

SURVEY OF RECENT LABOR AND EMPLOYMENT LAW DEVELOPMENTS FOR SEVENTH CIRCUIT PRACTITIONERS

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INTRODUCTION

The field of labor and employment law was a hotbed of activity during the 1993 survey period, with important developments in both the legislative and judicial arenas. The highlights of these developments include a clarification of the standard of proof in sexual harassment cases, increased use of the “after-acquired evidence” defense, enactment of the Family and Medical Leave Act of 1993, and growing judicial application of the exclusivity provisions of Indiana’s worker’s compensation statute.

This Article focuses on the most significant labor and employment law developments during the survey period. It does not, however, discuss every important ruling or legislative change; instead, this Article is a summary and analysis of key developments affecting labor and employment law practitioners in the Seventh Circuit.

I. TITLE VII

A. *Standard of Proof in Harassment Cases*

The U.S. Supreme Court’s decision in *Harris v. Forklift Systems, Inc.*¹ addressed whether conduct must seriously affect an employee’s psychological well-being or lead the employee to suffer injury to be actionable as “abusive work environment” harassment. This issue had been resolved differently among the circuit courts of appeal, with the Seventh Circuit requiring a showing of psychological injury.²

In *Harris*, the president of the company for which the plaintiff worked made repeated, unwanted sexual innuendos toward the plaintiff, often in front of others. Although the president later apologized and said he was only joking, the statements continued. Ultimately, the plaintiff quit and filed suit after the

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1. 114 S. Ct. 367 (1993).

2. *Brooms v. Regal Tube Co.*, 881 F.2d 412, 419 (7th Cir. 1989). Other decisions reaching the same result include *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), and *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989). *But see* *Ellison v. Brady*, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting such a requirement).

president asked her whether she promised a customer sex while arranging a deal.³

The company successfully defended against the lawsuit in the lower courts by arguing that the comments did not affect the plaintiff's psychological well-being.⁴ Justice O'Connor, writing for a unanimous Court, reversed, reaffirming the standard originally set forth in *Meritor Savings Bank v. Vinson*,⁵ which outlawed discriminatory conduct sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment.⁶

In *Harris*, however, Justice O'Connor clarified that the reference in *Meritor* to discriminatory work environments that "destroy completely the emotional and psychological stability of minority group workers" did not "mark the boundary of what is actionable."⁷ Rather, *Meritor* merely presented some "especially egregious examples of harassment."⁸

Unfortunately, as Justice Scalia noted in his concurring opinion, *Harris* did not conclusively define what constitutes hostile work environment harassment.⁹ Justice O'Connor similarly acknowledged, "This is not, and by its nature, cannot be, a mathematically precise test."¹⁰ The Court did, however, explain that whether an environment is hostile or abusive is determined by looking at "all the circumstances," which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."¹¹

Moreover, the Court explained that there is both an objective and a subjective component to this analysis. Not only must the conduct create an objectively hostile work environment, the victim must "subjectively perceive the environment to be abusive."¹² Otherwise, the conditions of employment have not actually been changed so as to create a Title VII violation. Although the plaintiff's psychological well-being is relevant to determining the subjective component of the claim, it is merely one factor to be considered and psychological injury is not required.¹³ Thus, *Harris* eases the burden on plaintiffs in Title VII cases by avoiding the necessity of proving psychological injury.

3. *Harris*, 114 S. Ct. at 369.

4. *Id.* at 369-70.

5. 477 U.S. 57 (1986).

6. *Harris*, 114 S. Ct. at 370.

7. *Id.* at 371 (quoting *Meritor*, 477 U.S. at 66).

8. *Id.*

9. *Id.* at 372.

10. *Id.* at 371.

11. *Id.*

12. *Id.* at 370.

13. *Id.*

B. Burden-Shifting Analysis

In *St. Mary's Honor Center v. Hicks*,¹⁴ the Supreme Court revisited the landmark 1973 decision of *McDonnell Douglas Corp. v. Green*,¹⁵ which established the oft-used "burden shifting" analysis for proving intentional employment discrimination in the absence of direct proof.¹⁶ In *Hicks*, a correctional officer who alleged that his demotion and discharge were racially motivated made a prima facie showing of discrimination.¹⁷ In response, the employer claimed that the adverse employment actions resulted from the severity and number of the plaintiff's rules violations.¹⁸ The district court found the reasons offered by the employer were not the real reasons for the plaintiff's discharge.¹⁹ This finding was based on evidence that other employees were not similarly disciplined for rules violations and that the plaintiff's supervisor manufactured a final verbal confrontation with the plaintiff in order to provoke him into threatening the supervisor.²⁰

The district court nevertheless found in the employer's favor, concluding that, although the plaintiff had proven a systematic attempt to terminate him, there was no proof of racial motivation rather than something innocuous such as a personality conflict. The Eighth Circuit Court of Appeals, however, concluded that the plaintiff was entitled to judgment as a matter of law.²¹

Reversing this decision, Justice Scalia's majority opinion emphasized that the defendant's burden was one of production only, and that the ultimate burden of persuading the trier of fact remains at all times with the plaintiff:

[T]he Court of Appeals' holding that rejection of the defendant's proffered reasons *compels* judgment for the plaintiff disregards the fundamental principle of Rule 301 that a presumption does not shift the burden of proof, and ignores our repeated admonition that the Title VII plaintiff at all times bears the 'ultimate burden of persuasion.'²²

14. 113 S. Ct. 2742 (1993).

15. 411 U.S. 792 (1973).

16. As stated in *McDonnell Douglas*, and reaffirmed in *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 711 (1983), the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Upon making this showing, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the at-issue employment decision. If such a showing is made, the plaintiff then has the opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant was not its true reason, but was a pretext for discrimination.

17. *Hicks*, 113 S. Ct. at 2747.

18. *Id.*

19. *Id.* at 2748.

20. *Id.*

21. *Id.*

22. *Id.* at 2749.

On the basis of *Hicks*, therefore, the falsity of an employer's explanation alone is not enough to compel judgment for the plaintiff. Rather, the burden rests with the plaintiff to affirmatively prove discrimination while disproving all of the employer's proffered reasons. A spirited dissent authored by Justice Souter labeled the majority's scheme of proof as "unfair and unworkable."²³ It may be premature to call the scheme set forth in *Hicks* unworkable. At a minimum, *Hicks* clarifies that the burden of proof remains on the plaintiff at all times, but it also leaves in question precisely how plaintiffs can disprove all explanations offered by employers in justifying employment decisions.

C. No-Dating Policies

Some employers have policies prohibiting employees from dating one another. A Seventh Circuit decision issued during the survey period—*Sarsha v. Sears, Roebuck & Co.*²⁴—reveals the inherent problems associated with such policies. A review of the facts in *Sarsha* is necessary in order to understand these problems.

Kenneth Sarsha, a male operating manager of an Illinois Sears store, was dating Rebecca Schaertl, a subordinate female employee. The store manager, Gary Taylor, learned of this relationship and after consulting with the company's regional office discharged Sarsha.²⁵ The decision to discharge Sarsha was based primarily upon four seemingly solid pieces of evidence. First, two unsigned letters, purportedly written by employees at the store, complained about a previous affair Sarsha had with a Sears security officer. Second, in response to these letters the former regional personnel manager, Allen Zimmerman, had a meeting with Sarsha and, according to a memo documenting the meeting, told Sarsha of Sears' long-standing practice against managers dating employees and warned that Sarsha would be terminated if he had a future relationship with a subordinate. Third, the store manager, Taylor, wrote to Zimmerman and told him that on two occasions he had informed Sarsha of this policy. Finally, a surveillance report confirmed that the subordinate employee, Schaertl, had spent an evening with Sarsha at his home.²⁶

Based upon this evidence, Sears discharged Sarsha but not Schaertl. Sarsha responded by claiming discrimination on the basis of his age and sex.²⁷ Sears successfully moved for summary judgment before the trial court. The issue on

23. *Id.* at 2757.

24. 3 F.3d 1035 (7th Cir. 1993).

25. *Id.* at 1037.

26. *Id.* at 1039-40.

27. Although this case involved both age and sex discrimination claims, no-dating policies typically raise sex discrimination issues and therefore this case is addressed under the Title VII heading.

appeal was whether Sarsha created a genuine issue of fact concerning the sincerity of the stated reasons for his discharge.²⁸ This decision provides excellent guidance for practitioners facing a similar issue.

Sarsha convinced the appellate court that a genuine issue existed on his age claim based upon several factors. First, Sarsha established that the claimed no-dating policy was not in writing. Second, Sarsha obtained deposition testimony from a previous manager of the store who said he never had heard of a policy relating to dating. Third, Sarsha submitted an affidavit stating that he met his second wife while both were employed at Sears and that Sears threw a party for the couple prior to their marriage.²⁹ Finally, Sarsha denied being told that dating a subordinate violated company policy and claimed he never received a copy of the Zimmerman memo.³⁰

Based upon this evidence, the Court of Appeals concluded that genuine issues of material fact existed as to whether Sears had a policy against dating and as to whether Sarsha was warned that dating Schaertl would present a problem. This decision underscores the importance of having policies in writing and of enforcing them uniformly. As the *Sarsha* court concluded, “[w]hen the existence of a uniform policy or practice is in doubt, it cannot serve as a reason for discharging [an employee].”³¹ The decision also suggests that had Sarsha actually received a copy of the memorandum purporting to set forth his conversation with Zimmerman, the evidence that Sarsha had been warned against dating subordinates would have been stronger.

The *Sarsha* decision does not mean that no-dating policies are unlawful, even if, under the policy, the employer only disciplines supervisors. In fact, the Seventh Circuit affirmed the dismissal of Sarsha’s sex discrimination claim stating “Sears is entitled to enforce a no-dating policy (if one exists) against supervisors, who by virtue of their managerial positions are expected to know better, rather than subordinates.”³² Rather, the decision serves as a timely reminder about the usefulness and desirability of such policies.

D. Miscellaneous

The following decisions issued during the survey period, although not capable of being classified under a single heading, nevertheless are important:

- (1) Although the filing of an EEOC complaint is an activity protected by Title VII, “the EEOC filing does not create the right to fail to

28. *Sarsha*, 3 F.3d at 1038.

29. *Id.* at 1040.

30. *Id.* at 1040-41.

31. *Id.* at 1040.

