SURVEY OF LABOR AND EMPLOYMENT LAW DEVELOPMENTS FOR INDIANA PRACTITIONERS

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INTRODUCTION

The 1997 survey period involved several significant decisions at both the state and federal levels in the area of employment law. The Seventh Circuit Court of Appeals issued opinions clarifying several standards of proof, including same-sex harassment, hostile environment and *quid pro quo* sexual harassment in situations where the supervisor was the alleged harasser. Moreover, the U.S. Supreme Court finally affirmatively answered the question of whether same-sex harassment was actionable under Title VII and clarified the required standard of proof. The Court also determined the proper standard for substantive FMLA claims. The Indiana Supreme Court issued a long awaited opinion limiting exceptions to the employment-at-will doctrine. This article summarizes the most significant developments for practitioners in this area of law and is not intended to be a complete recitation of all decisions or developments.

I. TITLE VII

A. Same-Sex Sexual Harassment

The Seventh Circuit tackled the hotly-debated issue of whether same-sex harassment is actionable under Title VII in *Doe by Doe v. City of Belleville*.[1] The court held same-sex harassment to be actionable, despite both alleged harassers and victims being heterosexual.[2]

In *Doe*, twin sixteen-year-old brothers, hired by the City of Belleville as summer help for lawn maintenance, were continually subjected to harassment by their male co-workers.[3] One brother, H. Doe, was perceived by his co-workers as effeminate because he wore an earring. Co-workers subjected him to daily ridicule, predominantly of a sexual nature.[4] In addition, H. was subjected to at least one incident of physical abuse involving a co-worker grabbing his testicles and remarking, "I guess he's a guy."[5] The other brother, who was dubbed "fat

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1. 119 F.3d 563 (7th Cir. 1997).
2. *Id.* at 566.
3. *Id.*
4. Comments included referring to H. as a "fag" or "queer," urging H. to "go back to San Francisco with the rest of the queers," inquiring whether H. was a boy or a girl, and threatening H. with anal sex. *Id.* at 567.
5. *Id.*

boy" due to his weight, was spared most of these taunts.[6] However, after J. Doe contracted poison ivy, a co-worker inquired whether H. had passed the poison ivy to his brother during anal sex.[7] The brothers eventually quit due to the incessant taunting and brought an action for sexual harassment under Title VII.[8]

The district court granted summary judgment for the city because the plaintiffs failed to establish that the alleged behavior was "because of" their sex.[9] The district court reasoned that the alleged comments implied that H. was homosexual, a trait not protected by Title VII.[10]

In reversing the lower court's decision regarding the sexual harassment claim, the Seventh Circuit concluded that same-sex harassment was actionable, noting that Title VII does not "purport to limit who may bring suit based on the sex of either the harasser or the person harassed."[11] Rejecting the notion that same-sex harassment claims may only be brought when the alleged harasser is homosexual, the court distinguished cases where the harassment is not explicitly sexual but is gender-based nonetheless from harassment that has explicit sexual overtones.[12] In the former type of discrimination, because the alleged harassment is not explicitly sexual, the plaintiff must establish differential treatment of men and women or gender animus to raise a cognizable claim.[13] In the latter situation, the court concluded that the conduct itself established the nexus to the plaintiff's gender that Title VII required; therefore, the alleged harasser's motive in harassing the employee is irrelevant.[14] This case is a must read for practitioners in this circuit as it delineates the standard of proof required to successfully bring a same-sex harassment claim under Title VII.

Notably, in a unanimous opinion, *Oncale v. Sundowner Offshore Services*, the Supreme Court recently found same-sex harassment to be actionable under Title VII.[15] In *Oncale*, a male oil rig worker was subjected to repeated sex-

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6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 567-68.
10. *Id.*
11. *Id.* at 572-74. In so holding, the court focused on statutory construction and supportive precedent in other circuits. *Id.* at 573; *see, e.g.*, Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 141-43 (4th Cir. 1996); Yeary v. Goodwill Indus.-Knoxville, Inc., 107 F.3d 443, 447-48 (6th Cir. 1997); Quick v. Donaldson Co., 90 F.3d 1372, 1376-80 & n.4 (8th Cir. 1996); Fredette v. BVP Management Assocs., 112 F.3d 1503, 1506 (11th Cir. 1997).
12. Doe-by-Doe v. City of Belleville, 119 F.3d at 575-76, 585-86, 590-91.
13. *Id.* at 575-76.
14. *Id.* at 576-78 (quoting Andrews v. City of Phila., 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (stating that the intent to discriminate "in cases involving sexual propositions, innuendo, pornographic materials, or sexually derogatory language is implicit, and thus should be recognized as a matter of course.")). *Id.* at 576. Note that the Supreme Court rejected this conclusion in *Oncale v. Sundowner Offshore Services*, 118 S. Ct. 998 (1998).
15. *Oncale*, 118 S. Ct. at 1003.

related actions, including physical assault and threatened rape.[16] In reversing summary judgment for the employer, the Supreme Court stated that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the Plaintiff and the defendant . . . are of the same sex."[17] The court explained that in order to violate Title VII, workplace harassment must expose members of one sex to "disadvantageous terms and conditions of employment to which members of the other sex are not exposed."[18] To establish a Title VII violation, the plaintiff must prove in every sexual harassment case that the alleged harassment was "because of sex."[19] Moreover, the Court reemphasized that in order to violate Title VII, the alleged conduct must be so objectively offensive as to alter the conditions of the victim's employment.[20] *Oncale* sends a clear message that same-sex sexual harassment is actionable under Title VII. The district courts will be challenged to apply these standards to ascertain what level of conduct is necessary to implicate Title VII in these cases.

