no "manifestation of intent to quit" in Cheatem's actions. The court noted that Cheatem had not stated expressly that she was quitting and that in attempting to file a grievance over her suspension, she had evidenced that she did not intend to quit.⁷⁷

In *Thomas v. Review Board of the Department of Employment and Training Services*,⁷⁸ the claimant quit his job after being told by his employer that he would be fired if he filed a claim for unpaid overtime compensation with the Wage and Hour Division of the United States Department of Labor. The Review Board ruled that Thomas had quit without good cause.⁷⁹ The Second District Court of Appeals reversed the Review Board, holding that an employee has good cause voluntarily to leave his employment when his employer refuses to pay a statutorily mandated wage after the employee's demand.⁸⁰

74. 553 N.E.2d 888 (Ind. Ct. App. 1990).

75. *Id.* at 890.

76. *Id.* at 892.

77. *Id.*

78. 543 N.E.2d 397 (Ind. Ct. App. 1989).

79. *Id.* at 399.

80. *Id.* at 399-400.

B. *Just Cause Discharge*

One noteworthy judicial decision directly involving just cause discharge was rendered during the survey period. Additionally, as noted, the Review Board issued three important decisions addressing workplace drug testing.

1. *Court Looks to the Stated Reason for Discharge.*—In *Burnett v. Department of Employment and Training Services*,⁸¹ the Second District Court of Appeals reaffirmed that the Review Board and unemployment hearing referees are permitted to consider only whether the *stated* grounds for discharge have a basis in fact and constitute just cause. Reasons for discharge that are not communicated to the employee at the time of termination may not be relied upon as a basis for discharge in an unemployment compensation proceeding.⁸²

2. *The Review Board's Drug Testing Cases.*—In three survey period decisions,⁸³ the Review Board addressed the right to unemployment compensation benefits of employees discharged for failing a drug test. These cases are significant because many employers are implementing drug testing policies to comply with obligations under federal law⁸⁴ or as part of a voluntary effort to maintain a drug-free workplace.⁸⁵

81. 550 N.E.2d 78 (Ind. Ct. App. 1990).

82. *Id.* at 80-81 (citing *Voss v. Review Bd. Dep't of Employment and Training Serv.*, 533 N.E.2d 1020 (Ind. Ct. App. 1989)).

83. Review Board decisions are unpublished. Copies of the written decisions referenced herein do not reveal either party's name. When available, citation is made to the Review Board's case number. These decisions are on file in the *Indiana Law Review* office.

84. *See, e.g.*, Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 (1988); Department of Transportation Drug Testing Regulations, 49 C.F.R. pt. 40 (1989); Federal Highway Administration Regulations, 49 C.F.R. pt. 219 (1989); Federal Railway Administration Regulations, 49 C.F.R. § 391.81 (1989); Coast Guard Regulations, 46 C.F.R. pt. 16 (1989); Urban Mass Transit Workers Regulations, 49 C.F.R. pt. 653 (1989); Research and Special Programs Administration Regulations (pipeline and liquified natural gas facilities), 49 C.F.R. pt. 199 (1989).

85. A poll of 500 Indiana workers conducted by the Gallop Organization in March 1990 revealed the following:

- (1) While on the job, one in ten of the workers have been offered illegal drugs;
- (2) 42% of the workers have "personally seen or heard" that their co-workers have used drugs either before or after work while 32% report knowledge of on-the-job use; and
- (3) 97% of the workers favor some type of workplace drug testing; 25% believe drug testing "is a necessity"; 31% think drug testing should be permitted in limited circumstances; only three percent believe drug testing "is not needed."

Daily Labor Report (BNA), No. 135, July 13, 1990, A-1.

