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Survey of Recent Developments in Indiana Law: Labor and Employment Law

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Labor and Employment Law

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The past year did not bring many major developments in the labor and employment law field; it was mainly a year of refinements and fine-tuning. The biggest news on the legislative front is the passage of a statute prohibiting employment discrimination based on an employee's off-duty use of tobacco.[1] In the judicial arena, the Indiana Supreme Court, in *Bochnowski v. Peoples Federal Savings & Loan Association*,[2] joined the majority trend in recognizing a cause of action for third party intentional interference with at-will employment relationships. These were the highlights of a relatively quiet year. Other legislative developments discussed below include amendments to education statutes regarding suspensions of teachers with and without pay, changes in payment provisions under the unemployment and workers' compensation laws, and amendments to the penalty provisions of the occupational health and safety law. Among the judicial decisions reviewed in this Article are cases revisiting the *Frampton* rule, addressing employee defamation suits against employers, employment discrimination, issues arising in public sector employment, wage statutes, unemployment compensation, and workers' compensation.

I. LEGISLATIVE DEVELOPMENTS

A. Off-Duty Use of Tobacco

A new chapter was added to Title 22 of the Indiana Code dealing with the off-duty use of tobacco by employees. Chapter 22-5-4 prohibits an employer from requiring, as a condition of employment, that an employee refrain from using tobacco products when not at work.[3] This chapter also prohibits an employer from discriminating against an employee with respect to compensation, benefits, and terms and conditions of employment because an employee uses tobacco when not at work.[4] This statute does not prohibit employers from maintaining smoke-free workplaces, limiting the work areas where smoking is allowed, or for-

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1. IND. CODE §§ 22-5-4-1 to -4 (Supp. 1991).
2. 571 N.E.2d 282 (Ind. 1991). *See infra* notes 29-35 and accompanying text.
3. IND. CODE § 22-5-4-1(1) (Supp. 1991).
4. *Id.* § 22-5-4-1(2).

bidding employees from smoking while at work. The law is aimed solely at off-duty conduct of employees.

Many employers, however, see a connection between some types of employee off-duty conduct and employer profitability. A new trend in health care cost containment among corporations is to offer financial incentives to employees who adopt and maintain healthy lifestyles.[5] Many of these financial incentive plans focus on smoking. For example, Minneapolis-based Control Data Corporation charges its employees who smoke ten percent more for health insurance premiums than its nonsmoking employees.[6] Such a program would be illegal under the new Indiana law since it would constitute discrimination in benefits because an employee used tobacco products when not at work.

The new law allows employees to bring a civil action against employers to enforce its provisions.[7] The statute authorizes courts to award actual damages, court costs, and attorney's fees to prevailing employees and to enjoin further violations of the statute.[8] The remedies provided by this statute are not exclusive; employees retain any rights or remedies provided by any other state or federal laws.[9] The statute exempts from its application employers that are a church, a religious organization, or a school or business conducted by a church or religious organization.[10]

B. Amendments to Indiana's Education Statutes

The legislature also amended a section of the Teacher Tenure Act dealing with the cancellation of a permanent or semi-permanent teacher's indefinite contract.[11] The statute provided that, pending a decision on the cancellation of a contract, a teacher could be suspended from duty, but it was silent as to whether that teacher was entitled to continue receiving a salary while suspended.[12] The amendment prohibits the governing body of the school corporation from withholding salary payments and other employment benefits during the period of suspension.[13]

A new section was added to the Indiana education code detailing the procedures for suspending a teacher *without pay* when the procedures

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5. Laurie Cohen, *Wanted: Healthier Workers*, CHICAGO TRIBUNE, Jan. 6, 1992, § 4, at 1.
6. *Id.* at 2.
7. IND. CODE § 22-5-4-2(a) (Supp. 1991).
8. *Id.* § 22-5-4-2(b).
9. *Id.* § 22-5-4-3.
10. *Id.* § 22-5-4-4.
11. *Id.* § 20-6.1-4-11.
12. IND. CODE § 20-6.1-4-11(a)(8) (1988).
13. IND. CODE § 20-6.1-4-11(b) (Supp. 1991).

for canceling the contract do not apply.[14] The statute lists five exclusive reasons for which a teacher may be suspended without pay.[15] The reasons listed are broad enough, however, to encompass a multitude of situations. For example, a teacher may be suspended without pay for immorality or for good and just cause.[16]

This new section also provides due process procedures which must be followed to suspend a teacher without pay.[17] The teacher must be notified in writing of the time, place, and date of the consideration by the school corporation of the suspension and must be furnished, upon request, a written statement of the reasons for the suspension.[18] The teacher may file a written request for a hearing, where he is entitled to a full statement of the reasons for the suspension and is entitled to present testimony and evidence bearing on the reasons.[19] The section also provides when such a suspension may take effect[20] and allows the governing body of the school corporation to suspend a teacher without pay "for a reasonable time."[21] The section does not define, however, what is a reasonable time.