32. *Id.* at 1042.

perform assigned work, miss work, leave work without permission, or to do or fail to do any number of activities that would be legitimate reasons for dismissing any employee."³³

(2) Absent direct evidence of discrimination, word-of-mouth hiring does not compel an inference of intentional discrimination, at least where this is the cheapest and most efficient method of recruitment.³⁴

(3) Plaintiffs in Title VII cases are entitled to backpay for time they are off of work as a result of job-related emotional distress.³⁵

II. THE CIVIL RIGHTS ACT OF 1991³⁶

A. *Retroactivity*

There were a number of decisions regarding the Civil Rights Act of 1991 ("1991 Act") during the survey period, most notably ones concerning whether the provisions of this legislation should be applied retroactively to conduct occurring before the Act was signed into law.³⁷ The most important of these decisions for Seventh Circuit practitioners is *Mojica v. Gannett Co.*³⁸ in which the full Seventh Circuit held that the 1991 Act does not apply retroactively to cases that were pending before the district court, but had not yet gone to trial, at the time the law went into effect. The 7-4 decision, with one judge concurring, reaffirms two separate Seventh Circuit panel decisions that held the 1991 Act does not apply to cases pending on appeal when the law went into effect.

Judge Manion, writing for the majority in *Mojica*, said the two previous panel decisions addressing retroactivity—*Mozev v. American Commercial Marine Service Co.*³⁹ and *Luddington v. Indiana Bell Telephone Co.*⁴⁰—"remain the law of [the] circuit, and . . . stand independently in their precedential value."⁴¹

33. *Mack v. County of Cook*, 827 F. Supp. 1381, 1387 (N.D. Ill. 1993).

34. *Equal Employment Opportunity Comm'n v. Consolidated Serv. Sys.*, 989 F.2d 233 (7th Cir. 1993).

35. *Townsend v. Indiana Univ.*, 995 F.2d 691 (7th Cir. 1993).

36. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 16 U.S.C., 29 U.S.C., and 42 U.S.C. (1991)) [hereinafter 1991 Act].

37. The Act was signed into law by President Bush on Nov. 21, 1991. The Act states that except as otherwise specifically provided, "this Act and the amendments made by the Act shall take effect upon enactment." § 402(a). Despite this language, the Act does not explain whether it applies to cases pending on the date or cases filed after the effective date claiming discrimination that occurred prior to the Act's effective date.

38. 7 F.3d 552 (7th Cir. 1993).

39. 963 F.2d 929 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 207 (1992), *reh. denied*, 113 S. Ct. 644 (1992).

40. 966 F.2d 225 (7th Cir. 1992).

41. *Mojica*, 7 F.3d at 558.

Judge Manion then borrowed upon these cases' reasoning in concluding that it would be improper and unfair to apply the 1991 Act to conduct that occurred before the law's effective date.⁴² In his dissent, Judge Cummings noted the plaintiff's allegation of national origin discrimination was unlawful under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 and therefore the 1991 Act did not identify new conduct as illegal.⁴³

B. Individual Liability

The Civil Rights Act of 1991 has also rekindled the argument concerning whether individuals can be held personally liable for employment discrimination under the Age Discrimination in Employment Act (ADEA)⁴⁴ and Title VII. Although the Seventh Circuit has not ruled directly on this question,⁴⁵ several district courts in this Circuit have addressed the issue with mixed outcomes.

The decision which probably is most frequently cited in resolving this issue is *Miller v. Maxwell's International, Inc.*,⁴⁶ a divided Ninth Circuit Court of Appeals case issued during the survey period rejecting individual liability. Although *Miller* is a Ninth Circuit case, and therefore is not binding in the Seventh Circuit, the frequency with which this decision has been cited by district courts in the Seventh Circuit reflects *Miller's* importance.⁴⁷

42. *Id.* at 558-60.

43. *Id.* At the time of publication of this article, two cases presenting this issue also had been argued before the U.S. Supreme Court: *Landgraf v. USI Film Products*, 968 F.2d 427 (5th Cir. 1992), *cert. granted, in part*, 113 S. Ct. 1250 (1993); and *Harvis v. Roadway Express*, 973 F.2d 490 (6th Cir. 1992), *cert. granted, in part*, 113 S. Ct. 1250 (1993). The federal appellate courts had split on this issue. The Fifth, Sixth, Seventh, Eighth, Eleventh, and D.C. Circuit Courts of Appeal have ruled that the relevant portions of the 1991 Act apply prospectively, whereas the Ninth Circuit Court of Appeals held the 1991 Act does have retroactive application. *See Johnson v. Uncle Ben's Inc.*, 965 F.2d 1363 (5th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mojica v. Gannett Co.*, 7 F.3d 552 (7th Cir. 1993) (*en banc*); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Baynes v. AT&T Technologies, Inc.*, 976 F.2d 1370 (11th Cir. 1992); *Gersman v. Group Health Ass'n*, 975 F.2d 886 (D.C. Cir. 1992); and *Reynolds v. Martin*, 985 F.2d 470 (9th Cir.), *reh'g denied*, 994 F.2d 690 (9th Cir. 1993). The Indiana Court of Appeals, in *Perry v. Stitzer Buick*, 604 N.E.2d 613, 616 (Ind. App. 1992), followed a line of federal appellate court opinions which, at that time, had unanimously rejected retroactive application of the 1991 Act.

44. 29 U.S.C.A. § 621 *et seq.* (West 1985 & Supp. 1992).

45. In *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989), the Seventh Circuit upheld a finding of personal liability against a supervisor as well as the employer, but made no express holding on the individual liability issue.

46. 991 F.2d 583 (9th Cir. 1993).

47. As the Seventh Circuit often has stated, district courts in this circuit are required to give "respectful consideration" to decisions from other federal circuits absent Seventh Circuit precedent. *See, e.g., Colby v. J.C. Penney Co., Inc.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

The plaintiff in *Miller* alleged sex and age discrimination in employment and named the owners and managers of the restaurant where she worked as individual defendants.⁴⁸ The district court dismissed the case and the court of appeals affirmed. Borrowing upon the district court's reasoning, the appellate court observed that while the term "employer" in Title VII and the ADEA is defined to include any agent of the employer, "[t]he obvious purpose of this [agent] provision was to incorporate respondeat superior liability into the statute."⁴⁹ In addition, the court observed that because Title VII and the ADEA limit liability to employers with fifteen and twenty or more employees, respectively, "it is inconceivable that Congress intended to allow civil liability to run against individual employees."⁵⁰

The dissent argued that individual liability was supported by the amendments to Title VII contained in the Civil Rights Act of 1991.⁵¹ These amendments permit for the first time compensatory and punitive damages for intentional violations of Title VII. The dissent found this change significant and concluded that it may pave the way for individual liability under Title VII (although the allegations in *Miller* arose prior to the passage of the 1991 Act).⁵²

Declining to follow (or substantively discuss) the majority's holding in *Miller*, Chief Judge Moran permitted the plaintiff to pursue her individual Title VII claims in *Vakharia v. Swedish Covenant Hospital*.⁵³ In *Vakharia*, the court stated, "if the people who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely, while the victim may receive no compensation whatsoever."⁵⁴

In contrast, in *Pelech v. Klaff-Joss, LP*,⁵⁵ the court stated "we respectfully disagree" with Judge Moran's holding and instead relied in part upon *Miller* in concluding that the individual defendants were not "employers" for Title VII purposes.⁵⁶ Specifically, the *Pelech* court quoted *Miller* when it observed, "[i]f Congress decided to protect small entities with limited resources from liability,

48. *Miller*, 991 F.2d at 584.

49. *Id.* at 587 (quoting *Miller v. Maxwell's Int.*, 1990 U.S. Dist. LEXIS 10479 at 4 (N.D. Ca. Jan. 17, 1990)).

50. *Id.*

51. *Id.* at 589. The dissent also observed that in *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990), Judge Posner cited with approval to *House v. Cannon Mills Co.*, 713 F. Supp. 159 (M.D. N.C. 1988), which found agents could be individually liable under the ADEA (although Judge Posner did not so hold).

52. *Id.*

53. 824 F. Supp. 769 (N.D. Ill. 1993)

54. *Id.* at 786.

55. 828 F. Supp. 525 (N.D. Ill. 1993).

56. *Id.* at 529.

it is inconceivable that it intended to allow civil liability to run against individual employees”⁵⁷

The *Miller* decision also was considered at length in *U.S. Equal Opportunity Commission v. AIC Security Investigations*,⁵⁸ in which the court upheld a finding of personal liability against an individual decision maker under the Americans With Disabilities Act.⁵⁹ Rather than following *Miller*, however, the *AIC Security* case expressly agreed with Judge Moran’s decision in *Vakharia* that “if the person most responsible for invidious discriminatory actions (that is, the employee who actually discriminates) were shielded from personal liability, that person may never be sufficiently punished or deterred.”⁶⁰

The foregoing holdings reveal that the question of individual liability of supervisors for discriminatory conduct will remain unsettled in this Circuit until the Seventh Circuit Court of Appeals decides this topic.⁶¹ As a result, this issue is likely to be litigated frequently and practitioners must be familiar with the competing arguments.

III. AGE DISCRIMINATION

A. Willfulness/Proxy

A number of courts, including the U.S. Supreme Court, issued important decisions concerning the ADEA⁶² during the survey period. Perhaps the most significant of these decisions is *Hazen Paper Co. v. Biggins*.⁶³ In *Hazen Paper*, the plaintiff was fired by his employer at age sixty-two, a few weeks before his pension benefits would have vested. The plaintiff sued his former employer claiming violations of the ADEA and the Employee Retirement Income Security Act (ERISA).⁶⁴ The employer claimed the plaintiff was fired for doing business with competitors. The jury returned a verdict in the plaintiff’s favor on both his ADEA and ERISA counts, but the trial judge granted the employer’s motion for judgment notwithstanding the verdict (JNOV) on the jury’s finding

57. *Pelech*, 828 F. Supp. at 529 (quoting *Miller*, 991 F.2d at 587).

58. 1993 WL 427454 (N.D. Ill. 1993).

59. 29 U.S.C. § 12101 *et seq.*

60. *AIC Security*, 1993 WL 427454 at 8.

61. *See also* *Hangebrauck v. Deloitte & Touche*, 1992 WL 348743 (N.D. Ill. Nov. 9, 1992) (holding individual capacity suits under Title VII are improper and rejecting the argument that the 1991 Act changed the law on this front); *Zakutansky v. Bionetics Corp.*, 806 F. Supp. 1362 (N.D. Ill. 1992) (rejecting personal liability of corporate agents under Title VII); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407 (N.D. Ill. 1991) (accord).

62. 29 U.S.C.A. § 621 *et seq.* (West 1985 & Supp. 1992).

63. 113 S. Ct. 1701 (1993).

