

# YEAR IN REVIEW: A SURVEY OF SIGNIFICANT 2006 DEVELOPMENTS IN THE AREA OF LABOR AND EMPLOYMENT LAW AND THE IMPACT UPON INDIANA EMPLOYERS

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## INTRODUCTION

Last year turned out to be an interesting year for developments in the area of labor and employment law in the state of Indiana. Some of these developments have an immediate impact upon Indiana employers while the full impact of other developments will occur over time. This survey attempts to issue spot for the reader and summarize the impact and/or potential impact of the new development. This survey is not intended to be a treatise on Indiana labor and employment law. Readers of the survey are encouraged to analyze the developments discussed within the survey in the context of existing legal precedent.

I hope this survey makes for interesting and informative reading. While the author will continue to monitor the impact of recent developments in labor and employment law, readers of this survey should feel free to contact this author or any of the contributing authors directly if there are any questions regarding the content of the survey.

## I. INDIANA WAGE AND HOUR UPDATE

Indiana has long observed the employment-at-will doctrine. This doctrine permits both the employer and the employee to end the employment relationship at any time for “good reason, bad reason, or no reason at all.”<sup>1</sup> Generally, Indiana courts have been, and continue to be, resistant to recognizing exceptions to the doctrine for fear of undermining it. On rare occasions though, exceptions have been acknowledged. Thus, the Indiana Supreme Court in *McClanahan v. Remington Freight Lines, Inc.*<sup>2</sup> allowed a truck driver to bring a cause of action against his employer after he was fired for refusing to perform what would have been an illegal act. The court reasoned that if an employee could not bring a cause of action under these circumstances, it would encourage law-breaking by

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1. *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1128 (Ind. 2006).  
2. 517 N.E.2d 390 (Ind. 1988).

employers and employees alike.<sup>3</sup> In *Frampton v. Central Indiana Gas Co.*,<sup>4</sup> the court recognized a cause of action for employees allegedly fired for filing a claim for Worker's Compensation.<sup>5</sup> Exceptions such as these have proven to be atypical over the years, with the overwhelming majority of decisions refusing to recognize additional exceptions to the doctrine.

During this past year, however, Indiana recognized a new exception to the employment-at-will doctrine. Prior to the August 2006 decision of the Indiana Court of Appeals in *Tony v. Elkhart County*,<sup>6</sup> no Indiana court had recognized a claim of constructive discharge under state law. In *Tony*, however, the court held "that when an employee is discharged, whether expressly or constructively, solely for exercising a statutorily conferred right, an exception to the general rule of at will employment is recognized and a cause of action exists in the employee as a result of the retaliatory discharge."<sup>7</sup>

The plaintiff in *Tony* alleged he was constructively discharged in retaliation for filing a workers compensation claim.<sup>8</sup> Thus, the court addressed whether filing a worker's compensation claim fell within the public policy exemption to the employment at will doctrine recognized in *Frampton*.<sup>9</sup> The court concluded that

an employer's acts of creating working conditions so intolerable as to force an employee to resign in response to an employee's exercise of his statutory right to file a worker's compensation claim . . . creates a deleterious effect on the exercise of this important statutory right and would impede the employee's ability to exercise his right in an unfettered fashion without being subject to reprisal.<sup>10</sup>

Accordingly, the court held that "constructive discharge in retaliation for filing a worker's compensation claim" fell "within the *Frampton* public policy exception and that a cause of action for constructive retaliatory discharge exists

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3. *Id.* at 393.

4. 297 N.E.2d 425 (Ind. 1973).

5. *Id.* at 428.

6. 851 N.E.2d 1032 (Ind. Ct. App. 2006).

7. *Id.* at 1039.

8. *Id.* at 1034.

9. *Frampton* held "that an employee who alleges he or she was retaliatory discharged for filing a claim pursuant to the Indiana Worker's Compensation Act . . . has stated a claim upon which relief can be granted." *Frampton*, 297 N.E.2d at 428. Thus, the court recognized an exception to the employment-at-will doctrine. This opinion also suggested other exceptions to the doctrine were possible when it declared that "when an employee is discharged solely for exercising a statutorily conferred right an exception to the general rule [of employment-at-will] must be recognized." *Id.* at 428. Nevertheless, the supreme court has since reined in this declaration, commenting in *Meyers v. Meyers*, 861 N.E.2d 704, 707 (Ind. 2007) that "[t]he decisions during the intervening thirty years have made it plain that this language is intended to recognize quite a limited exception." This case is discussed *infra* notes 14-17.

10. *Tony*, 851 N.E.2d at 1040.

[when] an employee” can show he was “forced to resign as a result of exercising this statutorily conferred right.”<sup>11</sup> “[T]o survive a motion to dismiss, the employee must allege in his complaint that he is entitled to bring a retaliatory discharge claim under an exception to the employment at will doctrine and that he was constructively discharged.”<sup>12</sup> “Tony . . . satisfied these requirements” because he alleged he exercised a statutorily conferred right when he filed workers compensation claims and was subjected to a hostile work environment that forced him to resign.<sup>13</sup>

Outside of this case, Indiana courts have not faltered in their continued support of the employment-at-will doctrine.<sup>14</sup> Recently, in *Meyers v. Meyers*,<sup>15</sup> the court refused to recognize an additional exception to the doctrine. The plaintiff in *Meyers* sought to establish an exception whereby employees would not be precluded from bringing an action alleging retaliatory discharge for exercising a statutory right to receive overtime pay.<sup>16</sup> Citing Indiana’s well established adherence to the employment-at-will doctrine, the court explained that the circumstances of the case did not warrant such an exception.<sup>17</sup> In the past, the instances where exceptions had been made typically “involved plaintiffs allegedly terminated in retaliation for refusing to violate a legal obligation that carried penal consequences,”<sup>18</sup> an element lacking in the plaintiff’s case. The court concluded by reiterating that requests for additional exceptions were generally unavailing as the legislature, not the supreme court, is the branch of government best suited to making such determinations.<sup>19</sup>

These cases illustrate the constant struggle between the employment-at-will doctrine and potential exceptions to it. While the decision in *Meyers* reflects a desire to maintain a healthy and robust employment-at-will doctrine unadulterated by numerous exceptions, the *Tony* decision demonstrates circumstances where courts feel compelled to recognize exceptions to right employers’ wrongs. Undoubtedly, the relationship between the doctrine and its exceptions will continue to evolve over the coming years.

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11. *Id.*

12. *Id.*

13. *Id.*

14. *See, e.g.,* *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1128-29 (Ind. 2006) (refusing to recognize an age discrimination exception to the employment-at-will doctrine); *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 892 (Ind. Ct. App. 2007) (declining to “construe employee handbooks as unilateral contracts” and thereby rejecting an attempt to create a “broad new exception to the at-will doctrine for such handbooks”); *M.C. Welding & Machining Co. v. Kotwa*, 845 N.E.2d 188, 195 (Ind. Ct. App. 2006) (refusing to recognize exception in case involving unemployment benefits).

15. 861 N.E.2d 704 (Ind. 2007).

16. *Id.* at 705.

17. *Id.* at 706.

18. *Id.* at 707.

19. *Id.*

A. *Indiana Wage Payment and Wage Claims Statutes*

The past year did generate a number of cases interpreting Indiana's Wage Payment and Wage Claims acts. Most involved questions regarding what constitutes a "wage" and timing issues.

The first of these cases, *Mitchell v. Universal Solutions of North Carolina, Inc.*,<sup>20</sup> concerned unused vacation time. At issue was whether employees who had accrued vacation time could, at the time of their discharge, recover those amounts as "wages" despite having signed a policy indicating otherwise.<sup>21</sup> The court ruled they could not.<sup>22</sup> Under the Wage Payment Statute, "employees, upon separation from employment, must be paid the amount due them at their next and usual payday . . . ."<sup>23</sup> According to Indiana law, "vacation pay constitutes deferred compensation" that must be paid upon discharge according to the Wage Payment Statute.<sup>24</sup> However, this requirement can be avoided so long as an agreement exists between the employer and employee to the contrary.<sup>25</sup>

Although both plaintiffs had signed policies in their respective employee handbooks indicating that unused vacation pay would not be paid upon termination, the plaintiffs contended that such an agreement was unenforceable.<sup>26</sup> Noting that each handbook stipulated that the policies therein were not contracts,<sup>27</sup> the plaintiffs therefore argued that the handbook's policies were not enforceable against them.<sup>28</sup> The court disagreed, holding that "[i]n this state, a party may not accept benefits under a transaction or instrument and at the same time repudiate its obligations."<sup>29</sup> In other words, the court held that the plaintiffs could not claim a right to vacation pay the benefit provided by the employee handbooks while at the same time maintaining that the employee handbooks were unenforceable against them.<sup>30</sup>

A similar conclusion was reached in *Williams v. Riverside Community Corrections Corp.*<sup>31</sup> Again, the plaintiff asserted she was entitled, upon discharge, to unused vacation and sick pay. The court of appeals disagreed,

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20. 853 N.E.2d 953 (Ind. Ct. App. 2006). The case was a consolidated appeal involving two separate plaintiffs and defendants.

21. *Id.* at 957-58. Both policies stipulated that, under certain conditions, unused vacation pay would not be payable upon termination.

22. *Id.* at 960.

23. *Id.* at 958 (citing IND. CODE § 22-2-5-1 (2004)).

24. *Id.*

25. *Id.* (citing *Ind. Heart Assoc., P.C. v. Bahamonde*, 714 N.E.2d 309, 311-12 (Ind. Ct. App. 1999)).

26. *Id.* at 959.

27. Such statements are customary in employee handbooks because they indicate the employers' intention to maintain an employment-at-will relationship with the employee.

28. *Mitchell*, 853 N.E.2d at 959-60.

29. *Id.* at 959.

30. *Id.*

31. 846 N.E.2d 738 (Ind. Ct. App. 2006).

pointing out that Indiana case law indicates that employers can implement policies which, if agreed to by the employee, prevent the employee from recovering unused vacation pay at termination. As for sick pay, the court indicated that “whether sick leave benefits are wages should be determined on a case-by-case basis.”<sup>32</sup> In some instances sick pay is analogous to vacation pay, in which case the same rules apply to each.<sup>33</sup> However, at other times, sick pay is not analogous to vacation pay and does not constitute wages and thus employees are not entitled to recover any amount at their discharge.<sup>34</sup> In this case the latter held true.<sup>35</sup>

An interesting case addressing when an employer is obligated to pay wages under the Wage Payment Statute arose in the case of *David A. Ryker Painting Co., Inc. v. Nunamaker*.<sup>36</sup> Originally the painter plaintiff performed work pursuant to a contract and received payment from the defendant for the work. Subsequently, the Department of Labor performed an audit and determined that the plaintiff was entitled to a higher wage than the one he originally received.<sup>37</sup> As a result of the audit, the Department ordered the defendant to pay the plaintiff an additional sum of money.<sup>38</sup> Fourteen days after the Department issued its order, the defendant paid plaintiff this amount.<sup>39</sup> In response, the plaintiff filed a lawsuit under the Wage Payment Statute, alleging that the defendant impermissibly delayed in paying him the full amount as determined by the Department of Labor.<sup>40</sup> At issue was whether the defendant’s payment was made in a timely matter or whether there was a delay in payment such that the Wage Payment Statute was implicated.

Although the appellate court had held that the plaintiff could recover liquidated damages and attorney’s fees under the Wage Payment Statute, the supreme court reversed.<sup>41</sup> The court ruled that the defendant paid the initial wages in a timely fashion as required by the contract between the parties.<sup>42</sup> Importantly, it also concluded that the defendant had no obligation to pay additional wages until the Department issued its determination.<sup>43</sup> As a result, the defendant’s second payment made fourteen days after this determination was within the time limits of the Wage Payment Statute. Thus, the defendant had fulfilled its statutory obligations and the plaintiff was unable to recover

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32. *Id.* at 749.

33. *Id.* at 748-49.

34. *Id.* at 749-50.

35. *Id.* at 750.

36. 849 N.E.2d 1116 (Ind. 2006).

37. *Id.* at 1118. The Department of Labor concluded that the painter was entitled to receive wages at a “skilled” as opposed to “semi-skilled” level. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1120.

42. *Id.* at 1119.

43. *Id.* at 1120.

liquidated damages or attorneys' fees.<sup>44</sup>

Finally, the supreme court has accepted transfer of *Naugle v. Beech Grove City Schools*, a case addressing whether the term "days" in the Wage Payment Statute refers to "business days" or "calendar days."<sup>45</sup> The Statute itself does not provide a definition.<sup>46</sup> According to the language of the statute: "Payment shall be made for all wages earned to a date not more than ten (10) days prior to the date of payment."<sup>47</sup> In other words, the statute provides a ten-day window within which employers must pay wages to their employees. Whether these ten days are considered business days or calendar days is significant because under the former interpretation, an employer essentially has two weeks to pay employees, while under the latter the timeframe is considerably lessened. The implications of the eventual ruling will undoubtedly have a major impact upon the business community.

