



IT'S THE LAW



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SERVING THE CONSTRUCTION INDUSTRY
IN EMPLOYMENT AND LABOR MATTERS AND CONSTRUCTION
CONTRACT CLAIMS

General Contractor Liability: General Principles and Court Application

History

The Structural Work Act a/k/a the "Scaffold Act" ("SWA") became law on June 3, 1907. The SWA was passed in response to the unsafe working conditions that existed on construction projects coupled with an injured worker's lack of recourse. On June 28, 1913, the Worker's Compensation Acts ("WC Acts") were promulgated. The WC Acts took the no fault approach - as long as the employer was paying into the system, the injured employee would receive compensation and the employer had no additional liability. Unfortunately, the WC Act

did not prohibit the injured worker from pursuing a claim under the SWA against the general contractor, every other sub-contractor on the job site, the property owner, and the architect.

In 1995, the SWA was repealed and a general contractor's liability was to be determined on negligence theories and premises liability theories.

I. Negligence

In the event a worker of an independent contractor ("IC") is injured on a project, he most likely will file suit against the general contractor. The suit will be rooted in principles of negligence or premises liability.

Generally speaking, a general contractor ("GC") is not liable for the acts or omission of the IC. However, a GC may be subjected to liability where the GC retains a certain degree of control over the manner in which the IC performs the work. Illinois case law provides that the authority to stop work for safety reasons is the most important factor courts consider when determining whether a GC has retained the degree of control necessary to impose liability. Illinois courts will first analyze the contract between a GC and IC to determine the scope of undertaking by the GC.

Most, if not all contracts between GC and IC grant to GC a general right to order the work

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stopped or resumed, to inspect work progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations for deviations. This general right of supervision will not give rise to liability. The question then becomes at what point does the GC possibly subject himself to liability. The law provides that liability may be imposed where the GC retains the right to control the operative details of the IC work. In other words, the IC is not entirely free to do the work in his own way.

For instance, contractual language which grants the GC authority to stop work if the IC is using unsafe procedures, unsafe equipment, order unsafe equipment removed, or order unfit or unskilled workers of the IC removed may subject the GC to liability. It is important to note that Illinois Courts are split on this issue. Some Appellate Court districts have not imposed liability even if such contractual language is present unless the GC actively inspects or employs a safety plan. That being said, if the GC provides safety classes, employs a safety inspector, provides safety equipment or instructs workers to put on hard hats, harnesses, etc., liability will almost certainly be imposed.

While some Illinois Appellate Courts will look solely to the contract language, others will take a more balanced approach and analyze the actual supervisory control exhibited by the GC. For instance, if the GC actively controls the means by which the IC performs work and takes an active role in ensuring safety liability, there is a strong possibility the GC will be liable in the event that an IC's worker is injured at the project.

In sum, a GC can shield itself from liability by avoiding control over the work - both actually and contractually. Some creative defendants have attempted to circumvent the "right to control" rule by arguing OSHA imposes a non-delegable duty on GC to maintain safe job sites and, therefore should be liable for any injuries even if it was the IC's

obligation to monitor safety under the contract. Thankfully, Illinois Court's have rejected the argument for the following reasons:

1. OSHA creates a governmental program to enforce compliance and does not deal with the assignment of liability among contractors; and
2. OSHA provides that it shall not be construed to supersede, enlarge, diminish or affect the common law of Illinois.

II. Premises Liability

Another avenue plaintiffs often use to impose liability upon a GC is rooted in principles of premises liability. Premises liability provides that a possessor or owner of land is subject to liability for physical harm caused to his invitees by a condition on the land if he knows if the dangerous condition will not be discovered by the invitees, and fails to exercise reasonable cause to protect the invitees from the danger. There will be no liability imposed if the condition of the land is an obvious and open hazard that the invites could appreciate or the owner did not know of the conditions.

Plaintiffs often attempt to use this avenue of recovery in addition to negligence but are rarely successful because in most instances their injury is the result of their negligence, the negligence of a co-worker, or equipment malfunction and not the land.

Conclusion

Prior to entering into a contract, a GC should review its contract with the IC to determine the scope of undertaking as it pertains to safety issues and specific rights relating to controlling the operative details of the IC's work. Even in the absence of such language, a GC may not be off the hook if the GC-Owner contract imposes a duty upon the GC to implement safety procedures and control the operative details of

the work, and the contract between the GC and IC incorporates these provisions. Because the Appellate Courts in Illinois are not on the same page when it comes to determining GC liability, it would be prudent to analyze Appellate Court decisions which potentially would have jurisdiction over a claim of an IC's employee. This analysis must take place prior to contract consummation and will allow your attorney to draft the contract in a fashion that lessens the likelihood of GC liability.