In Case No. 1,⁸⁶ the employer had a work rule requiring a drug test when an employee sustained a work-related injury. An employee who suffered an on-the-job injury tested positive for cocaine. In Case No. 2,⁸⁷ an employee who used marijuana during her off-duty time away from the employer's premises tested positive in a random drug test. In Case No. 3,⁸⁸ the employer suspected that an employee was using drugs based on a tip from another employee and the employee's low productivity. The employee tested positive. The Review Board's assignment in these cases was to determine the scope of the Employment Security Act's benefit disqualification provisions in the context of drug testing. The result was a charted path for employers to follow in implementing and enforcing drug testing policies.

a. The relevant disqualifications

Relevant provisions of the Indiana Employment Security Act provide that unemployment compensation benefits may be denied a claimant discharged for (1) reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on the employer's premises during working hours; (2) knowingly violating a reasonable and uniformly enforced rule of the employer; and (3) breaching a duty in connection with work that is reasonably owed the employer by the employee.⁸⁹

A positive test result alone, however, does not establish that an employee was "under the influence" for purposes of the first benefit disqualification.⁹⁰ "Under the influence" means "when one has an impaired condition of thought and action and, to a marked degree, the loss of the normal control of one's faculties."⁹¹ In the absence of proof of impairment, the employer must establish violation of a uniformly enforced and reasonable work rule or breach of a duty owed to the employer.

Regardless of which benefit disqualification the employer seeks to take advantage, the employer must show that the level of drug detected in an employee's system is sufficiently job-related to constitute "just

86. Review Board Case No. (89-A-10233) 89-R-1639 (June 20, 1990) (hereinafter referred to in text as "Case No. 1").

87. Review Board Case No. (89-A-7855) 89-R-1265 (Sept. 12, 1990) (hereinafter referred to in text as "Case No. 2").

88. Review Board Case No. (90-A-3968) 90-R-615 (June 20, 1990) (hereinafter referred to in text as "Case No. 3").

89. IND. CODE § 22-4-15-1(d) (1982).

90. Review Bd. Case No. (89-A-7855) 89-R-1265, at 3 (citing *Blake v. Hercules, Inc.*, 356 S.E.2d 453 (Va. Ct. App. 1987)).

91. *Alcoa v. Review Bd. of Ind. Empl. Sec. Div.*, 426 N.E.2d 54, 60 (Ind. Ct. App. 1981).

cause for discharge.”⁹² For this purpose, the Review Board has adopted the cutoff standards established by the United States Department of Transportation for determining whether an employee is “under the influence” of an illegal drug.⁹³

Under the second benefit disqualification, the employer must show not only uniform enforcement of the work rule but must show that the work rule is “reasonable.”⁹⁴ Thus, the employer must demonstrate that, under the circumstances, testing was appropriate. The Review Board has approved the following circumstances: (1) post-accident testing; (2) testing supported by a “reasonable suspicion” of an employee being under the influence or of on-premise use of intoxicants or illegal drugs; (3) follow-up testing of an employee after release from a treatment program; (4) testing required by state or federal law; or (5) random testing in safety or security sensitive jobs.⁹⁵

b. Evidentiary guidelines

To secure admission into evidence of the result of a drug test, an employer must satisfy certain evidentiary requirements set forth by the Review Board. The employer must produce the following documentary evidence:

- (1) A document signed by the tested employee indicating his or her consent to the test and release of the test results;
- (2) A document signed by the tested employee acknowledging that his or her specimen has been taken and sealed;
- (3) A document signed by the witness to the taking of the specimen, the sealing of the specimen, and the forwarding of the specimen in the chain of custody to the laboratory;
- (4) A certificate executed by the laboratory certifying that the specimen has been received with the chain of custody intact and that the chain of custody has been maintained at the laboratory;
- (5) Certification by the laboratory of the test results, together with the documentation of the tests and the cutoff value level for each test; and