B. Retaliation Charges Brought By Former Employees

The Supreme Court recently concluded that former employees may bring a Title VII action against their former employer for post-employment retaliation.[21] In *Robinson*, the plaintiff alleged that his former employer retaliated against him by providing a negative job reference after his termination.[22] Reversing the lower court's decision, the Court found the statutory definition of "employee" to be ambiguous, and held that including former employees in the statutory construction comported with the primary purpose of Title VII.[23]

C. Employer Liability For Sexual Harassment By Supervisors

The Seventh Circuit recently addressed the proper standard for supervisory sexual harassment.[24] Although the panel was unable to forge a clear-cut majority, the majority reached consensus that negligence is the proper standard for employer liability in hostile environment sexual harassment claims when the alleged harasser is the employee's supervisor.[25] The majority of the court further

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16. *Id.* at 1001.

17. *Id.* at 1001-02.

18. *Id.* 1002. Thus, harassment is not automatically discrimination 'because of sex' merely because the words have sexual connotations. Nor is it necessary for harassing conduct to be motivated by sexual desire. *Id.*

19. *Id.*

20. *Id.*

21. Robinson v. Shell Oil Co., 117 S. Ct. 843 (1997).

22. *Id.* at 845.

23. *Id.* at 849.

24. Jansen v. Packaging Corp., 123 F.3d 490 (7th Cir. 1997).

25. *Id.* at 494-95; *accord* Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1013 (7th Cir. 1997) (holding that employers are not "automatically liable for an environment of sexual harassment created by supervisors or co-workers; employers are liable only when they have been negligent

held that employer liability for *quid pro quo* sexual harassment is strict liability, even if the "supervisor's threat does not result in a company act."[26]

Because of the wide range of opinions on the panel regarding the proper standards for supervisory sexual harassment, numerous concurrences and dissenting opinions were authored, which are briefly summarized:

- Judge Flaum asserted that for supervisory *quid pro quo* sexual harassment, employers should be vicariously liable under agency principles.[27] The basis of the employer's liability results from the delegation of authority by the employer to the supervisor which in turn is used to harass.[28] Actionable *quid pro quo* harassment does not require an adverse job consequence; the threat itself violates the statute.[29] The exception to the general rule of vicarious liability would involve a situation where a plaintiff "could not have reasonably believed that it was within the supervisor's power to affect the conditions of the plaintiff's job."[30]

As for hostile environment sexual harassment, Judge Flaum concurred that negligence is the appropriate standard for employer liability, in part because of the difficulties employers would face in defining actionable behavior and communicating a consistent message to employees.[31]

- Judge Cudahy principally concurred with Judge Flaum's approach, emphasizing that a heightened standard of negligence is appropriate in supervisory hostile environment harassment cases.[32]
- Judge Kanne also concurred with Judge Flaum's opinion, while expressing reservations in two areas: (1) with regard to *quid pro quo* sexual harassment, mere threats without adverse employment consequences should be subject to a negligence standard rather than strict liability; and (2) the standard for hostile environment harassment should be a pure negligence standard without a "heightened duty of care."[33]
- Judge Posner's lengthy dissent concurred that employer liability for hostile environment supervisory harassment should be subject to the negligence

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either in discovering or remedying the harassment).

26. *Jansen*, 123 F.3d at 494-95.

27. *Id.* at 496.

28. *Id.* at 497. "[B]ecause a supervisor would be unable to engage in *quid pro quo* harassment without the authority and power furnished by the employer, the supervisor's conduct is properly imputed to the employer." *Id.*

29. *Id.* at 499.

30. *Id.* at 500. Thus, if the supervisor lacks apparent authority to alter the terms and conditions of the plaintiff's workplace, vicarious liability would not be imposed on the employer. *Id.* at 500 & n.7.

31. *Id.* at 501-02.

32. *Id.* at 504.

33. *Id.* at 505-06. Note that Judge Kanne's concern with imposing strict liability for mere threats in a *quid pro quo* case included the significantly greater litigation costs and the tendency that plaintiffs would have to turn all sexual harassment cases into "implied threats" to qualify for the easier standard. *Id.*

standard, while advocating that an additional complaint mechanism should be utilized in cases where the harasser is the supervisor.[34] Posner distinguished two types of *quid pro quo* harassment: (1) those situations where the supervisor uses his authority to do "a company act;" and (2) those cases where the harassment encompasses only threats.[35] In the former type of scenario, strict liability is appropriate because it would be a more effective deterrent than a negligence standard.[36] Strict liability is inappropriate in the latter type of harassment as the supervisor has not used his delegated authority to commit a company act and it would be infeasible for employers to be aware of this type of action.[37] The appropriate standard in the pure "threat" type of harassment is negligence.[38]

- Judge Coffey opined that the proper standard for all supervisor sexual harassment is negligence.[39] Judge Coffey stated "[i]n the employment context, liability should be based on fault, and the flexible negligence standard should be used to determine an employer's legal responsibility in Title VII sexual harassment cases, regardless of who allegedly engage[d] in the harassment (supervisor vs. co-worker) or what type of harassment allegedly occur[red] (quid pro quo vs. hostile work environment)."[40]
- Judge Easterbrook and Judge Woods advocated an agency analysis applying state law.[41]
- Judge Manion concurred with Judge Posner's "company act" approach to strict liability supervisor sexual harassment cases.[42] Judge Manion advocated a three-prong test for actionable *quid pro quo* sexual harassment before strict liability would attach: (1) the unwelcome sexual advances were motivated at least in part by the plaintiff's sex; (2) the supervisor issued an ultimatum or strong suggestion that failure to comply with the demand would result in a tangible job detriment; and (3) the plaintiff suffered a tangible job detriment.[43]
- Judge Wood would apply agency law, "under which acts of 'quid pro quo'

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34. *Id.* at 512.

35. *Id.*

36. *Id.* For example, employers could set up mandatory levels of review for all employment decisions that alter an employee's terms and conditions of employment.

37. *Id.* at 513-14. Posner also concluded that the cost-benefit analysis of imposing strict liability for this type of harassment weighed against strict liability. *Id.*

38. *Id.*

39. *Id.* at 518.

40. *Id.* at 546-47. Although Judge Coffey rejected the strict liability theory for supervisor harassment, he noted that the imposition of vicarious liability "might conceivably be proper in that rare situation . . . where a plaintiff is able to establish that the supervisor acted with actual or apparent authority to engage in such conduct." *Id.* at 518.

