

Survey of Recent Developments in Indiana Labor Law

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I. INTRODUCTION

During the survey period, several significant employment law issues were decided by the federal and state courts in Indiana. This Article will focus only on those court decisions dealing with "just cause" discharge, unemployment compensation and workplace discrimination under Indiana law.

II. JUST CAUSE DISCHARGE

A. *The Collateral Estoppel Effect of Administrative Decisions*

On June 19, 1989, the United States District Court for the Southern District of Indiana issued its decision in *Spearman v. Delco Remy Division of General Motors*.¹ In *Spearman*, Indiana law was interpreted, for the first time, as authorizing the application of the doctrine of collateral estoppel based upon an administrative decision issued by the Indiana Employment Security Division.² This case involved Edgar Spearman, an employee working under a month-to-month employment contract who was discharged after having allegedly used his position of trust and confidence to induce his employer, Delco Remy, to purchase packaging crates from a company with which his stepson was affiliated.

Upon discharge, Spearman applied for and was initially awarded unemployment benefits by the Indiana Employment Security Division. Delco Remy appealed this eligibility determination. At hearing before an appeals referee, both Spearman and Delco Remy were represented by counsel and called witnesses on their behalf. Based on the evidence presented at this hearing, the appeals referee, by written decision, reversed Spearman's initial award of benefits. In denying Spearman's claim, the referee determined that Spearman had been discharged for violating a

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1. 717 F. Supp. 1351 (S.D. Ind. 1989).

2. *Id.*

duty of loyalty owed his employer,³ a "just cause" reason for discharge under Indiana Code section 22-4-15-1(d)(8)⁴ that disqualified Spearman from receiving unemployment benefits. Spearman appealed this decision to the Review Board of the Indiana Employment Security Division. At a hearing held before a three-member panel of the Review Board, both Spearman and Delco Remy were again represented by counsel. After this hearing, the Review Board, by written decision, reversed the appeals referee's decision and found that Spearman had not been discharged for statutory "just cause."⁵ Delco Remy appealed this decision to the Indiana Court of Appeals, which affirmed the Review Board's decision. Delco Remy's petition for transfer to the Indiana Supreme Court was also denied.

After Delco Remy exhausted its appeal rights on this administrative decision of "no just cause," Spearman filed a diversity action in federal court, alleging that he had been wrongfully discharged by Delco Remy. Spearman then filed a motion for summary judgment, claiming that the Indiana Employment Security Division's determination that he had not been discharged for statutory "just cause" estopped Delco Remy from relitigating that issue in his wrongful discharge claim.

In responding to Spearman's motion, the federal district court admitted that "the boundaries of applying administrative decisions to court litigation are not well defined in Indiana."⁶ However, the court went on to note that the Indiana Supreme Court, in *McClanahan v. Remington Freight Lines*,⁷ had recently recognized, in *dicta*, that "some administrative proceedings may estop relitigation in subsequent civil proceedings."⁸ The court then quoted, with approval, the four "basic standards"⁹ for administrative collateral estoppel set forth in *McClanahan*:

1. whether the issues sought to be estopped were within the statutory jurisdiction of the agency;
2. whether the agency was acting in a judicial capacity;
3. whether both parties had a fair opportunity to litigate the issues; [and]
4. whether the decision of the administrative tribunal could be appealed to a judicial tribunal.¹⁰

3. *Id.* at 1354.

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

5. *Spearman*, 717 F. Supp. at 1355.

6. *Id.* at 1357.

7. 517 N.E.2d 390 (Ind. 1988).

8. *Spearman*, 717 F. Supp. at 1357 (quoting *McClanahan*, 517 N.E.2d at 394).

9. *Id.*

10. *Id.* (quoting *McClanahan*, 517 N.E.2d at 394).

To these expressed standards the court added the following additional "implicit requirements":

5. whether the parties are the same; and
6. whether the issues sought to be barred are the same.¹¹

Turning to the facts at issue, the court found all six of these conditions precedent to the application of administrative collateral estoppel to be present in Spearman's case.¹²

The court found, without further discussion or explanation, that the "agency jurisdiction," "appealability of administrative decision" and "identity of parties" standards had been met.¹³ Turning to the "identity of issues" standard, the court concluded that, while the general issue before the Indiana Employment Security Division was whether Spearman was entitled to unemployment benefits, the *key* issue before both the Review Board and the court was whether Spearman was discharged from his employment for just cause.¹⁴ The court rejected Delco Remy's argument that this "just cause" issue decided administratively by the Review Board differed from the "cause" element¹⁵ of Spearman's wrongful discharge claim, finding that the "breach of duty" rationale advanced by Delco Remy as its statutory "just cause" ground for discharge¹⁶ was the "precise element" of cause at issue in Spearman's wrongful discharge claim.¹⁷ The court also found that the "fair opportunity to litigate" standard had been met, noting that both Spearman and Delco Remy had been represented by counsel, had called witnesses, and had vigorously litigated the issue of "just cause" at each administrative level.¹⁸ Finally, the court found that the "judicial capacity" standard had been met by the Indiana Employment Security Division in deciding Spearman's claim.¹⁹ In the court's view, the fact that both Spearman and Delco Remy had been represented by counsel, had called witnesses, had received detailed written decisions at each administrative level, and had had their case heard in Indianapolis by a three-member Review Board panel whose findings of fact were statutorily recognized as final and conclusive,²⁰ sufficiently "formalized" Spearman's case so as to distinguish it from

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 1357-58.

15. *See* Peterson v. Culver Educ. Found., 402 N.E.2d 448 (Ind. Ct. App. 1980); Seco Chems., Inc. v. Stewart, 349 N.E.2d 733 (Ind. Ct. App. 1976).

16. *See* IND. CODE § 22-4-15-1(d)(8) (1982).

17. *Spearman*, 717 F. Supp. at 1358.

18. *Id.*

19. *Id.*

20. *See* IND. CODE § 22-4-17-12(a) (1986).

other Indiana cases²¹ in which administrative collateral estoppel was not applied because of the "informal" nature of the administrative procedures involved.²²

Having found that all six of the above conditions were met, the federal district court stated that it was convinced that, under Indiana law, the Indiana Supreme Court "would apply the doctrine of administrative collateral estoppel to the higher-level, more formal administrative decision in this litigation."²³ Finding no reason to relitigate the issue of whether Spearman was discharged for cause, the court granted Spearman's motion for summary judgment.