C. Other Legislative Developments

House Enrolled Act No. 1594 amends several sections of the unemployment compensation statute, primarily providing for changes in the fund ratio schedule and increasing the amount of claimant payments. A new section also was added authorizing the administrative law judges and review board to hold hearings by telephone under certain specified conditions.[22]

House Enrolled Act No. 1517 contains numerous amendments to the workers' compensation law, the majority of which provide for increases in the payment schedules for injuries and occupational diseases. Additionally, two new provisions were added establishing time limits within which an employer must begin temporary total or partial disability payments or notify the workers' compensation board and the affected employee that it is denying liability.[23] These provisions also specify the

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14. *Id.* § 20-6.1-5-15.

15. *Id.* § 20-6.1-5-15(b). Section 15(b) expressly provides that the five listed reasons are the only reasons for which a suspension without pay may occur.

16. IND. CODE § 20-6.1-5-15(b)(1), (5) (Supp. 1991).

17. *Id.* § 20-6.1-5-15(c).

18. *Id.* § 20-6.1-5-15(c)(1), (2).

19. *Id.* § 20-6.1-5-15(c)(3)-(6).

20. *Id.* § 20-6.1-5-15(c)(7).

21. *Id.* § 20-6.1-5-15(c)(8).

22. *Id.* § 22-4-17-8.5.

23. *Id.* § 22-3-3-7(b) (disabilities caused by injuries); *id.* § 22-3-7-16(a) (payments on account of occupational disease).

circumstances under which the employer may terminate such payments once begun.[24] Another section was added to the workers' compensation law requiring employers to post a notice at the workplace informing employees that they are covered by workers' compensation insurance and containing the name, address, and telephone number of the insurance carrier.[25]

House Enrolled Act No. 1517 also amended the occupational health and safety law by increasing the amount of the penalty assessed for violations[26] and adding penalties for failure to comply with the posting requirements[27] and for knowing violations of any standard, rule, or order.[28]

II. Judicial Developments

A. Employment-at-Will

In *Bochnowski v. Peoples Federal Savings & Loan Association*, the Indiana Supreme Court recognized, for the first time, the validity of a claim for tortious interference with an employment relationship when that relationship is based on a contract terminable at will.[29] Prior to *Bochnowski*, Indiana courts refused to recognize such a cause of action.[30] The courts had noted that to assert a successful claim for tortious interference, the underlying contract right subject to the interference must be enforceable. When the underlying contract is terminable at will, the contracting parties do not have enforceable rights as to the duration of the contract. The fact that third party interference caused the contract to be terminated, therefore, did not give rise to a cause of action because there was no enforceable expectation as to the date when the contract could be terminated.[31]

The Indiana Supreme Court, in rejecting this reasoning, joined the majority of states which have recognized a cause of action for tortious interference with an employment-at-will relationship.[32] The court did not disagree with the proposition that in a tortious interference action the underlying contract right subject to interference must be enforceable.

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24. *Id.* § 22-3-3-7(c) (payments on account of injuries); *id.* § 22-3-7-16(b) (payments on account of occupational disease).

25. *Id.* § 22-3-2-22.

26. *Id.* § 22-8-1.1-27.1(a).

27. *Id.* § 22-8-1.1-27.1(a)(4).

28. *Id.* § 22-8-1.1-27.1(a)(6).

29. Bocknowski v. Peoples Fed. Savings & Loan Ass'n, 571 N.E.2d 282 (Ind. 1991).

30. *See* Stanley v. Kelley, 422 N.E.2d 663 (Ind. Ct. App. 1981).

31. *Id.* at 667.

32. *Bochnowski*, 571 N.E.2d at 284.

Rather, the court viewed the right being interfered with by the third party in a slightly different light. First, it noted that "until a contract terminable at will is terminated, it constitutes a valid and subsisting agreement that is presumed to continue in effect."[33] Although not disputing the fact that the durational element of such a contract is unenforceable, the court observed that the right with which the third party is interfering is the *enforceable* expectation that the *decision* regarding duration will be made by the contracting parties and "not upon the whim of a third party interferer."[34] Thus, a claim for tortious interference with an at-will employment relationship can be maintained. In concluding, the court held that in order to be able to prevail on such a cause of action, the plaintiff must be able to prove "that the defendant interferer acted intentionally and without a legitimate business purpose."[35]

The appellate court, in *Stivers v. Stevens*,[36] revisited the *Frampton* rule and expanded it to a closely related set of circumstances. In *Frampton v. Central Indiana Gas Co.*,[37] the Indiana Supreme Court recognized a public policy exception to the employment-at-will doctrine, allowing an employee to sue her employer for retaliatory discharge for filing a workers' compensation claim.[38] The court noted that refusing to recognize such a cause of action would allow employers to coerce their employees against asserting their rights under the workers' compensation law, thereby undermining the legislative purpose behind the law.[39]

In *Stivers*, the employee alleged that she was discharged because she told her employer she intended to file a workers' compensation claim. The employer asserted that the holding of *Frampton* should be limited to its specific facts, arguing that the plaintiff's claim should be dismissed because she was not fired for filing a claim, but only because she said she would file a claim. The appellate court, rejecting the employer's contention, looked to the reasoning underlying the *Frampton* decision. Acknowledging that *Frampton* is a narrow exception to the employment-at-will rule, it noted that a reason for preventing employers from terminating employees who file workers' compensation claims is the "deleterious effect on the exercise of this important statutory right. The discharge of an employee merely for suggesting she might file a claim has an even stronger deleterious effect."[40]

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33. *Id.*
34. *Id.* at 285.
35. *Id.*
36. 581 N.E.2d 1253 (Ind. Ct. App. 1991).
37. 297 N.E.2d 425 (Ind. 1973).
38. *Id.* at 428.
39. *Id.*
40. *Stivers*, 581 N.E.2d at 1254.

