XI. Labor Law

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A. Employment Security Act

In the leading case of this and recent years dealing with unemployment benefits, the Indiana Supreme Court wrote the final chapter, accepting transfer and vacating the opinion below, in *Wilson v. Review Board of Indiana Employment Security Division.*[1] The Indiana Court of Appeals, in a decision discussed at length in the 1978 Survey of Labor Law,[2] had itself vacated its own earlier opinion.[3] After Donna Wilson was terminated from her employment, she filed an initial claim for benefits with the Indiana Employment Security Division and was recognized by the division as an insured worker. She began receiving benefits. Shortly thereafter, the employer reported to the division that it had twice offered to reinstate her, and that she had refused both offers. The division terminated her benefits pursuant to a statutory provision under which an insured worker can be found ineligible for reasons such as refusal to apply for or accept suitable work when offered, without good cause.[4]

Wilson filed two judicial proceedings, the first seeking review in the court of appeals of the decision of the review board denying unemployment compensation benefits, and the second, in Marion County Circuit Court, seeking a declaratory judgment that the procedure by which the division suspended the claimant's benefits violated due process guarantees afforded by the state and federal constitutions. The two proceedings were consolidated for review in the court of appeals, but the supreme court accepted transfer only on the constitutional issues.

The court of appeals had concluded that unemployment benefits constitute a property interest protected by the requirements of due process, and that consequently an insured worker's benefits could be suspended or terminated only after the worker had been provided

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*Partner, Bingham, Summers, Welsh & Spilman. B.A., University of Notre Dame, 1965; J.D., Indiana University School of Law, 1968.

[1]385 N.E.2d 438 (Ind. 1979). *See also* Greenberg, *Administrative Law, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 39, 45 (1980).

[2]*See* Archer, *Labor Law, 1978 Survey of Recent Developments in Indiana Law*, 12 IND. L. REV. 212, 223-24 (1979).

[3]373 N.E.2d 331 (Ind. Ct. App. 1978), *vacating* 369 N.E.2d 675 (Ind. Ct. App. 1977).

[4]IND. CODE § 22-4-14-3 (1976).

with adequate notice and an opportunity for a hearing at which he could offer evidence or confront adverse witnesses.[5]

The court of appeals relied heavily upon *California Department of Human Resources Development v. Java*,[6] in which the United States Supreme Court had affirmed a ruling that a California statute precluding payment of unemployment compensation benefits when an employer took an appeal from an initial determination of eligibility was inconsistent with the Social Security Act.[7] The court also relied upon a recent amendment to the Indiana Employment Security Act providing that once an administrative determination of eligibility had been reached, benefits would continue to be paid to an insured claimant "unless said administrative determination had been reversed by a due process hearing."[8]

A four-member majority of the Indiana Supreme Court agreed that as an insured worker who was receiving benefits but whose claimed eligibility was later disputed, Wilson had a right to due process of law.[9] However, the majority held that all that was required by the due process clause was "a procedural scheme whereby a claimant is afforded a full evidentiary hearing within a reasonable time after the termination of benefits."[10] The supreme court thus disagreed with the court of appeals determination that due process required adequate notice and opportunity for a hearing at which the insured worker could offer evidence prior to suspension or termination of benefits.

The majority opinion distinguished *Java*, noting that *Java* had involved an employer appeal following an administrative determination of eligibility, whereas the present case involved an employee appeal following an administrative determination of ineligibility.[11] The court found the Indiana case to be more similar to *Torres v. New York State Department of Labor*,[12] in which the United States Supreme Court had summarily affirmed a district court determination that a full due process hearing was not required prior to suspension of benefits.[13]

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[5]373 N.E.2d at 337-44.

[6]402 U.S. 121 (1971).

[7]42 U.S.C. § 503(a)(1) (1964).

[8]IND. CODE § 22-4-17-2(e) (Supp. 1979), *quoted in* 373 N.E.2d at 343.

[9]385 N.E.2d at 443.

[10]*Id.* at 445.

[11]*Id. See also* Greenberg, *supra* note 1, at 47.

[12]405 U.S. 949 (1972).

[13]The *Torres* litigation had a history almost as tortured as that of *Wilson*. The district court originally found the New York statutory scheme to be adequate. 321 F. Supp. 432 (S.D.N.Y. 1971). While an appeal from that decision was pending, the Supreme Court decided *Java* and remanded the *Torres* decision for reconsideration in light of *Java*. 402 U.S. 968 (1971). Upon remand, the district court adhered to its

The majority opinion then turned to the question "whether Indiana's procedures provide claimants with a full hearing within a reasonable time after their benefits have been terminated."[14] Relying upon statistics submitted by the division indicating that 89.1 percent of all appeals were completed within forty-five days and noting that Wilson had obtained a full hearing thirty-six days after her benefits were suspended, the court concluded that claimants in Indiana who appealed adverse eligibility determinations were afforded "a full evidentiary hearing within a reasonable time after their benefits had been discontinued."[15]