B. Judicial Refinement of the Statutory Definition of "Just Cause"

The survey period saw further judicial refinement of the statutory definition of "just cause" used to determine eligibility for unemployment benefits under the Indiana Employment Security Act.²⁴ In this regard, Indiana Code section 22-4-15-1(d) defines "discharge for just cause" as including, but not limited to:

- (1) separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge;
- (2) knowing violation of a reasonable and uniformly enforced rule of an employer;
- (3) unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness;
- (4) damaging the employer's property through willful negligence;
- (5) refusing to obey instructions;
- (6) reporting to work under the influence of alcohol or drugs, or consuming alcohol or drugs on employer's premises during working hours;
- (7) conduct endangering safety of self or co-workers; or
- (8) incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction or for any breach of duty in connection with work which is reasonably owed an employer by an employee.²⁵

In *Meulen v. Review Board of Indiana Employment Security Division*,²⁶ the Second District Court of Appeals refused to limit "just cause"

21. See *McClanahan*, 517 N.E.2d 390 (Ind. 1988).

22. *Spearman*, 717 F. Supp. at 1359.

23. *Id.* at 1360.

24. IND. CODE § 22-4-1-1 (1986).

25. *Id.* § 22-4-15-1(d) (1986).

26. 527 N.E.2d 729 (Ind. Ct. App. 1988).

discharges based on the violation of an employer's work rule to instances in which such violations were "deliberate."²⁷

In *Meulen*, claimant Rita Meulen appealed a Review Board decision which denied her claim for unemployment benefits. Meulen filed this claim after she had been discharged for accumulating six disciplinary write-ups for work rule violations and three disciplinary write-ups for excessive absenteeism, all within the same year. On appeal, Meulen argued that her discharge had not been for statutory "just cause" because she had not *deliberately* violated her employer's work rules. The court was unpersuaded by Meulen's argument, finding that, under Indiana law, an act of employee deliberation "is not required to be demonstrated before benefits may be withheld."²⁸ The court likened Meulen's situation to that found in earlier Indiana cases where "recurring" failures to perform job duties were found to be grounds for "just cause" discharge.²⁹ While noting that Meulen's "mere negligence"³⁰ would not have, in and of itself, constituted statutory "just cause," the court held that her repeated errors and excessive absenteeism demonstrated an overall course of conduct sufficient to justify a finding of "just cause" discharge.³¹

In *Voss v. Review Board Department of Employment & Training Services*,³² the Second District Court of Appeals also refused to carve out an exception to the statutory definition of "just cause" in instances where employee conduct that otherwise constituted grounds for "just cause" discharge was, nonetheless, "reasonable" under the circumstances.³³ This case arose when claimant Larry Voss was discharged for violating his employer's work rules by placing approximately 190 unauthorized long distance calls to his wife and to a betting agency on his employer's telephone without reporting and/or paying for the calls. On appeal from an unfavorable Review Board determination, Voss argued that it had not been "unreasonable" for him to have made these telephone calls and, therefore, that his work rule violations did not constitute a "just cause" reason for discharge. The court rejected this argument, finding that the "reasonableness" of Voss' telephone calls was "not relevant" to a finding that his "specifically prohibited and excessive conduct" constituted "just cause" for discharge.³⁴

27. *Id.*

28. *Id.* at 730.

29. *See Hale v. Review Bd. of Ind. Emp. Sec. Div.*, 454 N.E.2d 882 (Ind. Ct. App. 1983); *White v. Review Bd. of Ind. Emp. Sec. Div.*, 280 N.E.2d 64 (Ind. Ct. App. 1972).

30. *Meulen*, 527 N.E.2d at 730.

31. *Id.*

32. 533 N.E.2d 1020 (Ind. Ct. App. 1989).

33. *Id.*

34. *Id.* at 1022.

Finally, in *Beene v. Review Board of Indiana Department of Employment & Training Services*,³⁵ the Second District Court of Appeals refined and re-stated the circumstances under which an employer's "no-fault" attendance policy constitutes a "reasonable" work place rule whose violation can be used as grounds for an employee's "just cause" discharge.³⁶ In this case, claimant Carolyn Beene was discharged after accumulating a dischargeable number of absences under her employer's written "no-fault" attendance policy. Some of these absences, such as those caused by Beene's or her children's illness, were considered "excused absences" by her employer. Nevertheless, the Review Board upheld earlier claims deputy and appeals referee findings that Beene had violated a "reasonable and uniformly enforced" work rule and had thus been discharged for "just cause." On appeal, Beene argued that her employer's "no-fault" attendance policy was not a "reasonable" work rule, because it counted towards termination "excused" absences that were beyond her control. The court rejected this argument, finding, as a matter of law, that the "no-fault" attendance policy at issue was a reasonable and uniformly enforced rule whose violation justified Beene's discharge.³⁷

In so ruling, the court acknowledged that its decision was "somewhat at odds with decisions of other states whose statutes rely on a finding of 'misconduct' or 'willful misconduct' rather than 'just cause' in denying unemployment compensation."³⁸ However, the court stated that, in Indiana, the fact that Beene's absences were caused by occurrences "beyond her control" was "not the litmus test."³⁹ The court noted that, in 1983, it had held that a "no-fault" attendance policy which counted "excused" absences towards discharge was statutorily "unreasonable,"⁴⁰ but that it soon retreated from this earlier *per se* rule and decided to determine the "reasonableness" of "no-fault" attendance policies on a case-by-case basis.⁴¹ In *Beene*, the court concluded that the attendance policy under which Beene had been discharged was a "reasonable" work rule because it "protected the Employer's interest in the efficient running of its business by preventing against the practice of certain employees of

35. 528 N.E.2d 842 (Ind. Ct. App. 1988).

36. The knowing violation of a reasonable and uniformly enforced work rule constitutes "just cause" for discharge. IND. CODE ANN. § 22-4-15-1(d)(2) (Burns Supp. 1989).

37. *Beene*, 528 N.E.2d at 845.

38. *Id.* at 846.

