Avoiding the Exclusive-Remedy Doctrine: When Workers' Compensation Is Not The Only Recourse For Employees Injured By Crime

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Workplace violence has risen steadily in recent years. Almost two million workers are assaulted each year, and nearly twenty are murdered every week.[i] While workers' compensation is generally the exclusive remedy that injured employees have against their employer, many workplace-violence victims and their survivors have successfully avoided the exclusive-remedy doctrine and have used civil lawsuits to recover from employers and third parties. This article examines the exceptions to the exclusive-remedy doctrine.

Types Of Workplace Violence

As criminologists, security specialists, human resources managers, and trial attorneys continue to study workplace violence, more is becoming known about the causes and costs of this tragic phenomenon and its impact on victims. A number of sociological, psychological, and organizational theories have been offered to explain the occurrence of workplace violence,[ii] and scholars have proposed a useful typology to assist in the understanding of the problem. There are four forms of workplace violence: Type I (criminal intent), Type II (customer/client), Type III (worker-on-worker), and Type IV (personal relationship).

Type I workplace violence involves a perpetrator who has no legitimate business relationship with a company. The perpetrator is primarily motivated by theft or robbery and often uses a deadly weapon to accomplish this goal. The victims are employees who are often working late and alone, and who are in a position to provide access to cash and other valuables. Type I is the most common cause of worker homicide, accounting for eighty-five percent of all such crimes.

Type II workplace-violence incidents involve customers or clients for whom, or because of whom, services are provided. Employees such as nurses, teachers, social workers, or bus drivers are common targets. This category of incident, which also includes police, security, and corrections officers, accounts for about five percent of workplace homicides.

The third category involves violent incidents where the perpetrator is a current or former employee of the victim's employer. Type III is the "fellow-worker-going-berserk" scenario which often involves multiple victims and generates intensive media coverage. Although these workplace atrocities constitute only about seven percent of all job-related homicides, the combination of random and targeted violence, as well as the perpetrator's frequent suicide, tend to dominate media accounts of the workplace violence issue.

Finally, Type IV workplace violence involves the spillover of domestic violence into the workplace. In this category, perpetrators target women more often than men, and attack them in a place where it is known the victims will be present with regularity—at work. The perpetrators are often rejected intimate partners or ex-spouses who have stalked their victims to the workplace. Such incidents account for about three percent of all workplace homicides.[iii]

Exceptions To The Exclusive-Remedy Doctrine

Many victims' lawyers believe that workers' compensation is the only remedy workplace-violence victims have against their employers. However, this is not accurate and there are a number of scenarios in which injured employees can litigate for more just compensation than is generally available under workers' compensation statutes.[iv] These exceptions to the exclusive-remedy doctrine have been recognized by courts or adopted by state legislatures.[v]

Workers' compensation laws were enacted for the protection of industrial workers. At the time such laws were initially proposed, legislators did not consider the interests of workers who were victimized by crime. More importantly, victimized workers never bargained for the workers' compensation remedy. For these reasons, victims of workplace violence should not be bound by the workers' compensation remedy.

Exceptions Recognized By The Courts

Imported Risks/Personal Animosity Exceptions

Workplace-violence victims are often attacked for reasons unrelated to their employment. Such victims are normally precluded from recovering workers' compensation benefits because a compensable workplace injury is one that *arises out of* and *in the course of* a worker's employment. When there is no connection between the injury and the work being performed by the employee—as in the case where a worker is victimized for personal reasons—the employee is permitted to pursue a traditional tort suit against his or her employer. Courts commonly refer to this rule as the "personal-animosity doctrine" because the risk of being physically assaulted is ordinarily imported into the workplace and does not arise out of the worker's employment.

