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JLO Newsletter Fall 2018

The Exclusivity Provision Means Exclusive

Ekblad v. Indep. Sch. Dist. No. 625, 17-2359, 2018 WL 3768429, at *1 (8th Cir. Aug. 8, 2018)[1]

By Tal A. Bakke

Work place injuries in Minnesota are exclusively compensated by workers' compensation benefits. Minn. Stat. § 176.031. "The exclusive remedy provision is part of the quid pro quo of the workers' compensation scheme in which the employer assumes liability for work-related injuries without fault in exchange for being relieved of liability for certain kinds of actions and the prospect of large damage verdicts." *Karst v. F.C. Hayer Co., Inc.*, 447 N.W.2d 180, 184 (Minn. 1989). In essence, the exclusive remedy provision provides certainty to employees in that an employee will be compensated for work related injuries and removes the uncertainty and expense often associated with lengthy litigation. *See generally* Minn. Stat. 176.001. The exclusivity provision is not without exception but, unlike other areas of the law, the exceptions have not swallowed the rule. *Karst*, 447 N.W.2d at 185. Rather, the Minnesota Supreme Court "has been consistently unwilling to extend these exceptions without a clear manifestation of legislative intent to do so." *Id.* A recent decision of the Eighth Circuit Court of Appeals demonstrates the strength of the exclusivity provision and just how narrowly its exceptions are applied. *See Ekblad v. Indep. Sch. Dist. No. 625*, 17-2359, 2018 WL 3768429, at *1 (8th Cir. Aug. 8, 2018).

Factual Background

John Ekblad filed a lawsuit against his employer, Saint Paul Public Schools (SPPS), Independent School District No. 625, alleging negligence, negligent supervision, and Civil Rights violations under 28 U.S.C. §1983. *Ekblad v. Indep. Sch. Dist. No. 625*, 17-2359, 2018 WL 3768429, at *1 (8th Cir. Aug. 8, 2018).[2] The claim arose out of Mr. Ekblad's attempt to break-up a fight between students that resulted in him being attacked and beaten by one of the students. *Id.* After the attack, Mr. Ekblad's attacker asked students observing the fight: "Did you see me slam that white-ass teacher." *Id.* The SPPS does not require its teachers to intervene in fights but instructs teachers to intervene if they feel they can do so safely, noting a teacher will not be subject to discipline for failing to intervene. *Id.* Mr. Ekblad received injuries from the attack for which he received workers' compensation benefits. *Id.*

The School District moved for summary judgment dismissal arguing Mr. Ekblad's sole remedy was under the Workers' Compensation Act. The district court agreed and Mr. Ekblad appealed. At the Eighth Circuit, Mr. Ekblad argued that his claim fell within three exceptions to the exclusivity provisions: (1) the assault exception, (2) the intentional act exception, and (3) the co-employee liability exception. The Eighth Circuit disagreed and affirmed. Both the Federal District Court for the District of Minnesota and the Eighth Circuit Court of appeals recognized that exceptions to the exclusivity provisions are narrow.

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Congratulations

Jardine, Logan & O'Brien, PLLP congratulates **Jordan C. Leitzke** for passing the bar and joining the firm as an Associate.

Jordan received his J.D. from the University of Minnesota Law School, where he served on the editorial board for the ABA Journal of Labor and Employment and worked in the Child Advocacy Clinic. During law school, Jordan also held judicial externships with Magistrate Judge Becky Thorson of U.S. District Court - District of Minnesota and Judge Laurie Miller in Hennepin County. He joined JLO in 2016 as a law clerk and worked at the firm throughout his second and third years of law school, working primarily in Government Liability and Employment Law practice groups.

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The Assault Exception

First, Mr. Ekblad argued his claim fell within the assault exception, which includes injuries inflicted for personal reasons, because his attacker harbored racial animus towards him. *Ekblad,* 2018 WL 3768429, at *2. The Eighth Circuit disagreed and recognized that racial -animus was insufficient to qualify as a personal reason when it overlaps with employment related animus. *Id.* Further, the Eighth Circuit held "Ekblad's attacker called him "white-ass" but he also called him a teacher, and the context makes clear that Ekblad's employment played a causal role in the assault". *Id.* This reasoning aptly demonstrates the minimal amount of employment related context required to bar application of the assault exception. *Id.*

Intentional Act Exception

Mr. Ekblad next attempted to fit his claim into the intentional act exception which excludes injuries resulting from an employer's conscious and deliberate intent to inflict injury. *Id.* Here again, the Eighth Circuit rejected such argument and determined the evidence did not suggest his supervisors' policies were consciously and deliberately intended to injure him. *Id.* In so holding, the Court noted that such conscious and deliberate intent may not be inferred from negligence or gross negligence, again demonstrating the high standard required to bar application of the exclusivity provision. *Id.*

Co-employee Exception

Mr. Ekblad's final argument to avoid application of the exclusivity provision was that his injuries fit within the co-employee exception. *Id.* Such exception applies when (1) a co-employee owes a personal duty towards the plaintiff; (2) the activity causing an injury was not part of the coemployee's general administrative responsibilities, and (3) the co-employee was grossly negligent in performing the personal duty. *Id.* The Court quickly rejected Mr. Ekblad's arguments because Mr. Ekblad's suit was primarily against the district, not against co-employees. *Id.* Further, the Court affirmed that the duty Mr. Ekblad claim was owed--the duty to provide a safe workplace--was owed by the employer and was non-delegable. *Id.*

Conclusion

The exclusivity provision of the Minnesota workers' compensation is a strong legal defense to work-related injuries with few exceptions that require a high bar to invoke. Unlike other defenses, it does not produce a harsh result because it leaves open, indeed requires, employee's ability to seek workers' compensation benefits to compensate work-related injuries. The Eighth Circuit in *Ekblad* demonstrates the strength of the defense and further supports the intent of the Minnesota workers' compensation scheme: "quick and efficient delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers." ●

[1] Larry Rocheford, of Jardine, Logan, & O'Brien along with Hannah Felix, of the League of Minnesota Cities, formerly with Jardine, Logan, & O'Brien, successfully defended this matter on behalf of the SPPS and the individual defendants.