The court of appeals determined, applying rules of statutory interpretation, that the term meant "calendar days."<sup>48</sup> Of course, this holding was vacated upon the supreme court's accepting transfer of the case. It remains to be seen how the supreme court might rule on this issue.<sup>49</sup> A ruling contrary to the appellate court would most definitely serve employers' interests by providing them additional time within which to make payments of wages, and is the more widely accepted interpretation; however, the analysis of the appellate court is also persuasive.

Whatever the supreme court eventually rules in *Naugle* may soon become irrelevant, however, depending upon the outcome of a bill that recently received the General Assembly's approval.<sup>50</sup> This bill, which is currently awaiting the Governor's signature,<sup>51</sup> would amend the Wage Payment Statute so that the requirement that wages be paid within "ten days" would be interpreted as "ten business days."<sup>52</sup> Of course, this interpretation would run counter to the court of appeals' holding. Significantly, this bill would also apply retroactively, thereby foreclosing any potential lawsuits prior to the statute's effective date.

### B. Indiana's Minimum Wage

Indiana will soon be subject to an increase in the state's minimum wage. House Bill 1027, which was signed by the Governor on May 4, 2007, ties the

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44. *Id.*

45. *Naugle v. Beech Grove Elementary Sch.*, 840 N.E.2d 854, 855 (Ind. Ct. App. 2006), *vacated*, 864 N.E.2d 1058 (Ind. 2007).

46. *Id.* at 857.

47. IND. CODE § 22-2-5-1(b) (2004).

48. *Naugle*, 840 N.E.2d at 858.

49. In April 2007, the Indiana Supreme Court reversed the appellate court's ruling, holding instead that the term "days" in the Wage Payment Statute referred to business days. *Naugle v. Beech Grove Elementary Sch.*, 864 N.E.2d 1058, 1068 (Ind. 2007).

50. The bill is S.B. 276, 115th Leg., Regular Sess. (Ind. 2007).

51. Governor Daniels signed this bill into law on April 25, 2007.

52. S.B. 276, 115th Leg., Regular Sess. (Ind. 2007).

state's minimum wage to that of the federal government's minimum wage.<sup>53</sup> Because an increase to \$7.25 an hour, up from the current \$5.15 per hour, is planned at the federal level, employers and employees in Indiana will be subject to a similar increase.<sup>54</sup>

## II. RECENT DEVELOPMENTS IN EMPLOYMENT DISCRIMINATION LAW

### A. General Overview

As a general rule, Indiana follows the doctrine of employment "at-will," under which either party to an employment relationship, absent a binding agreement providing otherwise, may terminate the relationship at any time for any reason.<sup>55</sup> Accordingly, Indiana employers typically enjoy a high degree of discretion in making employment decisions.

This discretion, however, is not limitless. Several federal employment laws prevent employers from making employment decisions regarding their employees based on certain protected characteristics or status, such as race, color, religion, national origin, sex, age over forty, and disability.<sup>56</sup> The Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") generally apply to private employers that employ fifteen or more employees throughout at least twenty calendar weeks of the current or preceding year.<sup>57</sup> The Age Discrimination in Employment Act ("ADEA") applies to private employers that employ at least twenty workers in the same time period.<sup>58</sup> Some kinds of employers, such as religious institutions and bona fide private membership clubs, are exempt from federal discrimination statutes.<sup>59</sup> Federal employment discrimination laws commonly apply to federal employers, such as federal agencies. However, application of federal employment discrimination laws to state public employers is less uniform.

The Indiana Civil Rights Law ("ICRL"), codified in Indiana Code sections 22-9-1-1 through 22-9-1-18, "prohibits discrimination in employment on the basis of race, religion, color, sex, disability, national origin or ancestry and applies to most private and public employers in Indiana."<sup>60</sup> Additionally, some localities also prevent employers from taking adverse employment actions against employees because of other characteristics not protected by federal law, such as

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53. H.R. 1027, 115th Leg., Regular Sess. (Ind. 2007).

54. See Pub. L. 110-28 § 8102, 121 Stat. 112 (2007) (raising the federal minimum wage).

55. *Tony v. Elkhart County*, 851 N.E.2d 1032, 1035 (Ind. Ct. App. 2006).

56. See, e.g., Age Discrimination in Employment Act, 29 U.S.C. § 623 (2000); Americans with Disabilities Act, 42 U.S.C. § 12112 (2000); Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2 (2000); and 42 U.S.C. § 1981 (2000).

57. 42 U.S.C. §§ 2000e(b), 12111(5)(A) (2000).

58. 29 U.S.C. § 630(b) (2000).

59. See 42 U.S.C. §§ 2000e-1, 2000e(b).

60. *Montgomery v. Bd. of Trs. of Purdue Univ.*, 849 N.E.2d 1120, 1130 (Ind. 2006) (citing IND. CODE § 22-9-1-2, -1-3 (2004)).

sexual orientation and gender identity.

The information in this Part will discuss recent legal developments in employment discrimination law over the last two years.

### *B. Threshold Issues*

The Seventh Circuit explained the application of laches defense to Title VII hostile environment action. In *Pruitt v. City of Chicago*,<sup>61</sup> the Seventh Circuit upheld a district court's grant of summary judgment in favor of a defendant against a group of ten plaintiffs alleging hostile environment claims. Plaintiffs alleged that they were subjected to a racially hostile environment by their supervisor for over twenty years. Although the Supreme Court in the familiar timeliness case *National Railroad Passenger Corp. v. Morgan*,<sup>62</sup> exempted hostile environment claims from the typical 300 day filing requirements strictly applied to claims based on discrete acts, the *Pruitt* court noted that in *Morgan* the Court accorded an equitable laches defense to defendants in hostile environment cases.<sup>63</sup>

The Seventh Circuit explained that a defendant must prove a laches defense in a Title VII hostile environment claim just as in any other context, by showing: (1) a "lack of diligence" by the plaintiff, and (2) prejudice to the defendant.<sup>64</sup> The court found that this standard was easily met under the circumstances in *Pruitt*, in which the plaintiffs alleged racial harassment over a period of twenty years, all relevant supervisory employees were either retired, deceased, or otherwise unavailable, and where key documents had been destroyed years before the claim was filed.<sup>65</sup>

Although the court in *Pruitt* upheld the district court's grant of summary judgment in favor of the defendant on the laches basis, the opinion offers litigants cause to believe that a total grant of summary judgment might not be appropriate in future cases. Although laches might bar the advancement of the plaintiffs' hostile environment claims based on some of the alleged discrimination, the court reasoned, the defense could not logically apply to all of the allegations, particularly those occurring so recently that the employer would not be able to show either delay or prejudice.<sup>66</sup> To hold otherwise, the court explained, would be to find later discrimination inactionable merely because earlier discrimination took place, a fallacy that could not legitimately be advanced in Title VII jurisprudence.<sup>67</sup> Despite the court's indication that a successful laches defense did not automatically require dismissal of hostile environment claims based on even recent events, the plaintiffs' failure to argue

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61. 472 F.3d 925, 927-28 (7th Cir. 2006).

62. 536 U.S. 101 (2002).

63. *Pruitt*, 472 F.3d at 927.

64. *Id.* (quoting *Kansas v. Colorado*, 514 U.S. 673, 687 (1995)).

65. *Id.* at 928.

66. *Id.*

67. *Id.*

on this point was fatal to their case.<sup>68</sup>

### C. *Defining Adverse Actions in Employment Discrimination Cases*

In *Timmons v. General Motors Corp.*,<sup>69</sup> the Seventh Circuit found that involuntary placement of an employee on disability leave, even while his salary remained the same, so altered his material responsibilities as to constitute an adverse employment action in a disparate treatment claim under the Americans with Disabilities Act.<sup>70</sup>

In *Minor v. Centocor, Inc.*,<sup>71</sup> the Seventh Circuit found that a sales representative whose work hours were extended from fifty-five hours a week to seventy to ninety hours a week suffered a material change in the conditions of her work employment but failed to show it was a result of discrimination.<sup>72</sup> The court found that “[e]xtra work can be a material difference in the terms and conditions of employment.”<sup>73</sup> The court further found that the extra work alleged was material because the employee alleged that she was required to work twenty-five percent longer to earn the same income as before.<sup>74</sup> Nonetheless, the court affirmed the entry of summary judgment because there was no evidence that the longer work hours were imposed as a result of employee’s sex or age.<sup>75</sup>

### D. *Curative Measures Do Not Affect Adverse Action Determination*

In *Phelan v. Cook County*,<sup>76</sup> the Seventh Circuit held that an employee was subjected to an adverse employment action for the purposes of her Title VII claim when she was terminated, despite the employer’s decision to reinstate her with backpay four months later.<sup>77</sup> The *Phelan* court rejected the theory that economic cures such as reinstatement and backpay negated the termination.<sup>78</sup> Such a rule, the court explained, would permit employers to escape Title VII liability by simply reinstating an employee when doing so had less of a cost impact than facing imminent and costly litigation by a plaintiff.<sup>79</sup> Because Title VII’s primary objective is to prevent the harm, rather than provide redress, the court explained, the defendant’s later curative actions did not disturb the legitimacy of plaintiff’s claim that she had been subjected to an adverse

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68. *Id.* at 928-30.

69. 469 F.3d 1122 (7th Cir. 2006).

70. *Id.* at 1128.

71. 457 F.3d 632 (7th Cir. 2006).

72. *Id.* at 634-35.

73. *Id.* at 634.

74. *Id.*

75. *Id.* at 636.

76. 463 F.3d 773 (7th Cir. 2006).

77. *Id.* at 780.

78. *Id.*

79. *Id.*

employment action.<sup>80</sup>

*E. Pretext—Retaliation and Discrimination*

In *Forrester v. Rauland-Borg Corp.*,<sup>81</sup> the Seventh Circuit took the opportunity to correct and clarify several decisions regarding pretext in employment discrimination cases. The plaintiff in *Rauland-Borg* was discharged from his employment after a sexual harassment complaint was lodged against him by a female coworker. In support of his argument as to whether the employer's legitimate non-discriminatory reason for his termination, the harassment complaint, was pretextual, plaintiff offered evidence that the investigation performed by the employer regarding the complaint was "shoddy."<sup>82</sup>

Affirming the district court's grant of summary judgment in favor of the employer, the court once again emphasized that pretext analysis rests solely on the truth of the employer's proffered explanation for its actions, not the wisdom or correctness of such action.<sup>83</sup> In so doing, the court turned to repeated "dictum" in several of its employment discrimination opinions stating that pretext can be shown not only where doubt is cast upon the honesty of an employer's reason, but also where a given reason is "insufficient to motivate" the action at issue. This latter expression the court explained, had done little else but confound pretext jurisprudence.<sup>84</sup> "A pretext, to repeat, is a deliberate falsehood," the court explained.<sup>85</sup> "An honest mistake, however dumb, is not, and if there is no doubt that it is the real reason it blocks the case at the summary-judgment stage."<sup>86</sup>

*F. Harassment Cases—Non-Employee Harassment of Employees—  
Employer Liability Found*

In *Erickson v. Wisconsin Department of Corrections*,<sup>87</sup> the Seventh Circuit found that an employer could be held liable for the rape of an employee in a minimum security prison, by an inmate of the prison.<sup>88</sup> Evidence demonstrating that the employee had reported to her supervisor during a social event a previous incident in which the inmate entered employee's work space after regular office hours created a genuine issue of material fact as to whether employer could be held liable under Title VII.<sup>89</sup>

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80. *Id.*

81. 453 F.3d 416 (7th Cir. 2006).

82. *Id.* at 417.

83. *Id.*

84. *Id.*

85. *Id.* at 419.

86. *Id.*

87. 469 F.3d 600 (7th Cir. 2006).

88. *Id.* at 605.

89. *Id.* at 607.

*G. Employer Liability—Notice Imputed Beyond Reports to Designated Individuals*

In a recent case, the Northern District of Indiana found that an employer may be charged with notice of harassment of an employee even where the employee has failed to inform any of the company officials to whom employees were instructed to report harassment.<sup>90</sup> In *Jean-Baptiste v. K-Z, Inc.*, the plaintiff alleged that he was subjected to a racially hostile work environment by a coworker, thereby requiring him to demonstrate a basis for his employer's liability.<sup>91</sup>

With respect to notice of coworker harassment, the court explained, a plaintiff cannot withstand summary judgment without offering evidence of negligence, namely that he gave the employer evidence sufficient to demonstrate to a reasonable employer that he was being subjected to harassment.<sup>92</sup> Although the plaintiff did not report the harassment to any of the three "point persons" designated by company policy to receive harassment complaints, the court found sufficient evidence warranting employer liability.<sup>93</sup> Because the individual to whom the plaintiff complained was a member of management, had allegedly observed some of the harassment, and ultimately terminated plaintiff's employment, plaintiff had reasonable grounds to believe that although he had not reported harassment to a designated "point person," a member of the company with authority to either correct or report the behavior was aware of the unlawful treatment.<sup>94</sup>

### III. COVENANTS NOT TO COMPETE

A covenant not to compete is a contract in which one party agrees not to compete with the other. Typically, the agreement not to compete is limited with respect to the activity, time, and geographic area. Although covenants not to compete are generally disfavored, courts will enforce them if the scope of activity, time limitation, and geographic restriction are reasonable.<sup>95</sup> Accordingly, when a plaintiff seeks to enforce a covenant, the defendant often argues that the covenant is unenforceable because it is unreasonable with respect to the activity, time, and/or geographic area.

