Employer Liability for Supervisors' Intentional Torts: The Uncertain Scope of the "Alter Ego" Exception

Michael Hayes  
*University of Baltimore School of Law, mjhayes@ubalt.edu*

Quinn Broverman  
*Broverman Professional Corporation*

Follow this and additional works at: [http://scholarworks.law.ubalt.edu/all_fac](http://scholarworks.law.ubalt.edu/all_fac)

Part of the Labor and Employment Law Commons, Torts Commons, and the Workers’ Compensation Law Commons

**Recommended Citation**


This Article is brought to you for free and open access by the Faculty Scholarship at ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of ScholarWorks@University of Baltimore School of Law. For more information, please contact snolan@ubalt.edu.
Employer Liability for Supervisors’ Intentional Torts: The Uncertain Scope of the “Alter Ego” Exception

By Michael J. Hayes* and Quinn Broverman

I. Introduction

When Illinois employees are the victims of intentional torts by supervisors,1 can they bring common law tort suits against their employers for these injuries, or are they limited to bringing a claim under the workers’ compensation system? This question, which arises with unfortunate regularity, lacks a clear answer because both state and federal courts in Illinois are divided over the scope of the “alter ego” exception to the exclusivity of workers’ compensation as the remedy for intentionally inflicted workplace injuries.

The Illinois Workers’ Compensation Act ("IWCA") contains exclusivity provisions that mandate that workers’ compensation is the sole remedy available to employees for workplace injuries.2 There are exceptions to the exclusivity rule, including the principle that the rule does not apply if the injury is not accidental.3

In Meerbrey v Marshall Field and Co., Inc., the Illinois Supreme Court held that employees were barred from suing their employers in tort for injuries intentionally inflicted by co-workers because such injuries were “accidental” for purposes of the IWCA.4 The court explained that “such injuries are unexpected and unforeseeable from the injured employee’s point of view.” More importantly, these injuries “are also accidental from the employer’s point of view” and therefore “the employer has a right to consider that the injured employee’s sole remedy against the employer will be under the workers’ compensation statute.”

Meerbrey held that injured employees can bring common law actions against their co-workers for intentional torts. The court found that such suits are not barred by the exclusivity rule because persons who committed intentional torts should not be permitted to claim that their victims’ injuries were accidental and covered by the IWCA.5

The Meerbrey court used a similar rationale in reaffirming two judicially created exceptions to the IWCA’s preclusion of employee suits against employers for intentionally inflicted injuries. Citing prior Illinois court decisions, the court held that the exclusivity rule would not apply where (1) the injuries were intentionally inflicted by “the employer or its alter ego,” or (2) the injuries “were commanded or expressly authorized by the employer.”6 The court reasoned that “the employer

*Professor Hayes thanks Professor Patrick Kelley for his valuable comments on an earlier draft and law student Kamran Q. Khan for his excellent research assistance.

1. In this article, the term “supervisor” will refer generically to all persons with supervisory or managerial authority over employees, regardless of their level of authority.
2. See 820 ILCS 305/5(a) (“No common law or statutory right to recover damages from the employer...or the [employer’s] agents or employees...for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided...is available to any employee who is covered by the provisions of this Act”); 800 ILCS 305/11 (“The compensation herein provided...shall be the measure of the responsibility of any employer...for accidental injuries sustained by any employee”).
5. Id.
6. Id., 534 NE2d at 1229-30.
7. 564 NE2d at 1226 (citing Callier, 408 NE2d at 202-03 and Jakubowski v. Muller, 83 Ill App 3d 908, 380 NE2d 924 (1st D 1978)).
should not be permitted to assert that the injury was "accidental," and therefore under the exclusive provisions of the Act, when he himself committed the act."

The Meerbrey decision did not define the scope of either of these exceptions. Consequently, in the eight years since Meerbrey, employers and employees have frequently litigated the meaning of both exceptions. In many cases of alleged intentional torts by supervisors, the injured employee has contended that the supervisor is an "alter ego" of the employer, so that the exclusivity rule does not bar a suit against the employer. Illinois courts, however, have adopted at least three different definitions of the alter ego exception, which we discuss below.