Justice DeBruler, in a brief dissent, suggested that the factual record presented to the supreme court was hazy and that the case should have been remanded to the trial court for an evidentiary hearing.[16] The dissent also contended that the procedure employed by the division for resolving claims did not satisfy constitutional requirements of due process because there was no requirement that the deputy weigh any answer given by the claimant to the charges of the employer. The deputy is apparently free, according to the dissent, to consider only the employer's charge, wholly disregarding the insured's answer.[17]

The majority decision is difficult to reconcile with the language of the Indiana Employment Security Act, which was amended by the legislature in 1972 with the apparent intent to ensure that benefits are paid to an insured person until there has been a full due process hearing.[18] By that amendment, the legislature deleted a provision which had stated: "In the event a hearing is requested, the payment of any disputed benefits with respect to the period prior to the final determination . . . shall be made only after such determination or decision."[19] In place of that provision it adopted the provision stating that "[i]n the event a hearing is requested by an employer or the Division after it has been administratively determined that benefits should be allowed to a claimant, entitled benefits shall continue to

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previously expressed opinion, distinguishing *Java* on its facts. 333 F. Supp. 341 (S.D.N.Y. 1971). On resubmission, the second opinion was summarily affirmed. 405 U.S. 949 (1972). *But see* Greenberg, *supra* note 1, at 47-48.

[14]385 N.E.2d at 445.

[15]*Id.* at 446.

[16]*Id.* (DeBruler, J., dissenting). The trial court had granted a motion to dismiss the complaint on grounds unrelated to the due process issue.

[17]*Id.* at 446-47.

[18]IND. CODE § 22-4-17-2(e) (1976) (amending Indiana Employment Security Act, Pub. L. No. 355, § 42(e), 1971 Ind. Acts 1430.

[19]Indiana Employment Security Act, Pub. L. No. 355, § 42(e), 1971 Ind. Acts 1431 (amended 1972).

be paid to said claimant unless said administrative determination has been reversed by a due process hearing."[20]

Although the amendment refers to a request for a hearing by an employer or the division, not by a claimant, in the circumstances of a case such as *Wilson* that distinction is illusory, as noted by the court of appeals.[21] Wilson had been determined to be an insured worker entitled to benefits unless subsequent events caused her disqualification. Those benefits were suspended by a deputy's decision based solely upon a communication from the former employer.

The majority opinion also appears to be inconsistent with prior precedent, particularly in the determination that it is reasonable for the division to suspend benefits for up to forty-five days for an insured person who has previously been found to be eligible. During the period of suspension, that insured person will receive no unemployment compensation.[22]

The United States Supreme Court has previously stated that if welfare benefits were interrupted pending resolution of a controversy over eligibility, a recipient might be deprived of "the very means by which to live while he waits."[23] In a concurring opinion in *Java*, Justice Douglas rejected an argument that unemployment compensation benefits were not based on need, pointing out that "history makes clear that the thrust of the scheme for unemployment benefits was to take care of the need of displaced workers, pending a search for other employment."[24]

As a result of the decision in *Wilson*, the division will be permitted to suspend payments to an insured worker, pending the outcome of a hearing, upon the mere suggestion by an employer that the worker has been disqualified for further payments.

The division did not fare as well on challenges of a violation of due process in *Wolfe v. Review Board of Indiana Employment Security Division*.[25] An employee who had quit his job was denied unemployment compensation because the review board found that he did not leave with good cause connected with the work. The employee had offered eight reasons why he quit, including the refusal of the employer to remedy dangerous working conditions and the making of physical threats by the employer, alleging generally that he had been forced out of the job. The findings adopted by the review board dealt only with three of the reasons

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[20]Indiana Employment Security Act Amendments, Pub. L. No. 174, § 2, 1972 Ind. Acts 848 (codified at IND. CODE § 22-4-17-2(e) (1976)).

[21]373 N.E.2d at 343-44.

[22]*See* Mathews v. Eldridge, 424 U.S. 319, 339-40 (1976).

[23]Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

[24]402 U.S. at 135 (Douglas, J., concurring).

[25]375 N.E.2d 652 (Ind. Ct. App. 1978).

raised as cause by the employee, with no finding as to the other contentions.

The court first noted that all administrative agencies in Indiana, including the review board, have a constitutional obligation to afford "minimal due process" by supplying a statement of the reasons for a determination and an indication of the evidence upon which a decision maker has relied.[26] The court gave strong advice to the review board, and by implication to other administrative agencies, declaring: "Perhaps it is still the case that review boards do not know *how* to make specific findings. But, we believe that it is time the administrative boards learned. . . . Reviewing courts have been too tolerant of findings which are *not* things of beauty."[27] The case was remanded to the review board for specific findings of fact on each of the reasons given by the employee for terminating his employment.[28]

The court acknowledged that its decision would require the referee or review board to play an active role in the proceedings and determine which comments or testimony by a claimant posed a valid issue for decision.[29] The board must then prepare findings dealing with each of the issues raised. Although this decision will impose additional burdens upon the division, it is totally consistent with requirements for findings of fact which have been imposed on other administrative agencies, and will assist the court of appeals in determining the adequacy of factual support for decisions of the division.