Covenants not to compete can arise in the sale of business context (where the seller agrees not to compete with the buyer) or in the employment context (where the employee agrees not to compete with the employer). Additionally, as one of the cases below indicates, they can also arise in the independent contractor context. The following recent cases made new law or clarified or extended

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90. *Jean-Baptiste v. K-Z, Inc.*, 442 F. Supp. 2d 652, 675-76 (N.D. Ind. 2006).

91. *Id.* at 673-74.

92. *Id.*

93. *Id.* at 675-76.

94. *Id.*

95. *See, e.g.*, *MacGill v. Reid*, 850 N.E.2d 926, 929 (Ind. Ct. App. 2006).

existing law.

### A. *Liquidated Damages*

In *Degani v. Community Hospital*,<sup>96</sup> the Hospital and the Doctors entered into agreements for anesthesia services containing covenants not to compete (Section 7.1) that provided, in part:

Physician agrees that Hospital shall be entitled to injunctive relief to enforce this covenant, except as provided in the following sentence. Physician and Hospital agree that physician may make a lump sum payment to Hospital of an amount equal to the annual base compensation paid or payable to Physician in the year in which Physician's employment by Hospital is terminated in lieu of Hospital's right to injunctive relief, which sum shall constitute liquidated damages in full for violation of this covenant.<sup>97</sup>

The Doctors sued the Hospital for breaching their agreements, and in its counterclaim, the Hospital sought, among other things:

- (1) declaratory judgment that the Doctors' employment contracts and covenants not to compete [were] valid and [were] in full force and effect;
- (2) a permanent injunction enjoining the Doctors from practicing anesthesiology within twenty miles of [the] Hospital for a period of one year after the end of their employment; [and] (3) damages in an amount equal to the Doctors' annual base salary . . . plus prejudgment interest.<sup>98</sup>

The Doctors denied that their agreements required "payment to the Hospital as liquidated damages an amount equal to their annual base compensation for breach of their restrictive covenants."<sup>99</sup> Subsequently, the Hospital stipulated that it sought "only those damages set forth in Section 7.1 . . . which [was] an amount equal to the Doctors' annual base salaries . . . plus prejudgment interest."<sup>100</sup>

The Doctors alleged that Section 7.1 did not "conform to the definition of [an enforceable] liquidated damages provision," as the plain language afforded them the option of making a lump sum payment to avoid the Hospital's right to seek injunctive relief.<sup>101</sup> The court found that a plain reading of Section 7.1 demonstrated that the agreement "afford[ed] the Doctors, not the Hospital, the discretion to make a lump sum payment to the Hospital."<sup>102</sup> Although the agreements characterized the lump sum payment as "liquidated damages," the

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96. No. 2:04-CV-398-PRC, 2006 U.S. Dist. LEXIS 1037 (N.D. Ind. 2006).

97. *Id.* at \*8.

98. *Id.*

99. *Id.* at \*10.

100. *Id.* at \*10-11.

101. *Id.* at \*11.

102. *Id.* at \*16.

court found the “characterization to be improper under Indiana contract law” and noted that interpretation of a contract provision cannot be controlled by erroneous labels.<sup>103</sup> The court stated that “‘liquidated damages’ applies to a specific sum of money that has been expressly stipulated by the parties to a contract as the amount of damages to be recovered by one party for a breach of the agreement by the other,” which either “exceeds or falls short of actual damages” and that a typical liquidated damages provision provides for the forfeiture of a stated sum of money upon breach without proof of damages.<sup>104</sup> The court noted that the cases cited by the Hospital provided for an automatic forfeiture of a stated sum of money upon breach by a party, whereas Section 7.1 gave the Doctors an option.<sup>105</sup>

Additionally, because the Hospital stipulated that it sought only those damages set forth in Section 7.1, the court found that the Hospital “waived or abandoned any right to seek remedies of declaratory judgment, permanent injunction, and any money damages other than liquidated damages.”<sup>106</sup> The court also found that the Hospital was not “entitled to recover liquidated damages under [Section] 7.1.”<sup>107</sup> Accordingly, the court held the Hospital’s counterclaim failed as a matter of law, and “the Doctors [were] entitled to summary judgment on that claim.”<sup>108</sup>

### *B. Independent Contractors and Not-for-Profit Corporations*

In *Hope Foundation, Inc. v. Edwards*,<sup>109</sup> Hope was a not-for-profit corporation engaged in the business of training “educators to improve schools and student achievement.”<sup>110</sup> Hope provided on-site professional development programs in which it sent consultants to visit a school or school district, and most of the consultants were independent contractors.<sup>111</sup> Hope and Edwards (a consultant) signed a contract with a non-competition agreement that contained a one year restriction.<sup>112</sup> Later, “Edwards’ wife set up a website for Edwards Education Services,” which described “educational leadership services that compete[d] directly with those offered by Hope.”<sup>113</sup> Subsequently, Hope filed an action seeking injunctive relief to prevent Edwards and Edwards Educational Services from competing with Hope for one year.<sup>114</sup>

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103. *Id.* at \*16-17.

104. *Id.* at \*17.

105. *Id.*

106. *Id.* at \*18.

107. *Id.*

108. *Id.*

109. No. 1:06-CV-0439-DFH-TAB, 2006 WL 3247141 (S.D. Ind. 2006) (slip opinion).

110. *Id.* at \*1.

111. *Id.*

112. *Id.* at \*2-3.

113. *Id.* at \*7.

114. *Id.* at \*1.

The court recognized that there were “two unusual features about this case.”<sup>115</sup> First, the parties did not cite, and the court did not find, any Indiana cases dealing with covenants not to compete as applied to independent contractors.<sup>116</sup> The court stated that covenants not to compete were the “most familiar in the context of employment agreements and agreements to sell businesses.”<sup>117</sup> The court noted that in a previous case, the Indiana Supreme Court applied the “standards of employer-employee covenants” “[w]here an independent contractor was a corporation acting as an agent for another corporation as a principal.”<sup>118</sup> The court also noted that courts in other states “have not adopted a complete prohibition on covenants” not to compete but “have treated such covenants as similar to an employee’s covenant, subject to close scrutiny.”<sup>119</sup> The court stated that “[i]n considering the overall issue of reasonableness . . . a court may still consider the specific context, including the nature of the contractual relationship, when deciding whether the covenant seeks to enforce a legitimate, protectable interest, [and that i]f a person is an independent contractor, that fact may signal a greater likelihood that he has brought his own strengths and abilities . . . such that the party seeking to enforce [the covenant] may have a more limited protectable interest.”<sup>120</sup> Here, the court stated, Edwards was “more like an employee than the [seller of] a business,” and his limited relationship with Hope as a part-time, independent contractor tended to weaken Hope’s protectable interest.<sup>121</sup> The court also noted, however, that Hope had a legitimate interest in its good will and relationships with its customers.<sup>122</sup>

The second unusual feature of this case, the court stated, was that Hope was not a “for-profit business seeking to protect its profitability,” but rather, “[i]t was founded to spread its ideas about educational reform as widely and as effectively as possible.”<sup>123</sup> The parties did not cite, and the court did not find, any “Indiana cases addressing a not-for-profit corporation’s ability to enforce a covenant not to compete.”<sup>124</sup> The court stated that, looking at cases from other states, there was “no reason to predict the state court would adopt an absolute bar to such cases.”<sup>125</sup> Moreover, the court noted, because non-for-profit corporations might compete against for-profit corporations (in this case, Edwards Educational Services was set up as a for-profit corporation), it would be unfair if courts “were

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115. *Id.* at \*8.

116. *Id.* at \*9.

117. *Id.* at \*8.

118. *Id.* at \*9.

119. *Id.*

120. *Id.*

121. *Id.* at \*10.

122. *Id.* at \*13.

123. *Id.* at \*10.

124. *Id.*

125. *Id.*

willing to enforce [covenants] in favor of only the for-profit entities.”<sup>126</sup> The court also noted that in evaluating the protectable interest of Hope and the public interest as might be affected by a preliminary injunction, the court “should consider its not-for-profit status as part of the relevant circumstances.”<sup>127</sup> Here, the court stated that the public interest weighed in Edwards’s favor, because schools were in the midst of long-term relationships with him, and if injunctive relief were granted, “[a]nother consultant would have to start over again,” which would “disrupt, delay, and add costs to projects” that were “valuable and important efforts to improve public education.”<sup>128</sup> Based on all the relevant circumstances, the court denied Hope’s motion for a preliminary injunction.<sup>129</sup>

### C. *Protectable Interest and Unenforceable Penalty*

In *Press-A-Dent, Inc. v. Weigel*,<sup>130</sup> Weston worked as an independent contractor for Buckley, who owned Press-A-Dent. Weston later “terminated his relationship with Buckley and went into business for himself as ‘Papa Dent’” and was subject to a non-competition agreement with Buckley and Press-A-Dent.<sup>131</sup> Weston and Weigel entered an agreement in which “Weston signed as the co-owner of Papa Dent” and Weigel would work as a contractor and Weston would provide him training.<sup>132</sup> The agreement contained a non-competition covenant prohibiting Weigel from engaging in any business of any kind that was in competition with Weston during the term of the agreement and two years after its termination.<sup>133</sup> It also stated that if Weigel violated or breached the non-competition covenant, Weigel agreed to pay Weston, as liquidated damages, \$50,000.<sup>134</sup> Subsequently, Weston assigned the agreement to The Dent Man, whose president was Rose, who “was Weston’s girlfriend at the time.”<sup>135</sup> In May 1999, Weigel terminated the agreement, and, in essence, The Dent Man conducted no business following the termination.<sup>136</sup> In July 2000, Press-A-Dent purchased the agreement.<sup>137</sup> In September 2002, “Press-A-Dent filed suit against Weigel, seeking injunctive relief and damages.”<sup>138</sup> The trial court ruled in favor of Weigel, and Press-A-Dent appealed.<sup>139</sup>

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126. *Id.*

127. *Id.*

128. *Id.* at \*17.

129. *Id.* at \*18.

130. 849 N.E.2d 661 (Ind. Ct. App. 2006).

131. *Id.* at 663.

132. *Id.*

133. *Id.* at 664.

134. *Id.*

135. *Id.* at 665.

136. *Id.* at 666-67.

137. *Id.* at 667.

138. *Id.*

139. *Id.* at 667-68.

The court stated that because The Dent Man essentially ceased all operations when Weigel terminated the agreement, it was reasonable for the trial court to conclude that there was no protectable good will in the company.<sup>140</sup> Therefore, the court stated, Press-A-Dent established no damages as the result of Weigel's alleged breach of the agreement.<sup>141</sup> The court also noted that "neither The Dent Man nor Rose took any action to enforce the non-competition provision during the two years that it was arguably in effect."<sup>142</sup> With respect to liquidated damages, the court noted that, in Indiana, "where the liquidated damages are 'grossly disproportionate to the loss which may result from the breach or [are] unconscionably in excess of the loss sought to be asserted, [courts] will treat the sum as a[n] [unenforceable] penalty rather than as liquidated damages.'"<sup>143</sup> Here, the court stated, "The Dent Man essentially ceased operating after May 1999" and "never demanded that Weigel stop his operations," and because "there was no ongoing business and . . . no good will to protect, The Dent Man failed to show that it sustained any damages as a result of Weigel's actions."<sup>144</sup> The court noted that Weigel's training in Texas cost less than \$2000 and that "receipts could have been submitted to ascertain the cost of the junkyard steel that was used to craft Weigel's tools once he went into business for himself."<sup>145</sup> Therefore, the court stated, "damages could have been calculated with reasonable certainty," and the "liquidated damages provided for in the [] agreement amounted to nothing more than a penalty."<sup>146</sup> The court affirmed.<sup>147</sup>

#### *D. Scope of Activity Restriction*

In *MacGill v. Reid*,<sup>148</sup> Reid owned Reid's Housekeeping, which provided residential housekeeping services by matching housekeepers, who were independent contractors, to her clients, who were homeowners who wanted their homes to be cleaned. In October 2003, Reid entered into an employment contract with MacGill that provided that MacGill would perform administrative tasks for Reid's Housekeeping's office.<sup>149</sup> The contract contained a covenant not to compete that provided that MacGill agreed "that for a period of two years after termination" of the agreement, MacGill "will not own, manage, or materially participate in any business substantially similar to [Reid's] business within a 25 mile radius of [Reid's] principal business address."<sup>150</sup> "MacGill ended her

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140. *Id.* at 669.