The last two cases of interest in this area involve defamation suits brought by employees against their employers. In *Burks v. Rushmore*,[41] the company medical director sent a memorandum to the secretary of the company benefit committee, the assistant vice president of personnel, and a company attorney involved in labor matters. The memorandum questioned whether the plaintiff-employee had engaged in fraud because he appeared to be actively managing a business while on disability leave from the company.

The appellate court affirmed the grant of summary judgment dismissing the complaint, finding that no publication had occurred.[42] The plaintiff contended that since the company attorney had no responsibility to act on the content of the memorandum, there was publication as to him. The attorney had stated that he would not have acted on the memorandum without talking to somebody about it first. The court noted, however, that the company medical director had consulted in the past with the attorney on different matters and that after sending the memorandum, had consulted with the attorney concerning the plaintiff.[43] The court held that these facts showed that the attorney had some managerial responsibility to act upon the matter and thus, was an appropriate party to receive the memorandum.[44] No publication, therefore, had occurred.

The court also held that, even if there had been publication as to the attorney, the relationship between the medical director and the attorney met the requirements for a qualified privilege.[45] Because the attorney had a responsibility to act upon the information provided when consulted and the medical director had a duty to monitor the plaintiff's disability, the memorandum concerned their corresponding duties on an employment matter, was used for a proper purpose, and was sent to persons who had legitimate reasons to receive it. Thus, the communication was protected by a qualified privilege.[46]

Chambers v. American Trans Air, Inc.[47] also concerned the scope of the qualified privilege in the employment context. Chambers, who had previously been employed by defendant American Trans Air, became concerned that her ex-employer was giving bad references to prospective employers, interfering with her ability to procure employment. She asked her mother and boyfriend to telephone the defendant, ostensibly as

41. 569 N.E.2d 714 (Ind. Ct. App. 1991).
42. *Id.* at 716.
43. *Id.* at 715.
44. *Id.* at 716.
45. *Id.* at 717.
46. *Id.* at 716-17.
47. 577 N.E.2d 612 (Ind. Ct. App. 1991).

prospective employers, and request a reference. Chambers alleged that the statements made by the defendant during these telephone conversations were defamatory. The trial court granted summary judgment for the defendant, holding that there had been no publication because the mother and boyfriend were acting as agents of the plaintiff.

The appellate court affirmed the grant of summary judgment, but on a different rationale. It considered whether the statements were protected by a qualified privilege.[48] The court cited Prosser & Keeton, *Torts*,[49] for the general rule that "an employee reference given by a former employer to a prospective employer is clothed with the mantle of qualified privilege."[50] The court adopted this general rule as consistent with existing Indiana law on the applicability of qualified privilege in other circumstances and as serving a significant social interest in unrestricted communication on a matter in which the parties have a common interest — the appraisal of an employee's qualifications for employment.[51]

Having recognized the qualified privilege for employment references, the court also specified that the communication could lose its privilege upon a showing of abuse.[52] Such a showing could be made when: "(1) [t]he communicator was primarily motivated by ill will in making the statement; (2) there was excessive publication of the defamatory statement; or (3) the statement is made without belief or grounds for belief in its truth."[53]

B. Employment Discrimination

Indiana Civil Rights Commission v. Kightlinger & Gray[54] clarified the scope of the term "employment" as used in the Indiana Civil Rights Law, which prohibits certain types of discrimination "relating to employment."[55] A senior partner in a law firm was expelled from the firm, allegedly due to his history of alcoholism. The attorney filed a complaint with the Indiana Civil Rights Commission claiming handicap discrimination in employment. The firm filed a motion to dismiss the complaint, contending that a partner is not an employee and that discrimination against a partner is not discrimination relating to employment. The Commission denied the motion.

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48. *Id.* at 615.

49. W. PAGE KEETON, PROSSER & KEETON ON THE LAW OF TORTS, § 115, at 827 (5th ed. 1984).

50. *Chambers*, 577 N.E.2d at 615.

51. *Id.* at 615-16.

52. *Id.* at 615.

53. *Id.* at 616.

54. 567 N.E.2d 125 (Ind. Ct. App. 1991).