39. *Id.*

40. See *Love v. Heritage House Convalescent Center*, 463 N.E.2d 478 (Ind. Ct. App. 1983).

41. See *Jeffboat, Inc. v. Review Bd. of Ind. Emp. Sec. Div.*, 464 N.E.2d 377 (Ind. Ct. App. 1984).

being frequently 'ill'."⁴² In affirming the decision of the Review Board, the court concluded that the attendance policy at issue sufficiently safeguarded employees by providing "some leeway for cases of long-term illness," allowing verified instances of "real emergencies" to be considered on their merits, and allowing employees to "move back one step in the discipline progression" if they remained discipline-free for a stated period of time.⁴³

III. UNEMPLOYMENT COMPENSATION

A. *Due Process and Equal Protection of Law*

During the survey period, Indiana courts continued to review unemployment compensation decisions with an eye toward the overall due process and equal protection rights afforded the parties affected by such decisions. In *Carter v. Review Board of Indiana Department of Employment & Training Services*,⁴⁴ the First District Court of Appeals refused, on due process grounds, to make conclusive the general presumption under Indiana law that notices sent through the mails are received by their respective addressees.⁴⁵ Claimant John Carter had initially been found eligible for unemployment benefits, but his employer appealed this initial determination. Upon appeal, the Indiana Department of Employment and Training Services mailed a hearing notice to Carter. Nevertheless, Carter failed to appear at the appeals referee hearing, and his favorable eligibility determination was reversed. Carter appealed this decision to the Review Board, claiming that he had not received notice of the hearing and had therefore been denied the opportunity to attend it and present evidence in his behalf. The Review Board denied Carter's appeal without addressing this timely notice issue.

On appeal, the First District Court of Appeals reversed, remanding the case to the Review Board for an evidentiary hearing to be held on Carter's claim of inadequate notice.⁴⁶ The court distinguished this case from earlier Indiana cases in which claimants had already presented their evidence to an appeals referee and then appealed the referee's post-hearing decision.⁴⁷ In such cases,⁴⁸ the court agreed that due process of

42. *Beene*, 528 N.E.2d at 846.

43. *Id.*

44. 526 N.E.2d 717 (Ind. Ct. App. 1988).

45. *See Osborne v. Review Bd. of Ind. Emp. Sec. Div.*, 381 N.E.2d 495 (Ind. Ct. App. 1978); *see also Miedreich v. Lauenstein*, 232 U.S. 236 (1914).

46. *Carter*, 526 N.E.2d at 719.

47. *Id.*

48. *See Frederick v. Review Bd. of Ind. Emp. Sec. Div.*, 448 N.E.2d 1230 (Ind. Ct. App. 1983); *Whirlpool Corp. v. Review Bd. of Ind. Emp. Sec. Div.*, 438 N.E.2d 775 (Ind. Ct. App. 1982).

law did not require the Review Board to hold any additional evidentiary hearings.⁴⁹ In Carter's case, however, where he had no opportunity to present *any* evidence on his timely notice claim, the court viewed this total lack of opportunity to be heard on that issue as constituting a "deprivation of due process"⁵⁰ that could only be remedied by the holding of an additional evidentiary hearing.

In *Stanley v. Review Board of Department of Employment & Training Services*,⁵¹ the First District Court of Appeals also reversed a Review Board decision on due process grounds. The Review Board had reversed an appeals referee's findings after conducting only a "paper review" of the case record. Claimant Robert Stanley had been discharged for failing to timely report an absence from work, in violation of a written work rule. Before the appeals referee, Stanley alleged that he had timely notified his employer of his work absence, an assertion denied by the employer's witnesses. The appeals referee resolved this credibility issue in Stanley's favor. The Review Board reversed, however, finding that Stanley had failed to adequately identify the person he claimed to have contacted to report his absence.

On appeal, Stanley argued that the Review Board's reversal of its appeals referee's decision, which was based solely on witness credibility, violated his right to due process of law. The court agreed, creating an exception to the general rule of law on administrative review that was, in the court's own words, at odds with "the weight of state and federal authority."⁵² As noted by the court, administrative agencies under federal law are generally "allowed to make findings on issues of credibility without taking live testimony."⁵³ This rule of law has been followed in Indiana,⁵⁴ at least in cases where witness credibility has not been "the sole determinative factor."⁵⁵ The court also recognized that, even in cases where credibility is the determinative factor, other courts⁵⁶ have not prohibited "paper review" credibility determinations, but only re-

49. *Carter*, 526 N.E.2d at 719.

50. *Id.*

51. 528 N.E.2d 811 (Ind. Ct. App. 1988).

52. *Id.* at 813.

53. *Id.*; see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); *Hameetman v. City of Chicago*, 776 F.2d 636 (7th Cir. 1985).

54. See *Wampler v. Review Bd. of Ind. Emp. Sec. Div.*, 498 N.E.2d 998 (Ind. Ct. App. 1986); *St. Mary's Med. Center v. Review Bd. of Ind.*, 493 N.E.2d 1275 (Ind. Ct. App. 1986); *Public Serv. Co. v. Review Bd. Of Ind. Emp. Sec. Div.*, 451 N.E.2d 371 (Ind. Ct. App. 1983); *Sloan v. Review Bd. of Ind. Emp. Sec. Div.*, 444 N.E.2d 862 (Ind. Ct. App. 1983).

55. *Stanley*, 528 N.E.2d at 814.

56. See *Parker v. Bowen*, 788 F.2d 1512 (11th Cir. 1986); *Pieper Elec. Inc. v. Labor and Indus. Review Comm.*, 346 N.W.2d 464 (Wis. 1984).

quired an administrative review board "to include in the record either its reasons for rejecting the lower tribunal's credibility determination . . . or some indication that the lower factfinder's credibility assessment could be gleaned from the record or from personal consultation with that factfinder."⁵⁷

Nevertheless, while acknowledging the existence of these contrary court decisions, the court chose to prohibit outright the "paper review" reversal of appeals referee decisions where witness credibility is the determinative factor in the case. The court stated that, in cases such as these, where witness credibility is "the sole and determinative factor in reversing a referee's finding"⁵⁸ and "the testimony of neither party can be discredited by impeachment, nor is there any evidence that the individuals testifying were in any way incapacitated,"⁵⁹ a claimant's due process rights will be violated unless the Review Board first conducts a second hearing at which it is able to observe for itself the testimony of material witnesses.⁶⁰

Finally, in *Winder v. Review Board of Indiana Employment Security Division*,⁶¹ the Second District Court of Appeals limited, on equal protection grounds, the circumstances under which claimants can be denied unemployment benefits.⁶² *Winder* involved a claimant who had worked for one employer as a full-time caseworker and for another employer as a part-time cashier. Eleven days after the claimant voluntarily quit her part-time position, she was discharged from her full-time job. Under Indiana Code section 22-4-15-1(c)(1), a claimant is disqualified from receiving unemployment benefits if, "having been simultaneously employed by two (2) employers, he leaves one (1) such employer voluntarily without good cause in connection with the work" and does not thereafter remain "in employment with the second employer for at least ten (10) weeks subsequent to leaving the first employer."⁶³ In reliance on this statutory language, the Review Board disqualified *Winder* from receiving unemployment benefits, as she had not remained with her second employer for at least ten weeks after leaving her first employer.⁶⁴ On appeal, *Winder* argued that this statutory law had been applied so as to deny her equal protection of law, by treating persons "who qualify for benefits after voluntarily quitting one job, and who subsequently lose a second

57. *Stanley*, 528 N.E.2d at 814.