64. 29 U.S.C. § 1001 *et seq.* (1988).

that the employer willfully violated the ADEA. The court of appeals affirmed, but reversed the trial judge's grant of JNOV.⁶⁵

The Supreme Court vacated the appellate court's decision and in so doing reaffirmed its own prior decision in *Trans World Airlines v. Thurston*.⁶⁶ In *Thurston*, the Supreme Court held that an employer willfully violates the ADEA if it either knew or showed reckless disregard for the matter of whether the conduct at issue was prohibited.⁶⁷ Since *Thurston* was decided, a number of circuits have declined to apply this standard where age was involved in the employment decision on an ad hoc, informal basis rather than through a formal policy.⁶⁸

The Supreme Court used its *Hazen Paper* decision as an opportunity to provide guidance on the proper application of the willfulness standard. The Court stated:

It is not true that an employer who knowingly relies on age in reaching its decision invariably commits a knowing or reckless violation of the ADEA . . . If an employer incorrectly but in good faith and nonrecklessly believes that the statute permits a particular age-based decision, then liquidated damages should not be imposed.⁶⁹

The Court further stated that once an employee has shown that the violation was willful, the employee does not have to also "demonstrate that the employer's conduct was outrageous, or provide direct evidence of the employer's motivation, or prove that age was the predominant rather than a determinative factor in the employment decision."⁷⁰

The *Hazen Paper* decision also clarified the circumstances under which an employer's interference with the vesting of pension benefits may violate the ADEA. This clarification was necessary because, as the Court stated, "some language in our prior decisions might be read to mean that an employer violates the ADEA whenever its reason for firing the employee is improper in any respect."⁷¹

65. *Hazen Paper*, 113 S. Ct. at 1704-05.

66. 469 U.S. 111 (1985).

67. *Id.* at 126.

68. *Hazen Paper*, 113 S. Ct. at 1709.

69. *Id.*

70. *Id.* at 1710. Also during the survey period, a district court in Illinois denied summary judgment in an age discrimination case where the employer, citing budgetary restraints and the need to keep salaries low, would not consider job applicants with extensive prior experience. EEOC v. Francis W. Parker Sch., 1993 WL 106523 (N.D. Ill. 1993). The court held that this practice unlawfully screens out persons based on their age. The validity of this decision clearly is called into question by the Supreme Court's decision in *Hazen Paper*.

71. *Hazen Paper*, 113 S. Ct. 1707 (emphasis in the original).

The Court held that “an employer does not violate the ADEA just by interfering with an older employee’s pension benefits that would have vested by virtue of the employee’s years of service.”⁷² Although recognizing that pension status may be a proxy for age, the court held that it is not necessarily so.⁷³ It is significant that in *Hazen Paper* the plaintiff’s vesting rights were tied completely to years of service, rather than to age. This fact obviously limits the scope of the decision on the pension issue. Moreover, *Hazen Paper* should not be understood to mean that an employer lawfully may fire an employee for the purpose of preventing pension benefits from vesting. As the Supreme Court noted, such conduct is actionable under § 510 of ERISA.⁷⁴

B. Derogatory Remarks

In *Monaco v. Fuddruckers, Inc.*,⁷⁵ the Seventh Circuit held that evidence of age-based derogatory remarks in the workplace is not necessarily sufficient to survive a motion for summary judgment under either the direct or indirect method of proof. In *Monaco*, a skilled butcher was told on several occasions by his manager that he was getting “too old” and that he should quit. He also was asked to train a younger employee, who the butcher claimed replaced him after he quit following reductions in the butcher’s wages and benefits.⁷⁶

The Seventh Circuit first held that the age-based remarks did not constitute direct evidence of discrimination because there was no connection between the managers’ remarks and the reductions in the plaintiff’s wages and benefits.⁷⁷ Rather, the decision to reduce wages and benefits was made by Fuddruckers’ central corporate management and applied to all of its skilled butchers and hourly employees.⁷⁸ The plaintiff’s attempt to utilize the indirect, burden-shifting method of proof also failed. The Seventh Circuit held that although there are “numerous ways to prove pretext,” the plaintiff relied only upon the evidence used to establish his *prima facie* case.⁷⁹ “This he may not do,” the court said.⁸⁰

72. *Id.* at 1707-08.

73. *Id.* at 1707.

74. *Id.*

75. 1 F.3d 658 (7th Cir. 1993).

76. *Id.* at 659.

77. *Id.* at 660.

78. *Id.*

79. *Id.* at 661.

80. *Id.*

C. *Post-retirement Income*

In *Moskowitz v. Trustees of Purdue University*,⁸¹ the Seventh Circuit held that post-retirement income is not compensable under the ADEA. The plaintiff in *Moskowitz*, a tenured biology professor, was forced to retire at age seventy. Although the ADEA permits universities to require professors to retire at seventy, the plaintiff argued that before his retirement he was denied research funds, facilities, and travel grants because of his age. The district court dismissed this portion of the plaintiff's claim on the ground that the ADEA limits damages to lost earning and benefits.⁸² The issue on appeal was whether post-retirement income is within the scope of remedies the ADEA authorizes.

Judge Posner, writing for a unanimous Seventh Circuit panel, acknowledged that the ADEA allows courts to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of the law."⁸³ However, Judge Posner noted that the ADEA incorporates the remedies of the Fair Labor Standards Act (FLSA)⁸⁴ and therefore "the natural way to take this language is as referring to amounts such as wages or benefits that the employer should have given the employee but did not because of the latter's age."⁸⁵ The court reasoned that this would exclude claims for post-retirement income which is in effect "consequential damages."⁸⁶ The *Moskowitz* decision thus makes it clear that the Seventh Circuit will strictly limit the types of legal relief that may be recovered under the ADEA.

D. *Size of Employer*

*Rogers v. Sugar Tree Products, Inc.*⁸⁷ provides useful guidance on two separate issues relevant to whether an employer has the required twenty employees to be covered by the ADEA. First, addressing whether individuals are employees or independent contractors, the Seventh Circuit held that although control is important in making this determination, the "nature of the relationship" between the individual and the company also must be examined.⁸⁸ Second, the *Rogers* court discussed the circumstances under which two companies will be considered to be a single employer. On this issue, the court held that two companies will not be considered a single employer for ADEA purposes simply

81. 5 F.3d 279 (7th Cir. 1993).

82. *Id.* at 281.

83. *Id.* at 283 (quoting 29 U.S.C. § 626(b) (1988)).

84. 29 U.S.C. § 201 *et seq.* (1988).

85. *Id.*

86. *Id.*

87. 7 F.3d 577 (7th Cir. 1993).

88. *Id.* at 581.

because they are owned by the same individual, who also serves as president of the two companies.⁸⁹ Thus, in *Rogers* the two companies were held to be distinct employers.

IV. ERISA⁹⁰

In a decision some attorneys likely will welcome, a 5-4 majority of the Supreme Court held in *Mertens v. Hewitt Associates*⁹¹ that pension plan recipients cannot recover money damages from outside advisors such as actuaries, accountants, or attorneys. The case stemmed from actuarial assumptions that were not changed after numerous employees of a steel company elected to take early retirement. The plaintiffs sought monetary damages against the retirement plan's actuary alleging that the failure to recalculate the assumptions caused the plan to be inadequately funded.⁹²

Justice Scalia, writing for the majority, stated that although Sections 409(a) and 502(a)(2) of ERISA provide for damages and other "appropriate relief," these provisions are limited by their terms to fiduciaries.⁹³ The plaintiffs in *Mertens* argued that damages were appropriate under Section 502(a)(3), which authorizes a plan beneficiary, participant, or fiduciary to bring a civil action "to obtain other appropriate equitable relief." Specifically, the plaintiffs contended that requiring the actuary to make the plan whole for losses resulting from the alleged participation in the breach of fiduciary duty would constitute other appropriate relief within the meaning of this provision.⁹⁴

Rejecting this argument, Justice Scalia first noted that "while ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty."⁹⁵ While acknowledging that it never had interpreted the precise phrase "other appropriate equitable relief" in ERISA, the Court noted similar language in other statutes had been understood "to preclude 'awards for compensatory and punitive damages.'"⁹⁶ The majority refused to give "a strained interpretation to § 502(a)(3)" to carry out ERISA's purpose of protecting plan participants and

89. *Id.* at 583.

90. Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* (1988).

91. 113 S. Ct. 2063 (1993).

92. *Id.* at 2065-66.

93. *Id.* at 2066-67.

94. *Id.* at 2067-68.

95. *Id.* at 2067 (footnote omitted).

96. *Id.* at 2068 (quoting *United States v. Burke*, 112 S. Ct. 1867 (1992)).

beneficiaries.⁹⁷ However, Justice White's dissent argued that a compensatory monetary award was appropriate because such relief was available in the equity courts under the common law of trusts, the principles of which are to be used to construe ERISA and the scope of the term "appropriate equitable relief."⁹⁸

The full Seventh Circuit Court of Appeals expressed a similar divergence of opinion in a recent case concerning retirement benefits. In *Bidlack v. Wheelabrator Corp.*,⁹⁹ the court held that if language in a collective bargaining agreement is vague or ambiguous on the existence of a promise of lifetime health benefits for retirees, a jury may examine extrinsic evidence to determine the parties' intent.¹⁰⁰

Bidlack involved a class action in which retired employees alleged that a collective bargaining agreement conferred upon them lifetime rights to certain health benefits. The district court dismissed the action on the basis that the collective bargaining agreement revealed no intention on the part of the employer to provide the lifetime benefits the plaintiffs sought. On appeal, the full court voted to hear the case pursuant to Circuit Rule 40(f) to reexamine the holding in *Senn v. United Dominion Industries, Inc.*¹⁰¹

The issue on appeal in *Bidlack* was whether extrinsic evidence can be used to show entitlement to lifetime health benefits despite the absence of any such contractual language explicitly providing for these benefits. The majority held that if collective bargaining agreements are "silent" on the duration of health benefits, extrinsic evidence could not be used to show a perpetual entitlement.¹⁰² The *Bidlack* court further stated, however, that "the agreements are not silent on the issue; they are merely vague."¹⁰³ Therefore, the court ruled, a jury should hear the extrinsic evidence and decide the issue. "The contract in this case is ambiguous and both sides are poised to present testimony and documents that they claim will disambiguate it. We think they should be allowed to do so."¹⁰⁴

Judge Easterbrook's dissent, in which three other judges joined, proclaimed, "Uncertainty now reigns."¹⁰⁵ The dissent warned that because collective bargaining arrangements may last for decades and govern the affairs of many,

97. *Id.* at 2071.

98. *Id.* at 2073-74.

99. 993 F.2d 603 (7th Cir. 1993) (en banc).

100. *Id.* at 609.

101. *Id.* at 604-05. *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir.), *reh'g denied*, 962 F.2d 655 (1992), *cert. denied*, 113 S. Ct. 2992 (1993).

102. *Bidlack*, 993 F.2d at 608.

103. *Id.*

104. *Id.* at 609.

105. *Id.* at 620.