55. IND. CODE § 22-9-1-3(l) (1988).

Subsequently, the firm filed a petition for judicial review and a complaint for declaratory judgment with the superior court. The court granted both summary and declaratory judgment, holding that the Commission did not have jurisdiction over the complaint because a partnership relationship does not fall within the meaning of the statutory phrase "relating to employment." The appellate court affirmed.[56]

The appellate court noted that although the Indiana Civil Rights Law does not define the term "employment," it does define the terms "employer" and "employee" and the term employment must be considered within the context of those definitions.[57] Although the law firm in this case satisfied the definition of employer because it employed six or more persons, the complainant attorney was not an employee because he did not receive wages or salary as required by the statutory definition; he received a portion of the profits.[58]

The relationship among partners in a law firm is not that of employer and employee. Rather, the parties have equal status among themselves; a partnership is an arrangement among equals.[59] The court cited to the Supreme Court's discussion in *Hishon v. King Spalding*[60] regarding partnership status within the context of Title VII of the Civil Rights Act of 1964. Noting that the decision was not binding on the court in its interpretation of Indiana law, the court found the analysis in Justice Powell's concurring opinion helpful: "The relationship among law partners differs markedly from that between employer and employee. . . . The judgmental and sensitive decisions that must be made among the partners embrace a wide range of subjects. The essence of the law partnership is the common conduct of a shared enterprise."[61]

C. Public Sector Employment

In *Indiana State Prison v. Van Ulzen*[62] the Indiana Supreme Court interpreted a provision in the State Personnel Act[63] governing demotions of state employees. The provision states that any change of an employee from a position in one class to a position in a lower ranking class is

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56. *Kightlinger & Gray*, 567 N.E.2d at 130.
57. *Id.* at 129.
58. *Id.*
59. *Id.*
60. 467 U.S. 69 (1984).
61. Indiana Civil Rights Comm'n v. Kightlinger & Gray, 567 N.E.2d 125, 130 (Ind Ct. App. 1991) (quoting Hishon v. King & Spalding, 467 U.S. 69, 80 (1984) (Powell, J., concurring)).
62. 582 N.E.2d 789 (Ind. 1991).
63. IND. CODE §§ 4-15-2-1 to -43 (1988 & Supp. 1991).

a demotion and can be made only in accordance with prescribed procedures.[64]

The appellee, Van Ulzen, was a teacher at the Indiana State Prison. On occasions when prison authorities instituted lockdowns, during which no classes were held, Van Ulzen was temporarily reassigned to perform certain correctional officer duties. Van Ulzen argued that this reassignment constituted a demotion because a correctional officer's job is of a lower rank than a teacher and that the demotion violated state law because it was accomplished without following the prescribed statutory procedures.

Although Van Ulzen lost before the State Employees Appeals Commission, both the circuit and appellate courts endorsed his argument. On transfer to the Indiana Supreme Court, however, the court looked beyond the narrow confines of section 24 of the State Personnel Act governing demotions. The court began its analysis by noting that, with limited exceptions, no one has a right to continued public employment.[65] It then cited to that section of the State Personnel Act which allows the employer to layoff employees for lack of work.[66] Accordingly, the warden could have laid off Van Ulzen during the lockdown because there was no teaching work; the fact that Van Ulzen was temporarily reassigned instead did not mean he was demoted.[67] Although acknowledging that the language of section 24 states that "any change" in position to a lower-ranking class constitutes a demotion, the court concluded that the legislature could not have intended to create a system so inflexible as to preclude such temporary reassignments.[68]

The court supported its conclusion by referring to section 34 of the Personnel Act which sets forth the procedures which must be followed before demoting an employee.[69] The same section governs procedures for dismissal. The court found that in requiring these procedural protections, the legislature had in mind changes in employment of a permanent nature—dismissals and demotions.[70] The concept of demotion connotes a permanent change for disciplinary purposes accompanied by a cut in pay. Van Ulzen's reassignment was temporary, due to emergency situations, and did not entail a reduction in pay.[71] Van Ulzen's temporary reassignment, therefore, did not come within the purview of section 24

64. IND. CODE § 4-15-2-24 (1988).
65. *Van Ulen*, 582 N.E.2d at 791.
66. *Id.* (citing IND. CODE ANN. § 4-15-2-32(a) (1988)).
67. *Id.* at 792.
68. *Id.* at 791.
69. *Id.* at 791 n.3 (citing IND. CODE ANN. § 4-15-2-34 (West Supp. 1991)).
70. *Id.* at 791.
71. *Id.* at 791-92.

dealing with demotions, and the prison acted lawfully. The court added, "We are hard-pressed to imagine a situation where a modicum of flexibility is more in order."[72]

In another case dealing with state employees, the appellate court interpreted Indiana Code chapter 4-15-3 dealing with the employment of engineers by the state. In *May v. Department of Natural Resources*,[73] May claimed that the Department of Natural Resources (DNR) lacked the authority to demote him because DNR had failed to promulgate rules and regulations concerning the employment of engineers as required by Indiana Code sections 4-15-3-3 and 4-15-3-5. DNR responded that these provisions are discretionary, not mandatory.