58. *Id.* at 815.

59. *Id.*

60. *Id.*

61. 528 N.E.2d 854 (Ind. Ct. App. 1988).

62. *Id.* at 855.

63. IND. CODE § 22-4-15-1(c)(1) (1982).

64. *Winder*, 528 N.E.2d at 855.

job, differently from those who qualify for benefits after involuntarily losing their only job.”⁶⁵

In analyzing Winder’s case, the court first used a “rational relationship” test⁶⁶ to determine whether the different treatment afforded Winder, in relation to claimants who had held only one job, was related to “legitimate state goals.”⁶⁷ The court noted that two of the expressed statutory purposes for the enactment of the Indiana Employment Security Act were to “provide for payment of benefits to persons unemployed through no fault of their own [and] to encourage stabilization in employment.”⁶⁸ Keeping these “state goals” in mind, the court concluded that Winder had lost her full-time job through “no fault of her own” and had only quit her part-time job with the expectation that she would still be able to maintain “stable employment” by working at her full-time job.⁶⁹ As Winder had never voluntarily become unemployed and would have been entitled to unemployment compensation if she had never held her part-time job, the court reasoned that to deny her unemployment benefits solely because she had held two jobs, instead of one, bore “no rational relationship to the goals of the Indiana Employment Security Act”⁷⁰ and denied Winder equal protection of law.⁷¹ For this reason, the court reversed the Review Board and found Winder eligible for unemployment benefits.⁷²

B. *Unemployment Compensation During Periods of Labor Unrest*

During the survey period, Indiana courts refused to expand the circumstances under which employees can be found ineligible for unemployment benefits during periods of labor unrest, and limited the circumstances under which picketline misconduct can be used as grounds for “just cause” discharge.

Indiana Code section 22-4-15-3(a) states that:

An individual shall be *ineligible* for waiting period or benefits rights: For any week with respect to which his total or partial or part-total unemployment is due to a *labor dispute* at the factory, establishment or other premises at which he was last employed.⁷³

65. *Id.* at 856.

66. *See* Jenkins v. Hayes, 560 F. Supp. 918 (S.D. Ind. 1983).

67. *Winder*, 528 N.E.2d at 856.

68. *Id.* (quoting IND. CODE § 22-4-1-1 (1986)).

69. *Id.* at 857.

70. *Id.*

71. *Id.*

72. *Id.*

73. IND. CODE § 22-4-15-3(a) (1980) (emphasis added).

In *USS, A Division of USX Corp. v. Review Board of Indiana Employment Security Division*,⁷⁴ the Fourth District Court of Appeals refused to broaden the definition of "labor dispute" used to determine eligibility for unemployment benefits under Indiana law.⁷⁵ In this case, the United Steelworkers of America and USS had been involved in collective bargaining negotiations. After several weeks of hard bargaining failed to produce a new labor contract, and although contract negotiations were still in progress, USS shut down its plant and locked out those employees who tried to report for work. These employees then filed claims for unemployment benefits, which were granted after the Review Board determined that the employees had not become unemployed "due to a labor dispute" under Indiana law.⁷⁶ USS appealed this administrative decision.⁷⁷

On appeal, the court chose to follow the standard first enunciated in *Boatz Manufacturing Co. v. Review Board of Indiana Employment Security Division*⁷⁸ for determining whether claimants were unemployed due to a "labor dispute."⁷⁹ This standard states that a statutory "labor dispute" does not exist when "bargaining is in a fluid state and no impasse has occurred."⁸⁰ In using this "*Boatz* standard," the court declined USS's invitation to instead use an "any controversy" standard.⁸¹ In refusing to adopt this proffered standard, the court stated that such a standard "would defeat the act's declared purpose⁸² when negotiations are still fluid [by] . . . allow[ing] management to immediately 'lockout' [sic] employees in an effort to coerce them into settlement."⁸³ As employees would almost always be ineligible for unemployment compensation during "controversies" such as contract negotiations, the court reasoned that the "any controversy" standard did not square with the act's declared purpose which requires the encouragement of "good faith collective bargaining in the interest of public policy."⁸⁴ The court affirmed

74. 527 N.E.2d 731 (Ind. Ct. App. 1988).

75. *Id.*

76. *Id.* at 734.

77. *Id.*

78. 143 Ind. App. 17, 237 N.E.2d 597 (1968).

79. *USS*, 527 N.E.2d at 735.

80. *Boatz*, 143 Ind. App. at 23, 237 N.E.2d at 601.

81. *USS*, 527 N.E.2d at 737.

82. "The primary purpose of the [Employment Security] Act is 'to provide for the payment of benefits to persons unemployed through no fault of their own,' and such purpose is 'essential to the public welfare.'" *Id.* (citing *City Pattern & Foundry Co. v. Review Board*, 147 Ind. App. 636, 640, 263 N.E.2d 218, 222 (1970)).

83. *Id.* at 737-38.

84. *Id.* at 738.

the Review Board's decision to award unemployment benefits to the claimants.⁸⁵

In *Hehr v. Review Board of Indiana Employment Security Division*,⁸⁶ the Second District Court of Appeals limited the circumstances under which picket line misconduct could be used to justify the "just cause" discharge of striking employees. This case arose after four striking employees were discharged for damaging or attempting to damage vehicles crossing their picket line. One of these employees, Wade Hehr, was discharged for striking these vehicles with his hands, while the other employees were discharged for scratching and hitting the vehicles with clubs and other objects. Upon discharge, these employees applied for, and were denied, unemployment benefits.