The court of appeals, in *Osborn v. Review Board of Indiana Employment Security Division*,[30] determined that the procedures utilized by the division to notify claimants of a hearing before a review board met due process requirements, even assuming arguendo that the claimant did not receive the notice.[31] The claimant in *Osborn* did not contest the contention of the agency that the notice was sent by regular mail and that it was not returned undelivered. The court held that the due process clause does not require an ideal system for the administration of justice and that an isolated error is insufficient to strike the entire system of notice.[32]

Although it is difficult to quibble with the court's holding on the due process ground, the court's affirmance of the review board's determination against the employee on the merits of the case is more troublesome. Osborn was employed as a cocktail waitress and

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[26] *Id.* at 656, (citing Goldberg v. Kelly, 397 U.S. 254 (1970)).

[27] 375 N.E.2d at 655-56.

[28] *Id.* at 658.

[29] *Id.* at 656-57.

[30] 381 N.E.2d 495 (Ind. Ct. App. 1978).

[31] *Id.* at 499-500.

[32] *Id.* at 499.

visited the lounge on a day off to celebrate her husband's birthday. The celebration was apparently successful because Osborn consumed between six and eight small bottles of wine and became intoxicated. She and the bartender were found huddled over a fire extinguisher which had been removed from its normal position and placed in a passageway, the hose having been removed and the pin pulled. Failing to answer her employer's questions about the circumstances, Osborn departed.

The employer discharged Osborn and contested her claim for unemployment compensation upon the ground that she had been discharged for just cause within the meaning of the statute.[33] The statute disqualifies anyone who is discharged for just cause, giving several specific instances of misconduct which meet the definition of a discharge for just cause, and concluding with the catch-all statement, "or for any breach of duty in connection with work which is reasonably owed employer by an employee."[34] The court concluded that the review board could reasonably have determined that the fire extinguisher incident fell within this catch-all clause, that Osborn had engaged in conduct which was injurious to her employer, and that such conduct amounted to a breach of duty in connection with work.[35]

The court observed: "[W]e believe an employer can justifiably expect that its employees will comport themselves in such a manner to preserve the reputation of the employer. Furthermore, this duty may repose on an employee even though she happens to be off-duty."[36]

The decision appears consistent with authorities from other jurisdictions, and from an employer's viewpoint is rooted in common sense. An employer who personally observes "misconduct" on the part of an employee on the business premises has grounds to consider a discharge to be "for just cause." Nonetheless, it is difficult to reconcile the decision with the statutory language which refers to breach of a duty in connection with "work which is reasonably owed an employer by an employee." Osborn may have been guilty of misconduct, but the misconduct was not in connection with any work she owed her employer.

In a case of first impression in Indiana, the court of appeals approved a determination by the review board that a monthly disability retirement pension received from the federal government was properly considered as income to be deducted from an

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[33]IND. CODE § 22-4-15-1 (1976).

[34]*Id.*

[35]381 N.E.2d at 498.

[36]*Id.* at 499.

employee's unemployment benefits.[37] The employee contended that the pension he was receiving from his prior employer, the federal government, was merely a return of his contribution to the pension plan and that under federal law the return of an employee's contribution is not taxable as income. Under the applicable provision of the Employment Security Act, and in harmony with decisions from other jurisdictions,[39] the court concluded that the pension income was properly considered as deductible income, reducing the unemployment compensation. The court determined that the Indiana statutory provision was not inconsistent with the Internal Revenue Code or any other federal statute.[40]

The court also rejected the equal protection argument raised by the employee arising out of the fact that Social Security benefits are not treated as disqualifying income under the Act.[41] Reasonable and justifiable grounds were found to exist for the legislative distinction between the two types of income. The court observed that a government pension is "a form of a contract giving rise to compensation for past services rendered. Social Security, on the other hand, is a federal social insurance program in which the government is spending money in aid of the general welfare. This distinction is convincing."[42]

B. Workmen's Compensation and Occupational Diseases Act

In a three-two decision, the Indiana Supreme Court accepted transfer, reversing and vacating the judgment of the court of appeals in *Calhoun v. Hillenbrand Industries*.[43] The claimant felt pain in her lower back while engaged in her normal labor of lifting boxes of parts out of a bin and attaching those parts to table tops, involving weights of up to twenty-five pounds. She left work early that day, and a few days later was so severly disabled that she left work indefinitely. An orthopedic surgeon testified before the industrial board that she had an abnormal enlargement of a disc between two of the lumbar vertebrae, accompanied by abnormal knee and ankle reflexes, and that any kind of bending, lifting, or fall-

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[37]Fields v. Review Bd. of Ind. Empl. Security Div., 385 N.E.2d 1168 (Ind. Ct. App. 1979).

[38]IND. CODE § 22-4-15-4 (1976).

