New Jersey Law Journal

VOL. 202 NO. 5 NOVEMBER 1, 2010 ESTABLISHED 1878

Workplace Injuries&

2010 NJAJ Meadowlands Seminar Guide

Employee Tort Suits Against Employers: Proof Of Substantial Certainty of Employee Injury

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Under certain limited circumstances employees can sue their employers in tort, despite immunity conveyed by the Workers' Compensation Act. Suits are permitted in cases where the employer was "substantially certain" that an injury would occur. Recent decisions provide guidance as to what constitutes "substantial certainty."

Laidlow v. Hariton Machinery, Inc., 170 N.J. 602 (2002), established a two-pronged test for determining whether an employee can sue their employer in tort. The first prong, "conduct," considers facts which permit an inference that the employer knew injury was substantially certain to occur. The post-*Laidlow* cases have addressed what type of proofs do — and do not — establish the conduct prong. The proofs tend to center around the five factors discussed below.

(1) Disabling a safety device: Courts are likely to find for the employee where the employer has removed a machine guard, trained employees not to use a safety device or even installed a guard but didn't use it. Conversely, where a guard remains intact, employers often prevail.

In *Laidlow*, the employee's tort suit was allowed where the employer, while installing a safety guard, actually tied it up with wire and never used it. In *Mull v. Zeta Consumer Prods.*, 176 N.J. 385 (2003), plaintiff operated a "winder" which jammed. The employer modified the winder by deactivating the safety interlock, which shut the machine down when the cover was opened, and also synchronized the winder with another machine so powering up the second machine turned on the winder. These facts established that harm to the employees was "predictable." The court also found for the employee in *Almanzar v. C&C Metal Products, Inc.*, 2010 WL 1372301, *8 (D.N.J. Mar. 31, 2010), where safety devices on the machine were "rendered essentially ineffective" by virtue of the employer's training and instructions.

Conversely, where the employer does not tamper with a safety device, suit is generally not permitted. In *Cummings v. Tuscan Dairies, et al.*, 2008 WL 2245424, *4 (App. Div. March 5, 2008), the employee did not make out the "conduct" prong, since there was "no failure to install or removal of safety devices ..." There was also no proof of removal of a safety device or guard in *Calle v. Hitachi*, 2009 WL 509850 (App. Div. March 23, 2009). The employer's state of mind is relevant. If there is no proof that the employer intentionally disabled safety devices, they are likely to prevail. See, e.g., *Fermaintt v. McWane, Inc.*, 694 F. Supp. 2d 339 (D.N.J. 2010). In *Mechin v. Carquest Corp.*, 2010 WL 3259808, *8 (D.N.J. August 17, 2010), the court noted that the "employer did not disable safety device for profit." An employer's failure to add a safety device where one did not originally exist does not rise to the level of "substantial certainty" of injury. *Calavano v. Federal Plastics Corp.*, 2010 WL 3257784 (App. Div. August 18, 2010). In *Calavano* the blender used by the plaintiff never had an interlock safety device in the first place. In finding for the employer, the court relied on the fact that the company acted promptly to install safety interlocks two days after the accident In *Mann v. Heil Packer*, 2010 WL 98883, *7 (App. Div. Jan. 13, 2010),

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the employer didn't remove anything but, instead, added an alleged dangerous design modification. Nonetheless, this conduct did not rise to the level of proofs needed to permit suit to proceed.

Note that the removal of a guard, albeit compelling, is not a "bright-line" test requiring a finding for the employee. In *Tomeo v. Thomas Whitesell Constr. Co., Inc.*, 176 N.J. 366 (2003), the employer disabled a snow-blower safety lever but the court found that the conduct, while grossly negligent, did not rise to the level of proof of "substantially certainty" of injury. And see *Van Dunk v. Reckson Assoc. Realty Corp.*, 415 N.J. Super. 490, 503 (App. Div. 2010), where there was no removal of a safety device and yet the court still permitted suit to proceed against the employer based on other egregious circumstances.

(2) Prior accidents, injuries and/or "near misses": Proof of prior accidents strongly weighs in plaintiff's favor. Actual injury is not required. As the *Laidlow* court noted, "Simply because people are not maimed or killed every time" is not determinative, otherwise "it would be tantamount to giving every employer one free injury."