Some courts divide workplace victimization into three separate categories for purposes of determining whether they are covered by workers' compensation.[vi] For those types of assaults that are not covered, the exclusive-remedy doctrine does not apply and victims may file suit directly against their employers. The first category involves jobs that are dangerous by their very nature, and which, therefore, feature an increased risk of assaults upon employees. Assaults in this category are generally compensable injuries under most workers' compensation statutes.[vii] Another category of workplace assaults are those that emanate from private quarrels

which are personal to the employees themselves. These assaults are not compensable under most workers' compensation statutes because they do not *arise out of* the workers' employment.[viii] The final category of assaults do not have any identifiable origin and they cannot be attributed to the workplace on any more rational basis than that the employment environment afforded a convenient place for the assault to occur. Some jurisdictions treat this third type of workplace assaults as compensable under their workers' compensation statutes.[ix] However, workplace-violence victims in other jurisdictions have relied upon this exception to avoid the exclusive-remedy doctrine.[x]

Recreational Activities/Visiting Place of Employment

Employees are frequently victimized on their employer's premises before they begin working, after their scheduled work hours, and while visiting the workplace for pleasure. Many such workers have been permitted to pursue lawsuits against their employers and avoid the exclusive-remedy doctrine by arguing that they were not acting *in the course of* their employment when the assault occurred.[xi] This theory was successfully advanced by the plaintiff in *Small v. McKennan Hospital*.[xii] In that case, the estate of a worker who was raped and murdered while visiting her workplace proved that the security provided by the defendant-employer was inadequate and obtained a verdict which was upheld by an appellate court. A few states have codified this exception and allow victimized workers and the surviving relatives of deceased employees to sue employers when the main purpose of the worker's visit was either social or recreational.[xiii]

Workplace Harassment

Employees who are assaulted, raped, or murdered in the workplace because of their sex, race, religion, or national origin may not be limited to the workers' compensation remedy. This workplace-harassment exception to the exclusive-remedy doctrine has been adopted in most jurisdictions.[xiv] Under federal and state laws, business owners can be held liable for workplace harassment committed by their supervisors and co-workers.[xv]

There are two types of workplace harassment. The first type of harassment involves an adverse employment action being taken against the victim. This is known as *quid-pro-quo* harassment. The second type is *hostile-work-environment* harassment, which is characterized by pervasive hostility in the workplace based upon an employee's sex, race, religion, or national origin. An employer is ordinarily liable for this type of harassment if it fails to take prompt remedial action to protect a worker once it has notice of the hostility.[xvi] In some states, employers are held strictly liable for sexual assaults committed by their supervisors.[xvii] While a majority of jurisdictions reject hostile-work-environment claims based upon one incident, a number of jurisdictions allow such claims to be made if the incident was sufficiently severe, as in the case of rape.[xviii]

Employer's Breach Of Assumed Or Contractual Duty To Provide Security

Victimized workers have also avoided the exclusive-remedy doctrine by arguing that their employers breached a contractual duty or an assumed duty to provide a safe work environment. These arguments were successfully asserted by the estate of a deceased worker who was the victim of a brutal homicide in *Vaughn v. Granite City Steel Division of National Steel Corp*.[xix] In that case, the court relied upon language in an employment procedures manual to support its decision that the employer had voluntarily assumed the duty to protect its workers. The court

was persuaded that such a duty existed because the employment manual stated that the employer would maintain a trained, responsive security force to keep unsavory individuals off of the business premises.

Independent Claims Of Surviving Relatives

Under most workers' compensation statutes, dependant family members of workers who are killed at work usually receive nominal compensation for their loss of financial support and they are given a small sum for funeral expenses. Workers' compensation statutes designate these benefits as the exclusive remedy for these survivors. A few jurisdictions recognize an exception to the exclusive-remedy doctrine in this context and permit the surviving relatives to assert their own independent claims against the deceased worker's employer. These jurisdictions recognize that there is an obvious distinction between the surviving relatives' independent claims and those that are derived from the deceased worker. The surviving relative did not bargain for the exclusivity of the workers' compensation remedy. This reasoning was adopted by the federal trial court in *Nelson v. Hawkins.*[xx] In that case, the defendant-employer moved for summary judgment, arguing that a deceased worker's parent's suit was barred by the death benefit provision in the workers' compensation statute. The court denied the motion, finding that an employer is not immune from an independent claim of a deceased worker's parent for negligent infliction of emotional distress. Other courts around the country have issued similar rulings.[xxi]

Exception Available To Minors

Minors in a few states have been afforded the right to file lawsuits against their employers.[xxii] Because of their age, young, injured workers may not be limited to taking

workers' compensation benefits. An additional benefit is sometimes provided to minors which allows them to select their preferred remedy after suffering an assault, rape, or other type of workplace injury.[xxiii]