[2] Mr. Ekblad also sued the superintendent and assistant superintendent under 28 U.S.C. § 1983 alleging violations of substantive due process. These claims were dismissed and dismissal was affirmed on appeal because Mr. Ekblad could not establish conduct sufficient to shock the conscious as required to support a substantive due process claim.

2018 Minnesota Legislative Update

By Elle M. Lannon

The 2018 session of the Minnesota Legislature provided modifications and additions to many state statutes. These legislative changes will have an impact on general insurance defense, health, employment, and governmental entities. Below is a summary of the most significant legislation.

Construction Litigation – Statute of Limitations

The statute of limitations relating to recovery for damages from construction on real property, found in Minn. Stat. § 541.051, subd. 1, was amended to provide more clarity. Under the statute, recovery is generally only allowed two years after the action accrues, but no later than ten years after construction is complete. Construction actions begin to accrue: (1) upon discovery of the injury in cases for damages relating to bodily injury or wrongful death, or (2) upon discovery of the injury, but no earlier than completion, termination, or abandonment of construction or improvement, in cases relating to damages to real or personal property.

Data Practices Modifications

Minn. Stat. § 5B.03, subd. 3, was modified to require that certification under the Safe at Home program be used only for participation in the confidentiality program and prohibits certification use as evidence for any purpose in any civil, criminal, or administrative proceeding relating to actions giving rise to participation in the program. Minn. Stat. § 5B.07, subd. 1, provides that all data collected, created, or maintained by the Office of the Secretary of State relating to the Safe at Home program is private data as defined by Minn. Stat. § 13.02, subd. 12, with the exception of the participant's name and designated address.

Employment

Chapter 120 amended Minn. Stat. § 473.606, subd. 5, to provide that the Metropolitan Airports Commission is now exempt from compensation limits for employees of political subdivisions and can instead determine employees' compensation.

Government

Chapter 107 amended Minn. Stat. § 471.345 to provide for an increase of the threshold for a required sealed bidding process from $100,000 to $175,000 and to extend the range allowed for direct negotiations from $100,000 to $175,000.

Health

Chapter 167 makes significant changes to the provisions governing communicable disease, specifically the isolation and quarantine laws. Employers are now prohibited from discharging or discriminating against an employee who cares for a minor, disabled adult family member, or vulnerable adult family member subjected to isolation or quarantine. Minn. Stat. §§ 144.419, 144.4196.

Land Use

Minn. Stat. § 180.03, subd. 4, was amended to include new language exempting municipalities from some fencing, barrier, and signage requirements to properties with closed or abandoned mines owned, leased, or administered by a municipality for recreational or economic development purposes. Further, Minn. Stat. § 180.10 provides for criminal penalties for anyone who interferes with the requirements of Minn. Stat. § 180.03.

Passing Authorized Vehicles Stopped on Roadway

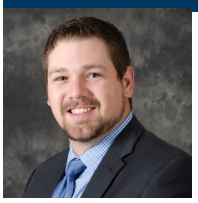
Minn. Stat. § 169.18 provides that when approaching and before passing an authorized emergency vehicle, freeway service patrol vehicle, road maintenance vehicle, utility company vehicle, or construction vehicle with lights activated, a lane change should be attempted. The statute was amended to provide that if a lane change is impossible, the driver approaching and attempting to pass the authorized vehicle should reduce the speed of the motor vehicle to a speed that is reasonable and prudent under the conditions until the motor vehicle has passed the stopped authorized vehicle.

For a summary of the 2018 Workers' Compensation Legislative Update, see the Summer 2018 Edition of the JLO Newsletter. ●

Workers' Compensation Newsflash

In the past month, the Workers' Compensation Court of Appeals (WCCA) has upheld a denial of primary liability based on the Dykhoff principle in two cases. The Dykhoff case is centered on the defense that where an Employee cannot show a causal connection between the work and the injury, the injury is not compensable. Dykhoff v. Xcel Energy, 840 N.W.2d 821, 73 W.C.D. 865 (Minn. 2013). To have the causal connection, there must be some form of increased risk for the Employee. In Rosar v. Southview Acres Health Care Ctr. (WCCA September 21, 2018), the Employee testified she walked quickly as part of her job as a nurse. She walked at a more relaxed pace when not at work. She fell in a hallway while walking fast; however, the hallway was carpeted, non-slippery, flat, dry and debris-free. There was insufficient evidence that the act of walking quickly was a cause of the fall. The Employee's claim was denied because there was no increased risk to the Employee. In Krull v. Divine House, Inc. (WCCA September 27, 2018), the Employee was carrying three gallons of milk, turned, took a step, and felt her knee pop. The factual issue in the denial of the Employee's claim was that she had completed the turn, and was walking normally, when the injury occurred. There was no factor of increased risk, as she also testified that carrying the milk did not affect her stability, she was simply walking when the injury occurred.

About the Authors



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About the Firm

Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.

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