41. *Id.* at 554, 570. This position was hotly debated by Judge Posner as unsupported and likely to result in grossly different standards from state to state. *Id.* at 506-08.

42. *Id.* at 546.

43. *Id.* at 559. Judge Manion reasoned that sexual harassment is a tort, and unless the plaintiff suffers a tangible job detriment, the tort is incomplete and no cause of action should lie. *Id.* at 560.

sexual harassment would almost always fall within the scope of the supervisor's employment and thus result in employer liability under a respondeat superior theory."[44]

Thus, although the panel reached consensus on the bare standard, the divergent views of the panel leave many unanswered questions in this area to be addressed by the judiciary in the future. Unfortunately for practitioners, the lack of firm direction from the court as to the proper analytical framework will potentially result in inconsistent decisions as the district courts struggle with the proper interpretation of this decision.

D. Notice To Corporate Employers Of Sexual Harassment

Following the *Jansen* decision, the Seventh Circuit undertook the task of delineating what level of notification is required to put a corporate employer on notice of sexual harassment.[45] In *Young*, the plaintiff, a production worker, was subjected to various incidents of sexual harassment by her immediate supervisor.[46] The plaintiff complained to the department head, the harasser's immediate supervisor, at least five times.[47] Subsequently, the plaintiff complained to another supervisor, who reported the harassment to the personnel director.[48] The personnel director took some action, but the plaintiff alleged that the harassment did not stop.[49]

The district court held that notice to the department head did not equate with notice to the company as he did not represent upper level management and had no responsibility to investigate charges of sexual harassment.[50] After a thorough survey of the law in other circuits on this issue, the appellate court concluded that notice should normally be given to the person who the employer has identified and who is empowered to act upon the complaint, the so called "point person."[51] If the company fails to establish clear channels for complaints, the court must assess "who in the company the complainant reasonably believed was authorized to receive and forward (or respond to) a complaint of harassment."[52]

In implementing this standard, the court found, in the instant case, that the

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44. *Id.* at 565. Judge Manion concluded, and this author agrees, that Judge Woods advocated one standard for supervisory sexual harassment. Under her model, the employer would be liable any time the supervisor committed harassment during the course of his/her supervision. If outside the scope of employment, the employer would be liable if negligent in failing to address the harassment, or when the supervisor had apparent authority to take the employment actions. *Id.* at 547-48.

45. Young v. Bayer Corp., 123 F.3d 672 (7th Cir. 1997).

46. *Id.* at 672.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 673.

51. *Id.* at 674.

52. *Id.*

department head would ordinarily be such a person when the complaint was lodged against someone in his chain of command.[53] As Judge Posner stated, "[i]f he receives such a complaint he would be obligated by elementary principles of management and good sense either to resolve the problem himself or refer it to someone else within the company, who can."[54] Based on this reasoning, the court reversed the lower ruling and remanded the case for trial.[55] Thus, the reasonableness of the plaintiff's decision regarding reporting will be the key inquiry in this Circuit.

E. Pregnancy Discrimination

In *Ilhardt v. Sara Lee Corp.*,[56] the Seventh Circuit affirmed summary judgment for the employer where it laid off a pregnant female part-time attorney during a reduction in force.[57] In ruling for the employer, the Seventh Circuit confirmed that the employee must show that she was treated less favorably than a nonpregnant employee under identical circumstances.[58] The plaintiff was the only part-time attorney and thus could not establish this element of the prima facie case.[59] Moreover, the court found that the plaintiff failed to establish that the employer's reason, eliminating the part-time position because less work would have to be reallocated, was pretextual.[60]

F. Miscellaneous Decisions

Several other decisions issued during the survey period also warrant comment:

(1) The Seventh Circuit again confirmed that stray remarks by nondecisionmakers, even when in positions of authority or coequals to the decisionmaker, do not constitute direct evidence of discrimination.[61]

(2) A former employee who brought a sexual harassment claim waived the psychotherapist-patient privilege when she placed her mental condition at issue

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53. *Id.*

54. *Id.* at 674-75.

55. *Id.*

56. 118 F.3d 1151 (7th Cir. 1997).

57. *Id.* at 1157.

58. *Id.* at 1155 (citing Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1010 (7th Cir. 1997)).

59. *Id.*

60. *Id.*

61. Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1400 (7th Cir. 1997). The Seventh Circuit also noted that the fact that the decisionmaker was of the same national origin as the plaintiff also rendered it more unlikely that the employment decision would be influenced by the other director who commented that "[a]ll Americans are stupid." *Id.* Also note that the court discounted the plaintiff's arguments that his favorable evaluations established that the employer's reason for discharging him due to a failed project were pretextual, listing several reasons why an evaluation might be inflated. *Id.* at 1397-98.

by claiming emotional damages and by naming the psychotherapist as an expert witness.[62]

(3) The Supreme Court adopted the so-called "payroll method" of calculating whether an employer has the requisite fifteen employees to be considered a covered employer under Title VII.[63] Thus, the employee is counted under this method regardless of whether the employee works during the week in question or is reimbursed so long as the employee remains on the employer's payroll.[64]

(4) A Kansas district court recently held that firing an employee for insisting on tape recording a scheduled meeting with her supervisor was a legitimate, nondiscriminatory basis for the employment action.[65]

(5) The Fifth Circuit recently overturned an $800,000 judgment in favor of a government employee because the complainant failed to cooperate in the agency's investigation of her sexual harassment complaint.[66]

II. AGE DISCRIMINATION

In a recent age discrimination case, the Seventh Circuit reaffirmed that in order to establish pretext in an age case, the employee must offer evidence "reasonably calling into question the honesty of [the employer's] belief."[67] The court reiterated that it was not within the province of the court to decide whether the reason articulated was "wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination."[68] In affirming summary judgment for the employer, the court noted that the plaintiff failed to present any record evidence that the decisionmaker's reason for the discharge decision, i.e., punching another employee, was not the honest reason for discharge.[69]

III. FAIR LABOR STANDARDS ACT

Several judicial opinions refined key issues under the Fair Labor Standards Act during the survey period.