Statutorily Defined Exceptions

Intentional Torts

The exclusive-remedy doctrine does not immunize business owners against liability for intentional torts.[xxiv] A majority of jurisdictions define intentional torts narrowly and limit the exception to only "true intentional torts." These are torts which are committed by employers with a "specific intent and desire to injure."[xxv] This exception was relied upon by the plaintiff in *Schutt v. Lado*.[xxvi] In that case, the employee was intentionally and falsely imprisoned by the employer, and the court held that the suit was not barred by the exclusive-remedy doctrine. Other states employ a much broader definition of intentional torts. These states allow workers to pursue lawsuits in cases where their injuries were caused by acts which were "substantially certain to occur." [xxvii] It is much easier for injured workers to circumvent the exclusive-remedy doctrine in jurisdictions that follow this rule. For example, in *Rovasio v. Wells*,[xxviii] an armored-car driver was shot by a third party while on the job. The driver filed suit, claiming that his employer intentionally refused to provide him with a bulletproof vest. The employer argued that the driver's suit was barred by the exclusive-remedy doctrine. The court disagreed, finding that the suit could proceed because it was substantially certain that the plaintiff would be injured without a vest.

Federal Employers' Liability Act/Jones Act

Federal employees who are victimized in the workplace are generally limited to the recovery of workers' compensation benefits. However, an exception to this general rule exists for federal railroad workers and seamen. The Federal Employers Liability Act provides the legal authority for railroad workers to avoid the exclusive-remedy doctrine, and the Jones Act excludes seamen from the federal workers' compensation scheme.[xxix] Both of these statutes have been used by victims to recover substantial verdicts from their employers. For example, in *Doe v. Louisiana Casino Cruises,*[xxx] the victim filed suit against her employer, a river boat casino, after she was attacked in a company parking lot. The plaintiff was awarded almost $1 million because of her employer's failure to provide adequate security in the parking lot.[xxxi]

Small Business/Minimum Payroll Exceptions

Workers' compensation statutes may not apply to smaller businesses or employers whose payroll falls below a certain threshold. In some states, businesses that do not employ at least some minimum number of workers are not immune from civil suits brought by those employees.[xxxii] This exception has enabled employees of smaller establishments, such as fast food restaurants and gas stations, who are frequently victimized in the workplace, to pursue negligent-security lawsuits against their employers. The minimum-payroll exception is similar in many respects, however, the focus is on an employer's total payroll obligation, not on the total number of employees.[xxxiii]

Opt-Out Provisions

Some states allow workers and employers the option of excluding themselves from the workers' compensation system.[xxxiv] Those workers who decide to opt out are permitted to pursue common-law tort actions against their employers.[xxxv] For an employee to be removed

from the workers' compensation scheme, the worker must specifically elect the common-law remedy in his or her employment contract; otherwise, it is presumed that the employee has elected statutory workers' compensation benefits.[xxxvi]

Employer's Failure To Purchase Or Maintain Insurance Coverage

Workers' compensation statutes impose an obligation on business owners to purchase and maintain insurance coverage for their employees, or to establish themselves as self-insured entities which retain sufficient monetary reserves to pay workers' compensation benefits. An employer's failure to purchase workers' compensation insurance, failure to pay premiums, or failure to maintain adequate funds in reserve may subject the employer to liability in a tort suit filed by an employee injured at work.[xxxvii] This exception has been justified as an incentive for compliance with workers' compensation laws.[xxxviii]

Third-Party Exceptions

The exclusive-remedy doctrine only bars suits against a worker's employer. It does not apply to any other potential defendants. As a result, workplace-violence victims may pursue civil suits against a wide range of possibly responsible third parties.

Labor Unions

Unions have been subjected to civil liability for assaultive conduct committed by their members upon temporary workers or those who decide to cross picket lines. A court recognized such liability in *United Brotherhood of Carpenters and Joiners v. Humphreys*.[xxxix] In that case, the plaintiff-worker was beaten by fellow union members because he decided to abandon the picket line and return to work. The court held that a principal is responsible for the wilful or malicious acts of its agent when those acts are committed within the course of the agent's

employment. The court concluded that the union was responsible because the motive for the assault grew out of the strike activities. Federal law also regulates the conduct of labor unions. For example, the Norris-LaGuardia Act imposes liability upon unions when they authorize, ratify, or participate in assaultive conduct by their members.[xl] Some states have adopted the federal rule, and other states follow the rule announced in *Humphreys*.