[39]385 N.E.2d at 1173-74 (citing Rogers v. District Unempl. Comp. Bd., 290 A.2d 586 (D.C. 1972); Yeager v. Unemployment Comp. Bd. of Review, 196 Pa. Super. Ct. 162, 173 A.2d 802 (1961); Caughey v. Employment Security Dept., 81 Wash. 2d 597, 503 P.2d 460 (1972).

[40]385 N.E.2d at 1173.

[41]*Id.*

[42]*Id.* at 1173-74.

[43]381 N.E.2d 1242 (Ind. 1978), *vacating* 374 N.E.2d 54 (Ind. Ct. App. 1978).

ing motion which exerted pressure on the back in a certain way could cause the type of back injury which the claimant had suffered.[44] The surgeon further testified that lifting such as that involved in the claimant's normal labor could have caused her back injury.

The industrial board found that

> from all of the credible evidence there is no specific time or incident that can be pointed to that would cause the pain in plaintiff's back. Said Full Industrial Board of Indiana finds that plaintiff did not sustain an accident or untoward event arising out of and in the course of her employment.[45]

The court of appeals reversed the industrial board decision on a finding that it was not supportable viewing the evidence in the record most favorably to the board. As the court of appeals viewed the record, there were two reasonable inferences from the facts: either that the claimant's "back was injured while she was performing her normal work duties on the day [during] which the pain commenced or [that] her back injury was attributable to the gradual wear and tear from bending and lifting during the performance of her normal work duties and it manifested itself on the day the pain had commenced."[46] The Workmen's Compensation Act of 1929 covers personal injury or death "by accident arising out of and in the course of the employment."[47] Relying upon a series of earlier cases defining "accident,"[48] the court determined that if the claimant's injury was a gradual development and the pain which she experienced on a particular day was merely a manifestation of a gradually developing injury, then she was entitled to recover.[49] Viewing the evidence in the light most favorable to the prevailing party, the employer and the board, the court determined that the claimant had in fact suffered an accident arising out of and in the course of her employment, and therefore reversed the decision of the industrial board.[50]

The majority of the supreme court disagreed with the court of appeals primarily on the view taken of the evidence presented by the administrative record. The supreme court considered that "[t]here is no evidence whatsoever in the record that wear and tear

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[44]374 N.E.2d at 55.

[45]*Id.*

[46]*Id.* at 56.

[47]IND. CODE § 22-3-2-2 (1976).

[48]Wolf v. Plibrico Sales & Service Co., 158 Ind. App. 111, 301 N.E.2d 756 (1973); Rankin v. Industrial Contractors, Inc., 144 Ind. App. 394, 246 N.E.2d 410 (1969).

[49]374 N.E.2d at 56.

[50]*Id.* at 58.

because of intermittent bending processes in Calhoun's work caused or could have caused the condition she had in her back."[51]

As to the definition of an accident for purposes of the Act, the majority held:

> It is well settled under our law that in order to show an accident there must be some untoward or unexpected event. It has been further described as an unlooked for mishap or untoward event not expected or designed. It is not sufficient to merely show that a claimant worked for the employer during the period of his life in which his disability arose.[52]

Justice DeBruler, writing for himself and Justice Hunter in dissent, believed that the industrial board had applied an erroneous view of the legal requirement imposed upon a claimant to prove an injury by accident and that there was no legal requirement for a claimant to prove "a specific time or incident that can be pointed to that would cause the pain in plaintiff's back."[53] Because they believed the board had considered the case from an incorrect legal perspective, the dissenting justices would have reversed and remanded to the board.

At first blush, it appears that the supreme court has reverted to a requirement that a claimant for workmen's compensation prove some sudden trauma or violence.[54] Even so, in the course of its opinion the majority distinguished an earlier court of appeals' decision granting compensation to a claimant based on evidence that a particular apparatus used by the claimant in his employment had produced a trauma to his hands "that had the result over thirteen years of causing a disabling condition to exist."[55] The supreme court apparently agreed with the conclusion reached by the court of appeals in that case that under such circumstances a claimant was not bound to show that the resultant injury and damage were due to one particular blow which produced the particular injury.

The reversal of the court of appeals opinion may have resulted solely from the supreme court's view of the proper inferences to be drawn from the record, or it may indeed herald a more restrictive view of the proper definition of an accident. Further litigation can be expected to attempt clarification of the issue.

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[51]381 N.E.2d at 1244.

[52]*Id.*

[53]*Id.* at 1245 (DeBruler & Hunter, JJ., dissenting).

[54]*See generally* B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 5.2, at 99 (1950).

[55]381 N.E.2d at 1244 (citing American Maize Prod. Co. v. Nichiporchik, 108 Ind. App. 502, 29 N.E.2d 801 (1940)).