141. *Id.*

142. *Id.* at 669-70.

143. *Id.* at 670 (quoting *Czeck v. Van Helsland*, 241 N.E.2d 272, 274 (1968)).

144. *Id.*

145. *Id.*

146. *Id.* at 671.

147. *Id.*

148. 850 N.E.2d 926 (Ind. Ct. App. 2006).

149. *Id.* at 927.

150. *Id.* at 928.

employment with Reid's Housekeeping in March 2005," at which time "Reid had between five to ten housekeepers and 200 clients who were 'mostly located' within twenty-five miles of Reid's business address."<sup>151</sup> MacGill subsequently "distributed flyers and obtained one customer for whom she provided 'housekeeping services.'"<sup>152</sup> "In May 2005, Reid filed a complaint for damages and permanent injunction against MacGill," who "argued that the covenant was not to compete unenforceable because Reid had no legitimate protectible interest" and the scope of the covenant was "unreasonably broad."<sup>153</sup> The trial court ruled in Reid's favor, and MacGill appealed.<sup>154</sup>

The court noted that "MacGill knew the names, addresses, and requirements of Reid's clients and housekeeping associates and had acquired an advantage through representative contact with these clients and housekeepers."<sup>155</sup> Thus, the court stated, Reid "demonstrated that Reid's Housekeeping ha[d] a legitimate interest," good will, "worthy of protection by the covenant."<sup>156</sup> With respect to the scope of the covenant, MacGill argued that the covenant was unreasonable because the activity restriction was broader than necessary to protect Reid's good will.<sup>157</sup> MacGill argued that the covenant's provision prohibiting her from managing or owning a housekeeping business, or even working in the housekeeping business altogether, was unnecessary to "protect Reid's goodwill interests" in preserving her customers and housekeepers.<sup>158</sup> MacGill also contended "that the covenant's term restricting her from 'materially participat[ing] in any business substantially similar to [Reid's] business' would prevent her working for another cleaning business in any capacity, such as working as a housekeeper," and therefore was overbroad.<sup>159</sup> The court noted that it had found in other cases that covenants that restricted "an employee from working in any capacity for an employer's competitor or from working within portions of the business with which the employee was never associated to be unreasonable because such restrictions extend[ed] beyond the scope of the employer's legitimate interest."<sup>160</sup> The court agreed

with MacGill that the covenant's provision—restricting her from owning, managing, or materially participating in any business substantially similar to Reid's Housekeeping—would prevent her from being employed in any capacity by any other cleaning business and [was] unreasonable because it extend[ed] beyond the scope of Reid's

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 930.

156. *Id.*

157. *Id.*

158. *Id.* at 931.

159. *Id.* (internal citation omitted).

160. *Id.* at 932.

Housekeeping's good will interest of protecting its current customers and housekeepers.<sup>161</sup>

The court reversed.<sup>162</sup>

#### IV. WORKER'S COMPENSATION ACT

The Indiana Worker's Compensation Act<sup>163</sup> (the "Act") forges compromises between the employer and the employee by allowing employees to recover benefits without having to show fault or negligence on the part of the employer. With each passing year, the Indiana General Assembly makes changes to the Act and Indiana courts continually interpret the Act making new law or extending or affirming existing law. The survey period of 2006 was no different.

##### A. Legislative Changes Affect the Act

House Bill 1307 was introduced and ultimately passed into law during the 2006 General Assembly Session. The Bill impacts a number of provisions in the Act. One of most significant changes was the legislative change, overruling the court's decision in *Milledge v. Oaks*.<sup>164</sup> The amendment now explicitly provides that the burden of proof of the element of a claim is on the employee, and that "proof by the employee . . . does not create a presumption in favor of the employee with regard to another element of the claim."<sup>165</sup> The amendments also provide for increases in the: (1) average weekly wage used to calculate worker's compensation and occupational disease benefits; (2) schedule for awarding compensation for the degree of permanent partial impairment determined by the board; and (3) maximum compensation that may be paid for personal injury by accident or disablement or occupational disease.<sup>166</sup> The amendment also establishes a new schedule for attorneys fees<sup>167</sup> and deletes an exception to and revises the statute of limitations to a straightforward two-year statute of limitations for the making of a modified award of worker's compensation benefits.<sup>168</sup>

##### B. Indiana Courts Interpret the Act

The full Workers Compensation Board (the "Board") can determine the dates for which compensation was payable instead of condition claims where no such findings were agreed upon by parties. In *Stump Home Specialties Manufacturing*

161. *Id.*

162. *Id.* at 933.

163. IND. CODE §§ 22-3-1-1 to -12-5 (2004).

164. 784 N.E.2d 926 (Ind. 2003).

165. See IND. CODE §§ 22-3-2-2(a), 22-3-7-2(a) (2004) (amended by 2006 Ind. Legis. Serv. P.L. 134-2006 (West)).

166. See *id.* §§ 22-3-3-10, 22-3-3-22, 22-3-7-19.

167. See *id.* § 22-3-1-4.

168. See *id.* § 22-3-3-27.

*v. Miller*,<sup>169</sup> employee was injured on May 23, 2001 and was paid temporary total disability (“TTD”) up to April 9, 2003.<sup>170</sup> Following the receipt of medical treatment and, upon reaching maximum medical improvement (“MMI”), employee received a permanent partial impairment (“PPI”) rating of twenty-three percent.<sup>171</sup> The parties executed a Form 1043 Agreement to Compensation pertaining to this PPI rating, noting the date of injury and the date upon which disability began. In the section of the Agreement allowing the parties to perform the PPI calculations, the parties stated “23% PPI of foot x 35 [degrees] = 8.05 x 1,100 a degree = \$8,855.00.”<sup>172</sup> The parties failed to indicate in the Agreement the period for which compensation would be paid.<sup>173</sup> The Agreement was approved by the Board on April 25, 2003. Employee subsequently filed an Application for Adjustment of Claim seeking an increased PPI award for his change of condition.<sup>174</sup>

This omission by the parties was a crucial error. The court noted that the statute of limitations for a change of condition case for increased PPI runs “one year from the last day for which compensation was paid.”<sup>175</sup> The Indiana Supreme Court has recently clarified that the statute of limitations in Indiana Code section 22-3-3-27 begins to run on the last day “for which” payments are made and not the last date “on which” payments were made.<sup>176</sup> Typically, as a practical matter, the parties commonly add language to the PPI calculation in the Agreement that indicates the award is payable between a starting and ending date. Here, the parties failed to identify the dates the award was payable.<sup>177</sup> The defendant employer argued that a start date for the payment of PPI benefits was implied on the date disability began by mere virtue of the fact that the date of disability was referenced on the Agreement. The defendant employer also argued that, historically, payment of PPI award commences on the date of the injury and, accordingly, the starting date for the payment of the award should be the date of injury unless the parties specify otherwise.

The court noted that Indiana law is devoid of any decision or statute providing that the date of injury is *always* the starting date for payment of the PPI award. In considering the evidence, the Full Board determined that absent an agreement by the parties, the PPI award is payable starting on the date the

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169. 843 N.E.2d 18 (Ind. Ct. App. 2006).

170. *Id.* at 19.

171. *Id.*

172. *See id.*

173. *Id.* at 20.

174. *Id.* at 19.

175. *See id.* at 21 (citing IND. CODE § 22-3-3-27(c) (2004)) (The court’s interpretation of the statute at issue was prior to the effective date of the legislative change but the legislative change does not affect the basic holding of the case).

176. For further discussion about this distinction, see generally *Prentoski v. Five Star Painting, Inc.*, 837 N.E.2d 972 (Ind. 2005).

177. *Stump Home Specialities Mfg.*, 843 N.E.2d at 20.

employee reached MMI.<sup>178</sup> The Board reasoned that the PPI should be considered paid from the date of MMI because the PPI rating itself cannot be determined until the date of MMI. Accordingly, under the Full Board's analysis, the employee's Application was timely.<sup>179</sup> On appeal, the court found the Board's reasoning to be logical and consistent with their authority pursuant to Indiana Code section 22-3-4-5 which grants the Board authority to determine "the period for which payments shall be made."<sup>180</sup>

The practical impact of this case is that it allows the Board to expand the statute of limitations in change of condition cases if the parties fail to properly complete the Form 1043 Agreement to Compensation. It is certainly acceptable to begin the payment of the PPI award from the date of the injury but, as *Stump Home Specialties Manufacturing* demonstrates, a failure to do so may result in the Board beginning the payment of the PPI award at a much later date—the date the employee reaches MMI. The result is of course a longer tolling of the now two year statute of limitations under Indiana Code section 22-3-3-27 for increased impairment.

### C. Court of Appeals Addresses Dual Employment

In *Wishard Memorial Hospital v. Kerr*,<sup>181</sup> the court of appeals once again muddied the waters on the issue of dual employment in the context of temporary agency employees.<sup>182</sup> Jenni Kerr ("Kerr") was a registered nurse who was directly employed by CareStaff, Inc., ("CareStaff") a temporary staffing agency for nurses.

On September 12, 2002, CareStaff executed an agreement with Wishard [Memorial Hospital ("Wishard")] for Kerr to work at Wishard, beginning on September 16 and ending on October 12, 2002. The agreement listed the specific dates and times that Kerr was expected to work and referred to Kerr as a "CS [CareStaff] Employee." Kerr was assigned to work in Wishard's psychiatric emergency room.<sup>183</sup>

"On October 1, 2002, Kerr was [leaving] Wishard after completing a shift when she slipped and fell on a freshly waxed floor, resulting in injuries. Kerr

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178. *Id.*

179. *Id.*

180. *Id.* at 21-22 (citing IND. CODE § 22-3-3-27(c) (2004) (amended by 2006 Ind. Legis. Serv. P.L. 134-2006 (West))).

181. 846 N.E.2d 1083 (Ind. Ct. App. 2006).

182. Dual employment issues in the context of worker's compensation cases have had a tendency to generate fractured rulings from the court of appeals. *Cf. Jennings v. St. Vincent Hosp. & Health Care Ctr.*, 832 N.E.2d 1044 (Ind. Ct. App. 2005) (involving almost identical facts as *Wishard* but reaching an entirely different conclusion and finding dual employment existed in *Jennings*. Interestingly, the dissenting judge in the *Jennings* decision was on the panel deciding *Wishard*).

183. *Wishard Mem'l Hosp.*, 846 N.E.2d at 1086-87.

applied for and received worker's compensation benefits from CareStaff's insurer. She also filed a complaint" for Damages in civil court alleging negligence against Wishard, but made no indication in the Complaint that she was an employee of Wishard.<sup>184</sup> "Wishard moved to dismiss the complaint for lack of subject matter jurisdiction, alleging that [her claim] was barred by the exclusivity provision of the [Worker's Compensation Act ("Act")] because Wishard" was an employer of Kerr.<sup>185</sup> The trial court denied the motion and Wishard pursued an interlocutory appeal.

The court noted at the outset that the Act "'provides the exclusive remedy for recovery of personal injuries arising out of and in the course of employment.'"<sup>186</sup> The Act further provides that an employee may simultaneously have more than one employer sometimes known as dual employment particularly in the context of temporary employees.<sup>187</sup> In determining whether an employee-employer relationship exists, the courts will engage in a balancing test involving the following seven factors: "(1) the right to discharge; (2) the mode of payment; (3) supplying tools or equipment; (4) belief of the parties in the existence of an employer-employee relationship; (5) control over the means used in the results reached; (6) length of employment; and (7) establishment of the work boundaries."<sup>188</sup>

In analyzing the seven factors, the court concluded that the factors which weighed in favor of an employee-employer relationship were: Wishard had the right to discharge Kerr, and Wishard provided the tools and equipment for Kerr to perform her job duties.<sup>189</sup> The factor which weighed against a finding of the existence of such a relationship was the fact that Kerr was not paid by Wishard and did not receive any Wishard benefits.<sup>190</sup> The court found there was conflicting evidence on the fourth and fifth elements, whether the parties believed an employee-employer relationship existed and control.<sup>191</sup> In evaluating the length of employment, the court noted that the longer the employment the more likely an employee-employer relationship exists. Here, Kerr had a finite term of four weeks for which she would work at Wishard which weighed against a finding of employee-employer relationship. The work boundaries appeared clear to the court to be confined to the Wishard Hospital building which would normally support a finding of an employee-employer relationship. Accordingly, the court found that the factors were split on the finding of dual employment and held that Wishard failed to carry its burden of establishing that Kerr was indeed

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184. *Id.* at 1087.

185. *Id.*

186. *Id.* (quoting IND. CODE § 22-3-2-6 (2004)).

187. *See* IND. CODE § 22-3-3-31.