“it will be possible to come up with evidence that someone thought that arrangements under the existing agreement would last forever.”¹⁰⁶

V. FAIR LABOR STANDARDS ACT¹⁰⁷

The Seventh Circuit upheld the Department of Labor's rules for calculating overtime for employees whose work hours fluctuate in *Condo v. Sysco Corp.*¹⁰⁸ The regulation at issue in *Condo* was 29 C.F.R. § 778.114 which provides that a salaried employee whose hours of work fluctuate from week to week may reach a mutual understanding with his employer that he will receive a fixed amount as straight-time pay for whatever hours he is called upon to work in a workweek, whether few or many, and that he will be compensated for his overtime work at a rate of 1/2 of his regular hourly pay. The regular hourly pay is calculated by dividing the employee's regular weekly pay by the total number of hours worked during the week.¹⁰⁹

The plaintiff in *Condo*, who worked as a chauffeur and in the company's mailroom, asserted that all hours worked in excess of forty hours per week should have been paid at a rate of one and one-half times his regular weekly rate as the FLSA¹¹⁰ generally requires. The company, however, asserted that its salary agreement complied with § 778.114 of the labor regulations.¹¹¹ The Seventh Circuit agreed and, more importantly, upheld the validity of the regulations.

The court observed that “[u]nder a system . . . set forth in § 778.114 an employee who receives a fixed weekly salary for ‘all hours worked’ receives the one and one-half times his regular rate for his overtime hours” as required by the FLSA.¹¹² It is true, the court noted, that as the number of hours an employee works increases, his regular rate of pay decreases and thus he will receive less overtime pay per hour. This, however, does not conflict with the FLSA so long as the regular rate within each workweek does not change and the rate of pay for each overtime hour is one and one-half times that regular rate.¹¹³

106. *Id.* at 618.

107. 29 U.S.C. § 201 *et seq.* (1988) [hereinafter FLSA].

108. 1 F.3d 599 (7th Cir. 1993).

109. *Id.* at 601-02.

110. 29 U.S.C. §§ 201-219 (1988).

111. *Condo*, 1 F.3d at 600-01.

112. *Id.* at 605.

113. *Id.*

VI. WARN ACT

Although there were few significant decisions affecting the Worker Adjustment and Retraining Notification Act (WARN Act)¹¹⁴ during the survey period, one case of first impression deserves mention. In *Jurcev v. Central Community Hospital*,¹¹⁵ the Seventh Circuit held that the WARN Act does not require an employer to show it had insufficient assets to remain open for the statutorily-required sixty-day period.¹¹⁶ In *Jurcev*, Central Community Hospital failed to give sixty days' notice of closure when it abruptly lost its primary source of funding, and a class of employees who lost their jobs brought suit alleging a WARN Act violation.¹¹⁷

The plaintiffs asserted that in order for the defendants to rely upon the "unforeseen business circumstances" exception to the WARN Act, the hospital had to show not only an unforeseeable circumstance, but also that closure could not be delayed for sixty days. The Seventh Circuit disagreed, stating, "Neither the WARN Act nor its accompanying regulations saddle an employer with the burden of making such a showing."¹¹⁸ In reaching this holding, the court found "no significance" to legislative history relied upon by the plaintiffs.¹¹⁹ Accordingly, *Jurcev* lessens the burden facing employers in attempting to utilize the WARN Act's unforeseen business circumstances exception.

VII. AFTER-ACQUIRED EVIDENCE

One of the most active areas in employment litigation recently has involved the use of after-acquired evidence to defeat employees' discrimination claims. The Seventh Circuit issued two decisions on this topic in 1992¹²⁰ and revisited this issue during the survey period in *Kristufek v. Hussmann Foodservice Co.*¹²¹

Plaintiff Kristufek claimed he was fired because of his age and also in retaliation for opposing the discharge of plaintiff McPherson, who also alleged she was terminated because of her age. Kristufek had two hurdles to overcome. First, he lied about his educational qualifications when he applied for the job, although this fact was not discovered until after his lawsuit was commenced. Second, the plaintiff never presented his retaliation claim to the EEOC. The

114. 29 U.S.C. §§ 2101-2109 (1988).

115. 7 F.3d 619 (7th Cir. 1993).

116. *Id.* at 625.

117. *Id.* at 620-21.

118. *Id.* at 625.

119. *Id.*

120. *See infra* notes 125-26.

121. 985 F.2d 364 (7th Cir. 1993).

district court declined to dismiss the retaliation claim for failure to exhaust administrative remedies and a jury returned a verdict in the plaintiffs' favor. However, the judge subsequently granted the defendant's JNOV motion on the basis that the fraudulent conduct barred Kristufek from any recovery.¹²²

The *Kristufek* court reversed the district court's grant of JNOV on the resume fraud issue. The appellate court held, "A discriminatory firing must be decided solely with respect to the known circumstances leading to the discharge. The deterring statutory penalty is for retaliatory firing, the character of which is not changed by some after discovered alternate reason for discharge which might otherwise have been used, but was not."¹²³ The court reached this decision despite the fact that the employment application form warned that misstatements or omissions of material facts may be cause for immediate dismissal. The court gave no significance to this language, stating "[m]ay be' is not 'will be,' and is not enough to avoid the proven charge of a retaliatory firing."¹²⁴ The Seventh Circuit's decision in *Kristufek* is somewhat contrary to its prior decisions in *Washington v. Lake County*¹²⁵ and *Reed v. Amax Coal Co.*,¹²⁶ in which it held generally that resume fraud may be a defense if the employer can show it would have fired the employee upon learning of the misstatements.¹²⁷

Although the Supreme Court was expected to address the proper role of after-acquired evidence during the survey period, that Court dismissed an appeal from the decision in *Milligan-Jensen v. Michigan Technological University* on August 10, 1993.¹²⁸ *Milligan-Jensen* held that evidence of employee misconduct acquired after the plaintiff's discharge can be a complete defense to discrimination claims.¹²⁹ The dismissal, which resulted when the parties settled the case,¹³⁰ leaves a split in the circuits as to the proper role of this "after-acquired evidence" in discrimination litigation. This is yet another issue of which practitioners must be aware and which undoubtedly will arise again.

On a related note, the Seventh Circuit decision in *Stromberger v. 3M Co.*¹³¹ makes it difficult for at-will employees to maintain fraud claims against

122. *Kristufek*, 985 F.2d at 365-67.

123. *Id.* at 369 (citations omitted).

124. *Id.*

125. 969 F.2d 250 (7th Cir. 1992).

126. 971 F.2d 1295 (7th Cir. 1992).

127. *Washington*, 969 F.2d at 256.

128. 975 F.2d 302 (6th Cir. 1992), *cert. granted*, 113 S. Ct. 2991, *cert. dismissed*, 114 S. Ct. 22 (1993).

129. *Id.* at 305.

130. See T. Baker, *Unsettled Issue*, 79 A.B.A. J. 39 (1993) (quoting defendant's counsel that case was "amicably resolved," but declining to give additional details of the settlement due to a confidentiality agreement).

131. 990 F.2d 974 (7th Cir. 1993).

their employers. In connection with his employer's downsizing in mid-1989, the plaintiff and other employees in *Stromberger* were offered a voluntary severance plan to encourage them to find employment elsewhere. Shortly before the deadline for accepting the severance package, plaintiff's supervisor indicated that the sales quota would be raised significantly and a failure to meet this quota would result in the salesmen being fired without benefits. Fearing he could not make this increased quota, the plaintiff resigned.¹³²

Later, however, the plaintiff discovered that not all salesmen in his group had been given the high quota and that even those salesmen who failed to make their lower quotas had not been fired. The plaintiff responded by suing the company for age discrimination and fraud, although the age claim was dismissed as untimely.¹³³ The plaintiff's fraud claim also failed on the ground that, as an at-will employee, if the employer wanted to get rid of him it could have fired him outright. The Court observed that the plaintiff could not be defrauded of "a job to which he had no right."¹³⁴ The court suggested, without deciding, that the case might have been different if the plaintiff could show that he would not have quit or been fired had the company not made the misrepresentations.¹³⁵

VIII. ARBITRATION AND MEDIATION

Arbitration-related decisions are occurring with increasing frequency. This survey period was no exception. Among the most significant cases in the arbitration arena was *Farrand v. Lutheran Brotherhood*¹³⁶ in which the Seventh Circuit declined to read *Gilmer v. Interstate/Johnson Lane Corp.*¹³⁷ broadly enough to require arbitration of an employment dispute involving a dealer registered with the National Association of Securities Dealers (NASD).

The plaintiff in *Lutheran Brotherhood* filed an age discrimination suit against his employer. However, the plaintiff previously had signed an agreement with his employer in which he agreed to arbitrate "any dispute, claim or controversy that may arise between me and my firm . . . that is required to be arbitrated under the rules . . . of the organizations with which I register."¹³⁸ The plaintiff was registered with the NASD. The foregoing language from the arbitration agreement was the same language at issue in *Gilmer*, although in that case the plaintiff was registered with the New York Stock Exchange (NYSE) rather than the NASD.

132. *Id.* at 975-76.

133. *Id.* at 976.

134. *Id.* at 977.

135. *Id.* at 978.

136. 993 F.2d 1253 (7th Cir. 1993), *reh'g denied*, at 1255 (*per curiam*).

137. 111 S. Ct. 1647 (1991).

138. *Lutheran Brotherhood*, 993 F.2d at 1254.

Based upon the arbitration agreement, Lutheran Brotherhood successfully argued before the district court that the employment dispute was subject to arbitration. The district court based its decision to compel arbitration upon *Gilmer*, which strongly endorsed the arbitration process.¹³⁹ The Seventh Circuit, however, interpreted *Gilmer* more narrowly, stating, "*Gilmer* did not establish a grand presumption in favor of arbitration; it interpreted and enforced the texts on which the parties had agreed."¹⁴⁰ The Seventh Circuit then observed that while the NYSE rules expressly referenced arbitration of employment disputes, the NASD rules lacked similar language.¹⁴¹

The *Lutheran Brotherhood* decision thus slows the trend toward arbitration of employment disputes, at least in the Seventh Circuit. The end result is that, at a minimum, arbitration agreements must expressly state the parties' intention to arbitrate employment disputes.¹⁴²

Another important survey period decision involving arbitration agreements is *International Union of United Automobile, Aerospace and Agriculture Implement Workers of America v. Randall Division of Textron, Inc.*,¹⁴³ which involved a dispute over whether an arbitration clause was of indefinite duration. In *Textron*, Randall took over operations of a manufacturing facility in Morristown, Indiana, and continued producing the same products as the facility's prior owner. Accordingly, the union that had represented the production, laboratory, and maintenance workers at the facility since 1978 asked Randall to recognize it as the employees' exclusive bargaining representative. Randall refused and unfair labor practice charges were filed.

When the smoke cleared, an agreement was reached that the charges would be withdrawn, that Randall would not be required to bargain with the union until eighteen months after Randall received clear title to the manufacturing facility, and that six months after receiving clear title Randall would be required to arbitrate discharge grievances. The agreement did not, however, state the duration of the obligation to arbitrate. Shortly after the eighteen-month period expired, Randall withdrew recognition of the union on the ground that it had a good faith doubt as to the union's majority status. Randall subsequently refused to arbitrate any of the grievances filed by the union.