A decision of the court of appeals[56] gives effect to a series of amendments to the Indiana Workmen's Compensation Act which have gradually expanded the period of time for which continuing medical expenses can be awarded by the industrial board.[57]

The claimant suffered a severe back injury in the course of his duties as an employee, resulting in permanent partial impairment of ninety percent. His condition required medical services and supplies on a continuing basis. The industrial board held that the claimant was entitled to 450 weeks of compensation for his impairment, but also incorporated into its award a statement that the employer's liability to pay for medical expenses and supplies "shall terminate on August 12, 1983, and that defendant shall not be responsible for any payments beyond said date."[58] The board specifically stated that it was without jurisdiction to order continuing medical payments beyond that date.[59]

The court of appeals affirmed the award of 450 weeks of compensation payments, but concluded that the findings by the industrial board regarding termination of benefits in 1983 "are mere unenforceable surplusage," based upon a review of the appropriate limitation periods imposed by the Act.[60] As the court interpreted those limitation provisions, a claimant who has been granted payments for partial impairment may seek a modification of the award any time within one year from the last day for which compensation was paid. No limitation is placed on the number of modifications which can be sought based upon an increase in permanent partial impairment or a continuation of medical expenses.[61] The court's decision properly interprets the amended provisions of the Act, and will permit full relief to claimants under the Act, as intended by the legislature.

The 1979 session of the Indiana General Assembly adopted several amendments to the Workmen's Compensation Act modifying several of the statutory benefit periods and maximum compensation amounts, and included prosthodontics among the appliances which an employer is required to provide to an injured employee. The amendments became effective July 1, 1979.[62]

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[56]Gregg v. Sun Oil Co., 388 N.E.2d 588 (Ind. Ct. App. 1979).

[57]*Id.* at 590-91 (construing Workmen's Compensation Act of 1929 Amendments, Pub. L. No. 227, § 1, 1979 Ind. Acts 1014 (codified at IND. CODE § 22-3-3-4 (Supp. 1979))).

[58]388 N.E.2d at 589.

[59]*Id.*

[60]*Id. See* IND. CODE §§ 22-3-3-4, -27 (Supp. 1979).

[61]388 N.E.2d at 590.

[62]Workmen's Compensation Act of 1929 Amendments, Pub. L. No. 227, §§ 1-6, 1979 Ind. Acts 1014 (codified at IND. CODE §§ 22-3-3-4 to -13 (Supp. 1979)).

C. Public Employees

Continuing a trend observable for several years in the state and federal courts, there were a number of significant decisions involving public employees. Several of those cases dealt with demotions. The court of appeals held that an ordinance adopted by the City of Whiting, which authorized demotion of policemen only for violation of written rules and regulations adopted by the Whiting Board of Public Works or Police Chief,[63] gave rise to an expectation on the part of each policeman that he would continue in his rank unless he violated one of the written rules and regulations.[64] Consequently, the policeman had a property interest, or legitimate claim of entitlement, which was protected by the due process clause of the fourteenth amendment to the United States Constitution. In the circumstances of the case, due process required sufficient cause for demotion to be established, with charges made and provided to the employee, notice given, and a hearing held prior to demotion.[65] The municipal ordinance gave rise to due process guarantees despite the fact that the then applicable state statute had been construed as not supporting a claim of entitlement or the basis for a property interest.[66]

The policemen involved had been summarily demoted by a letter from the newly installed Mayor Grenchik, who testified that he did not recall the city ordinance when he wrote the letters of demotion.[67] The court held that the policeman had been demoted in violation of procedural due process and that "[t]he proper remedy for a policeman who has been improperly demoted is reinstatement to the rank he held prior to demotion, and payment of the salary differential from the date of demotion."[68] Local ordinances mean what they say and may also give rise to constitutional guarantees unimagined by the city fathers.

In the absence of a local ordinance, the court of appeals in *Morris v. City of Kokomo*,[69] determined that a Kokomo Assistant Fire Chief and District Fire Chief, who had been demoted to the rank of private, did not have a property interest or a liberty interest which

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[63]Whiting, Ind., Ordinance 1057 (July 2, 1962), *as amended by* Ordinance 1083 (Nov. 1, 1965).

[64]State v. Grenchik, 379 N.E.2d 997, 1001-02 (Ind. Ct. App. 1978).

[65]*Id.* at 1002.

[66]*See* Smulski v. Conley, 435 F. Supp. 770, 773 (N.D. Ind. 1977); Jenkins v. Hatcher, 322 N.E.2d 117, 119 (Ind. Ct. App. 1975) (construing IND. CODE § 18-1-11-3 (1976)).

[67]379 N.E.2d at 1000.

[68]*Id.* at 1002.

[69]381 N.E.2d 510 (Ind. Ct. App. 1978). *But see* Greenberg, *supra* note 1, at 49.

had been implicated, and thus were not entitled to notice and a hearing under the due process clause.

Substantively, however, the fire officials also alleged that their demotions had been taken in retaliation for their exercise of constitutionally protected rights of freedom of speech and association, in that they had not supported the incumbent mayor's bid for reelection. The trial court had dismissed this count of the complaint together with the other counts. The court of appeals reversed the dismissal based upon the United States Supreme Court decision in *Elrod v. Burns.*[70] The Supreme Court there ruled that a non-policy making, non-confidential public employee could not be discharged from a job which he had been satisfactorily performing solely upon the ground of his political beliefs. The decision was widely regarded nationally as signaling the demise of the patronage system of public employment.