A. Use of Employer Vehicles

In *Baker v. GTE North, Inc.*,[70] the Seventh Circuit clarified that the use of an

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62. Vann v. LoneStar Steakhouse & Saloon, 967 F. Supp. 346, 350 (C.D. Ill. 1997).

63. Walters v. Metropolitan Educ. Enters., Inc., 117 S. Ct. 660 (1997).

64. *Id.* at 663.

65. Hernandez v. McDonald's Corp., 975 F. Supp. 1418, 1428 (D. Kan. 1997).

66. Barnes v. Levitt, 118 F.3d 404, 407-08 (5th Cir. 1997) (stating that if "the agency does not reach the merits of the complaint because the complainant fails to comply with the administrative procedures the Court should not reach the merits either.") (citations omitted).

67. Giannopoulos v. Brach & Brock Confections, 109 F.3d 406, 410 (7th Cir. 1997).

68. *Id.* at 411.

69. *Id.*

70. 110 F.3d 28 (7th Cir. 1997).

employer's vehicle by an employee primarily for traveling to and from the employee's home is not compensable time if (1) the use of the vehicle for travel is within the normal commuting distance for that employer's business *and* (2) the use of the vehicle is subject to an agreement between the employer and employees or their representatives.[71] The court, citing the Employee Commuting Flexibility Act of 1996,[72] held that the requirements of normal commuting area and employee consent were satisfied, despite the fact that the truck the employees drove contained tools essential to the performance of their jobs, because the principal activity involved was commuting.[73]

B. Notable Miscellaneous Decisions

(1) The Seventh Circuit affirmed that exempt employees do not lose their exempt status because they are subject to nonmonetary discipline for absences.[74]

(2) The Supreme Court recently confirmed in a public employment case that the "mere possibility" of a deduction in pay inconsistent with salaried status does not destroy the employee's exempt status.[75] For an employee to lose exempt status, there must be "either an actual practice of making such deductions or an employment policy that creates a 'significant likelihood' of such deductions."[76]

(3) Following the *Auer* decision, the Ninth Circuit held that additional compensation besides salary does not destroy the employee's exempt status under the salary basis test.[77]

(4) A city's one-time docking of an exempt employee's pay for a disciplinary infraction did not result in the loss of the exemptions for all employees in that category.[78] The city fell under the "window of corrections" defense where the city reimbursed the employee and changed its policy to comply with the FLSA.[79]

IV. WARN ACT

Although several interesting opinions were issued during the survey period, one recent opinion merits a brief discussion. The Eighth Circuit recently held that a buyer who had tentatively agreed to purchase an ailing company but backed out at the last minute, purchasing only the equipment, was not liable to the company's employees who were terminated.[80] Because the plant closing occurred on the date of the sale, the court reasoned that the obligation never

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71. *Id.* at 29.
72. Pub. L. No. 104-188, 110 Stat. 1755 (1996).
73. *Baker*, 110 F.3d at 31.
74. Haywood v. North Am. Van Lines, Inc., 121 F.3d 1066, 1070 (7th Cir. 1997).
75. Auer v. Robbins, 117 S. Ct. 905, 910 (1997).
76. *Id.* at 911.
77. Boykin v. Boeing Co., 128 F.3d 1279, 1281 (9th Cir. 1997).
78. Childers v. City of Eugene, 120 F.3d 944, 947 (9th Cir. 1997).
79. *Id.*
80. Burnsides v. MJ Optical, 128 F.3d 700, 703 (8th Cir. 1997).

passed to the buyer.[81] The court further held that the seller was partially protected by the "unforeseeable business circumstance" exception as the seller had exercised commercially reasonable business judgment in believing the sale would go through as originally negotiated.[82] However, because the seller delayed notifying its employees immediately when it became aware that the sale was only an equipment purchase, the court remanded the case for a determination of damages for the relevant time period.[83]

V. FAMILY AND MEDICAL LEAVE ACT

A. Standard of Proof In Substantive FMLA Claims

The Seventh Circuit declined to adopt the familiar *McDonnell-Douglas* burdenshifting framework in FMLA cases dealing with substantive statutory rights.[84] In a unanimous decision, the court distinguished anti-discrimination statutes from statutes which, like the FMLA, guarantee substantive rights to all employees.[85] The court held that the plaintiff's burden of proof in a substantive FMLA claim was to establish, by a preponderance of the evidence, that the plaintiff was entitled to the benefits claimed.[86] The appellate court left open the possibility of utilizing the burden-shifting framework for retaliation claims under the FMLA.[87]

After addressing the burden of proof, the court turned to the merits of the claim. In *Diaz*, the plaintiff took a month's FMLA leave for bronchitis. One day after the plaintiff was due to report to work, he phoned from Mexico and informed the employer that he had seen a second physician who diagnosed a host of unrelated illnesses which required an additional six weeks off. The employer eventually sent a notice to the plaintiff's last known address (pursuant to the terms of the collective bargaining agreement) requiring the plaintiff to report for a second medical examination.[88] The plaintiff failed to appear for the exam and was terminated for failure to report to work.[89] In upholding the plaintiff's discharge, the court reasoned that an employee who "fails to cooperate with the second-opinion process . . . loses the benefit of leave . . . . After missing the appointment set for June 8, [the plaintiff] was AWOL and could not invoke the FMLA to avoid discharge."[90]

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81. *Id.*
82. *Id.* at 704.
83. *Id.*
84. *See* Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997).
85. *Id.* at 713. Judge Easterbrook explained that "the question is not how [the employer] treated others, but whether it respected each employee's entitlements."
86. *Id.*
87. *Id.*
88. *Id.* at 712.
89. *Id.*
90. *Id.* at 713.

This well-reasoned opinion makes explicit the employee's obligation to cooperate with the defined FMLA procedures and the consequences for failure to comply with these mandatory obligations.