**Can a Former Employee Receive
Unemployment Benefits Ten
Months after Voluntarily Quitting
to Accept Other *Bona Fide* Work?**

The general rule governing eligibility to receipt of unemployment insurance benefits by a former employee who leaves work voluntarily is contained in Section 601(A) of the Unemployment Insurance Act ("Act"). Section 601(A) generally states that an employee is not eligible for unemployment benefits when he or she leaves work voluntarily and without good cause attributed to the employer.

However, Section 601(B)(2) of the Act contains an exception to the general rule and provides that Section 601(A) does not apply to an employee who leaves work voluntarily to accept other *bona fide* work.

Recently, an Appellate Court in the State of Illinois sent a case back to the trial court to consider a former employee's argument that Section 601(B)(2) allows him to be eligible for unemployment insurance benefits nine months after he quit to be self-employed.. In this case, the former employee worked as a tree trimmer for approximately two and a half years until he quit his job in February, 2003. The former employee applied for unemployment insurance benefits ten months later in December, 2003 and claimed that increased transportation distances and their related costs caused him to quit his job. His former employer protested the claim

and argued that the former employee voluntarily quit to start his own tree trimming business.

The former employee admitted that he was self-employed from March or April 2003 to November, 2003, and that his work was seasonal and that he would not resume it until March or April of 2004. As a result, the claim's adjudicator at the Illinois Department of Employment Security found the former employee ineligible for benefits based upon Section 601(A) of the Act since the former employee voluntarily quit to start his own business and that his quitting was not attributable to his employer and did not constitute "good cause" under the Act.

After going through the review process at the Illinois Department of Employment Security, and losing at each step, the former employee filed a complaint for administrative review in the trial court. The trial court denied the former employee's claim and the employee appealed. On appeal, the Appellate Court reversed the trial court. In reversing the trial court, the Appellate Court sent the case back to the circuit court with directions to order the Illinois Department of Employment Security Board of Review to address the former employee's claims that he is eligible for unemployment insurance benefits since Section 601(B) does contain mandatory language which states that the provisions of Section 601(A) do not apply to an employee who has left work voluntarily under some excused situations such as the "*bona fide*" work exception in Section 601(B)(2).

Section 601(B)(2) specifically states that Section 601(A) does not apply to an individual who has left work voluntarily to accept other *bona fide* work and after such acceptance, the individual is either not unemployed in each of two weeks, or earns remuneration for such work equal to at least twice his current weekly benefit amounts.

This exception does show the existence of a trap for an unwary employer in that an employee who quits work to work for another or his or her self can be subject to paying the former employee's unemployment insurance benefits even when an application for such benefits is made ten months after an employee quits.

Unemployment Benefits Denied Due to Employee's Vulgar Voice Mail Message Left at Co-Worker's Home

What conduct is sufficient to disqualify an employee from receiving unemployment benefits when an employer may not have been actually harmed? In a recent case decided by an Illinois Appellate Court, the Court ruled that a vulgar message left by an employee on a co-worker's voice-mail at home after business hours relating to an incident arising from work which included the disruption of slamming doors and swearing was sufficient to disqualify the employee from receiving unemployment benefits. In this case, the former employee was employed as a medical assistant from 1998 to 2004 when she was discharged for leaving a hostile and vulgar message on a co-worker's voice-mail at her home. The medical assistant had relied upon a co-worker to drive her to work because she had lost her driver's license.

One day, the co-worker left work without giving the employee a ride home. The former employee then called her co-worker at home and left a message that led to her firing. The former employee's employer, a doctor, testified that he believed the message was hostile, intimidating and vulgar and that the language used by the former employee was not permissible in the workplace.

The former employee testified that she was never warned about leaving emotional messages on a co-worker's voice-mail and that her work performance was excellent and had never been written up for poor work performance. The referee at the Illinois Department of Employment Security affirmed the claim's adjudicator's finding that the former

employee was ineligible for unemployment benefits due to misconduct. The referee ruled that the former employee knew, or should have known, that the message left on her co-worker's voice-mail constituted a willful and deliberate disregard of the employer's policies, even though there was no express, written policy in this regard.

The Board of Review of the Department of Employment Security affirmed the referee's ruling and the former employee appealed to the trial court. The trial court affirmed the Board of Review. The former employee argued that her voice-mail message did not constitute sufficient misconduct because it did not harm her employer or any other employee, and that she had not received any prior warning.

The former employee's argument was rejected outright by the Appellate Court. The Appellate Court declared that individuals who are fired from their jobs for misconduct are not eligible to receive unemployment benefits. In finding that the former employee was disqualified from receiving unemployment benefits, the Court said that there are three elements to prove misconduct: (1) that there was a deliberate and willful violation of a rule or policy; (2) that the rule or policy of the employer was reasonable; and (3) that the violation either harmed the employer or was repeated by the employee despite previous warnings.