II. Interpretations of the "Alter Ego" Exception

A. The Broadest Interpretation: Johnson and Its Progeny

Since 1990, numerous decisions have indicated that the "alter ego" exception applies to all supervisors, regardless of their degree of supervisory authority. The first case taking this position was Johnson v Federal Reserve Bank of Chicago, which predates Meerbrey by five months.

In Johnson, a bank employee claimed that his superiors had harassed and abused him for more than 18 months in retaliation for his objection to allegedly illegal bank practices. Based on this conduct, the employee sued his employer for intentional infliction of emotional distress. One of the employer's defenses was that the suit was barred by the exclusivity provisions of the IWCA.

Responding to this defense, the first district appellate court stated that the IWCA does not prohibit employee tort actions against employers for injuries intentionally inflicted "by the employer or a co-employee acting as the alter ego of the employer." The court held that Johnson's suit was not barred because "Johnson alleged intentional conduct by persons acting in their capacity as managers of the Bank, therefore as the alter ego of the Bank...." Thus, the court, without explanation, equated "managerial capacity" with alter ego status.

Other decisions have relied on Johnson in broadly interpreting the Meerbrey alter ego exception as covering any type of supervisor. These decisions have found the alter ego exception applicable to, for example, three "management employees" whose powers were not described in the plaintiff's complaint, eight supervisory and managerial staffers of various rank, a worker "employed...in a supervisory capacity," a district manager, and a vice president of corporate relations.

In Feliciano, Tolson, Wysong, and Whitehead, the courts found that for purposes of denying defendants' motions to dismiss, the "alter ego" status of the alleged tortfeasors was sufficiently demonstrated by allegations that they had such standard supervisory powers as the authority to discharge employees, to review employee performance, and to grant vacation and sick leaves.

Only two of these decisions, both by Judge Norgle of the U.S. District Court for the Northern District of Illinois, offered any rationale for the conclusion that all supervisors are alter egos of their employer. In Whitehead, the court noted that the seminal decision, Johnson, had not explained why the bank managers were alter egos. The court then provided its own explanation: "[W]here the employer is a fictitious person, i.e., corporate entity, and its authorities and powers are necessarily delegated to supervisors to conduct the corporate business, the supervisors act as alter egos of the corporate entity."

Similarly, in Feliciano, the court reasoned that where the employer is a fictitious person, like a corporation, "powers are necessarily delegated to managers to conduct the corporate business" and so those managers may be alter egos of the corporation.

Under these precedents that broadly interpret the alter ego exception, an employee's showing that the person who committed the intentional tort possessed standard supervisory powers is sufficient to overcome the exclusivity of the IWCA and to permit the employee to bring a common law action against his or her employer.

B. The Strictest Interpretation: The Jablonski Line of Cases

Beginning in 1978 with Jablonski v Mullack, a series of state and federal decisions in Illinois have held that the alter ego exception to exclusivity applies only when the individual tortfeasor has such a dominant role or substantial ownership interest in the employer that there is a blurring of

8. Id.
10. Id, 557 NE2d at 329-30.
11. Id, 557 NE2d at 332.
18. 860 F Supp at 1290.

ABOUT THE AUTHORS

Michael J. Hayes has been an assistant professor of law at Southern Illinois University School of Law in Carbondale since 1995. Previously, he practiced labor and employment law in Washington, D.C. for seven years. He received his B.S. from Cornell University in 1985 and his J.D. from the University of Virginia in 1988.

Quinn Broverman practices with the Taylorville firm of Broverman & Podeschi. He received his B.A. from Illinois College, where he was elected to Phi Beta Kappa, and his J.D. in 1997 from Southern Illinois University School of Law.
Identity between the individual and the employer. This definition of the alter ego exception is derived largely from the treatise Larson's Workmen's Compensation Law, which is generally accepted as the leading authority on workers' compensation.