The court agreed with DNR. It noted that section 4-15-3-3 empowers a department to promulgate rules "as it may deem proper."[74] This language clearly indicates that such promulgation is within DNR's discretion.[75] Section 4-15-3-5, however, states that each department "shall cause to be prepared the rules and regulations."[76] Although the use of the word "shall" is generally construed as mandatory, the context or purpose of the statute may suggest a different meaning.[77]

The court detailed circumstances in which the use of "shall" is held to be directory and found that those circumstances applied to this statute. First, the statute does not specify adverse consequences for failure to promulgate the rules.[78] Second, the promulgation of rules is not the essence of this statute.[79] Rather, the essence of this statute is that employment decisions regarding engineers be based on merit. Last, a mandatory construction of "shall" in section 4-15-3-5 obviously conflicts with the clearly discretionary provisions of section 4-15-3-3, and statutes regarding the same subject matter are to be construed *in pari materia*.[80]

Two other significant cases in the public sector employment area dealt with questions arising under the Certificated Educational Employee Bargaining Act (CEEBA).[81] In *Michigan City Education Association v. Board of School Trustees*,[82] the court held that a teacher discharge grievance cannot be subject to binding arbitration pursuant to a collective

72. *Id.* at 792.
73. 565 N.E.2d 367 (Ind Ct. App. 1991).
74. *Id.* at 370.
75. *Id.* at 371.
76. IND. CODE § 4-15-3-5 (1988).
77. *May*, 565 N.E.2d at 371.
78. *Id.*
79. *Id.*
80. *Id.*
81. IND. CODE §§ 20-7.5-1-1 to -14 (1988 & Supp. 1991).
82. 577 N.E.2d 1004 (Ind. Ct. App. 1991).

bargaining agreement between a school board and teachers' association.[83] CEEBA places limits on the scope of collective bargaining between the parties. Specifically, section 20-7.5-1-3 provides that a collective bargaining agreement cannot contain provisions in conflict with the school employer's authority to discharge employees.[84] The responsibility regarding teacher dismissal was entrusted by the legislature solely to the discretion of the school employer. The authority to decide this issue cannot be delegated to an arbitrator.[85] The court noted that the employer could contractually bind itself to follow specified criteria and procedures relative to a dismissal decision, but that the decision itself could not be contracted away.[86]

In *Coons v. Kaiser*,[87] a student sued schoolteachers who went on strike, alleging that she had suffered educational deprivation and emotional distress as a result of the teachers' illegal actions. The court ruled that the plaintiff lacked standing to enforce CEEBA's provisions prohibiting teacher strikes and that there was no common-law right of action to recover damages for such a strike.[88]

Section 20-7.5-1-14 of CEEBA not only prohibits strikes, but also expressly provides who may bring an action to enforce the prohibition and specifies the penalty imposed upon violators.[89] Only a school corporation or school employer is authorized to file suit for redress of an illegal strike. Relying upon the general principle of statutory construction that when a statute expressly provides a particular remedy the courts should not expand its coverage, the court concluded that a private cause of action could not be inferred.[90]

The court distinguished *Boyle v. Anderson Fire Fighters Association Local 1262*,[91] in which the court allowed private parties to maintain a cause of action for damages caused by fire during a firefighters' strike.[92] The determinative factor in *Boyle* was the absence of a comprehensive statute regulating strikes by firefighters.[93] The legislature has, however, acted with regard to teacher strikes and specified enforcement procedures.

The plaintiff in *Coons* also argued that the teachers had committed a common-law tort entitling her to common-law remedies. The court disagreed, holding that a claim of educational deprivation is not an

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83. *Id.* at 1008.
84. IND. CODE § 20-7.5-1-3 (1988).
85. *Michigan City Educ. Ass'n*, 577 N.E.2d at 1006-07.
86. *Id.* at 1008.
87. 567 N.E.2d 851 (Ind. Ct. App. 1991).
88. *Id.* at 852-55.
89. IND. CODE § 20-7.5-1-14 (1988).
90. *Coons*, 567 N.E.2d at 852.
91. 497 N.E.2d 1073 (Ind. Ct. App. 1986).
92. *Id.* at 1083.
93. Coons v. Kaiser, 567 N.E.2d 851, 853 (Ind. Ct. App. 1991).

established tort and should not be recognized independent of legislation.[94]

D. Wage Statutes

In *Osler Institute, Inc. v. Inglert*,[95] the Indiana Supreme Court determined the circumstances under which an employee qualifies for liquidated damages when the employer violates the Indiana wage payment statute.[96] Employee Inglert was terminated from employment by the Osler Institute, but the employer failed to pay her overtime and vacation pay within the period of time required by the wage payment statute. The employer argued that it was not liable for liquidated damages because Inglert had not requested the overtime and vacation pay prior to or concurrent with her employment as required by the statute and that the application of the penalty provision was dependant on such a request. The appellate court rejected the employer's contention, holding that because the employee had been terminated, it was not necessary for her to demand, during her employment, payment of wages due as of her termination. The court noted that the statute has three distinct requirements regarding wage payments, violation of any one of which subjects the employer to the penalty provisions. One of the requirements is that employees, upon termination of employment, are to be paid at the next regular pay period. The court found that a demand for such payment is not a prerequisite under this provision. Moreover, to hold otherwise would allow employers to terminate employees, refuse payment of wages due, and avoid the application of a penalty.

The Indiana Supreme Court affirmed the decision of the appellate court awarding liquidated damages and attorney's fees.[97] It expressly agreed with the rationale of the appellate court and noted that the court's interpretation was consistent with Indiana Code section 22-2-9-2, which provides that upon discharge of an employee, wages are due at the next regular pay period.[98] Additionally, to the extent that the court in *City of Hammond v. Conley*[99] held that a request was a prerequisite for the penalty provision, it was overruled.[100]

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94. *Id.* at 854.