92. Review Bd. Case No. (89-A-10233) 89-R-1639, at 3.

93. Department of Transportation's Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. § 40.29 (1989).

94. IND. CODE § 22-4-15-1(d) (1982).

95. Review Bd. Case No. (89-A-7855) 89-R-1265, at 4.

- (6) Evidence that a positive test was confirmed using gas chromatography/mass spectrometry techniques.⁹⁶

c. Applying the rules to the fact patterns

In Case No. 1, the Review Board denied the claimant benefits. The employer's work rule that required employees to submit to a drug test after a job-related injury was deemed reasonable and uniformly enforced; the employer used the Department of Transportation cutoff levels and conducted a confirming test; and the employer satisfied the evidentiary requirements.⁹⁷

In Case No. 2, the Review Board refused to withhold benefits. The Review Board framed the issue as whether an employer may prohibit off-duty use of illegal drugs and enforce a drug policy through random drug testing.⁹⁸ To discharge an employee for off-duty drug use, an employer likely will need to demonstrate that by using illegal drugs off-duty the employee "breach[ed a] duty in connection with work which is reasonably owed an employer by an employee."⁹⁹ To meet this burden, the employer must show that the claimant was aware that the mere presence of illegal drugs in his or her system could result in discharge and that the employee was performing a "high risk" job.¹⁰⁰

Regarding an employer's ability to base a discharge decision on a random drug test, the Review Board held that the employer must show that the selection procedure is scientifically valid and creates an equal chance of selection for any employee and that the claimant held a "safety sensitive" or "security sensitive" position.¹⁰¹ With respect to employees in nonsecurity or nonsafety sensitive positions, discipline short of discharge should be imposed with follow-up testing.¹⁰²

The Review Board specifically noted that if an employer offers chemical dependency evaluation, counseling, or treatment, just cause for discharge will exist if the employee fails to avail himself or herself of the proffered assistance or fails to follow up on treatment.¹⁰³

In Case No. 3, the Review Board refused to withhold benefits because the hearing referee had failed to require the employer to produce evidence relating to the chain of custody of the claimant's specimen.¹⁰⁴

96. Review Bd. Case No. (89-A-10233) 89-R-1639, at 2; Review Bd. Case No. (90-A-3968) 90-R-615, at 2.

97. Review Bd. Case No. (89-A-10233) 89-R-1639, at 3.

98. Review Bd. Case No. (89-A-7855) 89-R-1265, at 2.

99. IND. CODE § 22-4-15-1(d)(8) (1982).

100. *Id.* Review Bd. Case No. (89-A-7755) 89-R-1265, at 2.

101. Review Bd. Case No. (89-A-7855) 89-R-1265, at 5.

102. *Id.*

103. *Id.*

104. Review Bd. Case No. (90-A-3968) 90-R-615, at 2-3.

The Review Board's decisions illuminate the importance of well-conceived and uniformly enforced drug testing policies. The precedent created by the Review Board's rulings technically is limited to the context of an unemployment compensation claim. However, the guidelines set forth therein have practical implications for employers whose drug-test-based decisions, and drug testing policies generally, may be scrutinized for "fairness" by *any* third party — be it an arbitrator, an administrative agency, a court, or the employees themselves.

VI. PUBLIC EMPLOYMENT IN INDIANA

During the survey period, the right of state and local government employees to bargain collectively over the terms and conditions of their employment was the subject of much legislative debate and media attention.¹⁰⁵ Ultimately, however, no collective bargaining legislation passed, and Governor Evan Bayh, by executive order, agreed to extend union recognition to state employees only.¹⁰⁶ Employment rights of public employees also were at issue in several survey period decisions of both the court of appeals and the supreme court.

A. *McDermott v. Bicanic*

In *McDermott v. Bicanic*,¹⁰⁷ a former administrator of parks and recreation for the City of Hammond brought a section 1983 action,¹⁰⁸ claiming he was fired for political reasons in violation of his first amendment rights. The Lake County Circuit Court denied the defendants' motion for summary judgment, and they appealed.