139. *Id.*

140. *Id.* at 1255.

141. *Id.* at 1254.

142. It is important to keep in mind that *Lutheran Brotherhood* and *Gilmer* both involved arbitration of disputes in the securities industry. *Gilmer* did not resolve the question of whether arbitration of employment disputes outside the securities industry may be compelled in light of the Federal Arbitration Act's exclusionary clause, 9 U.S.C. § 1 (1988). See *Gilmer*, 111 S. Ct. at 1651 n.2.

143. 5 F.3d 224 (7th Cir. 1993).

The union responded by filing an action for breach of contract under § 301 of the Labor-Management Relations Act of 1947.¹⁴⁴ The district court concluded “that the arbitration clause was of indefinite duration and therefore terminable at will by either party.”¹⁴⁵ On appeal, the union argued in part that Randall’s obligation to arbitrate grievances was enforceable for a “reasonable amount of time,” which would be until bargaining commenced.¹⁴⁶ The Seventh Circuit agreed, concluding that the district court “should have determined the reasonable duration of Randall’s obligation to arbitrate discharge grievances.”¹⁴⁷ The appellate court then remanded the case for a determination of whether Randall’s arbitration obligation terminated when the eighteen-month bargaining moratorium expired or when the parties actually commenced bargaining.¹⁴⁸

It sometimes seems arbitration decisions are beyond reproach, but *Carpenter Local 1027 v. Lee Lumber and Building Material Corp.*¹⁴⁹ provides a useful example of an arbitrator exceeding his authority. In *Lee Lumber*, the union filed a grievance challenging the termination of an employee. The company agreed to reinstate the employee provided the employee return to work within seven days. The company and the union agreed that the union would notify the employee of his reinstatement and make sure that he returned to work on time. The employee, however, was out of town and the union either was unable or unwilling to locate him. The employee returned to work after nine days, the company refused to reinstate him, and the union filed a grievance on the matter. The issue before the arbitrator was whether the company had just cause to discharge the employee, and if not, what the remedy should be.

The arbitrator held that the employee was discharged without just cause because he could not be held responsible for knowing that he had to return to work within seven days. In addition, although the union had agreed to tell the employee of his reinstatement, the arbitrator stated that it is the company that reinstates not the union. Therefore, the arbitrator ordered the employee reinstated with back pay. However, the arbitrator ordered the union to reimburse the company the back pay to which the employee was entitled. The union responded by challenging this decision in federal court.

The *Lee Lumber* court first correctly observed that “[j]udicial review of arbitration awards is limited.”¹⁵⁰ The Seventh Circuit also observed that the

144. 29 U.S.C. § 185 (1988).

145. *Textron*, 5 F.3d at 226.

146. *Id.* at 229.

147. *Id.* at 230.

148. *Id.*

149. 2 F.3d 796 (7th Cir. 1993).

150. *Id.* at 797 (citing *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S.

collective bargaining agreement at issue did not explicitly set forth the remedies that the arbitrator could impose. The court noted, however, that the collective bargaining agreement did limit the arbitrator to deciding only the grievance submitted.¹⁵¹ Based upon this limitation, Judge Manion held, "Not only does the collective bargaining agreement strongly imply that the arbitrator could not impose the reimbursement remedy he imposed in this case, we think it is clearly implausible to suppose the parties ever contemplated that remedy."¹⁵² In reaching this decision, the court also referenced potential conflicts that such a remedy could pose between a union's "own interests and its duty to fairly represent its employees."¹⁵³

The *Lee Lumber* decision shows that while judicial review of arbitration is strictly limited, the Seventh Circuit will intervene when an arbitrator's decision is clearly beyond the authority granted by the collective bargaining agreement.

One final arbitration-related decision—*Chrysler Motors Corp. v. International Union*¹⁵⁴—is significant because of the aggressive and successful strategy pursued by the company in that case. In *Chrysler Motors*, an employee was discharged after sexually assaulting a female co-worker. A grievance was filed protesting the discharge and during the arbitration of this grievance Chrysler presented evidence that on four other occasions the employee intentionally grabbed and/or pinched female co-workers. At the time of the employee's discharge, Chrysler was unaware of these additional incidents. Focusing only on the incident known at the time of the discharge, the arbitrator found the discharge to be too severe and ordered the employee reinstated with a 30-day suspension.¹⁵⁵ Unlike the union in *Lee Lumber*, Chrysler was unsuccessful in its attempt to challenge this decision in subsequent proceedings in federal court.

Undeterred, however, Chrysler responded by sending the employee a check for one day's pay, along with a letter explaining that he was being reinstated for one day and simultaneously dismissed based upon the four additional incidents of misconduct that were discovered after the employee's initial discharge. The union responded by asking that the district court hold Chrysler in contempt for attempting to evade the court's order. The district court declined to do so and the Seventh Circuit affirmed.

593, 597 (1960)).

151. *Id.* at 798.

152. *Id.* at 799.

153. *Id.* As the court pointed out, had the union known it could have been liable for back pay, the temptation could have existed to give "short shrift" to the employee's grievance or to defend itself at the employee's expense since the union could not be liable if the employee was not entitled to backpay. *Id.*

154. 2 F.3d 760 (7th Cir. 1993).

155. *Id.* at 762.

In so doing, the Seventh Circuit first reviewed the arbitrator's decision to verify that he had not considered the additional incidents of misconduct.¹⁵⁶ Once this hurdle was cleared, the court held it was "entirely appropriate" for Chrysler to reinstate the employee and then, based upon evidence obtained during its post-discharge investigation, again discharge him.¹⁵⁷ As the court observed, simply because an arbitration award required reinstatement of a discharged employee does not mean that the employee "has been granted perpetual job security."¹⁵⁸ The *Chrysler Motors* decision thus represents a bold litigation strategy which, when successfully implemented, may bar meaningful reinstatement of employees who otherwise successfully challenge their discharge. The success of this strategy is dependent upon employee misconduct which: (1) the company was unaware of at the time of the discharge; (2) the arbitrator did not consider in reaching a decision; and (3) independently supports the discharge.¹⁵⁹ Another factor that undoubtedly played a role in the court's decision was the employee's egregious misconduct, which included grabbing a female co-worker's breasts and proclaiming, "Yup, they're real."¹⁶⁰ Because of the possible liability for back pay and the potential for being held in contempt of court, use of this strategy should be carefully considered.

IX. NATIONAL LABOR RELATIONS BOARD

A. *Electromation*

The hottest topic concerning the National Labor Relations Act (the "Act")¹⁶¹ during the survey period was "Electromation," referring to the National Labor Relations Board's ("NLRB" or "Board") decision in *Electromation, Inc.*¹⁶² The Board in *Electromation* held that joint labor-management committees were "labor organizations" under Section 2(5) of the National Labor

156. *Id.* at 763.

157. *Id.* at 764.

158. *Id.* at 763 (quoting *Chicago Newspaper Guild v. Field Enter., Inc.*, 747 F.2d 1153, 1156 (7th Cir. 1984)).

159. This strategy is not limited to discharge cases. If the necessary elements are present, suspensions and other forms of discipline also could be supported.

160. *Id.* at 761.

161. 29 U.S.C. § 141 *et seq.* (1988).

162. 309 NLRB 990 (1992). Although this case was decided in 1992, it was issued late in the survey period (Dec. 16, 1992), and therefore was not addressed in last year's Survey Issue. Moreover, the decision has had a major effect during the survey period, as employers, unions, and the courts have attempted to determine what conduct is permissible in light of *Electromation*. At the time of publication, *Electromation* had been appealed to and orally argued before the Seventh Circuit, but a decision had not yet been handed down.

Relations Act and that management illegally dominated and interfered with these committees in violation of Section 8(a)(2) and (1) of the Act.¹⁶³ Although *Electromation* arguably deals a blow to management's efforts to form joint labor-management committees, the decision contains fact-specific language limiting the breadth of its holding, and Board Member Oviatt's separate concurrence stressed the "wide range of lawful activities" he viewed as being "untouched" by the decision.¹⁶⁴ As pointed out, the joint labor-management committees at issue in *Electromation* involve "innovative employee involvement programs directed to improving efficiency and productivity."¹⁶⁵ The programs, however, have come under attack from organized labor, who view them as an attempt to thwart union organization efforts.¹⁶⁶

In *Electromation*, a non-union manufacturer of electrical components and parts with a work force of approximately 200 people set up five "action committees" to discuss issues involving wages, bonuses, incentive pay, attendance programs, and leave policy. Employees signed up to participate on these committees, which also included management representatives. Shortly after these committees began meeting, a union made a recognition demand. Management responded by withdrawing its participation on the committees, but the company told the employees they could continue to meet if they so desired.¹⁶⁷ Two of the committees continued meeting on company premises; a third committee, formed to address attendance and bonus issues, wrote a proposal which, after revision, was deemed fiscally sound by the company's controller. The proposal was not presented to the company's president, however, because of the intervening union campaign.¹⁶⁸

The four Board members who decided *Electromation* unanimously agreed that the action committees were labor organizations under Section 2(5) of the Act and that the company illegally dominated and interfered with these committees in violation of Section 8(a)(2) and (1) of the Act. Each Board member wrote separately, however, to express his particular view of what conduct is actionable. Pursuant to *Electromation*, a committee is "a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment."¹⁶⁹ The decision also suggests, although it expressly

163. *Id.*

164. *Id.* at 1004-05.

165. *Id.* at 1004.

166. 245 *Daily Labor Rep.* AA-2 (Dec. 18, 1992) (quoting Teamsters President Ron Carey).

167. *Electromation*, 309 NLRB at 991.

168. *Id.*

169. *Id.* at 994.

does not decide, that the committee must have the purpose of representing the employees.¹⁷⁰

Provided that the labor committees at issue are found to be a labor organization, the next issue is whether management illegally dominates or interferes with these committees in violation of Section 8(a)(2) and (1) of the Act. Illegal domination was found in *Electromation* because management: (1) created the committees; (2) “drafted the written purposes and goals of the Action Committees, which defined and limited the subject matter to be covered by each Committee;” (3) “determined how many members would compose a committee . . . , and appointed management representatives to the committees to facilitate discussions;” and (4) “permitted employees to carry out the committee activities on paid time.”¹⁷¹ Under these circumstances, Chairman Stephens observed that “employees essentially were presented with the Hobson’s choice of accepting the status quo, which they disliked,” or participating in the committees.¹⁷²

The legality of joint labor-management committees remains uncertain in the wake of *Electromation*, partly because the decision is largely limited to its facts.¹⁷³ Adding to the confusion are the decision’s three separate concurrences. Although legal scholars have expressed different views on the decision’s significance,¹⁷⁴ at a minimum *Electromation* portends that management-sponsored programs in both the union and non-union setting will come under increased scrutiny. One example of this is *DuPont Co.*,¹⁷⁵ a post-*Electromation* decision in which the Board ordered DuPont—which has an organized labor force—to disband several joint labor-management committees.

