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Abstract

Under Florida law, the defense of intoxication can be asserted by an employer when his employee makes a claim for workmen's compensation. Section 440.09(3) of the Florida Statutes deals in pertinent part with the defense of intoxication wherein: "No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee.."

KEYWORDS: employer, employee, drunk

Workmen's Compensation: What if the Employer Gets the Employee Drunk?

Under Florida law, the defense of intoxication can be asserted by an employer when his employee makes a claim for workmen's compensation. Section 440.09(3) of the Florida Statutes deals in pertinent part with the defense of intoxication wherein: "No compensation shall be payable if the injury was occasioned primarily by the intoxication of the employee"¹ This statute, and the decisions interpreting it, stand for the general proposition that, if an injury was caused primarily by the claimant's intoxication and it can be shown that the intoxication was the proximate cause of the injury, then recovery will be denied.²

In construing Section 440.09(3), Florida courts have been concerned with the causal relationship of the claimant's conduct to the injury.³ It is surprising to note, however, that the courts do not mention the employer's possible culpability: "What if the employer gets the employee drunk?"⁴

To date, there have been no cases in Florida dealing with this problem. This paper will explore the resolution of this issue in other jurisdictions and apply existing Florida law to the analyses rendered.

1. SOLUTIONS IN OTHER JURISDICTIONS

In *Tate v. Industrial Accident Commission*,⁵ the California District Court of Appeals, when confronted with a case where the employer bought drinks for the claimant and then sent him home in a company car, held:

1. § 440.09(3) FLA. STAT. (1977).

2. See, e.g., *Zee v. Gary*, 189 So. 34 (Fla. 1939), where the Florida Supreme Court adopted the view that an injury caused by extreme intoxication of the employee does not arise out of the employment.

3. See, e.g., *Cone Brothers Contracting Co. v. Allbrook Co.*, 16 So. 2d 61 (Fla. 1943); *Duval Engineering and Contracting Co. v. Johnson*, 16 So. 2d 290 (Fla. 1944).

4. L. M. ALPERT, *FLORIDA WORKMEN'S COMPENSATION LAW*, § 19-12 at 493 (2nd ed. 1975).

5. 120 Cal. App. 2d 657, 261 P. 2d 759 (1st DCA 1953).

Such a state of facts, if found to exist, would support a finding of estoppel. Such participation by the employer amounts to an implied representation that the employer will not hold it against the employee if he drinks, and will not deprive him of his job or of compensation benefits if he does so.⁶

Thus, the employer was prohibited from raising the intoxication of the employee as a defense to the claim for benefits.

In the leading California case, *McCarty v. Workmen's Compensation Appeals Board*,⁷ the employee's estate claimed death benefits for a fatal injury which occurred when the worker was returning home from a company-sponsored activity where the employer had permitted and encouraged the consumption of alcoholic beverages. The California Supreme Court, in overruling the Workmen's Compensation Appeals Board, held that the employer was estopped from asserting the defense of employee intoxication since the facts demonstrated that the purchase of intoxicants with company funds and the employer's active involvement in the service of liquor at a company activity brought the employee's conduct within the scope of employment.⁸

The New Hampshire Supreme Court adopted an approach similar to *Tate* in *Henderson v. Sherwood Motor Hotel, Inc.*⁹ There, the employee, a cocktail waitress, became intoxicated while on duty. The employer, aware of her condition, allowed her to leave work alone. In upholding the employee's claim which arose out of an automobile accident on the way to her home, the court reasoned that, "[i]f the accident resulted from her intoxication, her death could clearly be found to have arisen 'out of' her employment."¹⁰ In reviewing the facts, the court concluded that the employer, in effect, had directed the deceased employee to the location of the accident and contributed to her intoxicated condition: "The fact that the accident was caused by the decedent's intoxication is no bar to the action, since it was stated that 'the employer knew that the employee was intoxicated.'"¹¹

6. 261 P. 2d at 764.

7. 12 Cal. 3d 677, 117 Cal. Rptr. 65, 527 P. 2d 617 (1974).

8. *Id.* at 684-85, 117 Cal. Rptr. at 69-70, 527 P. 2d at 622.

9. 201 A. 2d 891 (N.H. 1964).

10. *Id.* at 894. "The time bomb . . . is started ticking during working hours, but it happens to go off at a time and place remote from the employment. The hazards of the employment follow the claimant beyond the time and space limits of his work and there injure him." *Id.*, citing 1 LARSON, WORKMEN'S COMPENSATION LAW, § 29.22 at 450.

