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JUST RESTING MY EYES — AN EMPLOYER'S LIABILITY FOR FATIGUED EMPLOYEES

In *Nabors Drilling, U.S.A., Inc. v. Francisca Escoto, et. al*, the Texas Supreme Court recently addressed the issue of whether an employer is liable for the off-duty actions of an employee who falls asleep while driving home after experiencing work conditions that induce extreme fatigue in its employees.

The Court declined to extend the duty to extremely fatigued employees, and held that the employer had no duty to prevent injury due to the fatigue of its off-duty employee or to train employees about the dangers of fatigue.

BACKGROUND FACTS

Robert Ambriz worked in the oil fields of Nabors Drilling U.S.A., Inc., the largest land-based driller in the continental United States. The work schedule required that Ambriz, and other employees, work twelve-hour day shifts from 6:00 a.m. to 6:00 p.m. one week, take a week off, and then work twelve-hour night shifts from 6:00 p.m. to 6:00 a.m. the following week.

On the day of the accident, Ambriz's shift ended at 6:00 a.m., and he left the site about ten minutes later. Although he was provided a place to stay at the work site in trailers provided by Nabors, Ambriz chose to leave. While driving along a farm-to-market road at approximately 6:30 a.m., Ambriz crossed over the center line into the wrong side of the road and collided with a vehicle driven by Martin Rodriguez and occupied by Robert Escoto, Jose Gutierrez, and Leovarda Torres. The accident resulted in the death of Ambriz, Rodriguez, and all three passengers.

Ambriz's estate and Nabors were sued for the wrongful deaths of each decedent. Escoto alleged that the negligence of both Ambriz and Nabors caused the collision. At trial, the jury found that Ambriz was 57% responsible for the accident and Nabors was 43% responsible. As damages, the jury awarded Escoto \$5.95 million.

However, the trial court signed a take-nothing judgment, ruling that Nabors owed no duty to Escoto for the off-duty actions of Ambriz. The court of appeals reversed, holding that Nabors owed the plaintiffs a duty for the actions of Ambriz.

LIABILITY FOR OFF-DUTY EMPLOYEES

Under the doctrine of *respondeat superior*, an employer is vicariously liable for the torts of an employee committed in the course of his or her employment. In order for an employee's conduct to fall within the course and scope of employment, the complained of act must be (1) within the scope of the general authority of the employee, (2) in furtherance of the employer's business, and (3) for the accomplishment of the object for which the employee was employed. As a general rule, an employer owes no duty to protect the public from the wrongful acts of its off-duty employees that are committed off the work site. Texas law has recognized limited exceptions to that general rule.

For example, Texas courts have held that under certain circumstances the employment relationship may impose limited duties on employers to control the activities of off-duty employees. Those situations have arisen when an employer affirmatively exercised control over its employee because of that employee's incapacity, and when an employer required its employee to consume alcohol to the point of intoxication while working. However, neither of these issues is confronted in this case.

Although it is in furtherance of the employer's business for an employee to arrive at work or leave work, an employee is generally not within the course and scope of employment while traveling to and from work. The result might be different if the employer had the right to control the employee in the performance of the activity at the instant of the negligent conduct or omission.

Considering the large number of Texans who do shift work and work long hours (including doctors, nurses, lawyers, police officers, and others), the Court found that there is little social or economic utility in requiring every employer to somehow prevent employee fatigue or take responsibility for the actions of off-duty, fatigued employees. This new duty to protect the public from fatigued employees would impose a substantial burden on employers, which cannot be reasonably justified.

If this new duty for off-duty, fatigued employees were imposed, employers would have to inspect employees for signs of fatigue impairment; however, no quantitative measure or criteria are available to determine an employee's level of fatigue or assess whether an employee is merely tired or is actually incapacitated. In addition, employers would be compelled to take steps to eliminate fatigue at work, a very difficult task when no certain amount or type of work is known to consistently cause fatigue impairment in all persons, and when an employee's off-duty conduct will affect his level of fatigue.

In the end, the Court held that Nabors owed no duty to prevent injuries resulting from fatigue following an employee's shift-work schedule. Furthermore, Nabors owed no duty to train its employees regarding the dangers of fatigue.

WHAT DOES THIS MEAN FOR YOU?

Although this recent ruling by the Texas Supreme Court determined that there is no liability for off-duty, fatigued employees, there are still situations where an employer may be liable for an employee's conduct.

1. **On-duty actions:** If a fatigued employee, while on the clock, has an accident and hurts someone, the company is liable for those injuries if the act is:
 - A. within the scope of the general authority of the employee,
 - B. in furtherance of the employer's business, and
 - C. for the accomplishment of the object for which the employee was employed.
2. **Required alcohol consumption on duty:** The Texas courts have held that an employer may be liable if the employer requires an employee to consume alcohol to the point of intoxication while working. A violation of the Dram Shop Act, Tex. Alco. Bev. Code Ann. § 2.01 et seq., occurs when a provider of alcohol sells, serves, or provides alcohol to an obviously intoxicated person after the person's intoxication becomes apparent to the provider and when that person's intoxication was a proximate cause of the damages suffered.
3. **Off-duty, company-sponsored parties.** At least one Texas court has ruled that an employer owes no duty to control an employee's alcohol intake at a company-sponsored event because the employee's attendance at the event was voluntary, the employer did not pay for the drinks, and the employer exercised no control over the employee's activities that evening.

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