The Third District Court of Appeals applied the governing principle

105. Unlike their private sector counterparts, public employees have no federally based right to bargain collectively with their employers. Absent a state statute or local ordinance mandating collective bargaining with a majority representative, the state or municipality may refuse to recognize and bargain with a union. In 1975, the Indiana General Assembly passed public employee collective bargaining legislation. IND. CODE § 22-6-4-1 (1976), *repealed by* 1982 Ind. Act 3, § 1. However, in 1976, the Benton County Circuit Court held the statute unconstitutional and enjoined further proceedings under it. *Benton Community School Corp. v. Indiana Educ. Empl. Relations Bd.*, No. C75-141 (Benton Cir. Ct. Feb. 4, 1976). The Indiana Supreme Court agreed that the statute was unconstitutional. *Indiana Educ. Empl. Relations Bd. v. Benton Community School Corp.*, 266 Ind. 491, 365 N.E.2d 752 (1977). Indiana teachers maintain bargaining rights under an entirely different statute. IND. CODE § 20-7.5-1-1 (1973).

106. Exec. Order No. 90-6, 13 Ind. Reg. 10 (July 1, 1990).

107. 550 N.E.2d 93 (Ind. Ct. App. 1990).

108. The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1988). Section 1983 provides a federal cause of action for any person whose constitutional or statutory rights have been violated by any person acting under color of State law.

that a nonpolicy-making, nonconfidential public employee cannot be fired upon the sole ground of political beliefs; but a policy-making or confidential employee may be fired on political grounds without violating the first amendment.¹⁰⁹ The court determined that:

The ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position, rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.¹¹⁰

The court found that Bicanic prepared budgets for his department, interviewed candidates for employment, recommended individuals for hire, and negotiated and signed contracts and leases. Given such responsibilities and duties, the court deemed that Bicanic was a policy-making employee.¹¹¹ As such, his discharge for political reasons was upheld. The court stated:

Those the people elect are entitled to employ others who hold their confidence; they must do so if they are to carry out the programs they promised to pursue. Bicanic wanted both to exercise discretionary powers of government and to be insulated from politics. Such an approach would put the First Amendment athwart the ability of the people to have their way through elections.¹¹²

B. *City of Hammond v. Rossi*

*City of Hammond v. Rossi*¹¹³ arose when John Rossi, a fire fighter with the City of Hammond, was electrocuted during a training activity. Katherine A. Rossi ("Rossi"), the fire fighter's widow and administratrix of his estate, filed suit under the Indiana Tort Claims Act ("TCA")¹¹⁴ against the City and other defendants. Prior to trial, Rossi entered into a covenant not to sue and a structured settlement with all defendants except the City. Rossi argued that the City was negligent and violated her husband's employment contract by failing to provide a safe working environment. The City pleaded the affirmative defenses of contributory negligence, assumption of risk, and the fellow servant rule.

109. *McDermott*, 550 N.E.2d at 94 (citing *Branti v. Finkel*, 445 U.S. 507 (1980)).

110. *Id.*

111. *Id.*

112. *Id.*

113. 540 N.E.2d 105 (Ind. Ct. App. 1989).

114. IND. CODE §§ 34-4-16.5-1 to -16.8-2 (1988).

The trial court granted Rossi's motion to strike the City's affirmative defenses pursuant to Indiana's Employer's Liability Act ("ELA").¹¹⁵ Moreover, the trial court rejected the City's argument that the ELA did not apply, and accepted Rossi's tendered jury instruction stating that the ELA abrogated the City's common-law defenses to wrongful death. Finally, the trial court concluded that the ELA's liability limit of \$10,000¹¹⁶ had been superseded by the \$300,000 limit of the TCA.¹¹⁷ The \$937,995 jury verdict was set off by the amount paid to Rossi under the settlement with the other defendants. The verdict was further reduced to the TCA's \$300,000 limit. Both Rossi and the City appealed.¹¹⁸

The court of appeals rejected Rossi's argument that the ELA's damages provision had been superseded by the damages provision of the TCA, and limited the City's liability to \$10,000.¹¹⁹ However, the court was careful to note that it did not need to decide whether the ELA was applied properly to the case because Rossi tendered the instruction based on the ELA.¹²⁰ Thus, even if the ELA did not apply, Rossi invited the error. The court cited *City of South Bend v. Rozwarski*,¹²¹ another case involving a wrongful death claim against a city by a fire fighter's estate in which the court avoided addressing the issue of the applicability of the ELA because neither party challenged the trial court's ruling that the ELA did not apply.