The court of appeals gave valuable instruction as to the relative burdens borne by the parties in determining whether the demotions were unconstitutional. A plaintiff bears the burden of proving that the constitutionally protected activity was "a motivating force behind the demotions."[71] Assuming that burden is met, a city may yet escape liability in either of two ways.[72]

First, if a defendant city proves by a preponderance of the evidence that the decision to demote a plaintiff was justified by reasons independent of the constitutionally protected conduct, although the constitutionally protected conduct may have been a motivating factor, there is no liability, under the Supreme Court decision in *Mount Healthy City School District Board of Education v. Doyle.*[73]

Second, a defendant city could escape liability by showing a "paramount interest" justifying encroachment of first amendment freedoms, including a showing that an employee was in a confidential or policy-making position.[74] Because the complaint in *Morris* had been dismissed by the trial court, no factual record was available to the appellate court demonstrating whether these plaintiffs fell within either of the categories.

The court specifically considered the question whether *Elrod* and its progeny were applicable to demotions and other adverse job actions short of discharge. Accurately noting that the constitutional danger is that the employees will be coerced into affiliating with a

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[70]427 U.S. 347 (1976).

[71]381 N.E.2d at 517.

[72]*Id.*

[73]*Id.* (citing Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

[74]381 N.E.2d at 517.

particular party candidate out of a threat of adverse job action, the court concluded that "the prohibited result is the same whether the threat is demotion or discharge—a significant impairment of first amendment freedoms."[75]

Although the result in the case would be predictable based upon the proper interpretation of the United States Supreme Court decisions,[76] the opinion of the court of appeals is nevertheless highly significant because it will bring home to Indiana public employees, and to the Indiana judiciary, the viability and force of the first amendment protections in the area of patronage employment. Presumably the same result would apply to adverse job actions other than demotion, such as punitive transfers, assignment to unfavorable work stations, refusals of promotion, and any other adverse job action. The existence of the rights recognized by the court in *Morris*, together with possible municipal liability for damages and attorney fees, will bring a speedy end to the time-favored patronage system in Indiana.

Two decisions of the court of appeals interpreted the Collective Bargaining for Teachers Act[77] and the authority of the Indiana Education Employment Relations Board (IEERB), which administers the Act. *Board of School Trustees of Worthington-Jefferson Consolidated School Corp. v. IEERB*[78] may well be destined for an award for the number of opinions generated in the court of appeals.[79] The case involved three public school teachers who were dismissed from their positions by the Worthington-Jefferson School Corporation in the spring of 1974. The teachers filed unfair labor practice charges under the Act with the IEERB alleging that the school board had committed an unfair practice by dismissing them for exercising rights conferred by the Act, in particular the right to organize for collective bargaining. A hearing officer and the full IEERB found that the teachers had in fact been discharged because of their collective bargaining activites and that the school board had committed an unfair practice in violation of the Act.[80] The IEERB

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[75]*Id.* at 518. *See also* McGill v. Board of Educ. of Pekin Elementary School Dist. No. 108, 602 F.2d 774 (7th Cir. 1979), in which the court held that a retaliatory transfer can trigger first amendment rights, whether or not the employee held a protected property interest in a particular position. The court stated: "The test is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." *Id.* at 780.

[76]427 U.S. 347 (1976).

[77]IND. CODE §§ 20-7.5-1-1 to -14 (1976).

[78]375 N.E.2d 281 (Ind. Ct. App. 1978).

[79]The author was counsel of record for the three teachers in the Worthington-Jefferson proceeding.

[80]IEERB v. Board of School Trustees of Worthington-Jefferson Consol. School Corp., 355 N.E.2d 269, 271 (Ind. Ct. App. 1976) (construing IND. CODE § 20-7.5-7(a)(1)(3) (1976)).

issued a final order requiring the school board to reinstate the teachers with back pay. On a petition for judicial review under the Administrative Adjudication Act,[81] the trial court concluded that the factual record did not support the IEERB determination and that the school board had not committed an unfair practice.[82]

In its first opinion, the court of appeals reversed the trial court determination, concluding that the trial court had applied an erroneous standard of review of the agency proceedings and that the administrative determination must be approved if it was supported by "any substantial evidence" in the record.[83] Applying the appropriate standard of review itself, the court concluded: "The record before the IEERB is replete with extensive testimony to support the conclusion that the teachers were discharged for their union activities."[84] The court noted that the school board had attempted to raise an issue as to the power of the IEERB to order the reinstatement of a teacher in the circumstances of the case. Because the trial court had made no finding upon the matter, the court of appeals found that the question was not properly before it, and reversed and remanded for proceedings not inconsistent with the opinion.[85]