188. *Wishard Mem'l Hosp.*, 846 N.E.2d at 1087-88 (citing *Hale v. Kemp*, 579 N.E.2d 63, 67 (Ind. 1991)).

189. *Id.* at 1088-99.

190. *Id.* at 1099.

191. *Id.* at 1089-92.

an employee of Wishard.<sup>192</sup>

Finally, the court noted that “the remedies provided in the [] Act are in derogation of common law, and a statute that is in derogation of common law must be strictly construed against limitations on a claimant’s right to bring suit.”<sup>193</sup> While the court recognized a strong public policy favoring the coverage of employees under the Act, “this policy is not advanced where its effect ‘immunize[s] third-party tortfeasors and their liability insurers from liability for negligence which results in serious injuries to one who is not in their employ.’”<sup>194</sup> It appears that these public policy concerns influenced the court’s decision on the issue of dual employment in this case.

#### *D. Provider Fee Application Dismissed*

“On May 1, 2003, Dr. Danielson filed an Application for Adjustment Of Claim for Provider Fee (Application) with the Indiana Worker’s Compensation Board . . . alleging that [employer,] Pratt Industries, owed him \$2357.50 for emergency medical services performed on Huang Tien Hsiao,” an alleged employee of Pratt Industries on June 24, 2000.<sup>195</sup> In *Danielson v. Pratt Industries, Inc.*,<sup>196</sup> the court addressed whether the Board’s dismissal of Danielson’s Application for lack of jurisdiction was proper.

The full Board affirmed the hearing judge’s findings that Huang Tien Hsiao did not file an Application within the two year statute of limitations and, thus, any claim by him would be time barred under Indiana Code section 22-3-3-3. Additionally, since Huang Tien Hsiao failed to timely file a claim and “the Board would lack jurisdiction over any such claim, the Board similarly lacks jurisdiction over Danielson’s Application. Danielson argued that “the Board erred in determining that it did not have jurisdiction to entertain his Application.”<sup>197</sup> Specifically, Danielson argued that the two year statute of limitations contained in the Worker’s Compensation Act “does not apply to applications for medical provider fees, therefore, his claim should be subjected to the six-year time limitation under [Indiana Code section 34-11-2-7].”<sup>198</sup>

In affirming the full Board, the court noted that “[i]n order to collect the costs of reasonable medical services from the ‘Employer’” a physician “must provide services, treatment, or supplies to an ‘Employee.’”<sup>199</sup> The court reasoned that in the instant case, there had never been a determination that “Tien Hsiao was an ‘Employee’ of Pratt or that Pratt was an ‘Employer’ of Huang Tien

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192. *Id.* at 1093.

193. *Id.* (quoting *McQuade v. Draw Tite, Inc.*, 659 N.E.2d 1016, 1018 (Ind. 1995)).

194. *Id.* (quoting *GKN Co. v. Magness*, 744 N.E.2d 397, 404 (Ind. 2001)).

195. *Danielson v. Pratt Indus., Inc.*, 846 N.E.2d 244, 245 (Ind. Ct. App. 2006).

196. *Id.* at 244.

197. *Id.* at 246-47.

198. *Id.* at 247.

199. *Id.* (citing IND. CODE §§ 22-3-3-4(d), 22-3-6-1(i) (2004)).

Hsiao.”<sup>200</sup> Without those determinations, the court found that Danielson does not qualify as a ‘Medical Service Provider.’”<sup>201</sup> The court also reinforced the Board’s determination that it did not have jurisdiction to address whether Danielson could bring his claim under Indiana Code section 34-11-2-7 by indicating that the Board “did not err in its finding because nowhere in [Indiana Code section 22-3-1-3] is the Board delegated authority to increase the two year time limitation for filing claims found in [Indiana Code section 22-3-3-3].”<sup>202</sup>

The Board is overwhelmed with the increase in the filing of Provider Fee claims and, perhaps this case will spark some enforcement of the elements of proof on the part of the providers. It also provides case law support to weed out the claims without merit or where the provider has failed to collect first from the employer.

#### *E. Presumptive Dependents Include Unborn Children Under the Worker’s Compensation Act*

In *First Student, Inc. v. Estate of Meece*,<sup>203</sup> mother, as personal representative of putative father’s estate, filed a wrongful death action against bus company and its driver after driver struck and killed putative father while he was in the course and scope of his employment. The Defendant filed a motion for partial summary judgment, claiming that child born to mother after putative father’s death was not a “dependent child” under the wrongful death statutes, because mother did not timely file a paternity action within eleven months following putative father’s death.<sup>204</sup>

The putative father’s death gave rise to worker’s compensation liability as he was acting in the course and scope of his employment at the time of his death. On December 8, 2003, the mother filed an action in the Decatur Circuit Court titled “Verified Petition for Appointment of Guardian and Authorization to Compromise and Settle Minors’ Claims.”<sup>205</sup> In that settlement, the employer of the putative father offered to resolve the worker’s compensation claim for the unborn child and one-year-old child of the putative father for a sum of \$100,000. In approving the compromise agreement, the Decatur court required the mother to establish paternity after the birth of the child and report the findings to the court.<sup>206</sup> The question before the court was whether the paternity action in the worker’s compensation case, which was filed within eleven months after the death, is the equivalent to a paternity action in the intestacy statutes for purposes of the wrongful death statutes.

The court noted that the worker’s compensation statutes include in the

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200. *Id.*

201. *Id.* (citing IND. CODE § 22-3-6-1(i) (2004)).

202. *Id.*

203. 849 N.E.2d 1156 (Ind. Ct. App. 2006).

204. *Id.* at 1159.

205. *Id.* at 1157.

206. *Id.* at 1158.

definition of a presumptive dependent “acknowledged children born out of wedlock;” whereas, the relevant intestacy statute provided that although a mother’s testimony regarding paternity may be received into evidence to establish “paternity” or “acknowledgement,” the mother’s testimony “must be supported by corroborative evidence or circumstances.”<sup>207</sup> Prior case law has held that in order for “an illegitimate child to be considered a presumptive defendant under the worker’s compensation statutes,” “both the fact of paternity and acknowledgement must be established.”<sup>208</sup>

In its analysis of the issue at hand, the court stated that it was “unable to find any specific definition of precisely what is required to prove the fact of paternity in a worker’s compensation case.”<sup>209</sup> Ultimately, the court concluded “that the standard of proof for the factual determination of paternity in a worker’s compensation claim is effectively the same as that used under the paternity statutes.”<sup>210</sup> Additionally, the court concluded that the standard of proof therefore requires that the “mother’s testimony be corroborated in some way.”<sup>211</sup> The worker’s compensation standard then, also meets the requirements of a “paternity” action as contemplated by the intestacy statutes.<sup>212</sup>

#### *F. Ingress & Egress Re-Evaluated*

The court addressed the issue of ingress and egress in *Mueller v. DaimlerChrysler Motors Corp.*<sup>213</sup> Keith Mueller (“Mueller”) “parked his vehicle at the Kokomo Mall . . . and was crossing Boulevard Street to report to work at DaimlerChrysler when” he was struck and killed by an oncoming vehicle.<sup>214</sup> The employer provided parking for its employees in an adjacent lot not intersected by any public street and employer policy prohibited employees from parking in the mall parking lot.<sup>215</sup> The employer did not own, lease, or maintain the mall parking lot and exerted no control over the mall parking lot. Mueller’s widow filed for worker’s compensation death benefits arguing that his death occurred while acting in the course and scope of his employment.

Relying on *Clemans v. Wishard Memorial Hospital*,<sup>216</sup> Mueller pointed out that the court in *Clemans* recognized that “the Act should be liberally construed to accomplish the purpose for which it was enacted, and that employment necessarily includes a reasonable amount of time and space before and after

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207. *See id.* at 1163, 1160 (citing IND. CODE §§ 22-3-3-19, 29-1-2-7 (2004)).

208. *Id.* at 1164 (citing *Goins v. Lott*, 435 N.E.2d 1002 (Ind. Ct. App. 1982)).

209. *Id.*

210. *Id.*

211. *Id.* at 1165.

212. *Id.*

213. 842 N.E.2d 845 (Ind. Ct. App. 2006).

214. *Id.* at 846.

215. *Id.*

216. 727 N.E.2d 1084 (Ind. Ct. App. 2000).

ceasing actual employment.”<sup>217</sup> “[C]ourts have created a public policy exception to the rule to extend coverage of the Act to those accidents resulting from employees’ ingress to or egress from their employer’s operating premises or extensions thereof.”<sup>218</sup> Mueller argued that the court should extend the same rationale applied in *Clemans* to the case at bar. The court, however, declined to do so.<sup>219</sup>

In distinguishing *Clemans* from the facts at hand, the court noted that in *Clemans* the employee worked in one building and parked in an employer provided lot.<sup>220</sup> The lot was accessible through a series of tunnels connecting the various building on Wishard’s campus but was more easily accessible by crossing a public street. The *Clemans* court noted that it was within the employer’s contemplation that employees would cross the public street as the “most convenient and reasonable means of ingress and egress from its operating premises.”<sup>221</sup> Here, the employer clearly prohibited the employees from parking in the mall lot and the lot itself was not an extension of the employer’s operating premises. The employer in *Mueller* provided employee parking adjacent to its building which did not require the employees to subject themselves to the risks of crossing a public street. Accordingly, the court declined to extend the ingress and egress exception.<sup>222</sup>

#### G. Worker’s Compensation Act Bars Third-Party Spoliation of Evidence Claims by Employees Against Employers

In *Glotzbach v. Froman*,<sup>223</sup> an employee died when an electric pump he was working with exploded. Soon after the accident, an owner of the Company discarded the pump, despite being instructed not to do so by an Indiana Occupational Safety and Health Administration (“IOSHA”) Officer.<sup>224</sup> The employee’s estate filed a wrongful death complaint against the Company, “designer, manufacturer, and distributor of the pump.”<sup>225</sup> “The Estate later amended the complaint to add claims against [the Company] for negligent and intentional spoliation” of evidence and punitive damages.<sup>226</sup>

On transfer, the supreme court unanimously held that an employee who suffers injuries covered by the Worker’s Compensation Act has no claim against his or her employer for third-party spoliation of evidence relevant to claims

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217. *Mueller*, 842 N.E.2d at 848-49 (quoting *Clemans*, 727 N.E.2d at 1086).

218. *Id.* at 849.

219. *Id.*

220. *Id.*

221. *Id.* at 849 (citing *Clemans*, 727 N.E.2d at 1088).

222. *Id.*

223. 854 N.E.2d 337 (2006).

224. *Id.* at 338.

225. *Id.*

226. *Id.*

arising from the accident.<sup>227</sup>

In arriving at its holding, the supreme court relied on *Gribben*<sup>228</sup> for the proposition that “Indiana common law does not recognize an independent cause of action for either intentional or negligent ‘first-party’ spoliation of evidence, i.e., spoliation by a party to the underlying claim.”<sup>229</sup> *Gribben* “expressly held open the question whether Indiana law recognized a tort of spoliation by third parties,” but concluded that existing remedies for first-party spoliation claims were sufficient to deter and redress first-party spoliation.<sup>230</sup>

With regard to the estate’s third-party spoliation claim, the supreme court affirmed the court of appeals’ reasoning in *Murphy v. Target Products*.<sup>231</sup> *Murphy* found that “there is no common law duty on the part of an employer to preserve, for an employee, potential evidence in an employee’s possible third party action” and dismissed the plaintiff’s spoliation claim.<sup>232</sup>

Applying *Murphy*, the supreme court rejected the estate’s argument that the employer’s knowledge of the employee’s situation and circumstances surrounding the accident constituted a special relationship sufficient to confer upon the Company a duty to preserve the evidence.<sup>233</sup> The court observed that “an employer will virtually always be aware of an injury occurring in the workplace.”<sup>234</sup> Therefore, as a practical matter, that knowledge would always confer upon the employer the duty to preserve evidence for an employee’s use in “potential litigation against third parties.”<sup>235</sup> Moreover, IOSHA’s instruction to the Company to retain the pump did not confer a duty on the Company because IOSHA did not make any reference to the need to preserve the evidence for the employee’s use in private litigation. “[T]o the extent that IOSHA’s request created any duty to preserve evidence, it was a duty” the Company owed to IOSHA, not to the employee or his estate.<sup>236</sup> Further, the court rejected the estate’s argument that the foreseeability of harm caused by the Company’s failure to retain the pump supported the recognition of a duty because it is the “relationship of the parties, not foreseeability,” that might lead to a permissible third-party spoliation claim.<sup>237</sup>

Lastly, the court stated, “most importantly, as in *Gribben* we think the policy considerations are the controlling factor in refusing to recognize spoliation as a tort under these circumstances.”<sup>238</sup> While acknowledging that evidentiary

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227. *Id.* at 341-42.

228. *Gribben v. Wal Mart Stores, Inc.*, 824 N.E.2d 349 (Ind. 2005).