In *Laidlow*, plaintiff and a fellow employee "had experienced close calls with the nip point of the unguarded mill" where gloves were ripped off. They were reported to the employer, which failed to take action. In *Mull,* plaintiff's co-employee was working on the winder when it powered up without warning. The co-worker escaped injury, but became alarmed and notified his supervisor, who did nothing.

Where there are no prior accidents, the courts are considerably more likely to find for the employer. In *Suarez v. Lee Industries, et* al., 2007 WL 2141505, *5 (App. Div. July 27, 2007), the plaintiff fell off a forklift into a mixer pouring ingredients into a tank. Employees poured ingredients that way for seven years and "[d]uring that period, there had not been any accident" and there was "no evidence of any 'close call' in which such an accident had almost occurred." In *Cong Su v. David's Cookies, et al.*, 2009 WL 2426336, *2 (App. Div. August 10, 2009), the plaintiff was injured reaching under a guard of a cutting machine. "There was no evidence that anyone had ever been injured by the machine prior to the accident. There were no employee complaints regarding the machine or any safety aspects associated with it." Similarly, in *D'Artagnan v. Ted Brewer Building Contractor*, 2006 WL 138818 (App. Div. May 22, 2006), the court relied on the fact that there was no evidence of any prior accidents. In *Fermaintt*, 694 F. Supp. 2d at 347, and *Mechin,* 2010 WL 3259808, there were also no similar prior accidents or injuries.

Prior accidents are only relevant if they are similar to the plaintiff's. In *Mann*, 2010 WL 98883, *7, the employer prevailed where the two prior reported accidents involved substantially different facts. Injuries on machines other than the accident machine are also generally not relevant. *Wen Xue Shen v. Do Do Plastics, et al.*, 2008 WL 2491884,*1 ("prior to plaintiff's injury, no employee had ever been injured by the converter machine").

And note that in *Calavano,* 2010 WL 3257784, *5, where prior employee accidents had occurred, the court still found for the employer because the company owners "made no effort to hide existing records of prior injuries" and none of the employees "had notified management about safety concerns."

(3) Failure to comply with and/or deception of OSHA: Prior relevant OSHA violations and "willful" citations count heavily against an employer, but conduct which gives rise to post-accident OSHA citations typically does not.

In *Crippen v. Central Jersey Concrete Pipe Co., et al.*, 176 N.J. 397 (2003), the decedent was moving sand and gravel into a loading hopper when he fell in and suffocated. Prior to the accident, OSHA had investigated and found "serious" violations. The employer deliberately failed to correct these and intentionally deceived OSHA into believing they been abated "because it did not want OSHA to return to the plant." Suit was permitted.

(4) Corporate culture of disregard of safety: Another factor considered is the employer's concern for safety, or lack thereof. In *Laidlow,* the safety guard was removed "for speed and convenience." Similarly, in *Mull,* plaintiff's co-worker saw many things that raised safety concerns which he expressed to management "but it seemed to go in one ear and out the other." In *Montalvo v. Larchmont Farms, Inc.*, 2010 WL 3025045, employee farm workers were told to go out into the fields despite pesticides having been sprayed. In *Van Dunk,* 415 N.J. Super. 490, 503, the Court found that "plaintiff's safety was sacrificed for defendant's benefit."

To the contrary, where the employer shows an interest in employee safety (even if negligently implemented), tort suits are precluded. In *Calavano,* 2010 WL 3257784, even though there were missing guards and prior injuries, the Court found for the employer where the company acted promptly to install safety interlocks two days after the accident and made no attempts to hide the records of the prior accidents. Similarly, in *McNulty v. Dover Municipal Utilities Authority*, 2007 WL 102587, the Court found that, while the employer showed a "regrettable exercise of poor judgment," there was no deception or deceit.

(5) Expert opinion on "substantial certainty of injury": Plaintiffs who are able to successfully pursue a tort case against their employers typically proffer expert testimony that the employer's actions demonstrated a substantial certainty of injury.

Similarly, where the court makes no mention of an expert for plaintiff, the employer's motion for summary judgment has been granted.

In sum, the *Laidlow* conduct prong is intensely factual. The practitioner is well-advised to hold motion practice in abeyance until development of a complete factual record and to pay particular attention to the factors identified by the courts as persuasive. ■