On remand, the trial court determined that the IEERB did have the power, under the Act, to order the reinstatement of a teacher whose dismissal had resulted from the exercise of activities protected by the Act.[86] This determination of the trial court was in turn appealed to the court of appeals, which issued its second full opinion in May 1978.[87] The court first rejected the school board's contention that the matter should be remanded to the IEERB, under *Mount Healthy City School District Board of Education v. Doyle*,[88] to determine whether a preponderance of the evidence would show that the three teachers would have been meritoriously discharged even if they had not engaged in protected activities. The court noted that the IEERB had specifically found that the school board's stated justification for firing the teachers was "mere pretext." The court held that the only reasonable inference from the findings was that the school board did not have justifiable reason to dismiss the three teachers, and that consequently whether it was required to do so or not, the IEERB had met the test set forth in *Mount Healthy*.[89]

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[81] IND. CODE §§ 4-22-1-1 to -4-1 (1976).
[82] 355 N.E.2d at 270-71.
[83] *Id.* at 272-73.
[84] *Id.* at 273.
[85] *Id.* at 274.
[86] 375 N.E.2d 281, 283 (Ind. Ct. App. 1978).
[87] *Id.* at 281.
[88] 429 U.S. 274 (1977).
[89] 375 N.E.2d at 284.

Turning to the issue of the authority of the IEERB to order reinstatement, the court of appeals agreed with the school board contention that the IEERB is "merely a fact finding body and has no power to issue a final order to a school board to reinstate a teacher."[90] The remedial powers of the IEERB are set out in section 11 of the Act.[91] The section does not specifically contain a grant of authority to the IEERB to order the reinstatement of teachers, and the court refused to imply such a power in the absence of a specific grant. Because it found no ambiguity in the statutory language, the court did not utilize any of the standard rules of statutory construction in reaching its result. It made no reference to the intent of the legislature or the remedial purpose of the Act itself. The court considered the absence of a specific grant of power to be conclusive.[92]

However, the court recognized that a teacher who is found to have been dismissed for having engaged in a protected activity is entitled to a remedy, and devised a procedure which culminates in a determination by a trial court. If the trial court concludes that the factual determinations of the IEERB are supported by substantial evidence in the record, then the court may fashion a remedy "to cure whatever injustice has taken place" based upon the IEERB findings of fact.[93]

The court remanded the cause to the trial court again, with instructions that the trial court "enter an original order of mandatory relief reinstating" the three teachers and give "whatever other relief it deems to be just and equitable."[94]

The unwillingness of the court of appeals to consider the legislative intent revealed by the entire body of the Collective Bargaining Act has seriously, though not fatally, interfered with the purpose of the legislation. Now a teacher who is fired for having

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[90] *Id.*

[91] IND. CODE § 20-7.5-1-11 (1976) provides:

Unfair practices shall be remediable in the following manner:

(a) Any school employer or any school employee who believes he is aggrieved by an unfair practice may file a complaint under oath to such effect, setting out a summary of the facts involved and specifying the section of this chapter . . . alleged to have been violated.

(b) Thereafter, the board shall give notice to the person or organization against whom the complaint is directed and shall determine the matter raised in the complaint, and appeals may be taken in accordance with [IND. CODE §§ 4-22-1-1 to -30 (1971)]. Testimony may be taken and findings and conclusions may be made by a hearing examiner or agent of the board who may be a member thereof. The board, but not a hearing examiner or agent thereof, may enter such interlocutory orders after summary hearing as it deems necessary in carrying out the intent of this chapter.

[92] 375 N.E.2d at 284-85.

[93] *Id.* at 285.

[94] *Id.*

engaged in the very practices the Act was intended to foster—collective bargaining—has no efficient administrative process available for relief. Under the court's interpretation of the correct procedure, the teacher must go first to the IEERB to have the facts determined, and is then compelled to initiate judicial action, of some nature, to seek a remedy. Because the IEERB was created by the general assembly to exercise judgment, wisdom, and expertise in the area of personnel relations between teachers and school boards,[95] one would have thought the IEERB would have been best suited to fashion an appropriate remedy for unfair practices.

The appellees sought rehearing, and in September 1978 the court issued a third opinion denying the petition for rehearing, but offering additional guidance to the trial court as to the appropriate remedy.[96] The opinion on rehearing focused primarily upon the appellees' argument that use of the word "remediable" in section 11 of the Act[97] gave evidence of a legislative intent that the IEERB was to have the authority to redress a wrong. The court rejected the argument, suggesting that the word "remedy" could apply to final determinations of fact as well as to orders of specific relief.[98] Considering legislative intent for the first time, the court determined that the absence of a specific grant of power to order reinstatement of dismissed teachers was clear indication that the legislature did not wish to give that power.

As to the appropriate remedy to be ordered by the trial court, the court of appeals, having already ordered reinstatement, gave the following guidance: "In order to avoid future confusion we now state the trial court has the power to award back pay, and from the record with which we have been presented such would appear to be merited."[99]

On April 13, 1979, the trial court on remand, acting pursuant to the instructions contained in the opinion of May 1978, issued an order requiring the school corporation to reinstate the three teachers at the commencement of the 1979-80 school year. Despite the clear instruction of the court of appeals on remand, the school board filed a petition for a writ of mandate or prohibition, alleging that the trial court had exceeded its jurisdiction and violated the directions given by the court of appeals in ordering reinstatement. In a fourth full opinion, the court of appeals rejected the school

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[95]Indiana Educ. Empl. Relations Bd. v. Benton Community School Corp., 266 Ind. 491, 365 N.E.2d 752, 756 (1977).