Given the court of appeals' dicta in *Rossi* and *Rozwarski*, at most, municipalities can conclude that if the ELA is applicable, its damages provision has not been superseded by the TCA's damages provision. Whether the ELA is applicable when a fire fighter's estate seeks damages against a city for the fire fighter's death remains unsettled.

Rossi makes clear, however, that set-offs will be made against the verdict, not the judgment.¹²² Therefore, a plaintiff's settlement with other parties will not benefit a city when the jury's verdict exceeds the statutory limit (under whichever applicable statute) by an amount greater than the settlement.

C. *Speckman v. City of Indianapolis*

In *Speckman v. City of Indianapolis*,¹²³ an Indianapolis Department of Parks and Recreation employee who had been discharged in December

115. *Id.* § 22-3-9-1 (1990).

116. *Id.* § 22-3-9-6.

117. *Id.* § 34-4-16.5-4 (1988).

118. *Rossi*, 540 N.E.2d at 105-06.

119. *Id.* at 108.

120. *Id.* at n.4.

121. 404 N.E.2d 19 (Ind. Ct. App. 1980).

122. *Rossi*, 540 N.E.2d at 108-09.

123. 540 N.E.2d 1189 (Ind. 1989).

1979 executed a settlement agreement with the City in 1981 under which he agreed to release the City from liability for all claims of wrongful discharge in exchange for the City's agreement to reinstate him, pay damages and accrued leave time, and treat him in accord with the City's personnel manual which required just cause for disciplinary action. In February 1982, Speckman was summarily discharged for alleged unlawful or negligent handling of public monies. After Speckman's second discharge, City employees made statements to the press indicating that Speckman had been dishonest or even criminal in handling funds.¹²⁴

Speckman filed a wrongful discharge claim against the City alleging that his discharge was contrary to public policy and in breach of his written employment contract. He further alleged that the City had denied him due process by violating a property interest in continued employment and violating a liberty interest in his good name and reputation by failing to provide a pre-termination hearing. The trial court granted the City's motion to dismiss, and Speckman appealed. The court of appeals ordered each count reinstated.¹²⁵ The City petitioned for transfer, which the supreme court granted.

The supreme court held that Speckman could be terminated only for just cause because Speckman's agreement to release all claims of wrongful discharge against the City constituted sufficient independent consideration to create an employment contract, and the City had agreed to treat Speckman in accord with its personnel manual, which required just cause for discharge. Thus, Speckman's claim for breach of contract was sufficient to avoid dismissal.¹²⁶

The Indiana Supreme Court also held that the trial court must be allowed to determine whether Speckman's particular contract created a legitimate entitlement to continued employment¹²⁷ and whether the alleged defamation foreclosed him from continuing in the same occupation and damaged his standing in the community.¹²⁸ The court noted that an employee need not establish the existence of a property or liberty interest to be entitled to a hearing on a due process claim; rather, the employee need only raise a genuine issue as to his interest in continued employment.¹²⁹

The supreme court observed that if the City could show that the process given to Speckman was adequate under the circumstances, then his two due process claims would be obviated.¹³⁰

124. *Id.* at 1190.

125. *Id.* at 1191.

126. *Id.* at 1192.

127. *Id.* at 1193.

128. *Id.* at 1193-94.

129. *Id.*

130. *Id.* at 1195.