The Appellate Court further stated that the employee's conduct should be viewed in the context of potential harm and not in the context of actual harm in determining whether an employer has been harmed by an employee's conduct. Also, the Court said that an employer is not required to show the existence of a reasonable rule by direct evidence and the Court may find the existence of such rule by a common-sense realization that certain conduct intentionally and substantially disregards an employer's interests.

In ruling that the former employee was properly disqualified from receiving unemployment benefits, the Court reasoned that the voice-mail message may not have directly harmed her employer, but it was potentially harmful to her employer's interests since the use of hostile and intimidating language to a co-worker could adversely affect the work environment.

The Court also reasoned that it made no difference that the voice-mail message was left on a co-worker's telephone after business hours, since the incident from which it arose did relate to work and included slamming doors and swearing by the former employee. Such conduct was clearly potentially harmful to the former employee's employer since it had the potential to affect employee morale and cooperation. As a result, the former employee's action was sufficient to disqualify her from receiving unemployment benefits even though her employer's interests in leaving the vulgar voice-mail may not have been directly harmed.

Beck Posting Requirements

Certain government contracts and sub-contracts are required to include an employee notice clause that requires non-exempt contractors and sub-contractors to post a notice (Beck Poster) informing employees of certain rights related to Union membership and the use of union dues and fees paid by the employee under federal law. The failure to comply with these requirements can result in the cancellation, termination, or suspension of the government contract and can even lead to debarment.

Under Sec. 8(a)(3) of the National Labor Relations Act, an employer and a union are permitted to enter into an agreement that requires all bargaining unit employees to pay union dues in order to continue employment, regardless of whether or not the employees become union members. In Communication Workers of America v. Beck, a group of dues-paying employees who had not

chosen to become union members brought suit against the union challenging the union's use of the employees' agency fees for uses other than collective bargaining, contract administration, or grievance adjustment. The employees argued that the union should not be able to use their fees on activities such as organizing, lobbying for laboring legislation, and participation in social, charitable and political events. The United States Supreme Court agreed with this group of employees and held that unions cannot spend funds collected from dues-paying employees who are not members on any activities that are not related to collective bargaining. On February 17, 2001, George W. Bush issued an Executive Order requiring government contractors and sub-contractors to post notices informing employees of their rights pursuant to the Supreme Court's decision in Beck.

The employee notice clause must be included in all government contracts above the Simplified Acquisition Threshold ("SAT") of \$100,000 or more that were entered into on or after April 28, 2004 and resulted from solicitation issued on or after April 18, 2001. The following contractors are exempt from posting the Beck notice:

- Contractors with less than fifteen (15) employees
- Contractor establishments or construction work sites where a union has not been formally recognized by the prime contractor and the prime contractor has not certified a union as the exclusive bargaining representative of the prime contractor's employees

- Contractor establishments where state law forbids enforcement of union-security clauses (“right-to-work” states) - posting is required in Illinois
- Work that is performed outside the United States and does not involve the recruitment or employment of workers in the United States

Contractors may also be required to post notices at work sites where no work is performed under a government contract. However, the contractor can make a written request to the Office of Labor-Management Standards to get a waiver of the requirement to post for work sites that are, in all respects, separate and distinct from contractor activities related to the performance of the government contract.

Please call or email if you have any questions or would like to obtain a copy of the Beck Poster.

FIRM NEWS!

Stanley E. Niew Obtains Second Injunction against the IDOL

On April 25, 2006, Stanley Niew obtained a permanent injunction and was successful on a Summary Judgment Motion against the Illinois Department of Labor (“IDOL”) in its suit related to proper notice regarding revised wages under the Prevailing Wage Act (“PWA”). One of the firm’s clients received multiple violations under the PWA for failure to pay the prevailing wage rate to its employees. These alleged violations resulted from revisions to the specified rate in the locality during the job. Section 130/4 of the PWA states: “If the Department of Labor revises the prevailing rate of hourly wages to be paid by the public body, the revised rate shall apply to such contract and the public body shall be responsible to notify the contractor and each such sub-contractor of the revised rate”. The IDOL claimed that the notice requirement of Section 130/4 was satisfied by

publishing the current prevailing rate on the IDOL website directly. Stanley Niew argued that pursuant to the statute, the public body is responsible to notify the contractor of revised rates. The Circuit Court agreed with this interpretation of the statute and found that publication on the IDOL website, as well as passage of an ordinance by a municipality or other governmental body adopting prevailing rates, does not meet the notification requirements under the PWA. The client was not required to pay any of the alleged violations resulting from the changes in the prevailing rate that it was not notified of. In addition, the IDOL was permanently enjoined from seeking back wages under the PWA for the referenced jobs. We obtained the same result in the Circuit Court of Adams County in 2005.

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