229. *Glotzbach*, 854 N.E.2d at 338 (citing *Gribben*, 824 N.E.2d at 355).

230. *Id.* at 339.

231. 580 N.E.2d 687 (Ind. Ct. App. 1991).

232. *Glotzbach*, 854 N.E.2d at 339 (quoting *Murphy*, 580 N.E.2d at 690).

233. *Id.*

234. *Id.*

235. *Id.* at 340.

236. *Id.*

237. *Id.*

238. *Id.* at 341.

inferences are not available as a remedy for third-party spoliation, the court emphasized that several other remedies remain applicable.<sup>239</sup>

Certainly, recognizing a third-party spoliation claim against employers would foster many disadvantages including trials of third-party spoliation claims wherein proving damages is highly speculative; imposition or cumbersome, operations-interfering requirements on employers to retain or not repair equipment; and encouragement of satellite litigation against employers that the Worker's Compensation Act is designed to foreclose. Accordingly, the Indiana Supreme Court's decision preventing a third-party claim of spoliation by the employee against the employer appears to be in line with the purpose and intent of the Act.

#### *H. An Innocent Victim of Horseplay by Others Is Entitled to Worker's Compensation Benefits*

In *DePuy, Inc. v. Farmer*,<sup>240</sup> an employee "started to clock out at the end of his shift" and "brushed his timecard against his [co-worker's] side."<sup>241</sup> The co-worker, "who weighed approximately 470 pounds, yelled at [the employee], pinned him against a machine, and bent him backwards over it."<sup>242</sup> The employee, Anthony Farmer ("Farmer"), "sustained severe injuries to his back, resulting in lost work, surgery and medical bills."<sup>243</sup>

Farmer requested worker's compensation benefits in the amount of \$58,556 in medical expenses, \$3,312 for eight weeks [of TTD], and \$16,250 for twenty-five percent [PPI]. He also filed a civil suit against [the co-employee] for battery and against his employer for negligence. The trial court dismissed the civil claim against [the Company] on the basis that the [Act] barred a civil tort claim against the [ ] employer for injuries sustained in this workplace incident.<sup>244</sup>

The Company was unsuccessful in dismissing the Worker's Compensation claim as arising from "horseplay" not governed by the Act.

After the co-employee

paid Farmer \$3,000 to settle the battery suit, [the Company] renewed its motion to dismiss the worker's compensation claim, this time on the ground that it had not consented to the agreement between Farmer and [his co-employee]. The Hearing Judge agreed that the Worker's Compensation Board lacked jurisdiction as a result of Farmer's "third-party settlement" with his co-employee. The Board reversed the Hearing Judge but directed Farmer to remit the \$3,000 settlement sum to [the

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239. *Id.* at 341-42.

240. 847 N.E.2d 160 (Ind. 2006).

241. *Id.* at 163.

242. *Id.*

243. *Id.*

244. *Id.*

Company] as a condition to maintaining his worker's compensation claim.<sup>245</sup>

The issues presented to the supreme court on transfer were whether the Worker's Compensation Board "erred when it affirmed the Hearing Judge's finding that Farmer's injuries arose out of his employment"; whether Farmer's settlement with his co-employee in the civil suit barred his Worker's Compensation claim; and whether Farmer was entitled to an increased award pursuant to Indiana Code section 22-3-4-8(f).<sup>246</sup>

On the first issue, the supreme court agreed with the court of appeals "that a participant in horseplay is not entitled to worker's compensation because the horseplay is not for the benefit of the employer and therefore does not arise out of the employment, but an innocent victim of horseplay by others is entitled to worker's compensation benefits."<sup>247</sup> The supreme court found that "Farmer's acts were reasonable conduct in this work setting and did not provoke [the co-worker's] attack."<sup>248</sup> "Farmer's injuries were incurred while he was performing services for [the employer]" as he was walking toward the time clock to end his shift at the time of the attack.<sup>249</sup>

On the second issue, the court held that "[n]o third-party tortfeasor case has squarely addressed the situation . . . where a tort claim was settled for less than the apparent worker's compensation benefits before the worker's compensation claim was resolved."<sup>250</sup> The court of appeals held that Section 13 of the Act did not bar Farmer's Worker's Compensation claim. The court concluded that "by its terms, section 13 does not apply to a claim against a fellow employee."<sup>251</sup> "[A]lthough an absolute statutory bar is not applicable to a recovery against a fellow employee, equitable subrogation rights nevertheless give [the Company] the right to offset any recovery from [the co-employee] against its worker's compensation liability . . . [I]f an employee settles without the approval of [the Company] (or its carrier), the employer (or carrier) is free to challenge the amount received as inadequate."<sup>252</sup>

Regarding the third issue of statutory award increase, Farmer contended that he was "entitled to an increased award pursuant to Indiana Code section 22-3-4-8(f) which provides: 'An award of a the full board affirmed on appeal, by the employer, shall be increased thereby five percent (5%) and by order of the court may be increased 10%.'"<sup>253</sup> Taking into consideration the fact that the delay in

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245. *Id.*

246. *Id.* at 163-64.

247. *Id.* at 164 (citing *Fields v. Cummins Employees Fed. Credit Union*, 540 N.E.2d 631, 638 (Ind. Ct. App. 1989)).

248. *Id.*

249. *Id.*

250. *Id.* at 168.

251. *Id.* at 169.

252. *Id.* at 169-70.

253. *Id.* at 171.

this case was nearly twice the time consumed by most cases from injury to final determination on appeal, the supreme court determined that a “delay of over a decade warrants an additional five percent even if . . . the employer in good faith raises fairly debatable issues.”<sup>254</sup>

*I. Worker’s Compensation Benefits Can Be a Marital Asset  
Subject to Distribution*

In *Shannon v. Shannon*,<sup>255</sup> “Husband and Wife were married sometime during the 1990s. In October 2000, husband sustained an injury at work.”<sup>256</sup> Subsequently, he “received a lump sum worker’s compensation payment in the amount of \$48,000. In January 2003, Wife filed a petition for dissolution of marriage. Husband submitted a property division worksheet and proposed that wife be awarded” several items totaling \$42,000 of the marital estate.<sup>257</sup> Husband proposed that he be awarded his Worker’s Compensation Award, among other things, totaling \$53,500 of the total marital estate. After a hearing, the trial court included his Worker’s Compensation Award in the marital pot and awarded the wife \$10,000 out of that award.<sup>258</sup> “Husband contend[ed] that the trial court erred” when it did so.<sup>259</sup>

Worker’s Compensation benefits received during the marriage to replace earnings of that period are a marital asset subject to distribution.<sup>260</sup> “Only to the extent that worker’s compensation benefits replace earnings *after* the date that the dissolution petition is filed do the benefits remain separate property.”<sup>261</sup> “Because Husband did not present any evidence regarding what portion of the award was not marital property, he [could not] overcome the strong presumption that the trial court’s disposition of marital property [was] correct.”<sup>262</sup> The court of appeals held “that the trial court’s property distribution in this case [was] sufficiently close to the attempted fifty-fifty split.”<sup>263</sup> The court of appeals affirmed the decision of the trial court, awarding “Husband approximately fifty-two percent of the marital pot.”<sup>264</sup>

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254. *Id.* at 172.

255. 847 N.E.2d 203 (Ind. Ct. App. 2006).

256. *Id.* at 204.

257. *Id.*

258. *Id.* at 204-05.

259. *Id.* at 205.

260. *Id.* (citing *Leisure v. Leisure*, 605 N.E.2d 755, 759 (Ind. 1993)).

261. *Id.*

262. *Id.* at 206.

263. *Id.*

264. *Id.*

*J. Constructive Discharge in Retaliation for Filing Worker's Compensation Claim Falls Within Public Policy Exception to Employment-at-Will Doctrine*

In *Tony v. Elkhart County*,<sup>265</sup> Randy Tony ("Tony") "was employed by Elkhart County as a highway maintenance worker. During his employment with [the] County, Tony was involved in two work related accidents in which he sustained bodily injuries that required surgery and physical therapy. [Additionally], Tony's physicians placed him on work restrictions."<sup>266</sup> Tony alleged that from the onset of his claim, Elkhart County Management was hostile and "ridiculed" Tony by calling him a 'faker' and implying that he was 'malingering.'<sup>267</sup> According to Tony, his "employment with Elkhart County ended when he was 'constructively discharged.'<sup>268</sup>

Tony filed a complaint against [the] County and alleged that he had been "constructively discharged . . . in retaliation for [his] worker's compensation claims." Elkhart County filed a motion to dismiss under Indiana Trial Rule 12(b)(6) and argued that Tony's complaint should be dismissed for failure to state a claim upon which relief could be granted because Indiana did not recognize a claim for constructive retaliatory discharge.<sup>269</sup>

The trial court granted Elkhart County's motion to dismiss. The sole issue was whether the trial court erred by dismissing Tony's Complaint.

In establishing the public policy exception to Indiana's doctrine of employment at will, the Indiana Supreme Court in *Frampton*,<sup>270</sup> "held that the worker's compensation statute created a public policy in favor of an employee filing a worker's compensation claim."<sup>271</sup> The court concluded that an

employer's acts of creating working conditions so intolerable as to force an employee to resign in response to an employee's exercise of his statutory right to file a worker's compensation claim also creates a deleterious effect on the exercise of this important statutory right and would impede the employee's ability to exercise his right in an unfettered fashion without being subject to reprisal. Thus, [the court held] that a constructive discharge in retaliation for filing a worker's compensation claim falls within the *Frampton* public policy exception and that a cause of action for constructive retaliatory discharge exists for an employee that can show that he has been forced to resign as a result of exercising this statutorily conferred right.<sup>272</sup>

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265. 851 N.E.2d 1032 (Ind. Ct. App. 2006).

266. *Id.* at 1034.

267. *Id.*

268. *Id.*

269. *Id.* at 1034-35.

270. *Frampton v. Cent. Ind. Gas Co.*, 297 N.E.2d 425 (Ind. 1973).

271. *Tony*, 851 N.E.2d at 1035 (citing *Frampton*, 297 N.E.2d at 427-28).

272. *Id.* at 1040.

The significance of this case is obvious as it affirms a cause of action for constructive retaliatory discharge in Indiana for the filing or pursuit of worker's compensation benefits and gives disgruntled employees an opportunity to seek damages for what the employee perceives as intolerable conditions giving rising to his or her voluntary departure from the employment.

*K. Court Unwilling to Require Prejudgment Interest on Worker's Compensation Award*

In *Bowles v. Griffin Industries*,<sup>273</sup> Roger Bowles ("Bowles") "visited Dr. Ronald G. Bennett complaining of back problems, bilateral leg pain, and difficulty walking."<sup>274</sup> Approximately four years later, "Bowles, while employed full time by Griffin as a driver, injured his lower back 'in an accident arising out of and in the course of his employment' for Griffin. Griffin paid Bowles [TTD] benefits and statutory medical benefits" for approximately the next three years.<sup>275</sup> "A hearing before a member of the Board was conducted [a year later and] the member found that Bowles was permanently partially impaired (PPI) as a result" of the injury.<sup>276</sup> Two years after that, Bowles had been paid the remainder of the benefits he was entitled to for his permanent total disability.

"On January 29, 2004, Bowles . . . filed an application for benefits from Indiana's Second Injury Fund. . . . In July of 2004, a single member of the Board granted Bowles entry into the Second Injury Fund . . . but denied his request for retroactive admittance."<sup>277</sup> This cause was set up and "continued by the parties in this case multiple times over a span of 11 (eleven) years due to multiple reasons including failure of the Plaintiff . . . to timely respond to discovery requests."<sup>278</sup>

"In February 2005, while his second appeal was pending, Bowles submitted a stipulated record and requested that the Board order an award of interest. By then, Griffin had paid Bowles, through its worker's compensation insurance carrier, medical expenses of \$129,652.68, [TTD] of \$16,627.26, . . . permanent total disability of \$106,585.00 . . . and [PPI] of \$6,600."<sup>279</sup> "Bowles asserted that Griffin's insurer 'very belatedly paid worker's compensation disability benefits' and that these tardy payments violated the Act's requirement of 'payment of a specific weekly disability sum on a specific schedule of weekly dates.'"<sup>280</sup> Bowles also contended "that the 'delinquent' payments deprived him of the 'timely use of funds to which he [was] entitled' while simultaneously allowing Griffin and its insurer 'to enjoy the investment use and benefit' of 'improperly

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273. 855 N.E.2d 315 (Ind. Ct. App. 2006).

274. *Id.* at 316.

275. *Id.*

276. *Id.* at 317.

277. *Id.*

278. *Id.*

279. *Id.* at 318.

