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Indiana Supreme Court Holds: Day Laborer(s) Can Bring Wage Payment Case if Expectation of Future Employment Exists

In this installment of the Hoosier Litigation Blog, we return to the topic of Indiana's Wage Payment and Wage Claim statutes from our previous discussion from November. In our previous discussion we examined the differences between the two statutes in the context of the necessity of filing a claim with the Indiana Department of Labor (DOL) prior to filing a Wage Claims Act case and that such a prerequisite does not exist for the Wage Payment Act. This week, the Indiana Supreme Court sought to determine whether a group of day laborers were able to pursue a claim under the Wage Payment Act. The unanimous court held that they could.

The opinion in *Walczak v. Labor Works-Fort Wayne LLC* was authored by Justice Mark Massa. Before we delve into the facts of the case and then into its legal determination, I see it fitting to examine a bit of the comedic relief which Justice Massa utilizes to open the opinion. The opinion begins with a bit of a robust discussion of the "Duck Test." While it is typically the case that when this blog

discusses a *test*, such test is of particular legal significance. This is not such an occasion. Justice Massa wrote:

> James Whitcomb Riley (1849–1916), our celebrated "Hoosier Poet," is widely credited with the origination of the Duck Test; as he expressed it, "[w]hen I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck."[1]
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> [Footnote 1] Michael Heim, EXPLORING INDIANA HIGHWAYS: TRIP TRIVIA 68 (2007). Others attribute the Duck Test to labor leader and noted anti-Communist James B. Carey. See THE YALE BOOK OF QUOTATIONS 131 (Fred R. Shapiro, ed., 2006) (quoting Carey as saying, in the September 3, 1948 New York Times, "A door-opener for the Communist party is worse than a member of the Communist party. When someone walks like a duck, swims like a duck, and quacks like a duck, he's a duck.").
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> All questions of origination aside, the Duck Test is a classic example of Hoosier pragmatism, and it enjoys wide judicial acceptance. *See*, *e.g.*, *Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009) ("Joseph Lake, the plaintiff in this suit, flunks the Duck Test. He says, in effect, that if it walks like a duck, swims like a duck, and quacks like a duck, it sure as heck isn't a duck." (emphasis in original)).

With your edification upon the Duck Test now complete, let us return to the substance of the opinion.

The defendant, Labor Works, is a business that provides day labor services to clients through the use of workers who receive job assignments on a day-to-day basis. The workers receive their assignments by going to the Labor Works office and putting their name down to work. The work is doled out based on the amount to be had. This means that not every person looking to work that day will receive an assignment. Further, if a worker did not go to the Labor Works office that day then he or she could not be assigned work.

The named plaintiff Miss Brandy Walczak was such a day laborer for Labor Works. Miss Walczak "was paid by check at the end of each work day." Labor Works withheld taxes from her checks. She worked on January 27, but did not go to the Labor Works office in search of work on the 28th. On the 29th she signed up for work but no job was assigned to her. Then on February 1 she filed this case. She next worked the following day on the 2nd.

Labor works sought to have the case dismissed for lack of subject matter jurisdiction. The trial court agreed, as did the Court of Appeals. The Supreme Court, however, did not.

In order to understand the argument, we must first, briefly, discuss the differences between the Wage Payment Act and the Wage Claims Act. Actions brought under the Wage Claims Act must first be submitted to the Indiana Department of Labor. Wage Payment cases – on the other hand – can be filed directly with a court. Thus, whereas here, when a claim is not first filed with the DOL, it is vitally important to determine which Act applies. The Court summarized the meaningful distinction in this context.

> So to summarize in shorthand, it fairly can be said that the Wage Payment Act applies to, among others, those who keep or quit their jobs, while the Wage Claims Act applies to those who are fired, laid off, or on strike.

The key in this case to determining which Act applied was to determine the meaning of "voluntarily leaves employment" under the Wage Payment Act and "separates any employee from the pay-roll" under the Wage Claims Act.

Labor Works argued that because the day laborers were paid at the end of each day and their continued employment was optional, the works were separated from the pay-roll and thus any wage related claim was governed by the Wage Claims Act. Were this the case, then the case would have to be dismissed for lack of jurisdiction because it had not been properly filed with the DOL.

In determining the legislative intent behind the acts, the court considered the rationale for requiring one group of employees to submit its claim to the DOL and not the other. The Court found that the turning point was the motivation underlying an employee's actions based upon his or her present circumstances. An employee who has been involuntarily terminated are more apt to have animus toward the former employer. Thus, it makes sense to have an intermediary body review the actions of a fired employee prior to allowing suit – thereby creating litigation costs – upon an employer. On the contrary, a person who is still employed or "knows that [he or] she may soon resume [ ] employment presumably would have less reason to feel animus." In accordance with this legislative scheme and rationale, the Court held "that a day labor employee is not 'separate[d] from the pay-roll' for the purpose of the Wage Claims Act unless that employee has no immediate expectation of possible future employment with the same employer."

In this case, the Court found there to be a reasonable expectation – at least

for Miss Walczak. "[A]lthough she did not seek a job assignment from Labor Works on the day she filed her complaint, she successfully sought assignments on the following four days, and she continued to work for Labor Works on a sporadic basis for the next four weeks." The Court also noted that the employment agreement used by Labor Works distinguished between termination and reassignment – i.e. the acquisition of another work assignment by returning.

Surprisingly, the Court appears to have gone a step further than one would have expected. The case was filed as a putative class action. There is no indication that the class was ever certified. Thus, the Court could easily have held that Miss Walczak alone had a reasonable expectation of future employment, but said nothing of the applicability of her expectation to the entire putative class. The opinion, nevertheless, seems to delve into the class aspect a bit in passing. Justice Massa wrote:

> Labor Works may say that all its employees are terminated after every shift and rehired the next day, like phoenixes rising daily from the ashes, but its employees, unlike those who have really been "separate[d] from the pay-roll," have a realistic expectation that if they show up the next day, they may receive a job assignment. In other words, Walczak is more duck than phoenix.

What is confusing about this statement is that it seems to speak to the entire class of employees, yet ends only by referring to Miss Walczak.

To summarize, the case determined that a day laborer can bring a case under the Wage Payment Act – thus not needing to file a submission to the Indiana Department of Labor – unless "that employee has no immediate expectation of possible future employment with the same employer." To bring the case full circle, the opinion concludes, "[W]e, like Mr. Riley, call this bird a duck."

Join us again next time for further discussion of developments in the law.

Sources

- *Walczak v. Labor Works-Fort Wayne LLC*, ___ N.E.2d ___, No. 02S04-1298-PL-497 (Ind. Mar. 13, 2013).

- *Lake v. Neal*, 585 F.3d 1059, 1059 (7th Cir. 2009).

- Indiana Wage Payment Act: Indiana Code article 22-2-5.
- Indiana Wage Claims Act: Indiana Code article 22-2-9.

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