Franchisor Liability

Franchisors are not immune from tort liability and workplace-violence victims frequently assert claims against them. A franchisor's duty to protect employees of an independently owned franchise was addressed in *Martin v. McDonald's Corp*.[xli] In that case, restaurant employees were assaulted by an armed robber. The victimized workers and the estate of an employee who was killed sued the franchisor for failing to provide adequate security. The plaintiffs could not sue their actual employer because of the exclusive-remedy doctrine. McDonald's Corporation argued that it was a "joint employer" of the plaintiffs, and, therefore, it should be able to invoke the exclusive-remedy doctrine. The court rejected this argument, affirming the trial court's finding that the franchisor was liable for negligently performing its assumed duty to provide security to the franchisee's employees. This exception to the workers' compensation remedy is recognized in several jurisdictions and is frequently used by workplace-violence victims to avoid the exclusive-remedy doctrine.[xlii]

Security Companies

Employers often hire contract security firms to protect employees. When a security firm's negligence results in foreseeable harm to a worker, the victim may have a viable claim against the security company. This theory of liability has been recognized in a number of jurisdictions, and was examined by the court in *Holshouser v. Shaner Hotel Grp. Props. One*.[xliii] In that case, an employee who was raped on her employer's premises sued the security company hired by her employer. The company had been hired to provide security for guests and employees on the hotel premises. The trial court dismissed the complaint, finding that the security company did not have a duty to protect the plaintiff from the criminal assault. The appellate court reversed, holding that there was a triable issue of fact to be litigated. Numerous workplace-violence victims have availed themselves of this third-party exception.[xliv]

Commercial Landlords And Management Companies

Victims of workplace violence have also asserted negligent security claims against commercial landlords and management companies. Such claims have been recognized in numerous jurisdictions.[xlv] The legal duty owed by a commercial landlord to its tenants' employees was examined in *Nickelson v. Mall of America Company*.[xlvi] In *Nickelson*, a retail outlet store's manager was assaulted by a shoplifter. The victim sued the commercial landlord for failing to provide adequate security. The trial court dismissed the case, finding that the landlord had no duty to intervene on behalf of its tenant's employee. The Minnesota Court of Appeals reversed, holding that the plaintiff had stated a viable cause of action. The court reasoned that the defendant-landlord owed a legal duty to the plaintiff because it had hired a contract security company to protect its tenants' employees. Some courts impose an affirmative

duty upon commercial landlords to take reasonable steps to secure common areas against foreseeable criminal acts that are likely to occur in the absence of precautionary measures.[xlvii]

Conclusion

Given the prevalence of workplace crimes, victims' attorneys must carefully consider all of the possible exceptions to the exclusive-remedy doctrine. While the law in this area continues to evolve in a manner favorable to workers injured by crime, the facts of each case and pertinent state law will determine which of the exceptions should be pursued in litigation.

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i. DETIS T. DUHART, BUREAU OF JUSTICE STATISTICS, VIOLENCE IN THE WORKPLACE, 1993-1999 (2001); Eric Berkman, LAWYERS WEEKLY USA, July 26, 1999.

ii. *See, e.g.*, Joel H. Neuman, et al, *Workplace Violence and Workplace Aggression*: *Evidence Concerning Specific Forms, Potential Causes, and Preferred Targets*, 24 JOURNAL OF MANAGEMENT (1998), at 391-491; and Richard V. Denenberg, et al, *The Violence-Prone Workplace* (Ithaca: Cornell University Press, 1999).

iii. James A. Merchant, et al, *Workplace Violence: A Report to the Nation* (Iowa City: The University of Iowa Injury Prevention Research Center 2001).

iv. *See*, e.g., *Dietz v. Finlay Fine Jewelry Corp.*, 745 N.E.2d 958 (Ind. Ct. App. 2001) (holding that the exclusive-remedy provision did not operate as a bar to litigation because the court characterized the injury sustained by the plaintiff as one not involving a "personal injury," which is a requirement under most workers' compensation laws). *See also, Zeph v. Hilton Hotel & Casion*, 786 A.2d 154 (N.J. Super. 2001); *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489 (Tex. App. 2002).