280. *Id.* at 319 (quoting Appellant's Brief).

withheld' funds."<sup>281</sup> "In addition, he maintain[ed] that the Act 'constitutes a contract between employer and employee, and the employer must discharge its contractual liability by paying such benefits at the time or times, and in the amount or amounts, provided for in the contract.'"<sup>282</sup>

The court, understanding Bowles' time value of money argument, held that "neither the Act nor the case law mandates the payment of interest under the circumstances presented."<sup>283</sup> The court stated that "[h]ad the Legislature intended that administrative officers clothed with authority to carry out the provisions of the law might allow interest from the date of death in addition to the amounts fixed by way of compensation, it undoubtedly would have made a provision to that end."<sup>284</sup> The court noted that "the Legislature has amended the Act numerous times, but has never added a provision requiring pre-judgment interest on a worker's compensation award."<sup>285</sup> The Indiana Court of Appeals determined that it had "no authority to read in such a requirement."<sup>286</sup>

*L. Employer's Obligation to Pay Medical Expenses Does Not Extend Beyond Two Years of Accident Date*

In *Colburn v. Kessler's Team Sports*,<sup>287</sup> Bill Colburn ("Colburn") "sustained an injury to his lower back during the course and scope of his employment with Kessler's Team Sports ("Kessler's"). . . . Kessler's worker's compensation insurance carrier, 'accepted the claim as compensable and provided [] Colburn with medical care.'"<sup>288</sup> Colburn subsequently was treated by Dr. Vedantam and Dr. Brahmhatt, and underwent an Independent Medical Evaluation ("IME"). Colburn returned to see Dr. Vedantam for a follow-up visit on November 12, 2004, several months after his August 12, 2002 injury.<sup>289</sup> In the interim, Kessler's Worker's Compensation insurance carrier was liquidated, and "Colburn's claim was transferred to the Indiana Insurance Guaranty Association ("IIGA") on August 26, 2004. An IIGA representative . . . authorized payment" for the treatment prescribed by Dr. Vedantam on Colburn's follow-up visit to him.<sup>290</sup> "[W]hen Colburn subsequently sought authorization for surgery, [the IIGA Representative] informed him that the statute of limitations had run on his claim under [the Act]. Because Colburn had not filed an application for adjustment of his claim, [the Representative] denied him authorization for the

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281. *Id.*

282. *Id.* (quoting Appellant's Brief).

283. *Id.* at 320.

284. *Id.* at 321.

285. *Id.*

286. *Id.*

287. 850 N.E.2d 1001 (Ind. Ct. App. 2006).

288. *Id.* at 1003.

289. *Id.* at 1004.

290. *Id.*

surgery.”<sup>291</sup>

“On December 13, 2004, Colburn filed an application for adjustment of claim against Kessler’s. Kessler’s moved to dismiss the application, alleging that the Board lacked jurisdiction over Colburn’s claim because the statute of limitations had run in August 2004.”<sup>292</sup> The Full Board ultimately affirmed the decision of a single hearing member who dismissed Colburn’s Application. “Colburn contend[ed] that the Full Board erred when it found his application for change of condition was not timely filed.”<sup>293</sup>

“Here, Colburn sustained his back injury on August 12, 2002, so the two-year statute of limitations ran on August 12, 2004. Because he did not file his application for adjustment of Claim until December 2004, it was not timely filed.”<sup>294</sup> Colburn argued “that the term ‘compensation’ as used in Indiana Code [s]ection 22-3-3-3 does not include payments for medical treatment. Thus, Colburn maintain[ed] that the two-year statute of limitations [did] not apply to his request for medical benefits.”<sup>295</sup>

The court reasoned that

because an adjudication of permanent impairment must be made within the two-year statute of limitations under Indiana Code [s]ection 22-3-3-3, an employer’s obligation to pay medical expenses does not extend beyond two years from the accident date absent an agreement or Board decision otherwise. Here, because there was no temporary total disability or adjudication of permanent impairment within the two-year statute of limitations, Kessler’s was not obligated to pay Colburn’s medical expenses after August 12, 2004.<sup>296</sup>

The court concluded that “the statute of limitations on claims for medical services is two years under Indiana Code [s]ection 22-3-3-3.”<sup>297</sup>

Colburn also asserted that “Kessler’s had a duty to get a permanent partial impairment (“PPI”) determination within two years from the date of his accident, which Kessler’s failed to do. Colburn contend[ed] that had Kessler’s timely obtained a PPI rating, then a disagreement might have arisen over compensation, which would have permitted him to timely file an application for adjustment of claim.”<sup>298</sup> The court “reject[ed] Colburn’s contention that Kessler’s had a duty to timely obtain a PPI rating.”<sup>299</sup>

Finally, Colburn contended that “[a] harmonious construction of the two statutes [Indiana Code sections 22-3-3-3 and 22-3-4-5] is impossible to achieve

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291. *Id.*

292. *Id.* at 1004-05.

293. *Id.* at 1005.

294. *Id.*

295. *Id.*

296. *Id.* at 1006.

297. *Id.*

298. *Id.* at 1007.

299. *Id.*

without affording employers a tremendous loophole by which they could lawfully avoid providing future medical services for compensable injuries, as well as compensation for permanent partial impairment.”<sup>300</sup> The court declined “Colburn’s invitation to so construe the Act based on public policy considerations.”<sup>301</sup> Particularly instructive was the fact that “Colburn ha[d] not demonstrated that anything prevented him from resolving or preserving his claim prior to the expiration of the two-year statute of limitations.”<sup>302</sup> He “made the decision, more than once, to forego surgery.”<sup>303</sup> “Had [he] decided to undergo surgery earlier, he would have likely obtained a PPI prior to the expiration of the statute of limitations which would have expedited the claim process.”<sup>304</sup>

“In sum, [the court held] that under the circumstances of this case, the Board’s decision barring Colburn’s application for adjustment of claim does not violate public policy.”<sup>305</sup>

### *M. Conclusion*

The courts and the legislature addressed many significant issues affecting Indiana practitioners in the area of worker’s compensation in the survey period. We look forward with anticipation to the upcoming changes in the next year and the impact these changes will ultimately bring.

## V. SELECTED DEVELOPMENTS IN TRADITIONAL LABOR LAW

In contrast to other areas of employment law, practitioners addressing the relationship between management and organized labor rarely look to federal or state courts for guidance.<sup>306</sup> Rather, it is often the decisions of the National Labor Relations Board (“Board”)<sup>307</sup> that demarcate the posts and fences that mark off the ever-developing landscape of traditional labor law. Accordingly, this Survey section will discuss select Board decisions that are sure to impact the relationship between Indiana employers and organized labor.

300. *Id.* at 1007-08.

301. *Id.* at 1008.

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. Indeed, state laws regulating many aspects of the labor-management relationship are preempted by the National Labor Relations Act (“Act”). See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (“When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”).

307. At all relevant times during the Survey period, the Board consisted of Chairman Robert J. Battista and members Peter C. Schaumber, Wilma B. Liebman, Peter N. Kirsanow and Dennis P. Walsh.

### A. Supervisory Status

In a landmark trilogy of cases decided in October of 2006,<sup>308</sup> a divided Board<sup>309</sup> set out guidelines for deciding supervisory status after the Supreme Court's decision in *Kentucky River Community Care*.<sup>310</sup> In *Oakwood*, the lead case among the three, the Board assessed a claim that certain of an employer's charge nurses were supervisors under Section 2(11) of the National Labor Relations Act.<sup>311</sup> The Board described its holding in *Oakwood* as an effort to provide "clear and broadly applicable guidance for the Board's regulated community" as to the meanings of the following three terms listed in Section 2(11): "independent judgment," "assign" and "responsibly to direct."<sup>312</sup> Prior to *Oakwood*, Board law concerning the application of these terms had been more vague than any other area of the Board's jurisprudence.

The *Oakwood* Board began by establishing that it refused to "engage in an analysis that seems to take as its objective a narrowing of the scope of supervisory status."<sup>313</sup> First, the Board held that to "assign" as used in Section 2(11) means the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.<sup>314</sup> Thus, in the health care setting, to "assign" would include an employee's act of assigning nurses or other caregivers to particular patients.<sup>315</sup> Then, after establishing that "assign" and "responsibly direct" were distinct terms,<sup>316</sup> the Board defined the authority to responsibly direct to mean that the worker has "'men under him' . . . and decides 'what job shall be undertaken next or who shall do it'"<sup>317</sup> and is "accountable for the performance of the task."<sup>318</sup> To be found to be accountable, the Board held that it must be shown that the "employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary" and that "there is a prospect of adverse consequences for the putative supervisor" resulting from his or her direction of other employees.<sup>319</sup>

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308. *Oakwood Healthcare, Inc.*, 348 N.L.R.B. No. 37 (2006); *Croft Metals, Inc.*, 348 N.L.R.B. No. 38 (2006); *Golden Crest Healthcare Ctr.*, 348 N.L.R.B. No. 39 (2006).

309. In a strongly-worded dissent, Members Liebman and Walsh described the *Oakwood* decision as "among the most important in the Board's history." *Oakwood*, 348 NLRB No. 37 at 25.

310. 532 U.S. 706 (2001).

311. *Oakwood*, 348 N.L.R.B. No. 37 at 1.

312. *Id.*

313. *Id.* at 3.

314. *Id.* at 4.

315. *Id.*

316. *Id.*

317. *Id.* at 7.

318. *Id.* at 8.

319. *Id.*

Next, the Board held that to exercise “independent judgment,” a worker must “at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.”<sup>320</sup> The Board further determined that in order to constitute “independent judgment,” the requisite amount of discretion exercised must be more than “routine or clerical.”<sup>321</sup> Finally, the Board held that in order to be found to be a “supervisor” under the Act, the worker must spend “a regular and substantial portion of his/her work time performing supervisory functions.”<sup>322</sup> The Board defined regular to be “according to a pattern or schedule” and substantial as “at least 10-15 percent of their total work time.”<sup>323</sup> After applying these standards, the Board found that Oakwood’s charge nurses were supervisors as defined in the Act.<sup>324</sup> Thus, the Board’s decision in Oakwood is considered to be a victory for employers.

The Board first applied *Oakwood*’s principles in *Avante at Wilson, Inc.*<sup>325</sup> In *Avante*, the Board concluded, “contrary to the Regional Director, that the Employer . . . failed to establish that [the petitioned-for] staff nurses” were supervisors.<sup>326</sup> The Board found that the nurses did not possess supervisory authority with respect to (1) disciplining certified nursing assistants (“CNAs”) by sending them home and (2) exercising their authority to adjust CNAs’ grievances.<sup>327</sup>

The Board found that the staff nurses did not possess supervisory authority with respect to disciplining CNAs because the record evidence (the CBA covering the CNAs and the employee handbook) did not support a finding of authority to send CNAs home.<sup>328</sup> To satisfy the *Oakwood* standard, the employer’s witnesses would have to state (1) when incidents of CNAs being sent home occurred, as well as “who was involved, what the alleged insubordination consisted of, whether high [] level managers had been consulted, or whether the

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320. *Id.*

321. *Id.*

322. *Id.* at 9.

323. *Id.*

324. *Id.*

325. 348 N.L.R.B. No. 71 (2006). However, several ALJ decisions have applied *Oakwood*. See, e.g., GFC Crane Consultants, Inc., 2007 WL 486711 (N.L.R.B. 2007) (port engineers not supervisors because directions given by them did not rise above the status of routine or clerical functions); RCC Fabricators, Inc., 2007 WL 313431 (N.L.R.B. 2007) (finding employees to be supervisors because they possessed the powers to assign, effectively recommend assignment, discipline (including suspend, layoff, and discharge), and effectively recommend discipline); Talmadge Park, Inc., 2007 WL 174480 (N.L.R.B. 2007) (laundry worker is not a supervisor, as she does not assign or responsibly direct using independent judgment); J. Shaw Assocs., LLC, 2006 WL 3890287 (N.L.R.B. 2006) (sandwich store manager was not a supervisor because she could not assign or discipline and performed no other supervisory function).

326. *Avante at Wilson, Inc.*, 348 N.L.R.B. No. 71 at 1.

327. *Id.* at 1, 5.

328. *Id.* at 2.

situation was anything more than a one-time occurrence.”<sup>329</sup> In other words, evidence was needed of specific situations or details of circumstances where a staff nurse ordered a CNA to leave the facility. None was presented here.