95. 569 N.E.2d 636 (Ind. 1991) (per curiam).

96. Indiana Code § 22-2-5-1(a) requires that employers pay employees at least semi-monthly or bi-weekly, if requested. Indiana Code § 22-2-5-2 provides that if an employer fails to make payments as required by section 1, the employer is liable for liquidated damages and attorney's fees.

97. *Osler*, 569 N.E.2d at 637.

98. *Id.*

99. 498 N.E.2d 48 (Ind. Ct. App. 1986).

100. Osler Inst., Inc. v. Inglert, 569 N.E.2d 636, 637 (Ind. 1991) (per curiam).

In *Stampco Construction Co. v. Guffey*,[101] the court dealt with several issues concerning the enforcement and application of both the Indiana and federal prevailing wage statutes.[102] The initial issue presented was whether the statutes allow private causes of action. Neither statute expressly authorizes private enforcement; thus, the question was whether a private cause of action could be implied. Although noting that the federal courts of appeals for the Third and Fifth Circuits had answered that question in the negative, the *Stampco* court elected to follow the Seventh Circuit's decision in *McDaniel v. University of Chicago*,[103] which found an implied private cause of action.[104] The court, relying upon *McDaniel*, held that a private cause of action exists under the federal statute and adopted the *McDaniel* analysis to find that the Indiana statute also implies a private cause of action.[105]

The *McDaniel* court's analysis was based on an examination of the factors proposed by the Supreme Court in *Cort v. Ash*[106] for determining whether a federal statute implies a private action. The key element of the analysis in *McDaniel* was the decision that individual employees are members of the class for whose special benefit the Davis Bacon statute was enacted.[107]

A cogent dissent by Judge Buchanan to the court's holding in *Stampco* pointed out that the validity of the Seventh Circuit's analysis in *McDaniel* had been undercut by subsequent Supreme Court cases clarifying the factors for implying a private cause of action.[108] Judge Buchanan cited *Cannon v. University of Chicago*,[109] in which the Court held that, in answering the question whether the plaintiff belonged to the class of individuals for whose benefit the statute was passed, the courts should look to the language of the statute.[110] Judge Buchanan also pointed to *Universities Research Association, Inc. v. Coutu*,[111] in which the Court used the *Cannon* analysis in deciding whether an employee has a private cause of action under Davis Bacon when the underlying contract does not contain a prevailing wage clause. Although

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101. 572 N.E.2d 510 (Ind. Ct. App. 1991).

102. *See* 40 U.S.C. § 2762 (1988); IND. CODE §§ 5-16-7-1 to -5 (1988 & Supp. 1991). Both statutes require, *inter alia*, the payment of prevailing wages to employees on public works projects.

103. 548 F.2d 689 (7th Cir. 1977), *cert. denied*, 434 U.S. 1033 (1978).

104. *Stampco*, 572 N.E.2d at 512.

105. *Id.* at 512-13.

106. 422 U.S. 66 (1975).

107. *See* Stampco Constr. Co. v. Guffey, 572 N.E.2d 510, 512 (Ind. Ct. App. 1991).

108. *Id.* at 514-15 (Buchanan, J., dissenting).

109. 441 U.S. 677 (1979).

110. *Id.* at 689.

111. 450 U.S. 754 (1981).

noting that employees are the focus of the statute for whose benefit prevailing wages are required, the Court found that the language of the statute is directed to federal agencies, requiring them to place wage clauses in federal construction contracts.[112] Therefore, the language of Davis Bacon was not found to support a private cause of action under the circumstances presented.[113]

Judge Buchanan noted in his dissent that the *Coutu* Court limited its holding to the facts of the case and did not reach the broader question of whether Davis Bacon creates an implied right of action in any case.[114] However, using the *Cannon* and *Coutu* analysis, Judge Buchanan found that the language of Davis Bacon does not imply a private cause of action.[115] The *Stampco* majority responded to Judge Buchanan's concerns by stating that the court in *Coutu* "expressly refused to decide whether the act created an implied private right of action to enforce a contract that contained specific Davis Bacon stipulations."[116]

Having found that the *McDaniel* analysis was no longer viable, Judge Buchanan refused to rely upon it in determining whether the Indiana prevailing wage statute created a private cause of action. Using the *Coutu* analysis, Buchanan noted that the Indiana statute directs government agencies to require contractors to pay the prevailing wage; thus, the language does not indicate an intent to create a private cause of action.[117] Judge Buchanan found support for his conclusion in the fact that the Indiana statute provides criminal penalties for its violation, alluding to the discussion in *Cort* suggesting that the existence of criminal penalties is an indication that the legislature did not intend civil enforcement.[118]

The second issue the *Stampco* court confronted concerned the validity of waivers signed by employees agreeing to wages lower than those required by the prevailing wage statutes.[119] The court noted the public interest in not unnecessarily restricting freedom of contract, but emphasized that the prevailing wage statutes embody a public interest in protecting employees from substandard wages.[120] The court relied on the general rule that contracts violative of statutory rights are presumed void, as well as on a finding that such a contract waiver would also