v. Material that substantially informed the authors includes: Michelle R. Gagnon, *Employer Liability for Workplace Violence*, 1 VICTIM ADVOCATE 17 (2000); Daniel B. Kennedy, *Workplace Violence* in ENCYCLOPEDIA OF CRIMINOLOGY (Richard A. Wright ed., forthcoming 2003); Ann E. Phillips, Comment, *Violence in the Workplace: Reevaluating the Employer's Role*, 44 BUFF. L. REV. 139 (1996).

vi. *See, e.g., Liebam v. Colonial Baking Co.*, 391 S.W.2d 948 (Mo. Ct. App. 1965).

vii. *See, e.g., Aaron v. New Orleans Riverwalk Ass'n*, 580 So. 2d 1119 (La. Ct. App. 1991).

viii. This is also known as the sexual assault exception in some jurisdictions. *See McGowan v. Our Savior's Lutheran Church*, 527 N.W.2d 830 (Minn. 1995).

ix. *See, e.g., Holshouser v. Shaner Hotel GRP. Props. One*, 518 S.E.2d 17 (N.C. 1999).

x. *See, e.g., Dupont v. Aavid Thermal Technologies, Inc.*, 798 A.2d 587 (N.H. 2002).

xi. *See*, e.g., *Cremeans v. Maynard*, 246 S.E.2d 253 (Va. 1978).

xii. *Small v. McKennan Hospital*, 403 N.W.2d 410 (S.D. 1987).

xiii. *See, e.g.*, MICH. COMP. LAWS. ANN. 418.301 (3).

xiv. *See, e.g., Slayton v. Michigan Host, Inc.*, 376 N.W.2d 664 (Mich. Ct. App. 1985) and *Doe v. Celadon Trucking Servs.*, Webb County (TX) 341st Dist. Ct., No. 1999-CVQ 001270 D3 (Apr. 19, 2002). Workers have also successfully claimed that they were harassed by business patrons. *See, e.g., Turnbull v. Topeka State Hosp.*, 255 F.3d 1238 (10th Cir. 2001).

xv. *See* MICH. COMP. LAWS. ANN. 37.2101 *et seq*. and 42 U.S.C. §2000e *et seq*.

xvi. *See, e.g., Sheridan v. Forest Hills Public Schools*, 637 N.W.2d 536 (Mich. Ct. App. 2001).

xvii. *See, e.g., Champion v. Nation Wide Security*, 545 N.W.2d 596 (Mich. 1996) and *Doe v. Capital Cities*, 58 Cal. Rptr.2d 122 (Cal. Ct. App. 1996).

xviii. *See, e.g., Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128 (2nd Cir. 2001) and *Radtke v. Everett*, 501 N.W.2d 155 (Mich. 1993).

xix. *Vaughn v. Granite City Steel Division of National Steel*, 576 N.E.2d 874 (Ill. App. Ct. 1991).

xx. A parent's claim was upheld in *Nelson v. Hawkins*, Civil Action No. 98-39-DWM (D. Mont. 1998). For other relatives, see *Ferriter v. Danile O'Connel's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980).

xxi. *See, e.g., Johnson v. BP Chemicals, Inc*., 707 N.E.2d 1107 (Ohio 1999) and *Mullarkey v. Florida Reed Mills, Inc*., 268 So. 2d 363 (Fla. 1972).

xxii. *See, e.g., Patterson v. Martin Forest Prods*., 774 So. 2d 1148 (La. Ct. App. 2000).

xxiii. *See, e.g., Pappano v. Shop Rite of Pennington, Inc*., 517 A.2d 178 (N.J. 1986).

xxiv. See a recent case where a victimized worker avoided the exclusive-remedy provision based upon the intentional tort exception. *Taylor v. Transocean Terminal Operators*, 785 So .2d 860 (La. Ct. App. 2001).

xxv. *See, e.g, Travis v. Dreis and Krump Manufacturing Company*, 551 N.W.2d 132 (Mich. 1996); *Lantz v. National Semiconductor Corp*., 775 P.2d 937 (Utah Ct. App. 1989).