The message of *Speckman* is three-fold. First, a settlement agreement under which a former City employee agrees to release the City from tort liability in exchange for reinstatement constitutes sufficient independent consideration to elevate an employment relationship from one terminable at-will to one terminable only for cause. Second, the same settlement agreement can give rise to a legitimate entitlement to continued employment (that is, a property interest) thereby requiring a pre-termination hearing. Third, alleged defamatory public comments may give rise to a liberty interest requiring a pre-termination hearing if there is a showing of sufficient damage to one's future employment opportunities and reputation.

D. Indiana Department of Highways v. Dixon

Finally, in *Indiana Department of Highways v. Dixon*,¹³¹ an off-duty maintenance worker for the Indiana Department of Highways ("IDOH") told a summer employee that IDOH supervisors had implied that the summer employee would not be hired for a possible job opening because he had filed a race discrimination claim against IDOH. IDOH determined that Dixon's action violated a work rule proscribing verbal abuse of supervisors, and discharged him in accordance with its progressive discipline procedure.¹³²

Dixon filed a written complaint with the IDOH complaint board, which heard evidence on Dixon's dismissal, determined that his statements were harmful to IDOH, and upheld his discharge. Dixon's appeal of the board's decision to the IDOH director was denied. Subsequently, Dixon filed a petition for judicial review¹³³ under the Administrative Adjudication Act ("AAA").¹³⁴

The trial court found that IDOH dismissed Dixon for making off-duty statements regarding matters of public concern that are protected by the first amendment. After concluding that IDOH failed to carry its burden of showing that Dixon's statements caused actual harm to IDOH, the trial court ordered reinstatement and a hearing to determine appropriate back pay.¹³⁵

131. 541 N.E.2d 877 (Ind. 1989) (Dickson and Pivarnik, JJ., dissenting). Justices Dickson and Pivarnik dissented on three grounds: (1) the applicability of Indiana's Administrative Adjudication Act to an at-will employee, (2) the timeliness of Dixon's filing, and (3) waiver for failure to raise the constitutional claim in the petition for review. *Id.*

132. *Id.* at 878.

133. *Id.* at 879.

134. IND. CODE § 4-22-1-14(b) (1984), *repealed by* 1986 Ind. Acts 18, § 2 (effective July 1, 1987), and *replaced by* IND. CODE § 4-21.5-1-1 (1986).

135. *Dixon*, 541 N.E.2d at 879.

The court of appeals reversed the trial court on the ground that it lacked subject matter jurisdiction. The court reasoned that since Dixon was an at-will employee, he was not entitled to judicial review under the AAA.¹³⁶

The supreme court disagreed, citing the prior AAA¹³⁷ for the proposition that any party aggrieved by an agency action shall be entitled to judicial review.¹³⁸ Moreover, the supreme court held that when the legislature intends to preclude judicial review of a constitutional claim, its intent must be clear and that under Indiana law, there is a constitutional right to judicial review of an administrative action.¹³⁹ In addition, the supreme court rejected IDOH's argument that Dixon's petition for judicial review was untimely, holding that *actual* receipt of notice of agency action is necessary before the fifteen-day period for filing a review petition commences. Here, the agency complied with all the requirements for giving notice, and someone accepted the notice at the plaintiff's last known address.¹⁴⁰

With regard to Dixon's first amendment claim, the Indiana Supreme Court held that the State may not fire or discipline an employee for making statements if: the employee is speaking on a matter of public concern;¹⁴¹ the balance between the employee's interest as a citizen in commenting upon matters of public concern and the State's interest as an employer in running an efficient operation weighs in the employee's favor;¹⁴² and the employee's speech is a motivating factor in the State's firing decision.¹⁴³ The court further emphasized that Dixon's statements were protected, even though they may have been false, unless the statements were knowingly or recklessly false and actual and significant harm resulted from the comments.¹⁴⁴

The court also rejected IDOH's argument that Dixon waived his first amendment claim by failing to raise it before the agency or spe-

136. *Id.*

137. IND. CODE § 4-22-1-14(b) (1984).

138. *Dixon*, 541 N.E.2d at 880.

