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COVID-19 WRONGFUL DEATH LAWSUITS AGAINST EMPLOYERS

A number of wrongful death lawsuits have been filed by families of employees who died from the virus. In one case the family of a worker at a meat packing facility claimed that the employer “elected to pursue profits over safety during a global pandemic” and falsely assured workers that it was safe to work at the plant, when the employer knew that was a false statement.

Such lawsuits face two hurdles. First, in order to prevail the families will have to prove that the worker contracted the virus at work. Given that we are in a pandemic, that may not be easily done. Second, the workers compensation act bars most claims in connection with a work related injury or illness.

For example, in Connecticut an employee can avoid the workers’ compensation act and bring a lawsuit against the employer only if the employer created an unsafe work condition “with a substantial certainty of injury.”

The challenges of proving that and avoiding the exclusivity of the workers’ compensation act are shown in a recent Connecticut Supreme Court case, *Lucenti v. Laviero*. In that case plaintiff was operating an excavator in an attempt to pull a drain basin out of the ground and replace it. Because there was a mechanical flaw in the machine, it had to be operated at full throttle, which, in turn made the machine unstable. The machine jerked and plaintiff was severely injured.

The owner of the company had been told of the flaw and said that he did not want to spend money repairing the machine because he planned to sell it. In fact, an employee, who was a mechanic at the company, said he told the owner that someone was going to get hurt operating that machine. Despite that warning, the owner did not repair the machine and one week before the accident he operated it himself.

The Supreme Court reaffirmed the law – the workers’ compensation law is a total bar to common law actions brought by employees against employers for job related injuries with one narrow exception that exists when the employer has committed an intentional tort or where the employer has engaged in willful or serious misconduct. To show an intentional or willful conduct, the employee must show that the employer’s conduct was designed to cause the injury that resulted. Mere knowledge of the risk, short of substantial certainty that an injury will occur, is not sufficient to establish a claim.

In *Lucenti*, the Supreme Court noted that not only had the employer testified that he did not intend to injure the employee, but the employer himself operated the machine when he had an opportunity to have others do so or to use a different machine. Given that the employer used the machine himself, there was no evidence that he believed that there was “a substantial certainty of injury” in operating that machine.

With COVID-19, there are not many situations created or tolerated by an employer where there is “a substantial certainty of injury.” We know that not everyone exposed to the virus contracts it and we also know that some experience no or mild symptoms. Proving an employer had “a substantial certainty of injury” that an employee would suffer from contracting the virus, while working during the pandemic, would be difficult. Proving that an employer had “a substantial certainty of injury,” when the employer takes reasonable precautions to prevent the spread of the virus, would be exceedingly difficult.

In sum, although lawsuits are likely to be filed claiming that an employer’s actions resulted in the death or serious illness of an employee who contracted the virus, those lawsuits are unlikely to be successful.

If you have any questions about this or any other employment issue, please feel free to contact **Bernard E. Jacques** at bjacques@mdmc-law.com.

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