When Can Your Employees Sue You?

by John Johnson, Jr.

At the beginning of this century, workers were routinely injured, maimed, or killed in the workplace. An employee could sue the company for negligence, but the laws favored the company. If the job was obviously risky, the employee was held to have assumed the risk voluntarily and would lose the case.

Social legislation to remedy this situation began appearing in the late 1800s, and most states have had some type of workers compensation laws since the 1920s. These laws generally follow certain basic principles.

The Exclusive Remedy Rule

One of these principles is that an injured employee is entitled to one legal remedy, a concept known as "the exclusive remedy." It means that an injured employee who decides to accept workers compensation usually forfeits any right to sue the employer in civil court. Employees must receive full medical coverage and be paid lost time and benefits for an injury, regardless of their fault or the risk they have assumed. At the same time, employers are protected from jury trial verdicts, even when they are negligent and were at fault.

When all subcontractors have workers compensation coverage, a general contractor is spared any workers compensation liability if a subcontractor's employee gets hurt. Because the contractor is considered a "statutory employer" (employer by law if not in fact), both the general contractor and subcontractor are protected by the exclusive remedy.

Exceptions to the Rule

There have always been exceptions to this rule. Most of them rely on one of a few concepts.

Intentional harm. The most common exception is when an employer intentionally harms an employee. In Oregon, two employees were ordered to clean up a toxic chemical spill of PCBs. They worked in the chemical for five days on their hands and knees without protective clothing. They later became ill and sued their employer. The court held that the employer's actions constituted an intentional harm because the employer willfully endangered its employees' health.

Some cases are less clear cut. For example, Pennsylvania once denied exclusive remedy protection to an employer who intentionally exposed 75 employees to asbestos. But Nebraska found that even intentional concealment of asbestos was not an intent to injure, and thus formed no exception.

In West Virginia, a restaurant employee was burned by hot grease. There was evidence of an OSHA violation. The court held that since the employer had knowingly violated safety codes, it could be sued directly. Wyoming, on the other hand, has ruled that OSHA violations do not make an injury intentional.

Dual capacity. In some states, an exception to the exclusive remedy is created when the employer has a "dual capacity." One example is a tire company employee in Ohio whose company truck had a blowout. The employee sued for workers compensation, then sued the employer directly under products liability for the design of the tire. The employee's lawyers argued that the company had a separate duty to the employee as a member of the general public, and the court agreed. Most states don't accept the dual capacity doctrine, however. California has amended its law to state that dual capacity is not an exception to exclusivity.

Suing as a co-employee. Exceptions may arise where the employer and employee work side-by-side, as is the case with many small builders. If an employer directly injures an employee, the employee may try to bring suit as a co-employee. Some states, like Illinois, forbid suits against co-employees by statute. Some, like Colorado, forbid them by case law. A small minority of states allow an employee to sue a co-employee for simple negligence. In most states, however, there is a requirement that the action of the co-employee be "willful" or "grossly negligent."

Injuries not covered by comp. Employees sometimes sue employers on the grounds that the injury falls outside the scope of workers compensation. Some states accept separate suits for intentional infliction of emotional distress, sexual harassment, libel, illegal slander, wrongful discharge, and discrimination. Other states have held that these fall under workers compensation.

The North Carolina Case

One thing all of these cases have in common is that an employee can't bring suit in workers comp court and civil court at the same time. But a well-publicized North Carolina case has many people wondering if that will remain true. In that case, a contractor and subcontractor were jointly digging a trench. The contractor's foreman would not let his people work until they were provided with a trench box for safety, but the subcontractor's foreman ordered his people to dig without one. The trench eventually collapsed, killing one of the subcontractor's employees. On the day of the collapse, the contractor was not even working, and the trench box was available to the subcontractor, who chose not to use it. The civil court held that the subcontractor could be sued because its behavior constituted an intentional act to harm. The court reasoned that the subcontractor's misconduct was substantially certain to cause injury or death. It also held that the contractor could be sued because it had a responsibility to provide for the safety of all workers.

What shocked most observers was that the court let the estate of the deceased employee proceed in civil court and in workers compensation court *at the same time*. But this case may be less significant than many people fear. For one thing, the court said that duplicate awards would not be allowed; any workers compensation payments would be deducted from the proceeds of the civil case. For another, the case has not started a trend. The only two cases that refer to it are North Carolina cases, and one does not follow it.

The lesson is that unless your actions are grossly negligent, your employees can most likely only sue you through workers compensation. As with most things, your best protection is common sense. ■

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