B. Sufficient Notice To Employers

Since the enactment of the FMLA, a significant issue remains largely unanswered: the extent of the employee's burden to provide the employer with sufficient notice of the need for FMLA leave, and the consequences for failing to give proper notice. Several recent decisions provide insight.

In *Carter v. Ford Motor Co.*,[91] the Eighth Circuit upheld an employer's decision to terminate an employee for failure to follow company procedure for verifying the need for sick leave where the employee failed to give adequate notice of the need to take leave due to a serious health condition.[92] In *Carter*, the plaintiff's wife reported that her husband would be out because of "family problems."[93] The plaintiff subsequently called in six days later and reported that he was "sick" and that the illness was "personal."[94] In reality, the plaintiff's doctor had diagnosed him with depression and concluded that he was totally disabled.[95] The Eighth Circuit ruled that the plaintiff had failed to discharge his duty to provide adequate or timely notice to the employer under the FMLA and was thus precluded from bringing an FMLA claim.[96]

Similarly, the Eleventh Circuit recently concluded that when an employee deliberately withheld medical information and gave false information to the employer, the employer's inquiry notice was never triggered under the Act.[97] In *Gay*, the plaintiff was admitted to a psychiatric hospital to receive treatment for a nervous breakdown.[98] The plaintiff had been counseled for absences or tardiness on five prior occasions.[99] The plaintiff's husband admittedly lied to the employer about the reason for the plaintiff's absence and instructed their children to do the same.[100] Under these facts, the court held that the plaintiff failed to provide the employer adequate notice under the Act, and affirmed summary judgment for the employer.[101]

By contrast, in *Price v. City of Fort Wayne*,[102] the Seventh Circuit held that filing a leave request indicating that the reason was a "medical need," and

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91. 121 F.3d 1146 (8th Cir. 1997).
92. *Id.* at 1148-49.
93. *Id.* at 1147.
94. *Id.*
95. *Id.*
96. *Id.* at 1148-49.
97. Gay v. Gilman Paper Co., 125 F.3d 1432 (11th Cir. 1997).
98. *Id.* at 1436.
99. *Id.* at 1433.
100. *Id.*
101. *Id.*
102. 117 F.3d 1022 (7th Cir. 1997).

attaching a doctor's note requiring the plaintiff to take the requested time off was sufficient to put the employer on inquiry notice under the Act.[103]

C. Serious Health Condition

In *Murray v. Red Kap Indus., Inc.*,[104] the plaintiff acquired a respiratory infection, for which she was treated at a local hospital and at her private physician's office.[105] The plaintiff's physician released her to work after the first week of absence.[106] The plaintiff presented the work release to the employer on Friday of the first week indicating that she could return to work the following Monday.[107] Despite this release, the plaintiff failed to return to work for an additional week, claiming that she felt too sick to work.[108] The plaintiff was subsequently discharged pursuant to the employer's attendance policy.[109] In affirming the district court's judgment for the employer as a matter of law, the court held that the employee had failed to establish that she suffered from a "serious health condition" during the second week of her absence from work.[110] The court further noted that "in order to qualify for protection under the FMLA, the employee must provide the employer with proper notice of his intention to take leave."[111] In the instant case, the employer had no information about why the plaintiff was absent for the second week, a factor which the court considered.[112]

VI. THE AMERICANS WITH DISABILITIES ACT

A. Disabling Treatment May Qualify as a Disability Under the ADA

In *Christian v. St. Anthony Medical Center, Inc.*,[113] the Seventh Circuit expanded the definition of a disability to include necessary disabling treatment for a medical condition that may not be, by itself, disabling.[114] *Christian* involved a plaintiff who alleged she was terminated due to hypercholesterolemia, a condition involving an excessive blood level of cholesterol.[115] The plaintiff alleged that the employer fired her because of the expensive and disabling

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103. *Id.* at 1025.
104. 124 F.3d 695 (5th Cir. 1997).
105. *Id.* at 696.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 697.
112. *Id.* at 699.
113. 117 F.3d 1051 (7th Cir. 1997).
114. *Id.* at 1052.
115. *Id.* at 1051.

monthly pheresis treatments that she would eventually be required to undergo.[116]

The Seventh Circuit held that disabling treatments for a condition that by itself is not disabling would be protected under the ADA if two criteria were met:

(1) the disabling treatment needed to be truly necessary, and not merely an attractive option; and
(2) an anticipated disability did not trigger a duty of accommodation if the anticipated treatment was a result of an employee's voluntary choices.[117]

Writing for the court, Judge Posner found that the plaintiff in the instant case failed to establish these requirements because the plaintiff was not actually receiving the pheresis treatments.[118] Further, the court noted that pheresis was not the accepted method of treating high cholesterol; thus, the plaintiff also failed to establish that the treatment was truly medically necessary.[119]

B. Depression as a Disability

Recent decisions have addressed the circumstances under which depression will be considered a disability under the ADA. For example, in *Leisen v. City of Shelbyville*,[120] the district court held that a female EMT failed to establish that she was disabled under the statute due to depression where she presented no evidence that she was substantially limited in her ability to work.[121]

The city required all EMTs to acquire their paramedic certification within three years of initial employment as a condition of continued employment.[122] The plaintiff failed to acquire certification within the requisite time period, allegedly due to emotional difficulties that she was experiencing in her personal life.[123] The plaintiff sought counseling through the employee assistance program and was treated intermittently by a counselor for two years.[124] When the city refused to extend the time frame for her certification and terminated her employment, the plaintiff brought suit alleging failure-to-accommodate under the ADA.[125]

The district court initially found that the plaintiff's symptoms presented sufficient evidence to raise a genuine issue of fact as to whether the depression

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116. *Id.* at 1052. Pheresis refers to a process of systematically draining the patient's blood, subjecting it to a cleansing process, and returning the cleansed blood to the patient. *Id.*

117. *Id.* To further explain the second requirement, the court noted that an employer could fire an employee because of his known propensity to engage in recklessly dangerous activities.