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112. *Id.* at 770.
113. *Id.* at 772-73.
114. Stampco Constr. Co. v. Guffey, 572 N.E.2d 510, 515 (Ind. Ct. App. 1991) (Buchanan, J., dissenting).
115. *Id.* at 516 (Buchanan, J., dissenting).
116. *Id.* at 512 n.4.
117. *Id.* at 516 (Buchanan, J., dissenting).
118. *Id.*
119. *Id.* at 513.
120. *Id.*

violate public policy. Accordingly, the waivers were void and unenforceable.[121]

The court also found that because employees cannot waive their right to prevailing wages, a release signed by an employee for any unpaid wages is likewise void.[122] On this latter point, Judge Buchanan again dissented. While agreeing that employees cannot waive their right to receive prevailing wages, he considered a release signed after employment had been terminated and a cause of action had accrued as involving a substantially different circumstance.[123] The judge found no public policy against the settlement of claims and viewed a release in return for some consideration as a legitimate surrender of a right to pursue a cause of action.[124]

E. Unemployment Compensation

Several 1991 cases involved procedural issues arising in unemployment compensation cases, while one case resolved a constitutional challenge to a provision in the unemployment compensation statute.

In *Stoner v. Review Board*,[125] the Indiana Supreme Court considered the scope of review of a Review Board decision. An employee was discharged for using abusive language in referring to another employee. The Board denied the employee's claim, finding just cause for discharge based on the language used and on the fact that the employee failed to use the proper channels in dealing with the problem which had provoked his use of abusive language. The court of appeals reversed the Board's decision because it was based in part on a reason, failure to use proper channels, which was not the stated grounds for discharge.

The supreme court disagreed, holding that so long as the Board's decision was sustainable on any theory it could not be set aside.[126] The Board found abusive language had been used and relied upon that fact in making its decision. The fact that the Board also made extraneous conclusions did not invalidate the decision.[127] As Justice DeBruler pointed out in his dissent, however, one cannot tell if the Board's finding that the employee failed to use proper channels was extraneous because the Board relied on that finding, as well as the abusive language, to deny benefits.[128] It was unclear whether use of abusive language alone would

121. *Id.*
122. *Id.*
123. *Id.* at 517 (Buchanan, J., dissenting).
124. *Id.* at 516-17.
125. 571 N.E.2d 296 (Ind. 1991).
126. *Id.* at 297.
127. *Id.*
128. *Id.* at 298 (DeBruler, J., dissenting).

have been sufficient to deny benefits and thus, Justice DeBruler would have remanded the case to the Board to decide that issue.[129]

In *Watterson v. Review Board*,[130] the court held that the 1990 decision in *Blackwell v. Review Board*[131] could be applied retroactively.[132] *Blackwell* addressed the type of proof necessary to support a finding that an employer rule is reasonable and uniformly enforced as a prerequisite to finding just cause when the employee violates such a rule. The *Blackwell* court held that, absent stipulation, the employer's rule must be reduced to writing and introduced in evidence in order for the employer to satisfy its evidentiary burden.[133] Oral testimony regarding the rule is insufficient.[134] The *Watterson* court found that this requirement did not change the law, but merely clarified what type of evidence is sufficient to satisfy the employer's burden.[135] Therefore, it could be applied retroactively.

Best Lock Corp. v. Review Board[136] also involved the evidentiary standard of proof regarding the reasonableness of an employer rule, violation of which is sufficient to constitute just cause. The employer rule in question prohibited the off-duty use of tobacco and alcohol. The employee was discharged for drinking alcohol on his own time. The employer introduced the written rule into evidence[137] and proved that it had been uniformly enforced. The point of contention was whether such a rule was reasonable.

The court held that the burden was on the employer to establish the reasonableness of its rule.[138] When a rule regulates off-duty conduct, the employer must show that the activity sought to be regulated bears some reasonable relationship to an employer business interest.[139] The court cited a Wisconsin case, *Gregory v. Anderson*,[140] as an example of when an employer made such a showing. In *Gregory*, the employer's business involved selling and servicing vending machines located in taverns. The employer had difficulty obtaining insurance for his drivers, but the existence of a rule prohibiting all use of alcohol by his drivers played a decisive factor in obtaining coverage. The employer's rule,

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129. *Id.*
130. 568 N.E.2d 1102 (Ind. Ct. App. 1991).
131. 560 N.E.2d 674 (Ind. Ct. App. 1990).
132. *Watterson*, 568 N.E.2d at 1105.
133. *Blackwell*, 560 N.E.2d at 679.
134. *Id.*
135. Watterson v. Review Bd., 568 N.E.2d 1102, 1105 (Ind. Ct. App. 1991).
136. 572 N.E.2d 520 (Ind. Ct. App. 1991).
137. The employer thereby satisfied the *Blackwell* requirement.
138. *Best Lock*, 572 N.E.2d at 527.
139. *Id.* at 525.
140. 109 N.W.2d 675 (Wis. 1961).

