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Gallagher Sharp Shop Talk: Workers' Compensation

Question: Can an employer “consent” to horseplay in the workplace, rendering such behavior within the “course and scope” of employment?

The general rule in Ohio is that no compensation is recoverable for injuries sustained as a result of “horseplay” in the workplace, which removes a work-related incident from the “course and scope of employment.” *Indus. Comm. v. Bankes*, 127 Ohio St. 517, 189 N.E. 437 (1934). Exceptions can occur where the horseplay injures an individual attending to their duties, or where the employer is aware of or acquiesces to the horseplay. *Id.* Recently, the Tenth Appellate District was presented with a case involving a personal injury claim, and the appropriate jury instructions, where an employer was aware of and consented to an extensive pattern of “horseplay.”

Sanders v. Fridd, 2013-Ohio-4338, concerned a personal injury lawsuit filed by one employee against another arising from a wrist injury that occurred when a co-worker jumped from a hiding place and pushed her to the ground. The plaintiff filed a workers' compensation claim which was allowed, but then filed a negligence claim against her co-worker alleging negligence. The co-worker contended that he was entitled to immunity as a fellow employee pursuant to R.C. 4123.741, but the plaintiff argued that because the injury occurred as a result of “horseplay,” immunity was not available. (The co-worker also maintained that at the time of the injury, the plaintiff herself was engaged in “horseplay,” as she was “swinging her harms like a windmill” as she walked down the hall toward the fax machine.) In the course of discovery, a persistent pattern of ongoing “horseplay” was described, involving both workers and management employees, consisting of “body bumps,” pinching, shoving, wrestling, hair-pulling, as well as an ongoing practice of waiting outside of restrooms to “jump out and scare” fellow employees. The trial court denied a motion that the co-worker was entitled to workers' compensation immunity, and the matter proceeded to trial where a jury returned a verdict in favor of the co-worker, prompting an appeal to the Tenth District Court of Appeals.

On appeal, the Tenth District affirmed, concluding that the co-worker was entitled to immunity because there was substantial evidence that the employer ratified, and even endorsed, horseplay. The Court began with a thorough history of the law of co-employee immunity and “horseplay” and concluded that it was correct to instruct the jury that an individual who is injured by a fellow employee's negligent acts, who applied for benefits under Ohio's workers' compensation statutes, and whose injury is found to be compensable, is generally precluded from pursuing a claim against a fellow employee. While an employee engaged in “horseplay” is not acting in the “course and scope” of employment, an employer can consent to the horseplay and thus render it within the “course and scope.” See *Caygill v. Jablonski*, 78 Ohio App.3d 807, 605 N.E.2d 1352 (1992). In this case, the evidence of persistent and ongoing “horseplay” by both parties was sufficient to support the jury's conclusion that the employer was aware of and consented to the conduct, and that plaintiff participated. (The knowledge was imputed because the co-worker involved was also the operations manager.) The Court also refused to instruct the jury that, because the claimant received benefits, she was not engaged in “horseplay” as a matter of law. Finally, the Court found that evidence of prior horseplay on the part of the plaintiff was properly admitted, and that jury interrogatories were not misleading.

The scope of “horseplay” in *Sanders* is absurd, to the point where one must wonder how any work was accomplished. Nonetheless, it also stands for the proposition that an employer can consent to and ratify horseplay, to the point where an allowed claim can result. Managers should be careful to document incidents of horseplay and discipline employees who engage in such conduct.

If you would like to submit a question to Shop Talk, or would like to discuss this or any other workers' compensation issues, please feel free to contact me.

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