118. *Id.*

119. *Id.*

120. 968 F. Supp. 409 (S.D. Ind. 1997).

121. *Id.* at 416.

122. *Id.* at 414.

123. *Id.* at 414-15.

124. *Id.* at 415.

125. *Id.* at 415-16.

constituted an impairment under the Act.[126] However, the court noted that the plaintiff had no trouble functioning as an EMT and that she therefore failed to demonstrate that the alleged disability substantially limited her employment generally.[127] Thus, the plaintiff failed to establish that she was disabled under the statute and summary judgment was granted for the employer on the ADA claim.[128]

In *Weigel v. Target Stores*,[129] the Seventh Circuit addressed the issue of depression as a disability in the context of whether a plaintiff who claimed to be totally disabled was a "qualified individual with a disability" under the Act. In *Weigel*, the employee asserted a total inability to work in support of her social security claim.[130] Although the court declined to regard evidence offered to the Social Security Administration as conclusive evidence of an individual's disability under the ADA, it noted that the evidence was certainly relevant.[131] As the court observed, when employees "represent that they are 'totally disabled,' 'wholly unable to work,' or some other variant to the same effect, employers and factfinders are entitled to take them at their word; and, such representations are relevant evidence of the extent of a plaintiff's disability."[132]

The plaintiff also contended that her psychologist's affidavit, which stated that "to a reasonable degree of medical certainty" the plaintiff would be able to return to work after a leave of absence, created a triable issue of fact.[133] In striking this argument and affirming summary judgment for the employer, the court noted that the physician's simple assertion was too conclusory to be given any weight, citing the following Posner passage:

> [A] party cannot assure himself of a trial merely by trotting out in response to a motion for summary judgment his expert's naked conclusion about the ultimate issue . . . . To allow this would be to confuse admissibility with weight and to disregard the judge-crafted limitations on the admissibility of expert testimony. The fact that a party opposing summary judgment has some admissible evidence does not preclude summary judgment . . . . To put this differently, an expert's opinion based on 'unsupported assumptions' and 'theoretical speculations' is no bar to summary judgment.[134]

Thus, the fact that the plaintiff claimed to be totally unable to work ultimately resulted in a finding that the plaintiff could not establish that she was a qualified

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126. *Id.* at 416.
127. *Id.*
128. *Id.* at 417.
129. 122 F.3d 461 (7th Cir. 1997).
130. *Id.* at 463.
131. *Id.* at 466.
132. *Id.* at 467.
133. *Id.* at 468.
134. *Id.* at 469 (citing American Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1464 (7th Cir. 1996)).

individual with a disability under the Act.

C. *Cause Of Action Accrues At The Time Of The Discriminatory Act*

In *Huels v. Exxon Coal USA, Inc.*,[135] a plaintiff who suffered from alcoholism experienced a lay-off when the employer implemented a reduction in force due to a contractual dispute with a major customer.[136] Prior to the lay-off at issue, the company completed a forced ranking of its employees, resulting in the plaintiff being ranked at the bottom of the list.[137] Both the lay-off and subsequent recalls were based upon the rankings.[138] Because the initial ranking occurred prior to the effective date of the ADA, the plaintiff attempted unsuccessfully to argue that he was subject to a continuing violation, including the lay-off and failure to recall.[139]

The Seventh Circuit affirmed summary judgment for the employer, holding that the sole discriminatory act—the forced ranking—was the point at which the cause of action accrued.[140]

VII. OSHA/IOSHA DEVELOPMENTS

Although the survey period was relatively quiet, there were a few significant decisions regarding occupational safety and health.

A. *"Knowing Violations" Under Indiana Law*

The Indiana Supreme Court declined to accept transfer in *Union Tank Car v. Commissioner of Labor*,[141] leaving intact the definition of a "knowing" violation as previously defined in *Commissioner of Labor v. Gary Steel Products Corp.*[142] Thus, under current Indiana law, to prove a "knowing," violation, the Department of Labor is required to demonstrate that the employer "acted voluntarily, with either an intentional disregard of, or plain indifference to, its employees."[143] The appellate court rejected the employer's argument that a knowing violation requires an element of malice to differentiate it from a serious violation.[144] In a thoughtful dissent, Judge Friedlander questioned the majority's distinction between "knowing" violations and "serious" violations, noting that in his view, the element of malice is the element that elevates a serious violation to the level of a knowing violation.[145]

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135. 121 F.3d 1047 (7th Cir. 1997).
136. *Id.* at 1048.
137. *Id.*
138. *Id.* at 1048-49.
139. *Id.*
140. *Id.* at 1051.
141. 671 N.E.2d 885 (Ind. Ct. App. 1996), *trans. denied*, 683 N.E.2d 585 (Ind. 1997).
142. 643 N.E.2d 407, 411 (Ind. Ct. App. 1994).
143. *Union Tank Car*, 671 N.E.2d at 890.
144. *Id.* at 892.
145. *Id.*

B. Ergonomic Injuries Under The General Duty Clause

In a case of first impression, the Occupational Safety and Health Review Commission has held that an employer may be cited under the general duty clause for an ergonomics violation.[146] The decision resulted from an inspection of a Pennsylvania facility which produced cookies and other baked goods.[147] OSHA cited Pepperidge Farms for numerous alleged willful violations involving repetitive motion injuries and lifting hazards, as well as numerous deficient record keeping citations.[148] The proposed penalties were cited under the "egregious" case by case penalty policy and approached $1,400,000.00.[149] Although the Commission found that a general duty clause violation could be brought, the majority opinion vacated the willful repetitive injury citations because the Commissioner failed to identify acceptable feasible methods of abatement.[150] Commissioner Montoya dissented, finding that repetitive motion injuries were not a hazard within the meaning of the general duty clause.[151] Thus, although the Commission has upheld citing employers under the General Duty Clause for repetitive motion injuries, it remains to be seen how frequently or successfully this type of citation will be utilized.