As in *Electromation*, the Board in *DuPont* found that the committees at issue fell within Section 2(5)’s definition of labor organization. In reaching this conclusion, the Board found that the employee-members of the committee acted in a representational capacity, but again declined to decide whether the committee must have the purpose of representing the employees.¹⁷⁶ The Board also found that the company dominated the committees largely because: (1) the company retained veto power over any action the committee wished to take; (2) a management member played a key role in establishing the agenda for and

170. *Id.* at 994 n.20 (stating it is “unnecessary to the disposition of this case” to reach this issue, but observing that Member Devaney believes such a finding is essential).

171. *Id.* at 997-98.

172. *Id.* at 998.

173. For example, Member Devaney wrote, “I do not pass on the status of any other arrangement.” *Id.* at 999.

174. 245 *Daily Labor Rep.* A-14-17 (Dec. 21, 1992) (quoting various individuals, including Professor Charles Morris, who says the decision is not a setback for labor-management teamwork efforts).

175. 311 NLRB No. 88 (1993).

176. *Id.* at 2 n.7.

conducting each meeting; and (3) the company determined how many employees would serve on each committee.

At the same time, however, the Board found that quarterly safety conferences involving "brainstorming sessions" did not constitute direct dealing with employees in violation of Section 8(a)(5). This finding was supported by the fact that the company: (1) mentioned the union at each conference and told employees that the conference was not a union matter; and (2) told employees it recognized the union's role and that bargainable issues should be handled only by the union.¹⁷⁷ Thus, although *DuPont* is an example of the Board's increased scrutiny of joint labor-management programs, the decision provides some helpful guidance in lawfully establishing and maintaining such committees.¹⁷⁸

B. Union Security Clauses

The Board's decision in *Paramax Systems Corp.*¹⁷⁹ represents a change in the law with respect to union security clauses.¹⁸⁰ *Paramax* involved a challenge to a union security clause that required employees "to continue and remain members of the Union in good standing as a term and condition of employment."¹⁸¹ The NLRB general counsel maintained that the clause violated Sections 8(b)(1)(A) and 8(b)(2) of the Act because it failed to state that the only condition of continued employment is the payment of initiation fees and dues.¹⁸²

Although the Board did not find the clause facially invalid, as the general counsel had argued, the Board concluded that the phrase "members of the Union in good standing" was ambiguous, and therefore examined whether the union was required to inform members of their actual obligations.¹⁸³ Focusing on the

177. *Id.* at 4.

178. NLRB general counsel Jerry Hunter also provided some helpful guidance for analyzing *Electromation*-type issues in an advice memorandum issued on April 15, 1993, to all Board Regional Offices.

179. 311 NLRB No. 105 (1993).

180. A union security clause is the term used to describe a standard provision in collective bargaining agreements requiring employees to obtain and maintain membership in a union as a condition of employment. *See generally* PATRICK HARDIN, *THE DEVELOPING LABOR LAW* 1489-1566 (3d ed. 1992).

181. *Paramax*, 311 NLRB No. 105 at 1.

182. *Id.* at 2. This is the law based upon the Supreme Court's decision in *Communication Workers of Am. v. Beck*, 487 U.S. 735 (1988), which held that dissenting agency fee payers cannot be forced to contribute to union expenditures not related to collective bargaining, contract administration, or the adjustment of grievances. On a related note, on February 1, 1993, President Clinton issued Executive Order 12836, rescinding the requirement of Executive Order 12800 that employers notify their workers of their *Beck* rights. Exec. Order No. 12,836, 29 C.F.R. 470 (1993).

183. *Id.* at 7.

union's duty of fair representation, the Board found that the union "failed to take any steps" that would disabuse the employees of the belief that full union membership is required.¹⁸⁴ The Board wrote, "Specifically, we find that Respondents breached their fiduciary duty to Paramax employees by failing to inform them that their sole obligation under the union-security provision was to pay dues and fees."¹⁸⁵ As a result, the Board expressly rejected the long-standing model union security clause it announced in *Keystone Coat, Apron, & Towel Supply Co.*¹⁸⁶

Finally, the Board also stated that the new rule announced in *Paramax* will be applied "to this case and to all pending cases at whatever stage."¹⁸⁷ Based upon this retroactive application of *Paramax*, union security clauses in existing contracts should be examined to determine whether they adequately apprise employees of their Section 7 rights. If not, the union should take affirmative steps to tell its members that their sole obligation under the union-security provision is to pay dues and fees. In drafting new collective bargaining agreements, *Keystone's* model clause should be avoided and replaced with language that will remove any ambiguity about members' obligations.

X. FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993 (FMLA)¹⁸⁸ became effective for most covered employers on August 5, 1993.¹⁸⁹ The FMLA applies to all private employers with fifty or more employees for each working day during each of twenty or more calendar workweeks in the current or preceding calendar year,¹⁹⁰ and "public agencies" covered by the FLSA.¹⁹¹ For many larger employers this may be the most important legislation to take effect during the survey period.

184. *Id.* at 10.

185. *Id.*

186. 121 NLRB 880 (1958). The *Keystone* clause provided in relevant part: "It shall be a condition of employment that all employees of employer covered by this agreement who are members of the Union in good standing on the effective date of this agreement shall remain members in good standing. . . ." *Id.* at 885.

187. *Id.* at 12.

188. 29 U.S.C.A. §§ 2601 *et seq.* (West 1993 Supp). See also 29 C.F.R. Part 825 (1993) (setting forth interim final regulations from the U.S. Department of Labor. These regulations are subject to change, and, in fact, practitioners should expect that changes will occur).

189. 29 C.F.R. § 825.102. For employers with a collective bargaining agreement in effect on August 5, 1993, the FMLA became effective on the date the collective bargaining agreement terminated or on February 5, 1994, whichever was earlier.

190. 29 C.F.R. § 825.104.

191. 29 U.S.C. § 2611(4)(A).

A. Overview

Employees are not eligible to take leave unless: (1) they have worked for the employer for at least twelve months; (2) they have worked at least 1,250 hours during the preceding year; and (3) they are "employed at a worksite" where the employer employs at least fifty employees within a seventy-five-mile radius.¹⁹² The FMLA applies the requirements of the FLSA in determining hours of service, so that all hours that an employer suffers or permits an employee to work are counted toward hours of service.¹⁹³ This may include on-call time.¹⁹⁴ Employees exempt from FLSA requirements for whom no hours-worked records are kept are presumed to have met the 1,250-hour requirement unless the employer can clearly demonstrate this is not the case.¹⁹⁵

In determining whether a person is "employed" for FMLA purposes, the regulations adopt the "maintained on the payroll test."¹⁹⁶ Part-time employees and employees on leaves of absence thus would be counted as employed for each working day so long as they are on the employer's payroll for each day of the workweek. In contrast, an employee added to the employer's payroll after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on each working day in that workweek.¹⁹⁷

Leave taken prior to August 5, 1993, does not affect the leave to which an employee is entitled under the FMLA. The regulations make it clear that "only leave starting on and after" the effective date is considered leave that can be counted against an employee's twelve-week entitlement.¹⁹⁸

B. Serious Health Condition

The FMLA provides that an eligible employee may take leave to care for a spouse, son, daughter, or parent with a serious health condition, or because of the employee's own serious health condition.¹⁹⁹ Much of the debate surrounding the FMLA involved the uncertainty as to what constitutes a "serious health condition," which is defined to include a condition requiring in-patient care or "continuing treatment by a health care provider."²⁰⁰ The regulations provide

192. 29 U.S.C. § 2611(2). The 75-mile radius is measured based on surface miles on public roads, not "as the crow flies." 28 C.F.R. § 825.111(b).

193. 29 C.F.R. § 825.110.

194. *Id.*

195. *Id.*

196. 29 C.F.R. § 825.105.

197. *Id.*

198. 29 C.F.R. § 825.103.

199. 29 U.S.C. § 2612(a)(1).

200. 29 U.S.C. § 2611(11).

significant guidance in this area, although uncertainties remain and the regulations addressing this issue reportedly are being considered for amendment.

Where in-patient care is not involved, a serious health condition must involve absence from work (or, in the case of a family member, absence from school or incapacity in performing other daily activities) for a period of more than three days and require the continuing treatment of a health care provider.²⁰¹ The FMLA also provides for intermittent leave; therefore a serious health condition also includes treatment for a serious, chronic health condition which, if left untreated, likely would result in an absence from work of more than three days.²⁰² Prenatal care also is considered a serious health condition.²⁰³

“Continuing treatment” by a health care provider includes: (1) two or more visits to a health care provider; (2) two or more treatments by a health care practitioner on a referral from, or under the direction of, a health care provider; or (3) a single visit to a health care provider that results in a regimen of continuing treatment under the supervision of the health care provider (such as a course of medication or therapy).²⁰⁴ According to the regulations, this definition includes serious conditions that require supervision by a health care provider but do not involve continuing, active care, such as Alzheimer’s or late-stage cancer.²⁰⁵

Treatment for substance abuse also may come within the scope of the FMLA, provided a stay in an in-patient treatment facility is required. Absence because of the employee’s use of the substance, without treatment, does not qualify for leave. The FMLA regulations specifically explain that inclusion of substance abuse as a serious health condition does not prevent the employer from taking employment action against an employee who is unable to perform the essential functions of the job, provided the employer complies with the Americans With Disabilities Act and does not take action against the employee for exercising the right to take leave.²⁰⁶

C. Duration Of Leave

An eligible employee is entitled to take up to twelve weeks of leave in “any twelve-month period.”²⁰⁷ The FMLA regulations explain that employers will be allowed to choose a uniform method to compute the twelve-month period

201. 29 C.F.R. § 825.114(a)(2).

202. 29 C.F.R. § 825.114(a)(3).

203. *Id.*

204. 29 C.F.R. § 825.114(b).

205. 29 C.F.R. § 825.114(b)(3).

206. 29 C.F.R. § 825.114(c).

207. 29 U.S.C. § 2612(a)(1).

from various alternatives, including the calendar year, a fixed twelve-month period for all employees, twelve months measured forward from the first date that leave is used, and a rolling twelve-month period measured backward from the date leave is used.²⁰⁸

The FMLA provides for intermittent leave to care for a seriously ill family member or because of the employee's own serious health condition whenever "medically necessary."²⁰⁹ Addressing the topic of intermittent leave, the regulations state that there is no minimum leave duration other than the shortest period of time that the employer's payroll system uses to account for absences or use of leave.²¹⁰ Thus, presumably employees could take a series of one-hour leaves if medically necessary. The only limitation would be the FMLA's requirement that, if foreseeable, employees try to schedule the leave so as not to unduly disrupt the employer's operations. Covered employers are permitted to "dock" the pay of salaried and exempt employees for leave-related absences of less than a full day without affecting their exempt status under the FLSA.²¹¹

The FMLA entitles an employee to take a maximum of twelve weeks of leave for the birth of a child, even if the employer provides its own disability leave period. Thus, the regulations state that any period before and after birth during which a mother is not able to work for medical reasons may be considered leave for a serious health condition, despite the fact that the period after birth is also leave to care for the newborn child. In addition, the employer may require an employee to substitute accrued, paid leave for unpaid leave.²¹²

D. Benefits

The FMLA requires an employer to maintain coverage under any group health plan for the duration of leave and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave.²¹³ The regulations explain, however, that an employer is not required to provide health benefits during leave unless the employer already does so.²¹⁴

More complicated issues arise in connection with the FMLA's interplay with the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA).²¹⁵

208. 29 C.F.R. § 825.200(b).