On appeal, the court acknowledged that employees who damage the property of co-workers located on the employer's premises, or who engage in conduct which constitutes a substantial step towards damaging such property, breach a duty reasonably owed their employer and subject themselves to "just cause" discharge.⁸⁷ However, in applying this general rule to the instant case, the court found it necessary to distinguish between Hehr's actions in hitting vehicles with his hands and the actions of the other claimants in hitting vehicles with other objects. The court found it reasonable to conclude that "the use of an instrument such as a club in intentionally striking a vehicle constitutes a substantial step towards damaging property."⁸⁸ However the court concluded that, absent proof that Hehr's conduct violated a uniformly enforced work rule or resulted in actual property damage, the fact that Hehr intentionally struck vehicles with his hands did not, without evidence of the force he used, lead to a conclusion that his actions "were likely to cause damage."⁸⁹ For this reason, the court awarded Hehr unemployment benefits.⁹⁰

C. Allowable Deductions From Unemployment Benefit Payments

Indiana Code section 22-4-5-1 states, in relevant part, that income deductible from unemployment benefit payments includes:

- (1) remuneration for services from employing units;

85. *Id.*

86. 534 N.E.2d 1122 (Ind. Ct. App. 1989).

87. *Id.* at 1126-27.

88. *Id.* at 1129.

89. *Id.* at 1127.

90. *Id.* at 1129. In dissent, Judge Hoffman found that, because Hehr's actions "had the potential to be dangerous," they satisfied the "likely to cause damage" prerequisite to a finding of "just cause" discharge. *Id.* at 1130 (Hoffman, J., dissenting).

- (2) dismissal pay;
- (3) vacation pay;
- (4) pay for idle time;
- (5) holiday pay;
- (6) sick pay;
- (7) traveling expenses;
- (8) net earnings from self-employment;
- (9) payments in lieu of compensation for services;
- (10) awards by the National Labor Relations Board of additional pay, back pay or for loss of employment; or
- (11) payments made to an individual by an employing unit pursuant to the terms of the Fair Labor Standards Act.⁹¹

Recently in *Green Ridge Mining v. Indiana Unemployment Insurance Board*,⁹² where the scope of this statute was at issue, the First District Court of Appeals refused to consider payments made pursuant to a written settlement agreement, but not designated as "back pay," as income statutorily deductible from a claimant's unemployment benefit payments.

In *Green Ridge*, the employer had discharged claimant Mark Kraus for his alleged bad attitude and inability to get along with others. Upon termination, Kraus filed a claim for unemployment benefits, which was granted. Kraus then filed a complaint against Green Ridge with the Federal Mine, Safety and Health Review Commission, United States Department of Labor ("MSHA"). In this MSHA complaint, Kraus alleged that he had been terminated in retaliation for Green Ridge having received an MSHA citation for failing to report a workplace injury previously suffered by Kraus.

To settle this matter short of litigation, Kraus and Green Ridge entered into an agreement by which Green Ridge would pay Kraus \$15,000 in exchange for the withdrawal of his MSHA complaint. This settlement agreement expressly released Green Ridge "from any and all liability for known claims and demands . . . arising out of or relating to" Kraus' unemployment.⁹³ However, it did *not* specifically designate any portion of this \$15,000 payment as "back pay" for income Kraus lost as a result of his discharge. In the court's view, the failure to designate a portion of this payment as "back pay" distinguished this case from earlier Indiana cases in which monetary awards designated as "back pay" had been considered income statutorily deductible from

91. IND. CODE ANN. § 22-4-5-1 (Burns Supp. 1989).

92. 541 N.E.2d 550 (Ind. Ct. App. 1989).

93. *Id.* at 552.

unemployment benefit payments.⁹⁴ The court concluded that, as Kraus' settlement payment did not fall squarely within a specific category of statutorily deductible income, Green Ridge had the burden of demonstrating that this payment "was intended to replace income lost during any period of unemployment."⁹⁵ As Green Ridge failed to satisfy this burden of proof, the court refused to allow the deduction of this settlement amount from Kraus' unemployment benefit payments.⁹⁶

IV. WORKPLACE DISCRIMINATION

A. Allocation of Burden of Proof in Retaliation Cases

This survey period saw the Indiana Supreme Court clearly state, for the first time, what the proper allocation of proofs is to be in retaliation cases decided under Indiana law. In *Indiana Civil Rights Commission v. Culver*,⁹⁷ Culver Military Academy had hired Martha Bernauer as a reading instructor. As was Culver's practice, Bernauer was required to successfully complete a three-year probationary period before she could become tenured. The year after her hire, Bernauer filed a complaint with the Indiana Civil Rights Commission ("ICRC"), alleging that Culver had discriminated against her on the basis of her sex as a result of its allegedly unequal pay and insurance provisions. In response to this complaint, Culver changed its insurance policy to correct any disparities in insurance coverage that were based on sex. Meanwhile, the ICRC found no probable cause existed on Bernauer's equal pay claim. However, shortly after this matter was settled, Bernauer's position at Culver was eliminated.

In response to her dismissal, Bernauer filed another complaint with the ICRC, this time claiming that she had been terminated in retaliation for having filed a sex discrimination complaint. In response, Culver explained that it had hired new school superintendents in both 1974 and 1975, and that the first of these superintendents had eliminated Culver's reading program—thus necessitating Bernauer's dismissal. However, as Culver's evidence showed, the second of these superintendents reinstated the school's reading program and hired a new reading instructor. Culver argued that it was this unforeseen change in educational emphasis, rather than any retaliatory motive on its part, that led to Bernauer's dismissal. After completing its investigation of this complaint, the ICRC found

94. *Green Ridge Mining*, 541 N.E.2d at 552; see, e.g., *Frost v. Review Bd. of Ind. Emp. Sec. Div.*, 432 N.E.2d 459 (Ind. Ct. App. 1982).

95. *Green Ridge Mining*, 541 N.E.2d at 552.

96. *Id.*

97. 535 N.E.2d 112 (Ind. 1989).

no probable cause existed on Bernauer's retaliatory discharge claim. Bernauer appealed this finding, and a second ICRC investigation led to another "no probable cause" finding. Bernauer then appealed this finding, and was allowed to meet privately with the ICRC Commissioner. As a result of this private meeting, the Commissioner overruled the no probable cause determinations and found probable cause to exist on Bernauer's claim. A subsequent hearing officer's determination held that Culver had retaliated against Bernauer by cancelling its reading program and by not renewing Bernauer's employment at the end of her probationary period.