C. The Basis For General Duty Clause Citations

The Fifth Circuit, in *Metzler v. Arcadian Corporation*,[152] upheld the Commission's ruling that the proper unit of prosecution under the General Duty Clause is the hazard, not a per-employee basis as advanced by the Secretary.[153] *Metzler* involved an explosion at a fertilizer manufacturing plant which potentially exposed eighty-seven employees to work hazards.[154] The Secretary argued that the General Duty Clause allowed OSHA to issue a citation for each employee exposed to the alleged hazard, and proposed penalties of $50,000 per employee or over $4 million.[155] The court concluded that the General Duty Clause was not ambiguous and provided that the violative condition was the proper unit of prosecution based upon three criteria: (1) the plain meaning of preventing "recognized hazards" that "may cause death or serious physical harm to . . . employees"; (2) the penalty clause which states that an employer may not be assessed more than $70,000 per violation; and (3) the exclusive authority of the Commission to assess penalties once assessed by the Secretary and

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146. Pepperidge Farm, Inc., No. 89-265, 1997 OSAHRC LEXIS 40, at *4 (Apr. 26, 1997).
147. *Id.* at *1.
148. *Id.*
149. *Id.*
150. *Id.* at *190.
151. *Id.* at *239.
152. No. 96-60126, 1997 U.S. App. LEXIS 12693 (5th Cir. Apr. 28, 1997).
153. *Id.* at *2.
154. *Id.*
155. *Id.* at *3.

subsequently challenged.[156] This well-reasoned decision challenges a long-standing practice of the agency and is consistent with the statutory language of the Occupational Safety and Health Act.

D. Abatement Certification

OSHA's new abatement certification rule amended prior law by adding a new section detailing the abatement certification requirement.[157] The new rule became effective on May 30, 1997, and requires the employer to provide written certification within ten calendar days following the abatement date specified in the citation.[158] Employees and/or their representatives must also be notified of the abatement by posting the abatement letter for three working days at or near the site of the violation.[159]

E. Personal Protective Equipment

In *Union Tank Car Company*,[160] the Commission overruled the Secretary's position that employers must bear the cost of furnishing personal protective equipment to their employees.[161] Citing the regulatory language and the history of previous letters of interpretation from OSHA over the last twenty years, the Commission noted that the regulations do not address this issue, and the matter has historically been left to negotiations between the employer and its employees.[162] The citation was thus vacated against the employer.[163]

VIII. STATE LEGISLATIVE DEVELOPMENTS

A. New Employer Reporting Requirements

The New Hire Directory went into effect on October 1, 1997.[164] The statute requires all employers to submit identifying information to the Indiana Department of Workforce Development within twenty days of a new employee's hire date.[165] The information will be used to assist in the enforcement of child support obligations and to match unemployment insurance and worker's compensation records to verify eligibility for these programs.[166] The employer may comply with the new requirements by submitting the employee's W-4 form

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156. *Id.* at *12-23.
157. 29 C.F.R. § 1903.19 (1997).
158. 29 C.F.R. § 1903.19(c) (1997).
159. 29 C.F.R. § 1903.19(g) (1997).
160. No. 96-0563, 1997 OSAHRC LEXIS 104 (Oct. 16, 1997).
161. *Id.* at *12.
162. *Id.* at *5.
163. *Id.* at *12.
164. 42 U.S.C.A. § 653a (West Supp. 1998); IND. CODE § 22-4.1-4-2 (Supp. 1997).
165. IND. CODE § 22-4.1-4-2(g)(1) (Supp. 1997).
166. 42 U.S.C.A. § 653a (West Supp. 1998).

or by utilizing the new alternative W-4 form, which is scannable.[167] Employers have several options regarding the method of reporting the information.[168] An employer that has employees in two or more states and that transmits the reports electronically may designate one state in which to report new hires.[169]

IX. SIGNIFICANT INDIANA DECISIONS

A. At-Will Employment

In *Orr v. Westminster Village North, Inc.*,[170] the Indiana Supreme Court recently reversed the Indiana Court of Appeals and reaffirmed that the employment-at-will doctrine is alive and well in Indiana.[171] In a unanimous opinion, the court declined to abolish the rule that requires an employee to give independent consideration to convert an employment-at-will relationship into a "just-cause termination" relationship.[172] The court wrote, "[I]n Indiana, the presumption of at-will employment is strong, and this Court is disinclined to adopt broad and ill-defined exceptions to the employment-at-will-doctrine."[173] The court added, "[W]e decline plaintiffs' invitation to construe employee handbooks as unilateral contracts and to adopt a broad new exception to the at-will doctrine of such handbooks."[174] The court also noted that, even if such an exception were considered, the employee handbook at issue was insufficient to avoid at-will employment.[175]

The employer in *Orr* discharged several employees for being in an unauthorized area and for endangering safety and life as described in the employee handbook.[176] The employees challenged their discharge because the employer failed to follow the disciplinary procedure outlined in the handbook.[177]

The handbook contained the following significant sections:

- Rules of Employee Conduct which expressly stated that the list was not exclusive;
- A progressive discipline policy expressly stating that the employer could deviate from the normal progressive discipline format in serious situations;
- A grievance procedure providing employees with a mechanism to appeal adverse decisions; and

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167. IND. CODE § 22-4.1-4-2(h) (Supp. 1997).
168. *Id.*
169. *Id.* § 22-4.1-4-2(i).
170. 689 N.E.2d 712 (Ind. 1997).
171. *Id.* at 714.
172. *Id.*
173. *Id.* at 717.
174. *Id.* at 722.
175. *Id.*
176. *Id.* at 715.
177. *Id.*

- An express disclaimer stating that the handbook was not a contract and was subject to change as well as an acknowledgment form further emphasizing that the handbook was not a contract.[178]

Reviewing these provisions, the court held that the handbook "does not constitute a clear offer supporting a binding unilateral contract because its language regarding progressive discipline procedures is suggestive rather than mandatory, and because the handbook includes a prominent disclaimer and was accompanied by a second disclaimer, which is referenced in the handbook and was signed by plaintiffs."[179]