11. 201 A. 2d at 894.

In an important Indiana case, *United States Steel Corporation v. Mason*,¹² the employer allowed the claimant to operate a crane while he was intoxicated. The Appellate Court found that, under those circumstances, an affirmative duty was placed on the employer by common law:

By no means do we excuse drinking or intoxication on the part of employees on any job, nor do we mean to contravene the statute that bars recovery by employees who are intoxicated. What we are saying is that when a violation is as evident and plain as in this case, the employer must take some step to eliminate any semblance of approval or acquiescence.¹³

A review of existing case law shows that, in other jurisdictions, when an employer allows or encourages his employee to become intoxicated, such acquiescence bars him from raising intoxication as a defense to a claim by the employee. This holds true even if the injuries are sustained away from the employer's premises, once it can be shown that the main activity of the worker was within the scope of his employment, *i.e.*, a company function.¹⁴

By comparison, in other states, this issue is encompassed within the statutory framework. For example, Chapter 30, Section 61 of the Revised Statutes of Maine provides:

No compensation or other benefits shall be allowed for the injury or death of an employee where it is proved that . . . the same resulted from his intoxication while on duty. *This provision as to intoxication shall not apply, if the employer knew that the employee was intoxicated or that he was in the habit of becoming intoxicated while on duty.*¹⁵

Under this statute, if the claimant can show that the employer knew of either specific intoxication or habitual drunkenness, he can prevent the employer from raising the defense of intoxication. It is interesting to note that Maine has carried the doctrine of employer responsibility set forth in the common law one step further to cover the case of a worker who has exhibited alcoholic dependency on *previous* occasions.

12. 227 N.E. 2d 684 (Ind. App. Ct. 1967).

13. *Id.* at 696.

14. *See generally* 47 A.L.R. 3d 566 (1973).

15. ME. REV. STAT. ch. 39, § 61 (1964) (emphasis added).

2. DEVELOPING THE THEORY IN FLORIDA

Two of the basic postulates applied in other jurisdictions could also be argued in Florida cases. First, the doctrine of estoppel¹⁶ and second, the scope of employment theory.¹⁷

The application of the estoppel doctrine to workmen's compensation cases is stated generally in *Mercier v. American Refractories and Crucible Corporation*.¹⁸

[A]n employer may, by his conduct, estop himself from asserting what under other circumstances would constitute a good defense to a claim for consideration . . . Estoppel involves the two elements of misleading conduct by one party and prejudicial harm resulting to the other party.¹⁹

Unfortunately, use of the estoppel doctrine has been limited in Florida compensation law to questions involving entitlement to compensation. In *Butler v. Allied Dairy Products*,²⁰ the court held that an employer and its insurance carrier, which had for several years provided medical attention and treatment to an employee injured outside the state, were estopped from disclaiming further liability for benefits on the ground that the employment contract was not executed in Florida.²¹

Similarly, in *Blair v. Edward J. Gerrits, Inc.*,²² the employee was hired in Florida to do construction work in Puerto Rico and was injured and hospitalized in Puerto Rico. When he left the hospital, his supervisor purchased transportation for him to return to Florida, where he was provided with medical treatment by the employer. The court, in holding that the employer was estopped from insisting that the claimant return to Puerto Rico for medical treatment and compensation, said, "[t]he employer-carrier may not now be allowed to say there is no coverage in Florida when their prior conduct logically led the Petitioner to believe

16. See text accompanying notes 5 and 6 *supra*.

17. See text accompanying notes 7 through 11 *supra*.

18. 200 A. 2d 716 (Conn. 1964).

19. *Id.* at 720.

20. 151 So. 2d 279 (Fla. 1963).

21. *Id.* at 283. The Florida Workmen's Compensation statute provides that, if the employment contract is executed in Florida, an employee who is injured outside of the state is entitled to compensation. *Id.* at 281. The court pointed out that the gist of the statute is not whether the Industrial Relations Commission has jurisdiction over the subject matter, but whether the claimant is entitled to benefits. *Id.* at 283.

22. 193 So. 2d 172 (Fla. 1966).

that he could expect and receive coverage here."²³

Therefore, since the doctrine of estoppel is utilized in other areas of Florida compensation law, it might also be employed to bar the defense of employee intoxication. The two elements for estoppel enunciated in *Mercier*²⁴ would be satisfied by showing: 1) misleading conduct by one party — the employer's acquiescence in or encouragement of the employee's intoxication; and 2) prejudicial harm resulting to the other party — the employee's loss of compensation benefits.²⁵

The more fruitful approach to this issue may be found within the framework of "scope of employment."²⁶ If it can be shown that employee drinking is within that "scope," the employer may be held liable for claims arising out of injuries proximately caused by the intoxication.

