



Nov 18, 2011

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Hewitt v. L.E. Myers; Ohio Intentional Tort

Despite an Ohio statute that protects employers from most intentional tort claims, the Court of Appeals in Cuyahoga County recently upheld a jury verdict of nearly \$600,000 in favor of an employee who was injured on the job and had already received workers' compensation. *Hewitt v. L.E. Myers*, 2011 Ohio 5413 (Ohio Ct. App. 8th Dist. October 20, 2011). The employee was electrically shocked while working with energized high-voltage power equipment. A supervisor had instructed the employee to work alone without wearing protective safety equipment. Because of this instruction, the employee was able to persuade the jury that the employer put him in harm's way even though it "knew with a substantial certainty" that the employee would be injured.

Generally, Ohio workers' compensation law governs whether an employee injured at work is entitled to compensation and benefits. When an employee receives workers' compensation, the employee is usually barred from suing the employer for any work-related injury. A limited exception arises when an employer commits an "intentional tort" against an employee. Under Ohio's employer intentional tort statute (Section 2745.01 of the Ohio Revised Code), an employer can be liable for an intentional tort against an employee only if "the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." Ohio legislators passed the statute six years ago, and the Ohio Supreme Court declared it constitutional in March 2010. See *Kaminski v. Metal & Wire Prods. Co.*, 125 Ohio St. 3d 250 (2010). [Click here](#) to read more about this case.

In the *Hewitt* case, the employee/plaintiff showed the requisite "intent to injure" by arguing that the employer deliberately had the employee remove safety equipment that was meant to guard the employee from the hazard. The intentional tort statute provides that "deliberate removal by an employer of an equipment safety guard . . . creates a rebuttable presumption that the removal . . . was

committed with the intent to injure another if an injury or an occupational disease or condition occurs as a result.” At trial, a supervisor testified that he believed it would be good experience for the employee to clip into the wire without rubber gloves or sleeves, because it was a hot day and he thought the primary wire would be de-energized. For this reason, the employee was instructed not to wear his rubber gloves and sleeves. However, another supervisor testified that the work the employee had been assigned required him to wear rubber gloves and sleeves, regardless of the fact that he was working on de-energized lines, because it was possible that the lines could become energized. This evidence gave rise to the rebuttable presumption that the employer acted with the intent to injure the employee.

The employer argued that the rubber gloves and sleeves were not “an equipment safety guard” under the statute. The court disagreed. It ruled that the term “equipment safety guard” applies to rubber gloves and sleeves because they are devices designed to prevent injury or to reduce the seriousness of injury. Because the employer did not present any rebutting evidence, the employee/plaintiff successfully carried his burden of proving that the employer intended to injure him.

The *Hewitt* case demonstrates that, despite the protections of workers’ compensation law and the employer intentional tort statute, it is still possible for employees to be awarded significant damages in tort actions against their employers. In particular, employers should assess potential intentional tort risks when deciding what protective equipment its employees must use.

For assistance with issues raised by this decision or with other employment law matters, please contact [Joanne Glass](#), or any other attorney in Frost Brown Todd’s [Labor and Employment Practice Group](#).

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