

OHIO'S EMPLOYER INTENTIONAL TORT STATUTE UPHELD AS CONSTITUTIONAL



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For the past two decades, Ohio employers have been forced to navigate the ever-changing waters of Ohio's employer intentional tort law. Since the inception of the so-called employer "intentional tort," employers, with the assistance of the legislature, have been fighting for a liability standard which requires a **direct intent** to injure the employee. The Supreme Court of Ohio provided employers this much needed victory on March 23, 2010, in deciding the tandem cases of *Kaminski v. Metal & Wire Products Co.*, 2010-Ohio-1027 and *Stetter v. R.J. Corman Derailment Servs.*, L.L.C., 2010-Ohio-1029.

By way of background, the Supreme Court of Ohio established the common law action for employer intentional torts in *Blankenship v. Cincinnati Milacron Chems., Inc.* (1982), 69 Ohio St.2d 608, 433 N.E.2d 572. This cause of action allowed an employee not only to recover any and all benefits available under the state's workers' compensation scheme, but also to sue his/her employer and seek additional and more expansive damages by claiming that the employer "intentionally" caused the injury. Two years later, the Court affirmed its decision and further expanded employer intentional tort claims to encompass situations not only where the employer possessed an actual intent to injure, but also to circumstances where the employer required the employee to perform an act with the belief that injury to the employee was "substantially certain" to occur. *Jones v. VIP Dev. Co.* (1984), 15 Ohio St.3d 90, 472 N.E.2d 1046. The Court subsequently developed a three prong analysis to determine whether an employer possessed the requisite intent for purposes of these "substantial certainty" employer intentional tort claims. *Fyffe v. Jenos, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489.

In 2005, the Ohio legislature passed R.C. 2745.01 in an attempt to limit employer intentional tort claims. Pursuant to R.C. 2745.01(A), an employer is liable for an employer intentional tort if "the plaintiff proves that the employer committed the tortuous act with the intent to injure another or with the belief that the injury was substantially certain to occur." The statute, however, proceeds to define substantially certain as an employer acting "with **deliberate intent** to cause an employee to suffer an injury, a disease, a condition, or death." R.C. 2745.01(C).

Thus, to impose liability upon an employer for an intentional tort as defined by R.C. 2745.01, an employee must establish that the employer actually intended to injure the employee. As defined under the statute, it is no longer sufficient to establish that the employer committed an intentional act with the belief that the injury to the employee was "substantially certain" to occur. In other words, through the passage of R.C. 2745.01, the legislature limited an employer intentional tort claim to situations where the employer possessed an actual intent to injure. Consequently, "substantial certainty" intentional tort claims are no longer legally cognizable given the definition of intent provided by R.C. 2745.01.

The 2005 amendments to R.C. 2745.01 were the Ohio legislature's **third** attempt to limit employer intentional tort claims to situations where the employer possessed an actual intent to injure. Both previous attempts were deemed unconstitutional by the Supreme Court of Ohio. *Johnson v. BP Chemicals, Inc.*, 85 Ohio St.3d 298, 1999-Ohio-267, 707 N.E.2d 1107; *Brady v. Safety-Kleen Corp.* (1991), 61 Ohio St.3d 624, 576 N.E.2d 722.

In light of the legislature's three prior attempts to limit employer intentional torts, the employee in *Kaminski* argued that R.C. 2745.01 was unconstitutional. Although the trial court found the statute constitutional, the appellate court overruled the trial court and, based upon the Supreme Court of Ohio's previous decision finding similarly worded employer intentional tort statutes unconstitutional, held that R.C. 2745.01 was unconstitutional.

The Supreme Court of Ohio reversed the appellate court in *Kaminski* finding R.C. 2745.01 does not violate the Ohio Constitution. In doing so, the Court analyzed the extensive history of Ohio's workers' compensation laws and the development of the common law employer intentional tort cause of action. The Court recognized that the Ohio Constitution intended the workers' compensation system to be the exclusive remedy for injuries occurring within the course and scope of employment and that an employer intentional tort claim was a judicially created common law exception to that exclusive remedy.

The Court further recognized that through R.C. 2745.01, the legislature was attempting to limit common law employer intentional tort causes of action to situations where "an employer acts with specific intent to cause an injury." The Court noted that the legislature possesses the authority to alter, modify or abolish the common law and to define public policy. As such, according to the Supreme Court, the legislature possessed the authority to enact R.C. 2745.01 in an attempt to limit the common law.

In the tandem opinions, the Court proceeded to address the various constitutional attacks lodged against R.C. 2745.01, including whether the statute violated the Ohio Constitution's provisions covering workers' compensation, separation of powers, as well as the rights to trial by jury, to a remedy, to open courts, to due course of law and to equal protection. After subjecting R.C. 2745.01 to constitutional scrutiny, the Court upheld the statute as constitutional.

The Court further held in the tandem opinions that R.C. 2745.01 does not eliminate the common law cause of action for employer intentional torts but, instead, limits the common law cause of action to situations where the employer acted with deliberate intent to injure the employee. Thus, “the statutory standards [of R.C. 2745.01] apply [to employer intentional tort claims] rather than the common-law standards of *Fyffe*.”

Because R.C. 2745.01 does not contain retroactive application, the common law standards of *Fyffe*, however, still are applicable to employees “whose causes of action arose before the statute’s [April 7, 2005] effective date and whose claims have vested.”

The import of these decisions for Ohio employers, insurance carriers, and litigating attorneys cannot be understated. R.C. 2745.01’s requirement that an employee establish that the employer **actually intended** to injure the employee is a difficult standard for an employee to overcome. In fact, as Justice Pfeifer argues in his dissenting opinion, R.C. 2745.01 “in reality defines the [employer intentional tort] cause of action into oblivion.” Although Justice Pfeifer may be correct, the Court’s decision to uphold the “direct intent” standard manifests agreement with the legislature’s intent all along to abolish the negligence-type standard created by “substantial certainty” intentional torts.

The *Kaminski* and *Stetter* decisions can be expected to produce wide-spread impact on the manner in which intentional tort claims are litigated in Ohio such as: the number of filings, the quality of intentional tort claims filed, negotiation and settlement, evidentiary burdens, discovery, and the breadth of cases taken to trial. Although these decisions will also certainly impact insurance coverage for employer intentional tort claims, the Supreme Court of Ohio has substantially limited the risk of employee injuries for employers in Ohio.

Although the Supreme Court of Ohio provided employers with a degree of insulation from intentional tort claims, it must be noted that R.C. 2745.01 contains an exception to the requirement that liability only lies when the employer deliberately intends to injure the employee. R.C. 2745.01(C) states that “[d]eliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.” This provision clearly does not require the employer to possess an actual intent to injure, but rather is more akin to a “substantially certain” employer intentional tort. In those specific circumstances, however, the employer may nevertheless rebut the presumption of intent.

If you would like a copy of the full opinions or if you have any other questions regarding the impact of these recent Supreme Court of Ohio decisions on employment practices liability in Ohio, feel free to contact one of our Employment Practices Liability Practice Group Attorneys.

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