therefore, was found to be reasonable.[141] In the instant case, however, Best Lock failed to produce competent evidence to show any relationship between the rule and its business interests; therefore, its rule was unreasonable, and violation of the rule did not constitute just cause for purposes of denying unemployment benefits.[142]

In *Vicari v. Review Board*,[143] the claimant alleged that the unemployment compensation statute violated the equal protection guarantee in the Constitution because it treated claimants who had changed jobs within ten weeks differently than claimants who had not changed jobs within ten weeks. Indiana Code section 22-4-15-1(c)(1) provides that if an employee voluntarily leaves employment to accept a better job, she will not be disqualified from receiving benefits if terminated from the second job after a minimum of ten weeks of employment.[144] The court found no equal protection violation because the ten week rule was rationally related to a legitimate government objective—it prevents excessive job hopping and encourages employment stability.[145]

F. Workers' Compensation

The court in *Artz v. Board of Commissioners*[146] was asked to decide if the workers' compensation law applies to county police officers. The court determined that the officers are not excluded from coverage.[147] The county argued that Indiana Code section 22-3-2-2(c)(1), which excludes municipal corporation police officers who are members of a pension fund, was intended to exclude any police officer who is eligible for a death benefit under a pension plan. The court rejected this argument, noting that if the legislature's intent had been to prevent multiple coverage it could have drafted the provision to say so.[148] Secondly, the language of the statute specifically uses the terms "common council" and "city," indicating an intent to limit the exclusion to cities.[149] Lastly, the legislature could not have intended to exclude county police officers because when this section of the law was passed county police forces did not exist.[150]

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141. Best Lock Corp. v. Review Bd., 572 N.E.2d 520, 524 (Ind. Ct. App. 1991) (citing Gregory v. Anderson, 109 N.W.2d 675 (Wis. 1961)).

142. *Id.* at 527.

143. 568 N.E.2d 1061 (Ind. Ct. App. 1991).

144. IND. CODE § 22-4-15-1(c)(1) (Supp. 1991).

145. *Vicari*, 568 N.E.2d at 1063.

146. 566 N.E.2d 1105 (Ind. Ct. App. 1991).

147. *Id.* at 1106.

148. *Id.*

149. *Id.*

150. *Id.*

Union City Body Co. v. Lambdin[151] involved determining the "date of occurrence" under the *Evans* rule for purposes of deciding when the statute of limitations for filing a claim begins to run. The Indiana Supreme Court, in *Evans v. Yankeetown Dock Corp.*,[152] held that a compensable accident does not require a specific identifiable event, but could be the result of the usual exertion or exposure of an employee's job.[153] In *Lambdin*, the employee gradually became permanently disabled as a result of the bending and lifting he performed on the job over a period of years. Although the injury was compensable under *Evans*, the employer argued that the claim was barred by the statute of limitations because some of the events causing the injury occurred more than two years before the claim was filed. The court rejected the argument. It acknowledged that the limitations period begins to run from the date of the occurrence, but noted that in an *Evans*-type case, the occurrence is a continuing one.[154] When a continuing wrong exists, the statute of limitations begins to run when permanence of the wrong is discernible.[155]

Tarr v. Jablonski[156] dealt with the exclusivity provision of the workers' compensation statute. An employee experienced chest pains while at work. Paramedics from the company medical department administered emergency medical care, but the employee died of cardiac arrest. The employee's survivors instituted a civil action for wrongful death against the paramedics. The court found the cause of action barred by the exclusivity provision of the workers' compensation statute.[157]

The court initially noted the general rule that an individual covered by workers' compensation cannot maintain a civil action against co-employees for injuries arising out of employment.[158] The survivors argued for an exception to the rule based on *Ross v. Schubert*,[159] in which the court allowed an employee to sue a physician for malpractice even though the physician was employed by their common employer at the plant clinic. The court in *Tarr* refused to extend the *Ross* exception to paramedics for three reasons. First, *Ross* relied substantially on a case holding that a corporation cannot be held liable for physician malpractice, which holding is no longer viable. Second, the court cited *Rodgers v. Hembd*,[160]

151. 569 N.E.2d 373 (Ind. Ct. App. 1991).
152. 491 N.E.2d 969 (Ind. 1986).
153. *Id.* at 973.
154. *Union City*, 569 N.E.2d at 374.
155. *Id.*
156. 569 N.E.2d 378 (Ind. Ct. App. 1991).
157. *Id.* at 379-80.
158. *Id.* at 379.
159. 388 N.E.2d 623 (Ind. Ct. App. 1979).
160. 518 N.E.2d 1120 (Ind. Ct. App. 1988).

in which the court refused to apply *Ross* to nonmedical professionals. Third, the *Tarr* court distinguished *Ross* as involving a doctor required to exercise independent professional judgment, whereas paramedics have no such responsibility, but are required to follow written protocol.[161]

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161. Tarr v. Jablonski, 569 N.E.2d 378, 379-80 (Ind. Ct. App. 1991). The worker's compensation claim which the survivors filed against the employer was also denied for failure to prove that the employee's death was caused by the paramedics; therefore, the employee's death did not arise "out of employment." Jablonski v. Inland Steel Co., 575 N.E.2d 1039 (Ind. Ct. App. 1991).