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Workers' Compensation Alert

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Courts' Expansive Definition of "Equipment Safety Guards" May Subject Employers to Increased Exposure for Workplace Intentional Torts

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A longstanding bargain between employees and employers underlies the Ohio workers' compensation system. Employees are provided with compensation and medical benefits as long as an injury occurs in the course of and arising out of employment. Employers accept this "no fault" concept in exchange for the guarantee that statutory workers' compensation remedies are the exclusive remedies for workplace injuries. This bargain is explicit. It is contained in the Ohio Constitution and codified in the Ohio workers' compensation statute.

There are very limited exceptions to this exclusivity doctrine so as not to disrupt the established bargain between employees and employers. One of these exceptions allows employees to bring claims in court, seeking damages over and above those provided under the workers' compensation system, where the employee can prove that the employer "intended" to cause injury to the employee. The legal standard for establishing this intent requirement had been subject to a veritable tug-of-war between the Ohio Supreme Court and the Ohio legislature. In 2010, Ohio employers received good news when an Ohio statute severely limiting the availability of workplace intentional torts was upheld by the Ohio Supreme Court in *Kaminski v. Metal & Wire Products Company,* 125 Ohio St.3d 250 and *Stetter v. R.J. Corman Derailment Services, LLC*., 125 Ohio St.3d 280. The Ohio statute specifically states that an "employer shall *not* be liable unless 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." R.C. 2745.01(A). "Substantially certain" means that an employer acts with "deliberate intent to cause an employee to suffer an injury." R.C. 2745.01(B). Given the difficulties of establishing that an employer acted with deliberate intent, viable intentional tort claims post *Kaminski* and *Stetter* are rare – and employers have been receiving the benefit of their bargain in the form of workers' compensation exclusivity.

One troubling recent trend for employers, however, is the rise in the number of claims brought under the "equipment safety guard" clause contained in the intentional tort statute. That clause states: "Deliberate removal by an employer of an equipment safety guard … creates a rebuttable presumption that the removal … was committed with intent to injure another if an injury or occupational disease occurs." R.C. 2745.01(C). In the case of *Beyer v. Rieter Automotive North America, Inc.,* Sixth Dist. No. L-11-1110, 2012-Ohio-2807, the Sixth District Court of Appeals decided on June 22, 2012, that safety masks for employees fell within the definition of "equipment safety guard." In *Beyer*, the Sixth District Court of Appeals held that the fact that safety masks were locked up at certain times when employees were exposed to breathing in silica dust was sufficient evidence to establish a rebuttable presumption of the "employer's

deliberate intent to injure due to the removal of an equipment safety guard" under R.C. 2745.01(C). Significantly, in *Fickle v. Conversion Technologies International, Inc.* Sixth Dist. No. WM-10-016, 2011-Ohio-2960, the same court had recently determined that a mechanism to take a machine out of continuous run mode (a "jog control") and an emergency stop cable were *not* "equipment safety guards." In its *Beyer* decision, however, the Sixth District Court of Appeals followed the reasoning of the Eighth District Court of Appeals in *Hewitt v. L.E. Myers Co*., Eighth Dist. No. 96138, 2011-Ohio-5413, which determined last year that protective rubber gloves and sleeves also fell within the definition of "equipment safety guard." Other recent court decisions addressing the same statutory provision have dismissed similar claims in scenarios where personal protective equipment was available and not used or was not provided at all and, therefore, the equipment was not "removed" by the employer as contemplated in the statute. In one recent case, a federal court deciding the Ohio law issue found that an employer sufficiently rebutted the presumption of "intent" when it established that a guardrail was removed as part of a job process that was not known to be dangerous to employees.

These recent court decisions suggest an increased attention to the "equipment safety guard" clause of the intentional tort statute resulting in an increased exposure to employers for workplace intentional tort claims. These recent developments should be a reminder to employers of the importance of: 1) preventing workplace injuries involving personal protective equipment and machine guarding through increased attention to excellent workplace safety practices (including employee training); and 2) thoroughly investigating workplace incidents with a focus on not only effectively managing the workers' compensation claim but also analyzing the potential for a subsequent intentional tort claim.

If you have any questions concerning intentional torts, or any other workers' compensation or workplace safety issues, please contact James B. Yates (419-247-1830; jbyates@eastmansmith.com) or Mark A. Shaw (614-564-1441; mashaw@eastmansmith.com).

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