

**PREMISES LIABILITY AND
EMPLOYMENT UPDATE**
**Ohio Supreme Court Finds Employer Intentional Tort Statute
Constitutional**

Employers will not be held liable for workplace injuries occurring after April 7, 2005, unless the injured employee can prove that the employer acted with deliberate intent to harm the employee. This is an important protection for employers in Ohio.

On March 23, in a long-awaited opinion, the Ohio Supreme Court upheld the portion of Ohio's tort reform statute, R.C. 2745.01, that provides that an employee cannot recover against an employer (outside of the workers' compensation system) for an "employment intentional tort" unless the employee proves that the employer **deliberately intended** the harm. *Kaminski v. Metal & Wire Prods. Co.*, Slip Opinion No. 2010-Ohio-1027; companion case, *Stetter v. R.J. Corman Derailment Servs., L.L.C.*, case No. 2008-0972.

"INTENTIONAL" HAS NOT ALWAYS MEANT INTENTIONAL

Ohio's workers' compensation system is designed to compensate employees for on-the-job injuries regardless of fault and precludes employees from suing their employers for those same injuries. The employment intentional tort cause of action, however, has long been an exception in Ohio, allowing employees to sue employers for injuries when the employers acted intentionally and caused employees injuries. Until recently, the term "intentional" was a misnomer, because an employee could demonstrate an employer's "intent" by proving something less than deliberate, intentional behavior. To demonstrate "intent" under Ohio law an employee needed to prove that his employer had knowledge of a dangerous condition; that the employee was subjected by his employment to the dangerous condition; and that harm to the employee was a "substantial certainty." See *Fyffe v. Jenos, Inc.*, 59 Ohio St. 3d 115 (1991).

As part of Ohio's 2005 tort reform, the Ohio General Assembly gave the words "intent" and "substantial certainty" a more common meaning. Now, in order to prove an employment intentional tort, and thereby overcome the workers' compensation system's bar to employee suits against employers, a plaintiff must prove that the employer had deliberately injured the employee. See R.C. 2745.01. Put another way, the law now does not ask whether the employer knew that an employee's injury was virtually certain, but rather shifts the focus to ask whether the employer actually, deliberately intended to harm the employee.

In short, absent proof of a deliberate intent of the employer to cause injury, deliberate removal of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance, an employee's remedy for injuries sustained at work will be limited to recovery through workers' compensation. By placing greater emphasis on the workers' compensation system that provides immunity from workplace injury claims outside of that system, the ruling should limit the number



of lawsuits brought by employees attempting to “double dip” by filing an intentional tort claim while simultaneously receiving workers’ compensation benefits.

PRIOR ATTEMPTS TO LIMIT EMPLOYER INTENTIONAL TORTS FAILED

The 2005 legislation and ensuing litigation are not the first attempts by the Ohio legislature and courts to weigh in on this issue. In both 1991 and 1999, the Ohio Supreme Court struck down prior versions of employment intentional tort statutes where the legislature required the injured worker to prove actual deliberate and intentional conduct (and in one of the versions set a heightened “clear and convincing” burden of proof). *Johnson v. BP Chemicals, Inc.*, 85 Ohio St. 3d 298 (1999); *see also Brady v. Safety-Kleen Corp.*, 61 Ohio St. 3d 624 (1991) (holding as unconstitutional an employer intentional tort statute that exceeded the scope of, and conflicted with, the legislative authority granted by the Ohio Constitution). Each time the court struck down the Ohio legislature’s definition of “intent,” the legislature eventually came back with an alternative version of the statute.

TRY, TRY AGAIN

In *Kaminski*, the Supreme Court harshly criticized its earlier *Johnson* decision, even though the court refused to overrule it. The court noted that the *Johnson* opinion was “inappropriate” when it admonished the General Assembly for trying again to enact a statute that would shield an employer from liability unless there was proof of actual intent to injure an employee. This time around, the court upheld the statute and found that the legislature acted constitutionally in its attempt to limit the scope of employment intentional tort claims. The result is that employees must carry a heavier burden of proving deliberate intent to harm when suing employers for on-the-job injuries in Ohio—the burden that the legislature intended as part of tort reform to restore balance between employees’ and employers’ rights in the context of workplace injuries. Finally, in Ohio “intentional” now means intentional, deliberate conduct.

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