Jablonski was the first decision in Illinois to discuss the question whether the exclusivity provisions of the IWCA barred employee tort suits against employers for intentional torts by supervisors. The court declared that the Larson treatise "states the rule which we believe to be preferable":

When the person who intentionally injures the employee is not the employer in person nor a person who is militarily the alter ego of the corporation, but merely a foreman, supervisor or manager, both the legal and moral reasons for permitting a common-law suit against the employer collapse.

The legal reason for permitting the common-law suit for direct assault by the employer...is that the same person cannot commit an intentional assault and then allege it was accidental. This does not apply when the assailant and the defendant are two entirely different people...

Jablonski then relied on the Larson treatise in distinguishing Heskell v Fisher Laundry & Cleaners, Inc., an Arkansas case in which the tortfeasor employee had been deemed an alter ego of the employer. Jablonski explained that Larson had "the following to say about Heskell:

The correct distinction to be drawn in this class of cases is between a supervisorial employee and a person who can genuinely be characterized as the alter ego of the corporation. Take, for example, a case like Heskell...It seems probable from the facts given in the opinion that the assaultant there was so dominant in the corporation that he could be deemed the alter ego of the corporation under the ordinary standards governing disregard of corporate entity. He was an officer and general manager of the corporation. His name was Fischer, and the corporation's name was Fischer Laundry and Dry Cleaners Company—indicating that it was probably in whole or in part his own business. In such circumstances the attribution of moral responsibility for the actor's conduct to the corporation is quite a different matter from the same process when the actor is merely a foreman or supervisor.

Based on the legal principles expressed in these passages from Larson, Jablonski held that a restaurant manager was not an alter ego of the employer.

Under the interpretation of alter ego adopted in Jablonski, most supervisors would not be covered by the alter ego exception. The quotations from Larson repeatedly distinguish between "general alter egos" and "mere supervisors." Moreover, the reference, in the second passage from Larson, to the ordinary corporate law standards on alter ego suggests a particularly narrow definition of that concept. In corporate law, the alter ego doctrine applies only when there is "such unity of interest or ownership that the individual and corporation are, for all practical purposes, coextensive." Thus, under the standard set forth in the Larson treatise, and adopted in Jablonski, the alter ego exception would apply only in unusual circumstances.

Since the alter ego exception was reaffirmed by the Meerbrey decision in 1990, several decisions in Illinois have relied on Jablonski and the Larson treatise in strictly limiting that exception. One striking example is Joyce v HHl Financial Services, in which the court found that allegations that the tortfeasor was a regional vice president with supervisory powers to promote, discharge, and to review and evaluate employee performance were insufficient to show that he was an alter ego. "That set of relationships," the court declared, "does not remotely begin to approach the blurring of identity between employee and corporate employer that has been labeled the alter-ego concept."

Both Damato v Jack Phelan Chevrolet Geo, Inc. and Al-Dabbagh v Grempa, Inc. relied on lengthy quotes from Jablonski and the Larson treatise in explaining why the alter ego exception did not apply. In an unpublished decision in 1996, the seventh circuit also employed the Jablonski standard in ruling that the alter ego exception did not apply. In 1997, the seventh circuit again appeared to apply the strict interpretation of alter ego when it held, without elaboration, that a "head supervisor" did not possess "sufficient stature" to be the employer's alter ego.

Thus, in contrast to the Johnson line of cases discussed in the previous section, the decisions applying the Jablonski definition of alter ego have held that the alter ego exception to exclusivity applies only in very limited circumstances.

C. A Middle Ground: The Crissman Decision

In Crissman v Healthco International, Inc., 1997 WL 215169 (ND III April 10, 1995), the seventh circuit applied the Jablonski definition of alter ego: "The alter ego exception would apply only in unusual circumstances."