[96]Board of School Trustees of Worthington-Jefferson Consol. School Corp. v. IEERB, 380 N.E.2d 93 (Ind. Ct. App. 1978).

[97]IND. CODE § 20-7.5-1-11 (1976).

[98]380 N.E.2d at 95.

[99]*Id.*

board's argument, stating that it was the intent of the court of appeals that the three teachers be reinstated.[100] The matter was again remanded to the trial court for a hearing on the amount of back pay.[101]

Thus, the three teachers involved in the Worthington-Jefferson litigation appear destined to receive a full and adequate remedy for the unfair practices committed against them five years ago. They have been ordered reinstated, and have been granted back pay. Nonetheless, the procedure devised by the court of appeals for future teachers who are dismissed in violation of the Act will necessarily be time consuming, expensive, and cumbersome. To that extent, collective bargaining by public employees has been thwarted by judicial intervention.

The court of appeals decided an additional case involving a dismissed teacher and the IEERB, in *IEERB v. Board of School Trustees of Baugo Community Schools.*[102] The IEERB had found that the teacher was illegally dismissed in 1974 because of her affiliation and support of a teachers' negotiation group, the Baugo Education Association.[103] The trial court reversed the IEERB decision on judicial review. The court of appeals determined that the trial court had employed an improper standard of review and had utilized earlier appellate opinions, decided before the passage of the Collective Bargaining Act, in reversing the IEERB.[104]

Reviewing the record to determine whether there was substantial evidence to support the IEERB factual determinations, as the court had done in the first Worthington-Jefferson case, the court concluded: "[W]e do note that some evidence was present which supported the IEERB determination that Poyser was discharged due to her BEA activities. The trial court should not have substituted its decision for that of the IEERB."[105] The matter was remanded to the trial court for further proceedings.[106]

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[100]State *ex rel.* Board of Trustees v. Knox Circuit Court, 390 N.E.2d 232, 234 (Ind. Ct. App. 1979).

[101]On October 11, 1979, the Knox Circuit Court issued Findings of Fact, Conclusions of Law, and an Order requiring the school corporation to pay the three teachers a total of $103,073 in back pay, plus simple interest at eight percent from the date of injury. The court ordered that the teachers be given credit on the salary schedule for the five years they were ousted from the school corporation, together with other ancillary relief. Board of School Trustees of Worthington-Jefferson Consol. School Corp. v. IEERB, Cause No. CC75-77 (Knox Cir. Ct. Oct. 11, 1979).

[102]377 N.E.2d 414 (Ind. Ct. App. 1978).

[103]*Id.* at 415.

[104]*Id.* at 416-17.

[105]*Id.*

[106]*Id.* at 417.

In legislative developments, the statutes creating the status of semi-permanent teacher and permanent teacher[107] have been amended to comply with the Federal Age Discrimination in Employment Act.[108] Under the amendments, there is no upper age limit for a teacher to retain status as a semi-permanent teacher; a permanent or tenured teacher can retain that status until age seventy-one. Consistent amendments were made to the Teachers' Retirement Act.[109]

The Indiana Age Discrimination Act[110] was amended to increase the maximum age of coverage from sixty-five years to seventy years. Additionally, the definition of "employer" in the Act was amended, excluding any person or governmental entity which is subject to the Federal Age Discrimination in Employment Act.[111] Thus, employers will not be subject to dual coverage for age discrimination.

The opportunity of a public school board to comment upon the status of negotiations with the exclusive representative of the teachers was increased by an amendment to the Indiana Open-Door Law.[112] A new section was added to that statute permitting a school board to inform the public of the status of collective bargaining by release of factual information and by expression of opinion based upon factual information.[113]

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[107]IND. CODE § 20-6.1-4-9, -9.5 (Supp. 1979).

[108]29 U.S.C. §§ 621-634 (1976), *as amended by* Act of Apr. 6, 1978, Pub. L. No. 95-256, 92 Stat. 189.

[109]IND. CODE § 21-6.1-5-1 (Supp. 1979), *as amended by* Act of Apr. 9, 1979, Pub. L. No. 206, § 2, 1979 Ind. Acts 951.

[110]IND. CODE § 22-9-2-6 (Supp. 1979), *as amended by* Act of Apr. 9, 1979, Pub. L. No. 206, § 3, 1979 Ind. Acts 951.

[111]29 U.S.C. §§ 621-634 (1976).

[112]Act of Apr. 9, 1979, Pub. L. No. 39, § 4, 1979 Ind. Acts 161 (codified at IND. CODE § 5-14-1.5-6.5 (Supp. 1979)).

[113]*Id.*