Orr teaches that a handbook containing prominent disclaimers and permissive language giving employers broad discretion, along with an acknowledgment form stating that the handbook is not a contract, will not be construed as a unilateral contract in Indiana. This case should be read by all Indiana practitioners as the court clearly delineates the three exceptions to the employment at-will doctrine in Indiana: namely, (1) adequate independent consideration supporting the employment contract; (2) a clear contravention of a statutory right or duty; or (3) promissory estoppel.[180]

B. Threatening A Co-Worker Constitutes Just Cause For Discharge

In a 2-1 decision, the Indiana Court of Appeals held that threatening a co-worker could constitute just cause for discharge, despite the presence of an employment contract.[181] In *McQueary*, a school bus driver admittedly told a co-worker to get off his bus or he would "put him under."[182] The majority opinion held that this admitted statement constituted evidence of the employee's threat to kill a co-worker, and reversed the trial court's denial of summary judgment for the employer.[183]

C. Severance Pay Which Is Not Based On Work Performed Does Not Constitute Wages

In an unpublished opinion, the Indiana Court of Appeals recently held that an employee could not recover treble damages under Indiana's wage statute[184] for failure to pay a severance package that was not based upon work done by the employee.[185] In reversing the trial court's decision and award, the court declined

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178. *Id.* at 716-17.

179. *Id.* at 722.

180. *Id.* at 717.

181. Kokomo Ctr. Township Consol. Sch. Corp. v. McQueary, 682 N.E.2d 1305, 1306 (Ind. Ct. App. 1997).

182. *Id.* at 1306.

183. *Id.* at 1306-07.

184. IND. CODE § 22-2-5-2 (1993).

185. Sun-Gard U.S.A., Inc. v. Stevens, 683 N.E.2d 650 (Ind. Ct. App. 1997) (unpublished memorandum decision).

to broaden the restrictive definition of wages under the statute, and held that the severance pay in the instant case did not constitute wages.[186]

D. Bonuses Based Upon Company Performance Do Not Constitute Wages

Similarly, a federal court decision recently clarified that an employee's bonus, when based upon company performance and not the individual's performance, does not constitute wages within the meaning of Indiana's wage statute.[187] In granting summary judgment for the employer, the court relied upon the following facts:

- The bonus was not tied to or calculated from the plaintiff's salary or commissions;[188]
- The bonus in question was related to the overall performance of the bank branch;[189]
- The bonus was not paid on a periodic, regular basis as the bonus amount could only be calculated at the end of the fiscal year.[190]

X. WORKER'S COMPENSATION

Several key issues were addressed during the survey period that warrant a brief comment.

A. The Board's Authority To Enter Orders That Are Not Completely Dispositive

In responding to a certified question from the United States District Court, Southern District of Indiana, the Indiana Supreme Court held that the Board may issue enforceable and appealable determinations regarding the termination of temporary total disability benefits and the reasonableness of medical care.[191] The court also ruled that while the Board has the authority to rule on other limited issues, such as the compensability of a claim, the order would not become appealable until the order became a predicate of an award.[192]

The action at issue involved a class of injured workers not able to obtain benefits because their injuries had not reached the state of maximum medical improvement, or "quiescence."[193] The Worker's Compensation Board historically had not issued decisions which disposed of less than all the issues between the parties, based on the belief that the decision would not be subject to

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186. *Id.*
187. Phenicie v. Bossert Indus. Supply, Inc., 963 F. Supp. 747, 751 (N.D. Ind. 1996).
188. *Id.* at 751.
189. *Id.* at 752.
190. *Id.* at 753.
191. Cox v. Worker's Compensation Bd., 675 N.E.2d 1053, 1059-60 (Ind. 1996).
192. *Id.*
193. *Id.* at 1054.

judicial review.[194] The court held that the Board had explicit power to issue decisions regarding the termination of temporary disability benefits.[195] In concluding that the decision regarding the termination of benefits constituted an "award" under the Act, and was therefore enforceable and appealable, the court noted that the purposes of the Act were to be construed liberally.[196] The court used similar reasoning to conclude that the award of necessary medical benefits under the Act would also be construed as an "award" if incorporated into an order directing medical treatment or compensation.[197] Finally, the court concluded that nothing in the statute prevented the Board from ruling on other limited issues such as the compensability of the claim.[198] However, until the ruling resulted in an award, the ruling would not be immediately appealable.[199] This opinion gives the Board broad discretion to issue orders regarding limited issues in dispute in order to effectuate the purposes of the statute.

B. Premature Filing Of Application For Review

In *Jackson v. CIGNA/Ford Electronics & Refrigeration Corp.*,[200] the appellate court addressed an issue of first impression: whether the premature filing of an application for review satisfies the filing requirements under Indiana law.[201] The case involved a *pro se* plaintiff who contested the discontinuation of temporary total disability benefits.[202] On the day following the hearing, and roughly four months prior to the issuance of the order and award, the claimant filed a letter requesting a hearing before the full Board and entering an appeal against any ruling the hearing officer might make.[203] The full Board treated the appeal as untimely.[204] In reversing the Board's decision, the appellate court looked to the statutory purpose, which was to obtain the "speedy disposal of a claim" and to provide notice to the other party.[205]

CONCLUSION

This survey period reflected both clarification and refinement in numerous areas of employment law. On the state level, the Indiana Supreme Court

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194. *Id.*
195. *Id.* at 1056.
196. *Id.* at 1057.
197. *Id.* at 1058-59.
198. *Id.*
199. *Id.*
200. 677 N.E.2d 1098 (Ind. Ct. App. 1997).
201. *Id.* at 1100.
202. *Id.* at 1099.
203. *Id.*
204. *Id.*
205. *Id.* at 1102. Note that the statutory language in question states that an application for review is to be made "within twenty (20) days from the date of the award made by less than all the members." IND. CODE § 22-3-4-7 (1993).

revitalized the employment at-will doctrine in Indiana. Due to the overall increase in employment litigation that has been experienced, new issues will likely continue to develop as the boundaries of the various employment laws are challenged.