The Board also found there to be insufficient evidence to support the Regional Director’s conclusion that the staff nurses had supervisory grievance-adjustment authority.<sup>330</sup> Even though (1) the contract directed employees to present grievances to their “immediate supervisors” for adjustment and a CNA testified her immediate supervisor was a staff nurse; (2) the staff nurses’ job description stated they supervised CNAs and “serve[d] as [management’s] representative during the first step of the [employer’s] problem solving process”; and (3) a former staff nurse testified she personally resolved disputes between CNAs, the Board held that no evidence demonstrated that staff nurses actually participated in adjusting grievances.<sup>331</sup> According to the Board, “[m]erely being informed of a dispute between two CNAs does not indicate that staff nurses adjust or in any other way handle the problems at issue let alone establish the requisite independent judgment necessary to confer supervisory status.”<sup>332</sup> Therefore, the employer failed to satisfy its burden of proof and the Board concluded that the staff nurses were not supervisors.<sup>333</sup>

#### *B. Select Unfair Labor Practice Decisions—Polling Employees About Union Sentiments*

In *Unifirst Corp.*,<sup>334</sup> the Board reversed an ALJ’s finding that the employer violated Section 8(a)(1) of the Act by polling employees about their union sentiments while a decertification petition was pending.<sup>335</sup> In coming to this conclusion, Members Battista and Schaumber stated that since an employer that is presented with evidence of actual loss of majority status may lawfully withdraw recognition even if a decertification petition is pending,<sup>336</sup> and employer presented with the same evidence could lawfully poll employees.<sup>337</sup>

In *Unifirst*, the union filed unfair labor practice charges against the employer postponing a decertification election. An employee then circulated a petition demanding that the employer hold its own election.<sup>338</sup> The general manager at

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329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.* at 3.

333. *Id.*

334. 346 N.L.R.B. No. 52 (2006).

335. *Id.* at 2.

336. See generally *Renal Care of Buffalo*, 347 N.L.R.B. No. 112 (2006) (finding that the employer possessed the necessary proof that the union had actually lost majority support and withdrawal of recognition was lawful because half the employees in the bargaining unit signed a decertification petition).

337. *Unifirst Corp.*, 346 N.L.R.B. No. 52 at 3.

338. *Id.* at 1.

the facility received a copy of this petition, which carried signatures of a majority of bargaining unit members. The employer then decided to conduct a poll.<sup>339</sup> It was conducted in accordance with the requirements established by the Board in *Struksnes Construction Co.*,<sup>340</sup> which held that an employer is permitted to poll employees about their union sentiments only if: “(1) the poll’s purpose is to determine the truth of a union’s claim of majority status, (2) this purpose is communicated to the employees, (3) employer assurances against reprisal are given, (4) employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.”<sup>341</sup> The last criterion is limited to unfair labor practices that can be shown to have caused the loss of employee support for the union.<sup>342</sup> Additionally, the employer provided the union with advance notice of the poll’s time and place, as required by *Texas Petrochemicals*.<sup>343</sup>

The poll resulted in thirty-seven employees voting against continued union representation and twenty-one employees voting for representation.<sup>344</sup> Based on these results, the employer notified the union that it was withdrawing recognition. The Board held that the employer did *not* violate the Act by polling employees or by polling them while the decertification petition was pending. Instead, this poll was conducted in order to avoid a violation of the Act and “the [employer’s] conduct here was entirely consistent with the Supreme Court’s suggestion in *Allentown Mack* that an employer that *could* lawfully withdraw recognition might want to poll first to secure conclusive evidence that the union in fact lost majority support, as well as to maintain good employee relations, which otherwise might be harmed by an abrupt withdrawal.”<sup>345</sup> In the Board’s view, when an employer may choose not to continue recognition and wants to ensure that a withdrawal of recognition is lawful, “that employer may lawfully poll its employees to make sure that the Union in fact no longer enjoys majority status” so long as the poll “complies with the procedural safeguards articulated in *Struksnes*.”<sup>346</sup>

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339. *Id.*

340. 165 N.L.R.B. 1062 (1965).

341. *Unifirst*, 345 N.L.R.B. No. 52 at 16 (citing *Struksnes Constr. Co.*, 165 N.L.R.B. 1062, 1063 (1965)).

342. The relevant factors in determining whether a causal relationship exists between the unfair labor practices and loss of employee support for a union include: (1) length of time between the unfair labor practices and loss of employee support for the union; (2) nature of the violations, including the possibility of lasting and detrimental effect on employees; (3) tendency of the violations to cause employee disaffection with the union; and (4) effect of the unlawful conduct on the employees’ morale, organizational activities, and union membership. *Olson Bodies, Inc.*, 206 N.L.R.B. 779 (1973); *Master Slack Corp.*, 271 N.L.R.B. 78 (1984).

343. *Unifirst*, 346 N.L.R.B. No. 52 at 16 (citing *Tex. Petrochemicals*, 296 N.L.R.B. 1057, 1063 (1989)).

344. *Id.* at 2.

345. *Id.* at 5.

346. *Id.*

*C. Surveillance Rights of Unions and Employers*

The Board's decision in *Randell Warehouse of Arizona, Inc.*,<sup>347</sup> further clarified the Board's precedent regarding surveillance of employees engaged in union organizational activities. Specifically, Chairman Battista and Members Schaumber and Kirsanow held that "photographing employees engaged in Section 7 activity," in the absence of a valid explanation conveyed to employees in a timely manner, "constitutes objectionable conduct whether engaged in by a union or an employer."<sup>348</sup>

In *Randell II*, the Board concluded that the rationale applicable to holding employers and unions to different standards with respect to surveillance could not "withstand careful scrutiny."<sup>349</sup> Rather, "[T]he rationale for finding that unexplained photographing has a reasonable tendency to interfere with employee free choice applies regardless of whether the party engaged in such conduct is a union or an employer."<sup>350</sup> In coming to this conclusion the Board stated:

In the context of an election campaign, the union seeks to become (or remain) the express representative of the unit employees. To achieve this goal, the union must convince a majority of employees to vote in its favor. A reasonable employee would anticipate that the union would not be pleased if he or she failed to respond affirmatively to the union's efforts to enlist support, just as an employee would anticipate that an employer would not be pleased if he or she rebuffed the employer's solicitation to reject union representation.<sup>351</sup>

Accordingly, without a valid explanation provided to employees in a timely manner, surveillance of "employees engaged in Section 7 activity constitutes objectionable conduct whether engaged in by a union or an employer."<sup>352</sup>

In this case, the union engaged in objectionable conduct when it photographed employees as they were offered literature by union representatives. The union did not adequately explain its purpose for the photographing when it told a single employee that "It's for the Union purpose, showing transactions that are taking place. The Union could see us handing flyers and how the Union is being run,"<sup>353</sup> as this explanation was held to be "ambiguous at best."<sup>354</sup>

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347. 347 N.L.R.B. No. 56 (*Randell II*) (2006).

348. *Id.* at 1. This overruled the Board's prior decision in *Randell Warehouse of Arizona, Inc.* (*Randell I*), 328 N.L.R.B. 1034 (1999) (overruling Board precedent which had held that union photographing was objectionable and presumptively coercive and finding that photographing was not objectionable because it was not accompanied by other coercive conduct).

349. *Randell Warehouse of Ariz.*, 347 N.L.R.B. No. 56 at 1.

350. *Id.*

351. *Id.* at 4.

352. *Id.* at 1.

353. *Id.*

354. *Id.* at 8.

Therefore, as “photographing . . . is presumptively coercive,” the union could not establish a legitimate justification for its surveillance, which unlawfully interfered with employee free choice.<sup>355</sup>

#### *D. Prohibition on Wearing Union Buttons*

In *Starwood Hotels & Resorts Worldwide Inc.*,<sup>356</sup> the Board held that the employer, a resort hotel, did not violate Section 8(a)(1) of the Act and was justified in prohibiting in-room food-delivery service employees from wearing union buttons in public areas.<sup>357</sup> In coming to this conclusion, the Board gave great weight to the hotel’s marketing efforts to present a “‘Wonderland’ [image] where guests [could] fulfill their ‘fantasies and desires’ and get ‘whatever [they] want whenever [they] want it.’”<sup>358</sup> To further enhance this sought-after character, the hotel referred “to its lobby as its ‘living room,’” and referred to its employees as “talent” or “cast members,” their supervisors as “talent coaches,” and the hotel experience itself as “wonderland.”<sup>359</sup> The hotel commissioned uniforms for its employees that provided a “trendy, distinct, and chic look” for workers who had public contact,<sup>360</sup> required employees to wear a small “‘W’ pin on the[ir] upper left chest” area, and prohibited all other uniform adornments.<sup>361</sup> Further, when interacting with guests, the employer directed all employees to introduce themselves by name and to make every interaction “Genuine, Authentic, Comfortable, Engaging, Conversational, with Personality, Fun.”<sup>362</sup> The hotel strived to “create ‘an emotional attachment’ for guests, to move from ‘never say no to let me work the magic,’ to look for opportunities to ‘grant wishes,’” and to make the “W” experience “[a] dream come true.”<sup>363</sup>

One day, server Sergio Gonzalez donned a button distributed by the union that was two inches square and read: “‘JUSTICE NOW! JUSTICE AHORA! H.E.R.E. LOCAL 30’ in blue or red letters on a yellow background.”<sup>364</sup> During Gonzales’ meal break in a non-public area, his supervisor (or “talent coach”) directed him to remove the button.<sup>365</sup> Arguing in favor of the legality of its action, the employer claimed that allowing employees to wear a union button was akin to allowing “graffiti on the Mona Lisa.”<sup>366</sup> Chairman Battista and Member Schaumber refused to question the employer’s business plan and held that it

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355. *Id.* at 10.

356. 348 N.L.R.B. No. 24 (2006).

357. *Id.* at 1.

358. *Id.*

359. *Id.* at 7.

360. *Id.* at 1.

361. *Id.*

362. *Id.*

363. *Id.* at 16.

364. *Id.* at 2.

365. *Id.*

366. *Id.* at 9.

demonstrated sufficient circumstances to justify the prohibition on the display of the button in public areas.<sup>367</sup> Considered together, the hotel's investment in developing its brand and meticulous efforts to enforce that brand persuaded the Board majority that it was integral to the employer's corporate image.<sup>368</sup> Thus, the employer could prohibit employees from wearing such buttons while in public areas of the hotel.<sup>369</sup>

### E. Successorship

In *Planned Building Services, Inc.*,<sup>370</sup> the Board clarified the standard to be applied when a successor employer allegedly refuses to hire its predecessor's employees to avoid an obligation to bargain with the union representing those employees. Planned Building Services, a New York City cleaning and maintenance contractor, received service contracts at several buildings which had SIEU-represented workforces.<sup>371</sup> The employer decided not to employ most of those employees and staffed the buildings with nonunion workers.<sup>372</sup>

On these facts, the Board unanimously held that the proper standard to apply in a successorship-avoidance case is the *Wright Line*<sup>373</sup> test for unfair labor practice allegations involving employer motivation.<sup>374</sup> To establish a *Wright Line* violation, the employer's actions must be "the result of its animus toward union or protected activity."<sup>375</sup> If that showing is made, then the employer may avoid liability only by demonstrating "that it would have taken the same action even in the absence of the protected activity."<sup>376</sup> Applying this *Wright Line* standard, the Board found that the employer violated Section 8(a)(3) of the Act by avoiding its obligation to the predecessor's employees.<sup>377</sup> When addressing the proper

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367. *Id.*

368. *Id.* at 2.

369. *Id.* Nevertheless, in *Starwood Hotels* a different Board majority (Members Liebman and Schaumber, with Chairman Battista dissenting) held that the employer violated the Act when it prohibited the employee from wearing his button in nonpublic areas of the workplace. *Id.* at 3. The hotel contended that it would be impractical to prevent the employee from wearing the button in public areas while allowing him to wear it in nonpublic areas. The Board, however, found that the employer provided no evidence speaking to this impracticability, as the employee would simply be required to remove the button from his or her uniform and was not asked to make any other alteration to the uniform. *Id.*

370. 347 N.L.R.B. No. 64 (2006).

371. *Id.* at 2.

372. *Id.*

373. 251 N.L.R.B. 1083 (1980).

374. *Planned Bldg. Servs.*, 347 N.L.R.B. No. 64 at 2.

375. *Id.* at 3.

376. *Id.* Furthermore, the Board held that its *FES*, 331 N.L.R.B. 9 (2000) standard for evaluating a discriminatory refusal-to-hire is not appropriate when addressing a successor's refusal-to-hire.

377. *Id.* at 5.

remedy in this type of case, the Board explained that the traditional make-whole remedy, which awards backpay and benefits, is based on the predecessor employer's "terms and conditions of employment."<sup>378</sup> Significantly, however, the Board carved out an exception for successorship-avoidance cases, and held that the successor employer's remedial obligation may be altered on the presentation of evidence that it would not have agreed to the financial terms of the predecessor's collective bargaining agreement.<sup>379</sup>

#### CONCLUSION

Clearly, the Board's jurisprudence experienced substantial development during the survey period. Most significant were the Board's decisions in the *Oakwood* trilogy, which are sure to provide fertile ground for debate among labor law scholars and practitioners for the foreseeable future. As other hotly-contested cases are currently pending before the Board,<sup>380</sup> the impact of changes in future years is much-anticipated.

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378. *Id.* at 6.

379. *Id.* at 7.

380. *See, e.g.*, Dana Corp. & Metaldyne Corp., 341 N.L.R.B. No. 150 (2004) (indicating that it may not treat recognition pursuant to a neutrality agreement as the equivalent of a secret ballot election).