209. 29 U.S.C. § 2612(b)(1).

210. 29 C.F.R. § 825.203(d).

211. 29 C.F.R. § 825.206.

212. 29 C.F.R. § 825.207.

213. 29 U.S.C. § 2614(c).

214. 29 C.F.R. § 825.209.

215. Pub. L. No. 99-272, 100 Stat. 82 (1986). The interplay with other employment laws, such as the Americans With Disabilities Act, 42 U.S.C. § 12101-12213 (1988), raises a variety of

COBRA requires employers to allow employees to continue their health coverage for specific periods following a "qualifying event," such as termination from employment,²¹⁶ and also requires employers to give employees notice of their right to continue their coverage. Leave under the FMLA will not normally constitute a qualifying event because the employer expects the employee to return to work following the leave period. However, citing legislative history, the regulations explain that a qualifying event may occur when the employer knows that the employee is not returning to work after the leave.²¹⁷

One problem this presents for employers is that they may not know of the employee's plan not to return to work until the leave is concluded. Under this scenario, the employee would receive twelve weeks of employer-paid coverage in addition to eighteen months of COBRA coverage. Although the FMLA permits an employer to recover premiums it paid for maintaining health coverage during any period of unpaid leave under the Act, this is allowed only if the inability to return is not caused by the employee's serious health condition or "other circumstances beyond the employee's control."²¹⁸

E. Notice Requirements

Every employer subject to the FMLA is required to post in conspicuous places a notice explaining the FMLA's provisions and providing information concerning the procedures for filing complaints of alleged violations. Employers may duplicate the notice provided with the regulations,²¹⁹ or may obtain copies from local offices of the Wage and Hour Division. If an employer has an employee handbook discussing employee benefits or leave rights, the regulations require the handbook to incorporate information on rights and responsibilities provided under the Act.²²⁰

F. Enforcement

An employer that violates the FMLA leave provisions may be liable for damages equal to the amount of: (1) wages, salary, employment benefits, or other compensation denied to or lost by the employee by reason of the violation; or (2) where such wages, benefits, or compensation were not lost (as where the

complex issues which demand careful attention from labor and employment law practitioners.

216. For example, COBRA provides generally that an employee may elect to continue coverage for 18 months following the termination of the employee's employment. 29 U.S.C. § 1162(2)(A) (1988).

217. 29 C.F.R. § 825.209(f).

218. 29 U.S.C. § 2614(c)(2); 29 C.F.R. § 825.213.

219. 29 CFR § 825.

220. 29 C.F.R. § 825.301.

employee is wrongly denied leave and stays on the job), any actual monetary losses sustained by the employee as a direct result of the violation, up to a maximum amount of twelve weeks of the employee's wages or salary.²²¹ In addition, the FMLA also provides for an additional award of liquidated damages in an amount equal to the wages and benefits awarded (plus interest), although the court has the discretion not to award liquidated damages if the employer proves the violation was made in good faith.²²² The statute also provides for an award of attorney's fees and costs to the prevailing plaintiff.²²³

As the foregoing reveals, the FMLA dramatically changes the rules—and liabilities—governing leaves of absence in many workplaces. Many of these rules are complex and, at times, inconsistent with other federal labor laws. At a minimum, covered employers must revise their leave policies and incorporate FMLA information in their handbooks, or risk litigation.

XI. STATE LEGISLATIVE DEVELOPMENTS

Employment-related legislative activity at the state level was relatively minor during the survey period, yet a few changes are noteworthy. Perhaps most important, Indiana Code section 22-9-1-14 was added to provide that the Indiana Civil Rights Commission may award attorney's fees and costs to the prevailing party.²²⁴ This change will add an incentive for attorneys to represent plaintiffs in cases before the Commission and also raises the potential exposure of defendants in these cases. The impact of this change may be felt more by smaller employers (six²²⁵ or more employees but less than fifteen), who would not be covered by Title VII, which already provides for attorney fee awards. On a related note, Indiana Code section 22-9-1-6 was amended to extend the time for filing a complaint with the Commission from 90 to 180 days, and all references to "hearing officer" in the statute are changed to administrative law judge.

221. 29 U.S.C. § 2617(a). Interest will be added to any award under this provision. § 2617(a)(1)(A)(ii).

222. 29 U.S.C. § 2617(a)(1)(A)(iii). Note that the burden of proof on this issue is upon the employer.

223. 29 U.S.C. § 2617(a)(3).

224. This provision will automatically expire on December 31, 1994. In a related judicial development, a divided Indiana Court of Appeals held in *Indiana Civil Rights Comm'n v. Washburn Realtors, Inc.*, 610 N.E.2d 293, 297 (Ind. App. 1993) that the Commission exceeded its statutory authority by awarding emotional and punitive damages in a housing discrimination case.

225. IND. CODE § 22-9-1-3(h) (1993) defines "employer" to include most entities employing six or more persons.

XII. WORKER'S COMPENSATION

A number of decisions during the survey period affected practice and procedure in worker's compensation cases. Most significantly, a string of decisions demonstrated growing judicial application of the exclusivity doctrine. For example, in *St. Mary Medical Center v. Baker*²²⁶ an employee was injured in the course of her employment and received treatment for her injuries at the Medical Center. Traveler's Insurance, a worker's compensation carrier, paid a portion of the charges billed but disputed the validity of other charges. The Medical Center subsequently filed a state court action seeking to collect the balance directly from the employee.

The trial court dismissed the action, finding that the case should have been filed with the Worker's Compensation Board and that the court therefore lacked subject matter jurisdiction. This holding was based upon Indiana Code section 22-3-2-6 which generally excludes all rights and remedies of an employee against an employer other than those provided under the worker's compensation statute.²²⁷ However, *St. Mary's Medical Center* involved a claim by a health care provider against an employee, rather than an employee-employer dispute.

A divided court of appeals affirmed the dismissal of the complaint. Judge Staton, writing for the majority, concluded with little discussion that the dispute was among the class of issues to which the legislature had given an administrative agency exclusive and primary jurisdiction.²²⁸ Judge Baker's dissent observed that the class of issues left to the worker's compensation board "has traditionally been limited to questions of compensation arising between employees or their dependents and employers or employers' insurance companies," rather than disputes between an employee and a health care provider.²²⁹ Judge Baker's dissent notwithstanding, the holding in *St. Mary's Medical Center* broadens the worker's compensation exclusivity doctrine.

Another recent case, *Wolf Corp. v. Thompson*,²³⁰ also relied upon the exclusivity doctrine in affirming the dismissal of a complaint. In *Thompson*, the estate of a deceased employee brought a complaint that included a wrongful death action against the decedent's former employer claiming that the employer's handling of the employee's worker's compensation claim "caused the deceased severe emotional distress which caused his ulcer to burst which caused a heart attack which caused his death."²³¹

226. 611 N.E.2d 135 (Ind. Ct. App. 1993).

227. IND. CODE § 22-3-2-6 (1993)

228. *St. Mary's Medical Center*, 611 N.E.2d at 137.

229. *Id.* at 138.

230. 609 N.E.2d 1170 (Ind. Ct. App. 1993).

231. *Id.* at 1173.

The trial court granted the employer's motion to dismiss this portion of the complaint on the ground that it was barred by Indiana Code section 22-3-2-6. A unanimous court of appeals affirmed. The employee's estate argued that the case fell within the intentional tort exception to the exclusivity doctrine. The court rejected this assertion, stating "a naked allegation of an intentional tort is not enough to avoid the exclusive remedy provision of the Worker's Compensation Act."²³²

The exclusivity issue was presented in a somewhat different context in *Wolf v. Kajima International, Inc.*²³³ The central issue in *Kajima* was whether an injured employee of a subcontractor is barred from pursuing a tort action against the general contractor and owner of the plant where he was injured. The owner, Subaru-Isuzu Automotive, Inc., purchased a "wrap-around" worker's compensation policy for the general contractor, Kajima International, Inc., and the various subcontractors, including C.J. Rogers, Inc., for which Wolf worked.

After suffering an on-the-job injury, Wolf received \$148,646 in worker's compensation benefits under the wrap-around policy. Wolf then filed a negligence action against Kajima and Subaru. The trial court granted summary judgment in favor of these defendants on the ground that Subaru and Kajima should be treated as "statutory employers" because they provided worker's compensation benefits to Wolf.²³⁴ The court of appeals reversed, holding that an owner or general contractor cannot avoid potential tort liability to employees of contractors or subcontractors by purchasing worker's compensation insurance on behalf of subcontractors. "To hold otherwise would allow an owner or general contractor to voluntarily take out insurance that the law does not require and thereby secure for itself freedom from liability from negligence," the court wrote, adding that the legislature could not have intended such a result.²³⁵

The exclusivity doctrine also was applied in *The Associates Corporation of North America v. Smithley*.²³⁶ In *Smithley*, the plaintiff was discharged for dishonesty and responded by filing a lawsuit for assault and battery and defamation.²³⁷ The plaintiff's assault and battery claim alleged inappropriate sexual touchings by a co-worker, and the company responded by asserting that the cause of action was barred by the exclusivity provision of the worker's compensation statute.²³⁸ The plaintiff argued that the exclusivity provision was

232. *Id.* Ironically, Judges Staton and Baker were the concurring judges in *Thompson*.

233. 621 N.E.2d 1128 (Ind. Ct. App. 1993). This decision was adopted and incorporated by reference by the Indiana Supreme Court. *Wolf v. Kajima Int'l, Inc.*, 1994 WL 66090 (Ind. Mar. 8, 1994).

234. *Id.* at 1129.

235. *Id.* at 1132.

236. 621 N.E.2d 1116 (Ind. Ct. App. 1993).

237. *Id.* at 1118.