In so ruling, the ICRC hearing officer based his decision, in part, on an erroneous finding that Culver's reading program had been cancelled and then reinstated by the *same* school administrator. Although the Commission later recognized this factual error, it still accepted its hearing officer's findings and conclusions and ordered Culver to reinstate Bernauer with back pay. One of these conclusions of law accepted by the Commission was the hearing officer's conclusion that, once Bernauer had made a *prima facie* case of retaliation, the burden shifted to Culver "to prove that retaliation played no part in the decision to terminate" her.⁹⁸

On appeal from the Commission's decision, the Marshall Superior Court reversed and remanded, concluding that the ICRC's ultimate finding of discriminatory retaliation had been premised, in part, on its above-mentioned erroneous finding of fact. The Third District Court of Appeals reversed, finding that the trial court had improperly reweighed the evidence and had substituted its own judgment on the facts for that of the Commission in reaching its decision. Culver's petition to transfer finally brought this case before the Indiana Supreme Court.

The Indiana Supreme Court reversed again, and affirmed the trial court's decision and order. In so ruling, the court found that the ICRC had erred in shifting to Culver the burden of proving that retaliation played no part in its decision to terminate Bernauer.⁹⁹ As part of its decision, the court expressly adopted the three-step burden allocation formula used by federal courts to allocate burdens of proof in retaliation cases.¹⁰⁰ Under this formula, as set forth by the United States Supreme Court in *Texas Department of Community Affairs v. Burdine*,¹⁰¹ "the

98. *Id.* at 115.

99. *Id.*

100. *Id.*

101. 450 US 248 (1981). Under this burden allocation formula, the plaintiff has the initial burden of proving, by the preponderance of the evidence, a *prima facie* case of discrimination. The defendant must then articulate a legitimate, nondiscriminatory reason for its actions. The plaintiff then has an opportunity to prove that the reasons offered by the defendant were not its true reasons, but a pretext for discrimination.

ultimate burden of persuasion that the defendant engaged in unlawful discrimination remains at all times with the plaintiff."¹⁰² Applying this formula to the instant case, the court concluded that "Bernauer, not Culver, should have been required to prove that but for retaliation her contract would not have been terminated."¹⁰³ As the Commission had applied the wrong burden allocation formula to Culver and Bernauer, the court remanded the case to the ICRC for reconsideration in light of its ruling.¹⁰⁴

B. Scope of Preemption Under Civil Rights Acts

In *Fields v. Cummins Employees Federal Credit Union*,¹⁰⁵ the Fourth District Court of Appeals held that an employee's tort claims against her employer for workplace sexual harassment were barred by the exclusive remedy provisions of the Indiana Workers' Compensation Act.¹⁰⁶ However, the court refused to extend the exclusive remedy provisions of the Act, or the preemptive scope of either Title VII of the Civil Rights Act of 1964¹⁰⁷ or the Indiana Civil Rights Act,¹⁰⁸ to the employee's common law claims against her supervisor.

This case arose after Cummins employee Sue Fields filed suit against her supervisor, Joseph Taylor, alleging that Taylor had subjected her to sexual harassment and battery and had intentionally interfered with her advantageous business relationship. Fields also filed suit against Cummins, her employer, alleging that Cummins knew of Taylor's misconduct and had negligently retained Taylor as a supervisor. Both defendants moved for and were granted summary judgment by the Decatur County Circuit Court, and Fields appealed.

On appeal, Cummins argued, and the court agreed, that Fields' cause of action was barred, as to Cummins, by the exclusive remedy provisions of the Indiana Workers' Compensation Act.¹⁰⁹ In reaching this decision, the court relied upon the Indiana Supreme Court's decision in *Evans v. Yankeetown Dock Corp.*,¹¹⁰ which held that the statutory prerequisites for bringing a workplace injury under the scope of the Indiana Workers' Compensation Act were: (1) personal injury or death

102. *Culver*, 535 N.E.2d at 115.

103. *Id.* at 116.

104. *Id.*

105. 540 N.E.2d 631 (Ind. Ct. App. 1989).

106. *Id.*; See IND. CODE ANN. § 22-3-2-1 (Burns Supp. 1989).

107. 42 U.S.C. § 2000e (1978).

108. IND. CODE ANN. § 22-9-1-1 (Burns Supp. 1989).

109. *Fields*, 540 N.E.2d at 636. See also IND. CODE ANN. § 22-3-2-1 (Burns Supp. 1989).

110. 491 N.E.2d 969 (Ind. 1986).

by accident; (2) personal injury or death arising out of employment; and (3) personal injury or death arising in the course of employment.¹¹¹ In deciding that Fields' injury met all three of these statutory prerequisites, the court rejected the argument that her injury had not occurred "by accident" because the repeated nature of Taylor's harassing actions caused them to lose their "unexpected," and therefore their "accidental," character.¹¹² The court held that an employee's injury need not result from a single occurrence in order for it to be considered "accidental" under the Act.¹¹³

Turning to the Act's second statutory prerequisite, the court rejected Fields' arguments based on the doctrines of "respondent superior" and "negligent retention," finding that her claims were, by definition, predicated upon a causal connection between her alleged injuries and her employment relationship, and therefore arose "out of employment."¹¹⁴ The court reasoned that Fields' argument that her claims should be removed from the Act's coverage by the doctrine of respondeat superior must fail because, "[i]f Taylor was acting within the scope of his employment, [Fields'] injur[ies] would, by definition, arise out of the employment, while, if [Taylor] was not [acting within the scope of his employment,] the doctrine of respondeat superior would not apply and Cummins would [still] not be liable for his acts."¹¹⁵ Fields' argument that her claims should be removed from the Act's coverage by the doctrine of negligent retention fared no better, as the court noted that the use of this doctrine was premised on Cummins' negligence in the employment relationship, and that Field's injuries must, therefore, still arise "out of employment."¹¹⁶ Finally, as Fields did not contend that her injuries did not arise "in the course of employment," the court found that this third statutory prerequisite to coverage under the Act was also satisfied. For these reasons, the court affirmed the summary judgment in favor of Cummins, and held that a claim under the Workers' Compensation Act was Fields' exclusive remedy against her employer.¹¹⁷

111. *Id.* at 973.

112. *Fields*, 540 N.E.2d at 634.