139. *Id.*

140. *Id.*

141. The court held that race discrimination is a matter of public concern. *Id.* at 881.

142. The court held that IDOH failed to show any actual harm, noting that the State cannot base a discharge on possible bad effects or potential harm, and opined that a purely private statement on a matter of public concern will rarely, if ever, justify the discharge of a public employee. *Id.*

143. Dixon's speech was undisputably the motivating factor behind his termination. *Id.* at 878-79.

144. *Id.* at 882.

cifically to allege it in his petition for review because IDOH suffered no prejudice as a result of Dixon's failure.¹⁴⁵

The fact that this is a 3-2 decision and the fact that the at-will employee here had a constitutional claim should be kept in mind in subsequent cases in which at-will employees who do not have constitutional claims seek judicial review of their employers' discharge decisions.

VII. LEGISLATIVE DEVELOPMENTS

A. *Child Labor*

The survey period saw a heightened interest in child labor laws at both the state and federal levels. At the federal level, a child labor task force of the United States Department of Labor embarked on a nationwide sweep of small businesses uncovering numerous violations of federal child labor prohibitions.¹⁴⁶

At the same time, the 1990 session of the Indiana General Assembly expanded Indiana's limitations on the employment of children to cover seventeen-year-olds.¹⁴⁷ Under prior legislation, only children under the age of seventeen were protected.

B. *Statutory Minimum Wage*

On November 17, 1989, Congress enacted the Fair Labor Standards Amendments of 1989.¹⁴⁸ The amendments change certain provisions of the Fair Labor Standards Act ("FLSA") with respect to coverage, exemptions, and tip credits.¹⁴⁹ In addition, the FLSA minimum wage increased from \$3.35 per hour to \$3.80 per hour as of April 1, 1990, and to \$4.25 per hour as of April 1, 1991.¹⁵⁰ Employers may pay a training wage, under certain conditions, of at least eighty-five percent of the minimum wage, for up to ninety days, to employees under age twenty.¹⁵¹

The 1990 session of the Indiana General Assembly raised Indiana's minimum wage effective July 1, 1990, from \$2.00 per hour to \$3.35 per hour.¹⁵² Only employers with two or more employees who are not

145. *Id.*

146. Fair Labor Standards Act of 1938, 29 U.S.C. § 212 (1988) (as amended).

147. IND. CODE ANN. §§ 20-8.1-4-1, -2, -18, -20, -21.5, -23 (Burns Supp. 1990).

148. 29 U.S.C.A. § 201 (West Supp. 1990).

149. *Id.*

150. *Id.* § 206.

151. *Id.*

152. IND. CODE ANN. § 22-2-2-4(b) (Burns Supp. 1990).

subject to the FLSA are covered by Indiana's Minimum Wage Law.¹⁵³

VIII. CONCLUSION

Although the survey period did not yield a state decision or legislative change that is likely to have a substantial impact on the daily lives of Indiana's manufacturing, sales, service, and construction workers and their employers, the passage of the ADA, developments in workplace drug testing, and the continuous evolution of the employment-at-will doctrine will certainly affect the terms and conditions under which employees and employers interact. Therefore, developments in these specific areas should remain in focus during the next survey period.

Because employment law is a dynamic practice area, however, practitioners must not become myopic. Significant employment law developments occur literally on a daily basis. Because many of the daily changes occur at the administrative agency level where decisions and determinations are not published, and few of which are appealed, review of decisions published in the state reporters will rarely provide sufficient notice of trends that are developing in employment law. To navigate successfully the turbulent waters of the employment practice, practitioners must keep abreast of developments on the state and federal level, in administrative and judicial forums and in the legislature.

153. *Id.*