xxvi. *See, e.g., Schutt v. Lado*, 360 N.W.2d 214 (Mich. 1984).

xxvii. Several jurisdictions have followed this standard. *See, e.g., Johnson v. BP Chemicals, Inc.*, 707 N.E.2d 1107 (Ohio 1999); *Eller v. Shova*, 630 So. 2d 537 (Fla. 1993).

xxviii. *See, e.g., Rovasio v. Wells Fargo Armored Services*, 767 A.2d 1288 (Conn. Super. Ct. 2001).

xxix. The FEDERAL EMPLOYERS' LIABILITY ACT 45 U.S.C. 51 and the JONES ACT 46 U.S.C. 688.

xxx. *Doe v. Louisiana Casino Cruises*, La. E. Baton Rouge Parish 19th Jud. Dist. Ct., Civil Action No. 457,900 (Feb. 17, 2000).

xxxi. *Id*.

xxxii. *See, e.g., Ex Parte A-O Machine Company, Inc*. 749 So .2d 1268 (Alaska 1999); *Withers v. Black*, 53 S.E.2d 668 (N.C. 1949).

xxxiii. For a discussion of this rule in the context of a worker who was shot during a robbery of a video casino, see *Lester v. Workers' Compensation Com'n.*, 514 S.E.2d 751 (S.C. 1999); *but see Huff v. Smith Trucking*, 6 S.W.3d 819 (Ky. 1999)(refusing to recognize a minimum-number-of-employees requirement).

xxxiv. For an example of a typical statute that permits the employee to opt out of the workers' compensation statute, see R.I. GEN. LAWS §28-29-17. In certain jurisdictions, employers are permitted to opt out of the workers' compensation system. *See, e.g., Williams v. Razor Enterprises*, 70 S.W.3d 274 (Tex. Ct. App. 2002).

xxxv. *See, e.g.*, N.J. STAT. ANN. 34:15-1.

xxxvi. This is a statutory presumption. *See* N.J. STAT. ANN. 34:15-9.

xxxvii. *See, e.g., Smeester v. Pub-N-Grub, Inc*., 527 N.W.2d 5 (Mich. Ct. App. 1995). *See also* MICH. COMP. LAWS ANN. 418.641(2).

xxxviii. This rationale was explained at length in *Ehredt v. Dehavilland Aircraft Co. of Canada*, 705 P.2d 913 (Alaska 1985).

xxxix. *United Brotherhood of Carpenters and Joiners of America, AFL-CIO v. Roscoe Humphreys*, 127 S.E.2d 98 (Va. 1962).

xl. NORRIS-LAGUARDIA ACT, 29 U.S.C. §106 (1970). *See also Laborers' International Union of North America and Laborers' International Union of North America, Local No. 1240 v. Charles W. Rayburn*, 559 So. 2d 1219 (Fla. 1990).

xli. *Martin v. McDonald's Corp*., 572 N.E.2d 1073 (Ill. App. Ct. 1991).

xlii. *Exxon Corp. V. Tidwell*, 876 S.W.2d 19 (Tex. 1993). This exception has also been used by workers of subsidiaries to assert claims against parent corporations. *See Boggs v. Blue Diamond Coal Co.*, 590 F.2d 655 (6th Cir. 1979).

xliii. *Holshouser v. Shaner Hotel GRP. Props. One*, 518 S.E.2d 17 (N.C. 1999).

xliv. *See, e.g., Bonds v. Abberville General Hosp*., 782 So. 2d 1188 (La. Ct. App. 2001).

xlv. *See, e.g., Jardel Co., Inc. v. Huges*, 523 A.2d 518 (Del. Super. Ct. 1987); *Doe v. Dominion Bank of Washington, N.A.*, 963 F.2d 1552 (D.C. Cir. 1992); and *Sharon P. v. Arman, LTD*., 989 P.2d 121 (Cal. 1999).

xlvi. *Nickelson v. Mall of America Company*, 593 N.W.2d 723 (Minn. Ct. App. 1999).

xlvii. *Sharon P. v. Arman, LTD*., 989 P.2d 121 (Cal. 1999).