238. *Id.* at 1119-20.

inapplicable because the harm could not have occurred "by accident," as required by the statute, because of the repeated nature of her co-worker's conduct.²³⁹ The plaintiff also contended that the exclusivity provision would not bar a claim for negligent retention of the co-worker.²⁴⁰

The court of appeals rejected the plaintiff's arguments. Relying upon *Fields v. Cummins Employees Federal Credit Union*,²⁴¹ the court held that both the assault and battery claim and the negligent retention claim against the company were barred by the exclusivity provision of the worker's compensation statute.²⁴²

Finally, in *Weldy v. Kline*,²⁴³ the court held that an employee's death at an employer-sponsored party arose out of the course of his employment and therefore the exclusive remedy of the decedent's estate would be through worker's compensation subject to a determination on remand as to whether the employee actively participated in horseplay or was an innocent victim.²⁴⁴ Taken together, this series of cases demonstrates that Indiana courts increasingly are willing to dismiss actions based upon the worker's compensation exclusivity doctrine. Busy court dockets no doubt have contributed to this trend. Regardless of the cause, however, practitioners should be aware of this inclination and be prepared to litigate the issue more frequently in the future.

XIII. EMPLOYMENT CONTRACTS

The Indiana Court of Appeals decided several significant cases during the survey period addressing a variety of issues concerning employment contracts. Perhaps the most significant of these decisions is *Jarboe v. Landmark Community Newspapers of Indiana, Inc.*,²⁴⁵ which held that oral employment-related promises may bind employers despite Indiana's employment at will doctrine.²⁴⁶

The plaintiff in *Jarboe* alleged that he was told by his general manager that he had a one-year employment contract, that he could only be discharged for cause, and that if his performance was satisfactory he would be employed for the next year, and so on.²⁴⁷ He also allegedly was told that if his performance was unsatisfactory he would be placed on probation for thirty to sixty days and his

239. *Id.* at 1121.

240. This cause of action apparently was not clearly pleaded. *Id.*

241. 540 N.E.2d 631 (Ind. Ct. App. 1989).

242. *Smithley*, 621 N.E.2d at 1121.

243. 616 N.E.2d 398 (Ind. Ct. App. 1993).

244. *Id.* at 404-06.

245. 625 N.E.2d 1291 (Ind. Ct. App. 1993).

246. *Id.* at 1295.

247. *Id.* at 1293.

contract would be re-evaluated.²⁴⁸ The terms of the agreement never were reduced to writing.

Each year the plaintiff received favorable reviews. Upon learning that he needed surgery to replace a deteriorating knee, the plaintiff claimed that he was assured by his general manager that his job would remain open, and was told to take as long as necessary to recover.²⁴⁹ When the plaintiff was unable to return to work three months after his operation, however, his general manager allegedly told him that he was being replaced.

The plaintiff then filed suit for unjust dismissal and breach of his oral contract, and the court had to decide whether the plaintiff had an enforceable oral contract. As the court observed, the statute of frauds requires contracts that cannot be performed within one year to be reduced to writing. Accordingly, the *Jarboe* court held that the oral contract was not enforceable because the plaintiff's employment would be extended by at least a thirty-day probationary period after each year even if unsatisfactory.²⁵⁰

Undaunted, the plaintiff argued that despite the unenforceable oral contract his employer was promissory estopped from discharging him before his medical leave expired. The court agreed, citing *Eby v. York Division, Borg Warner*²⁵¹ for the proposition that application of the doctrine of estoppel is appropriate in actions where a party takes certain action to his detriment in order to avail himself of promised employment.²⁵² In *Eby*, however, the plaintiff and his wife put their Indianapolis home up for sale and moved to Florida based upon a promise that the plaintiff had a job there waiting for him. In contrast, the *Jarboe* plaintiff merely took a medical leave to have knee surgery, although this leave allegedly cost the plaintiff his job.

The facts in *Eby* are arguably more compelling for the application of the promissory estoppel doctrine. Thus, *Jarboe* suggests Indiana courts may begin applying promissory estoppel more liberally in the employment setting. The *Jarboe* decision also leaves unresolved what damages, if any, the plaintiff might be entitled to recover. In *Eby*, the plaintiff sought his moving expenses, lost wages while preparing to move (but not lost wages for lack of the job itself), and related expenses. In *Jarboe*, no similar expenses were at issue. Thus, the plaintiff presumably would be seeking lost wages up to the time that his medical leave would have expired. Recovery of these wages, however, seems somewhat inconsistent with the plaintiff's at-will employment status. Although the damages

248. *Id.*

249. *Id.*

250. *Id.* at 1294.

251. 445 N.E.2d 623, 627 (Ind. Ct. App. 1983).

252. *Jarboe*, 625 N.E.2d at 1295.

may be debatable, the lesson *Jarboe* teaches is certain: oral promises of employment may be binding even in an at-will employment setting.

In *Keating v. Burton*,²⁵³ the Court of Appeals addressed whether the parties had sufficiently agreed on the terms of the plaintiff's employment so as to create an oral employment contract. Plaintiff Sean Keating met with defendant Bryce Burton regarding the possibility of Keating working for Burton and purchasing the mechanical contracting division of Burton's Mechanical Contractors ("BMC"). The parties negotiated the proposed contract over a two-month period and Burton provided Keating with drafts of an agreement calling for a three-year term of employment.

At the parties' final meeting on this issue, however, Keating said he could not sign the agreement because he did not like the language governing termination. Nevertheless, Keating described the documents as "workable" and said he would let the attorneys work out the details.²⁵⁴ Keating thereafter began working for BMC as a contract estimator. Keating left the employ of BMC, however, after Burton curtailed Keating's estimating duties because of alleged mistakes. Keating responded by filing a breach of contract action.

The court of appeals, after addressing a separate issue involving the statute of frauds, found that the designated material evidence did not support the existence of an oral contract between the parties. Specifically, the court held, "This undisputed evidence shows that Keating and Burton did not agree to all terms of the employment agreement. Accordingly, a valid oral contract did not exist between Keating and Burton."²⁵⁵

Similarly, in *Rosi v. Business Furniture Corp.*,²⁵⁶ the plaintiff sued his former employer claiming he was owed certain commissions based upon a "Personnel Action Request" ("PAR"), which he asserted contained the parties' agreement with regard to the payment of commissions. The employer successfully moved for summary judgment on the ground that the PAR was merely an interoffice document created for the company accounting department and not an enforceable written contract. The court's unanimous decision affirmed the trial court ruling, noting that the specifically designated evidence did not support the conclusion that a contract existed.²⁵⁷ The court's decision was supported by the fact that the plaintiff was not given a copy of the PAR, he had not even seen it at the time of his hiring, the PAR was created for the benefit of

253. 617 N.E.2d 588 (Ind. Ct. App. 1993).

254. *Id.* at 590.

255. *Id.* at 592.

256. 615 N.E.2d 431 (Ind. 1993).

257. *Id.* at 435.

the accounting department, and the form and content of the document made it look like an interoffice communication.²⁵⁸

XIV. QUALIFIED PRIVILEGE

The Indiana Court of Appeals' decision in *Schrader v. Eli Lilly & Co.*²⁵⁹ discusses the circumstances under which an employer may use the qualified privilege defense against employee defamation claims. The plaintiffs in *Schrader* were five former Lilly employees who were discharged as a result of an investigation into rumors of theft at the company's Tippecanoe Laboratories facility. After these employees were terminated, rumors began circulating that they had been fired for stealing.²⁶⁰ Because of these continued rumors, the director of the Tippecanoe facility included a slide presentation in his weekly staff meeting for managers at the plant. One manager had his notes of the meeting transcribed and transmitted to various department heads, one of whom posted the typed notes on a bulletin board.²⁶¹ The notes stated in relevant part that six employees had been dismissed, but did not say that this action was taken because of theft. Rather, the notes said that the action was taken because of "loss of confidence" in the employees and further stated, "We cannot tolerate a loss of trust and honesty as a company or as individuals."²⁶²

The discharged employees subsequently brought an action for defamation and the issue on appeal was whether the slide presentation and the written notes were protected by the qualified privilege defense. The court of appeals affirmed the trial court's dismissal of the complaint to the extent it challenged the slide presentation to managers. The court held that the plaintiffs "have not shown that the slide presentation to the managers was anything other than a communication made in good faith on a subject matter in which Lilly and the managers each had an interest, that is, maintaining good employee morale and protecting high employee output."²⁶³ Therefore, the *Schrader* court held that as a matter of

258. The decision also is important because it emphasizes that parties must properly designate portions of the record to the trial court at the summary judgment stage. The plaintiff asked the trial court to reconsider its ruling on the ground that his action was not limited solely to a written contract theory and that the evidence showed an oral contract between the parties. The employer countered that the plaintiff had not designated any evidence for the court that would show that he was attempting to defeat summary judgment on the basis of an oral contract and the trial court agreed. On appeal, the court focused on the 1991 amendments to Trial Rule 56 and unanimously concluded that the plaintiff failed to designate any evidence demonstrating an oral contract for commissions. *Id.* at 434.

259. 621 N.E.2d 635 (Ind. Ct. App. 1993).

260. *Id.* at 638.

261. *Id.* at 638-39.

262. *Id.* at 639.

263. *Id.* at 642.

law the communications from Lilly to its managers fell under the scope of the qualified privilege.²⁶⁴

Lilly was not successful, however, in convincing the court of appeals that the trial court correctly applied the privilege to the bulletin board posting. First, the appellate court held that while some of the 1,500 Lilly employees at the facility may have had an interest in morale and output sufficient to justify the privilege, merely being a Lilly employee was not enough for the privilege to attach.²⁶⁵ As the court observed, some of the employees may not have had any misconceptions about why the plaintiffs were terminated and, therefore, Lilly “could not have had an interest or a duty to clarify misconceptions which did not exist.”²⁶⁶ Thus, an issue of material fact existed which a jury must decide.²⁶⁷

Second, the *Schrader* court held that the evidence was sufficient to raise the possibility that Lilly “engaged in excessive publication” of the information to outside contractors and subcontractors who may have seen the bulletin board notes.²⁶⁸ “The designated matter does not indisputably show that any or all of the outside contractors or subcontractors had a corresponding interest in morale, output, or job security or that they were covered by the privilege.”²⁶⁹ Therefore, a genuine issue of material fact also existed on this issue, thus precluding summary judgment.²⁷⁰

The *Schrader* decision demonstrates the limits of the qualified immunity defense in the employment setting. Plaintiffs increasingly are bringing defamation-type actions (in addition to discrimination claims) against their former

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

employers. *Schrader* serves as a timely reminder for managers to exercise caution against unnecessary dissemination of potentially defamatory information.

XV. CONCLUSION

The labor and employment law changes that occurred during the survey period were as numerous as they were significant. The survey period witnessed the Supreme Court's clarification of the standard of proof in sexual harassment cases, the passage of the federal family and medical leave law, and growing judicial application of the exclusivity provisions of Indiana's worker's compensation statute. At the same time, however, other important issues remain unresolved, most notably the role of after-acquired evidence and the possibility of individual supervisor liability in discrimination litigation. As the field of labor and employment law continues to develop, these issues will be addressed and, in all likelihood, resolved. Contemporaneously, new issues will develop requiring additional judicial and legislative attention.