The general test for connection to work is stated succinctly as follows:

A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment. An activity is related to the employment if it carries out the employer's purposes or advances his interests directly or indirectly. Under the modern trend of decisions, even if the activity cannot be said in any sense to advance the employer's interests, it may still be in the course of employment if, in view of the nature of the employment environment, the characteristics of human nature, and the customs or practices of the particular employment, the activity is in fact an inherent part of the conditions of that employment.²⁷

In Florida, this doctrine has been codified at Section 440.02(6) of the Florida Statutes, which defines "injury" as "personal injury or death by accident arising out of and in the course of employment . . ." ²⁸ Following the enactment of this statute, the Florida Supreme Court was

23. *Id.* at 175. The parties agreed that, since the contract was for employment exclusively out of state, the claimant would otherwise have been barred from recovery. *But see* *Wainright v. Wainright, Inc.*, 237 So. 2d 154 (Fla. 1970) (citing *Butler* and *Blair*, but holding that there was no waiver or estoppel in this particular case).

24. 200 A. 2d 716.

25. *See* text accompanying note 19 *supra*.

26. This doctrine, concerned with causal connection, holds that an employee's injuries would be compensable if he could show that the injuries would not have happened but for the conditions of the employment. *See generally* 1 LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, Ch. III (1978).

27. LARSON, *supra* note 26, § 20.00 at 5-1.

28. § 440.02(6) FLA. STAT. (1978).

confronted with an employee intoxication case in *Johnson v. Koffee Kettle Restaurant*,²⁹ where the employee was killed while walking across the highway from his place of employment, a restaurant, to obtain supplies from the grocery store across the street. His breath was found to contain an odor of alcoholic beverage. Nevertheless, the court allowed recovery.³⁰

In another Florida intoxication case, *Maroney v. Kelly and Sons, Inc.*,³¹ the claimant was entrusted with the employer's truck. After he completed a business mission, he drank beer with a fellow employee. He then realized that he had forgotten certain documents and decided to return to the place where he had left them. While en route, he was injured. The court denied compensation, applying the deviation from employment doctrine,³² without commenting on the intoxication issue or the employer's knowledge of the employee's drinking.³³

Florida courts have been confronted with various cases involving the liability of employers for injuries sustained by employees who followed their employers' directions. For example, in *Taylor v. Dixie Plywood Company*,³⁴ the court awarded compensation to an employee who was injured in an automobile accident on the way to his doctor's office, after being directed by his employer to seek medical attention for a job-related injury which occurred earlier that day. Similarly, in *Heller Brothers Packing Company v. Lewis*,³⁵ the Florida Supreme Court based its ruling for the claimant on the rationale that, when the employer "directed" the employee to take the company jeep and obtain

29. 125 So. 2d 297 (Fla. 1960).

30. In allowing recovery, the following test was applied:

[I]t is essential that claimant prove or show a state of facts from which it may be reasonably inferred that deceased was engaged in his master's business when the accident resulting in his injury took place. If the evidence to establish such a state of facts is competent and substantial and comports with reason or from which it may be reasonably inferred that deceased was engaged in his master's business when he was injured, it is sufficient.

Id. at 299. It is interesting to note that the defense of employee intoxication was not mentioned by the court.

31. 195 So. 2d 208 (Fla. 1967).

32. This doctrine holds that an employee who deviates from his employment duties in order to conduct personal business is not entitled to compensation for injuries sustained before he returns to those duties. See *Fidelity & Casualty Co. of New York v. Moore*, 196 So. 495 (Fla. 1940).

33. 195 So. 2d at 209-10.

34. 297 So. 2d 553 (Fla. 1974).

35. 20 So. 2d 385 (Fla. 1945).

lunch (at which time he was injured), the employer was advancing his own interests.³⁶

Similar holdings may be found in cases where the employer supplies transportation for the employee. In *Huddock v. Grant Motor Company*,³⁷ the Florida Supreme Court found that injuries sustained by an employee who is provided with transportation by the employer are compensable when that arrangement is:

the result of an express or implied agreement between the employer and his workman or when it has ripened into a custom to the extent that it is incidental to and part of the contract of employment, or when it is with the knowledge and acquiescence of the employer, or when it is the result of a continued practice in the course of the employer's business, and which practice is beneficial to both the employer and the employee.³⁸

This theory, by analogy, could be applied to the issue under discussion. If the employee could show that the employer provided him with the opportunity to become intoxicated, acquiesced in or encouraged his drinking, the employee could argue that his resulting behavior should be considered within the scope of employment. Therefore, any resulting injury would be compensable, despite an assertion by the employer that the defense of employee intoxication would defeat the claim.

