Recent Cases Change the Face of Worker's Compensation

By Karen Sutherland

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Most employers and employees believe that they understand the fundamentals of worker's compensation -- *i.e.*, in exchange for "no fault" insurance for workplace injuries, the employer is immune from liability for those injuries. What most employers and employees don't realize is that the rules have changed.

As workplace torts increase in complexity, the no fault/immunity tradeoff is not as simple as it used to be. Recent case decisions have expanded the "intentional acts" exception to employer immunity. These changes have cleared the way for employees to sue their employers for exposure to toxic chemicals in the workplace, and have allowed employees to sue for intentional infliction of emotional distress (outrage) arising from events that occur in the workplace. Additionally, the worker's compensation bar to civil liability does not apply in Washington State to civil-rights type injuries such as discrimination and sexual harassment.

Worker's compensation laws still cover a vast number of workplace injuries. For example, according to Matthew W. Finkin, et al., in *Legal Protection For The Individual Employee* 559 (2d ed. 1996), approximately 93.6 million workers were covered by workers' compensation programs in the United States in 1991. These programs paid out an estimated $42.1 billion in benefits, $16.8 billion of which was paid for medical treatment and hospitalization. Given the size of the programs, the fact that the courts have undertaken a little "tweaking" is no surprise.

Washington State's Workers' Compensation Law

By way of background, the State of Washington adopted a mandatory workers' compensation plan in 1911, which is known as the Industrial Insurance Act (IIA). It is codified at RCW Ch. 51.04. Most employees are protected by workers' compensations laws. Some of the exceptions to worker's compensation include, among others:

- Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed for forty or more hours a week in such employment;
- Any person employed to do gardening, maintenance, repair, remodeling, or similar work in or about the private home of the employer; and
- Any person whose employment is not in the course of the trade, business, or profession of his or her employer and is not in or about the private home of the employer.

RCW 51.12.020.

No Coverage for Intentional Acts

Intentional acts are not covered by the IIA. Recent cases have expanded the definition of "intentional act" beyond the its traditional meaning. Under *Birklid v. Boeing Company*, 127 Wn.2d 853 (1995), intentional injuries have been broadened to include injuries where the employer:

- had actual knowledge that an injury was certain to occur; and
- wilfully disregarded that knowledge.

Businesses and other employers should also be aware that they may be subject to civil liability for their supervisors' and management's actions.

Baker v. Schatz, 80 Wn. App. 775, 912 P.2d 501 (1996) provides a good example of what constitutes an intentional injury and illustrates that supervisors' intent may be imputed to the employer. In *Baker*, the employees claimed that their employer, General Plastics, deliberately intended to injure them by repeatedly exposing them to chemicals. One of the workers stated that he used a chemical which caused breathing difficulties that eventually developed into bronchitis and pneumonia. The employee was transferred to a different department, but continued to experience breathing difficulties, skin rashes, nausea and headaches. He complained to management, but was told that none of the chemicals were harming him.

Another worker pointed out that the material data safety sheet recommended various precautions regarding methylene chloride, which the employees were told to use to wash other chemicals off their arms and hands. Their supervisor responded by stating that the chemical was safe and was used in surgeries and for decaffeinating coffee.

Other employees also testified that they complained to supervisors that the chemicals were causing breathing difficulties, severe headaches, daily nausea, dizziness and skin rashes. Several employees passed out and were treated a number of times at nearby hospital emergency rooms.

The employer, General Plastics, denied that the employees' health problems were caused by the chemicals and attributed the problems to the flu or to the employees' smoking or other bad habits. During the lawsuit, however, the president of the company admitted that he was aware of the hazards of overexposure to methylene chloride, and that he understood that workers faced a potential health risk if they were exposed to toxic material above permissible levels. The president of the company also admitted that he was aware of employee complaints to the Department of Labor and Industries about unsafe working conditions and that the Department cited General Plastics for exposing workers to chemicals. Management also admitted that employees complained repeatedly to their supervisors that the chemical in the plant were causing health problems. Despite the above testimony, management and supervisors testified that they had *no intention of injuring* any of the employees.

Ultimately, the court held that General Plastics' supervisors and president were aware that the employees were suffering from chemical-related illnesses and unless the working environment changed, continuing injury was certain. Additionally, the court stated that General Plastics' supervisors knew that the material safety data sheet for methylene chloride stated that one should

avoid skin contact with the substance. As a result of all of the testimony provided, the court ruled that the employees could bring their civil action against the employer.

Civil lawsuits for discrimination also are not covered by the IIA's bar to civil suits, even if the discrimination stems from a workplace injury. In *Reese v. Sears Roebuck & Co.*, 107 Wn.2d 563, 731 P.2d 497 (1987), *overruled on other grounds by Phillips v. City of Seattle*, 111 Wn.2d 903, 766 P.2d 1099 (1989), *cited in Birklid*, 127 Wn.2d at 868-869, the court held that plaintiffs suffered two separate injuries - a workplace physical injury and a subsequent injury from the employers' alleged handicap discrimination. Because the injuries are of a different nature, arose at a different time, and require different causal factors, they are not considered to be the same injury. Therefore, the injured employee is allowed to pursue both remedies - payment for the workplace physical injury under the IIA, and payment for the discrimination relating to the workplace injury under the laws against handicap discrimination.

Avoiding Employer Liability for Intentional Acts

Taking the above cases into account, employers can be advised to avoid liability for civil suits relating to workplace injuries by:

- Adopting and enforcing policies against illegal discrimination and sexual harassment;
- Ensuring that managers and supervisors know that actions that cause emotional distress, even if they are related to a covered injury, can result in civil liability;
- Following the precautions on material safety data sheets;
- Correcting any OSHA or WISHA violations regarding exposure to toxic chemicals or substances in the workplace; and
- Correcting any workplace conditions that could be the source of repeated illnesses or injuries, particularly if they affect multiple employees.

One other important motivating factor to take preventative measures is that, if a civil lawsuit is filed, most business insurance policies do not provide coverage for intentional acts or employee injuries such as those described in this article (though such coverage may be available at an additional cost).

The steps described above cannot guarantee that an employer will not face civil liability for a workplace illness or injury, but they do make such claims less likely. Also, because this is a developing area of the law, a periodic review of recent case decisions can highlight any other potential areas of civil liability.