113. *Id.* (citing *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573 (Ind. 1987)). In *Hanson*, an employee's anxieties caused by her supervisor's practical jokes were found to constitute an injury caused "by accident," despite the repeated nature of the supervisor's misconduct. 507 N.E.2d at 634.

114. *Fields*, 540 N.E.2d at 635.

115. *Id.* at 636.

116. *Id.*

117. Fields also claimed that her cause of action against Cummins should not be barred by the exclusivity provisions of the Indiana Workers' Compensation Act because she did not receive the "quid pro quo" which comprises the rationale for workers' compensation, in that Cummins did not pay any of her medical bills nor file a claim on

In his separate defense to Fields' claims, Taylor also relied on the Workers' Compensation Act, arguing that, because he was in the same employ as Fields, he should be immune from suit under the exclusive remedy provisions of that Act.¹¹⁸ However, the court rejected this argument, holding that, even if Fields' claims met the jurisdictional prerequisites for coverage under the Act, Taylor was not thereby automatically immune from suit.¹¹⁹ Instead, the court held that Taylor would be able to invoke the Act's immunity provisions only if he had been "acting in the course of his employment"¹²⁰ at the time Fields allegedly suffered her injuries. Finding it inconceivable that Taylor's alleged acts were for the benefit of his employer, the court held that those acts did not arise "out of employment" and that Taylor was therefore not immune from suit.¹²¹

Taylor next argued that, even if he could not avail himself of the Act's exclusive remedy provisions, Fields' common law claims were still preempted by Title VII of the Civil Rights Act of 1964 or by the Indiana Civil Rights Act, and that her claims had been extinguished by her failure to follow the administrative requirements of those Acts. The court disagreed. As for Taylor's argument under Title VII, the court found that it was "based on the mistaken notion that Fields has no common law right to be free from the acts committed by him and that workers were 'fair game' for sexual harassment until the passage of Title VII."¹²² Quoting from *Alexander v. Gardner-Denver*,¹²³ where the United States Supreme Court stated that "the legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes,"¹²⁴ the court concluded that Fields' Title VII rights were independent of her rights under state common law and that she was under no obligation to comply with Title VII's statutory procedures before she was eligible to obtain relief under Indiana common law.¹²⁵

Turning to Taylor's state law preemption argument, the court agreed, in *dicta*, that if Fields' common law claims had been "only for dis-

her behalf. The court rejected this argument, finding that the question was not whether an employee received compensation, but whether the jurisdictional prerequisites to coverage under the Act had been met. *Fields*, 540 N.E.2d at 637.

118. *Id.* at 637.

119. *Id.*

120. *Id.*

121. *Id.* at 638.

122. *Id.*

123. 415 U.S. 36 (1974).

124. *Fields*, 540 N.E.2d at 638 (quoting *Gardner-Denver*, 415 U.S. at 48-49).

125. *Id.* at 639.

criminy actions arising from the sexual harassment"¹²⁶ she had experienced in the workplace, had involved facts *identical* to those needed to establish a claim for sexual harassment under the Indiana Civil Rights Act, and had involved remedies *identical* to those available under the Act, Taylor's argument "would be well taken."¹²⁷ However, as Fields' common law claims required the proof of facts in addition to those needed to show discrimination under the Indiana Civil Rights Act and could be remedied by the awarding of damages not available under that Act, the court concluded that Fields' common law claims were not preempted by the Act.¹²⁸ As she had not chosen to seek relief under the Indiana Civil Rights Act, the court also held that Fields was not required to comply with that Act's administrative procedures before she was eligible to obtain relief under Indiana common law.¹²⁹ For these reasons, the court reversed the summary judgment in favor of Taylor and remanded the case for further proceedings in accordance with its opinion.¹³⁰

C. *Handicap Discrimination Under Indiana Law*

This survey period also saw a case of first impression decided by an Indiana court on the scope of an employer's obligations to its handicapped employees under the Indiana Civil Rights Act. *Indiana Civil Rights Commission v. Southern Indiana Gas & Electric Co.*¹³¹ arose after job applicant N. June Leslie filed an employment application with Southern Indiana Gas & Electric Company ("SIGECO") for a job as a "meter man." Leslie was a 5'1" female weighing 124 pounds. The "meter man" job position for which she applied required heavy lifting on a daily basis. As part of its general practice, SIGECO's company doctor, a general practitioner, gave Leslie a pre-employment physical examination. As a result of this examination, this doctor determined that Leslie had a lower back condition known as the sacralization of the L-5 vertebra, which rendered her unfit for heavy lifting. Based solely on this medical opinion, SIGECO did not hire Leslie to fill its "meter man" job position.

After obtaining a second medical opinion from a specialist in orthopedics, which opinion stated that Leslie's medical condition would cause her no greater problems than someone with a "normal" back,

126. *Id.* at 640.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 641.

131. 544 N.E.2d 536 (Ind. Ct. App. 1989).

Leslie filed a handicap discrimination claim with the Indiana Civil Rights Commission. In her claim, Leslie contended that she was a victim of handicap discrimination because her back condition did not prevent her from safely and efficiently performing the job duties of a "meter man." The ICRC agreed, and ordered SIGECO to employ Leslie, with back pay. SIGECO challenged this administrative decision, and the Pike County Circuit Court found in SIGECO's favor, reversing the Commission's determination that Leslie was a victim of handicap discrimination. Leslie and the ICRC then appealed this decision to the Fourth District Court of Appeals, which reversed again and found in Leslie's favor.

In ordering the Commission's order reinstated, the Fourth District Court of Appeals initially determined that Leslie had conclusively proven before the Commission that her back condition did not hinder her ability to safely and efficiently perform the job duties of a "meter man," despite SIGECO's medical opinion to the contrary. The court then considered, and rejected, SIGECO's argument that, as Leslie had admitted that she was not "handicapped," she was barred from bringing a handicapped discrimination action under the Indiana Civil Rights Act. In so doing, the court held that the Act, by its terms, was to be liberally and broadly interpreted in order to effectuate its purpose, and that persons who are discriminated against because they are "perceived as having handicaps" are protected by the Act even if they, in fact, are not "handicapped."¹³² The court then rejected SIGECO's argument that its "good faith reliance" on its doctor's opinion that Leslie was unfit for heavy lifting relieved it of any liability.¹³³ Ignoring Judge Conover's strong dissent that its holding required employers to act as "insurers" of the correctness of their experts' opinions,¹³⁴ the court held that the suffering caused to job applicants by even innocently perpetrated handicap discrimination was not mitigated by an employer's good faith, and that the Act imposed an affirmative duty upon employers to reassess employment decisions based on challenged medical diagnoses.¹³⁵

V. SUMMARY

The survey period saw several significant developments in Indiana labor law. First, the federal district court's decision in *Spearman v. Delco Remy Division of General Motors*¹³⁶ authorized the application of the doctrine of collateral estoppel based upon administrative decisions

132. *Id.* at 539-40.