A more restrictive approach has been taken in the area of recreation than in other employer-supplied activities. For example, in *Mathias v. City of South Daytona*,³⁹ the Florida Supreme Court denied a petition for writ of certiorari to review the order of the Industrial Relations Commission denying benefits to a police officer who was injured at a

36. *Id.* at 387. The court recognized the general principle that there is no liability when an injury occurs during lunchtime and away from the employer's premises, even though the employee may be riding in the employer's vehicle, "on the theory that the accident did not arise out of or in the course of the employment." *Id.* at 387. Nevertheless, it upheld the award for compensation, stating:

The foreman well knew that a hungry fruit picker could not render very efficient services and a lunch would enhance the interest of both the employer and employee in that food would create the strength and reserve of the employee to work, thereby resulting in more efficient services in gathering fruit in behalf of the employer. The interest of the employer was advanced by the foreman in directing the employee to take the [employer's] "jeep" and go to . . . obtain lunch.

Id.

37. 228 So. 2d 898 (Fla. 1969).

38. *Id.* at 900.

39. 350 So. 2d 458 (Fla. 1977).

softball game held at his employer's home. Although at the administrative hearing the Judge of Industrial Claims awarded compensation, having found that the function fell within the scope of employment and that pressure was brought on the employee to attend, the claim for compensation was rejected by the Commission.⁴⁰ Justice Sundberg, in a dissenting opinion, argued that, in light of the general rules enunciated in Larson,⁴¹ the view adopted in Florida is conservative and self-defeating.⁴² Recreational activities are defined as being within the course of employment when:

1. They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
2. The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
3. The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.⁴³

While these criteria could be applied in intoxication cases by drawing an analogy to employer-sponsored recreational activities, the employer may claim that, since drinking is beneficial primarily to the employee, the claimant's attempt to prohibit the employer from raising the intoxication defense should be defeated. In response, the claimant could argue that an employee who becomes intoxicated while engaged in business-related activities is serving both a personal and a business purpose and should be compensated for resulting injuries under the "dual purpose doctrine."⁴⁴

40. *Id.* at 458.

41. *Supra* note 26.

42. 350 So. 2d at 459-60 (Sundberg, J. dissenting). For a more enlightening approach, see *Tedesco v. General Electric Co.*, 305 N.Y. 544, 114 N.E. 2d 33 (Ct. App. 1953) (holding that, under the facts of the case, injuries sustained during a softball game were compensable as arising out of the course of employment).

43. LARSON, *supra* note 26, § 22.21 at 5-71.

44. The "dual purpose doctrine" is stated in *Krause v. West Lumber Co.*, 227 So. 2d 486 (Fla. 1969), where the Florida Supreme Court upheld a claim for injuries suffered in a car accident by the employee who was on the way to an employer-sponsored sales meeting. The employer had directed the employee to take the employee's own automobile for the trip. "The fact that claimant's personal convenience was being served, as well as the interest of the employer, does not preclude recovery. An employee whose activities are serving a personal *and* business purpose is within the

3. CONCLUSION

The question of employer encouragement with respect to the defense of employee intoxication is unanswered in Florida, although other jurisdictions resolve the issue through case law or statute. Nevertheless, through the application of the doctrine of estoppel, as well as argument by analogy to scope of employment situations where the employer either directs, encourages or allows certain employee conduct, the Florida claimant has legal authority to prevent the employer from successfully raising the defense.

However, the employer can limit the effectiveness of the claimant's position by asserting that, since drinking is solely in the employee's beneficial interest, any claim for workmen's compensation benefits for injuries to an intoxicated employee should be denied. Although the Florida Supreme Court has not yet ruled on this issue, its reluctance in some areas, *e.g.*, recreation, to disturb holdings of lower courts which upheld the defense of employee intoxication suggests that the Florida claimant will have difficulty in successfully pursuing a claim for workmen's compensation when his intoxication is caused, even in part, by actions of his employer.

Myrna L. Black

scope of the Workmen's Compensation Act." *Id.* at 488 (emphasis added). *See also* Zipperer v. Peninsular Life Ins. Co., 235 So. 2d 473 (Fla. 1970).