133. *Id.* at 540.

134. *Id.* at 542 (Conover, J., dissenting).

135. *Id.* at 541.

136. 717 F. Supp. 1351 (S.D. Ind. 1989).

of the Indiana Employment Security Division in cases where the parties involved were represented by counsel and fully litigated at earlier administrative hearings the issues sought to be barred from relitigation.¹³⁷

Second, in *Meulen v. Review Board of Indiana Employment Security Division*¹³⁸ and *Voss v. Review Board Department of Employment & Training Services*,¹³⁹ respectively, the Second District Court of Appeals refused to limit the scope of statutory "just cause" by requiring employers to prove employee's "deliberately" violated their work rules¹⁴⁰ or that such violations were not "reasonable" under the circumstances.¹⁴¹ In *Beene v. Review Board of Indiana Department of Employment & Training Services*,¹⁴² the Second District Court of Appeals also found "no-fault" attendance policies to be "reasonable" work rules for unemployment eligibility purposes, as long as they allowed absences to "drop off" over time and provided safeguards for employees faced with long-term illnesses or special emergencies.¹⁴³

Third, in *Carter v. Review Board of Indiana Department of Employment & Training Services*¹⁴⁴ and *Stanley v. Review Board of Department of Employment & Training Services*,¹⁴⁵ respectively, the First District Court of Appeals refused, on due process grounds, to allow the Review Board of the Indiana Employment Security Division to either summarily dismiss claims of inadequate notice¹⁴⁶ or reverse eligibility determinations based solely on witness credibility.¹⁴⁷ Moreover, in *Winder v. Review Board of Indiana Employment Security Division*,¹⁴⁸ the Second District Court of Appeals held that equal protection of law requirements prevented the Review Board from applying the Indiana Employment Security Act so as to deny unemployment benefits to claimants who voluntarily quit one job and then involuntarily lose another while awarding such benefits to claimants who involuntarily lose their only job.¹⁴⁹

Fourth, courts in Indiana continued to utilize an "impasse" standard in determining whether claimants were unemployed due to a "labor dispute" and therefore statutorily ineligible for unemployment benefits.

137. *Id.* at 1357-60.

138. 527 N.E.2d 729 (Ind. Ct. App. 1988).

139. 533 N.E.2d 1020 (Ind. Ct. App. 1989).

140. *Meulen*, 527 N.E.2d at 730.

141. *Voss*, 533 N.E.2d at 1022.

142. 528 N.E.2d 842 (Ind. Ct. App. 1988).

143. *Id.* at 845-46.

144. 526 N.E.2d 717 (Ind. Ct. App. 1988).

145. 528 N.E.2d 811 (Ind. Ct. App. 1988).

146. *Carter*, 526 N.E.2d at 718-19.

147. *Stanley*, 528 N.E.2d at 813-15.

148. 528 N.E.2d 854 (Ind. Ct. App. 1988).

149. *Id.* at 857.

In *USS, A Division of USX Corporation v. Review Board of Indiana Employment Security Division*,¹⁵⁰ the Fourth District Court of Appeals refused to replace this standard with a broader "any controversy" standard.¹⁵¹ Moreover, in *Hehr v. Review Board of Indiana Employment Security Division*,¹⁵² the Second District Court of Appeals limited the circumstances in which picket line misconduct could be used to justify the "just cause" discharge of striking employees, by holding that claimants hitting vehicles crossing a picket line with their hands did not breach a duty owed their employers—absent proof of actual damage, the violation of a work rule, or evidence that the force of their blows would be likely to cause damage.¹⁵³ Finally, in *Green Ridge Mining v. Indiana Unemployment Insurance Board*,¹⁵⁴ the First District Court of Appeals refused to consider payments made pursuant to a written settlement agreement, but not specifically designated as "back pay," as income statutorily deductible from a claimant's unemployment benefit payments.¹⁵⁵

Fifth, this survey period saw changes in the law on workplace discrimination. In *Indiana Civil Rights Commission v. Culver*,¹⁵⁶ the Indiana Supreme Court specifically adopted the burden allocation formula used in federal courts for allocating burdens of proof in retaliation cases.¹⁵⁷ Under this formula, the ultimate burden of persuasion as to whether a defendant engaged in unlawful discrimination remains at all times with the plaintiff.¹⁵⁸ Moreover, in *Fields v. Cummins Employees Federal Credit Union*,¹⁵⁹ the Fourth District Court of Appeals gave employers a new defense to claims of workplace sexual harassment by ruling that such claims are subject to the exclusive remedy provisions of the Indiana Workers' Compensation Act.¹⁶⁰ However, the court refused to summarily extend the scope of that Act, or the preemptive scope of either Title VII or the Indiana Civil Rights Act, to common law claims filed by employees against their workplace supervisors.¹⁶¹ The court also held that, in Indiana, the administrative requirements of the above civil rights acts need not be followed as a condition precedent to the filing

150. 527 N.E.2d 731 (Ind. Ct. App. 1988).

151. *Id.* at 737-38.

152. 534 N.E.2d 1122 (Ind. Ct. App. 1989).

153. *Id.* at 1127.

154. 541 N.E.2d 550 (Ind. Ct. App. 1989).

155. *Id.* at 552-53.

156. 535 N.E.2d 112 (Ind. 1989).

157. *Id.* at 116.

158. *Id.* at 115.

159. 540 N.E.2d 631 (Ind. Ct. App. 1989).

160. *Id.* at 637.

161. *Id.* at 638-40.

of a common law claim.¹⁶² Finally, in *Indiana Civil Rights Commission v. Southern Ind. Gas & Elec. Co.*,¹⁶³ the Fourth District Court of Appeals interpreted the Indiana Civil Rights Act as imposing an affirmative duty on employers to reassess employment decisions based on challenged medical opinions.¹⁶⁴

162. *Id.* at 640.

163. 544 N.E.2d 536 (Ind. Ct. App. 1989).

164. *Id.* at 540-41.