22. 380 NE2d at 926.
23. 3d 80 NE2d at 927 (quoting Arthur Larson, 2A The Law of Workmen's Compensation § 68.21) (emphasis added).
25. 380 NE2d at 927 (quoting Arthur Larson, 2A Workmen's Compensation Law § 68.22) (emphasis added).
29. Damato, 927 F Supp 283, 94-92-92 (ND III 1996); Al-Dabbagh, 873 F Supp 1105, 1113-14 (ND III 1994). In Al-Dabbagh, the court observed that the tortfeasor did not even have a supervisory or management role, but stressed in a footnote that this observation "should not be misunderstood as suggesting that [this] type of low level status in the corporate hierarchy...would suffice to trigger alter ego responsibility for the corporation." 873 F Supp at 1114 n9.
31. Hunt-Goldfeder v Metropolitan Water Reclamation District of Greater Chicago, 104 F3d 1084, 1017 (7th Cir 1997). It will be interesting to see whether the seventh circuit's application of the strict interpretation of the alter ego exception in Carcione and Hunt-Goldfeder will be followed by other circuit courts in Illinois in determining which interpretation of that exception to apply.
32. 60 Imp Prac Dec (CCDO) § 41.089 (ND III 1992).
Judge Rovner's interpretation of the alter ego exception was inappropriate because a corporation could be separate from its owners under the strict alter ego standard, and yet take purposeful actions which are injurious to their employees.

Picking up Professor Larson's use of the term "realistically an alter ego," Judge Rovner proposed a "realistic and practical appraisal" of which persons should be deemed alter egos. Judge Rovner reasoned that "[i]f the tortfeasor holds a position in which he, in a practical sense, speaks for the company, he may be deemed the employer's alter ego. Accordingly, Judge Rovner found that "when the tortfeasor holds a position in which he, in a practical sense, speaks for the company, he may be deemed the employer's alter ego for purposes of the Workers' Compensation Act."

Applying the foregoing principles to the facts of Crissman, Judge Rovner concluded that the evidence of involvement of higher level managerial employees in the tortious conduct, and of tortious conduct being repeated over time, was sufficient to create a question of fact as to whether the conduct fit within the alter ego exception.

33. Id. at 73,000.
34. Id. at 72,999-73,000.
35. Judge Rovner, who now serves as a seventh circuit appellate justice, decided Crissman when she was a federal district court judge.
36. Crissman, 60 Empl. Prac. Dec. (CCH) at 73,000.
37. Id.
38. Id.
39. Id.
40. Id. at 73,001.
41. Id.
42. Id.
43. Id (quoting Arthur Larson, 2A Workmen's Compensation Law § 68.21).
44. Id.
45. Id.
46. Id.
47. Id. at 73,001-73,002.
48. Id. at 73,003.
49. Id.

TRADEMARK & COPYRIGHT SEARCHES

TRADEMARK - Supply word and/or design plus goods or services.

SEARCH FEES:
COMBINED SEARCH - $260
(U.S., State, and Expanded Common Law)
U.S. TRADEMARK OFFICE - $120
STATE TRADEMARK - $125
EXPANDED COMMON LAW - $165
DESIGNS - $145 per U.S. class (minimum)
COPYRIGHT - $155
PATENT SEARCH - $390 (minimum)

INTERNATIONAL SEARCHING

DOCUMENT PREPARATION
(for attorneys only - applications, Section 8 & 15, Assignments, renewals)

RESEARCH—(SEC - 10K's, SEC, POC, COURT RECORDS, CONGRESS.)

APPROVED—Our services meet standards set for us by a D.C. Court of Appeals Committee.

OVER 100 years total staff experience - not connected with the Federal Government.

GOVERNMENT LIASION SERVICES, INC.
3030 Clarendon Blvd., Suite 209
Arlington, VA 22201
Phone: (703) 524-8200
Fax: (703) 523-8451
Major credit card accepted

TOLL FREE: 800-642-6564
Since 1957

VOL. 35 BY LEXICH 1981/LEGAL DRESS 1981/107
Employer Liability (Continued)

Since 1992, several decisions of the U.S. District Court for the Northern District of Illinois have followed the Crissman precedent in determining the scope of the alter ego exception. In Rowan and Wood, the courts focused on Crissman’s discussion of the decisional authority of the tortfeasor. In Rowan, the court relied on Crissman in holding that “[w]here an employer is the alter ego of an employer depends upon whether the employee has ‘final decision-making authority’... within his or her region.” Applying this standard, the court found that the plaintiff’s allegations regarding the tortfeasor’s authority were sufficient to survive the employer’s motion to dismiss.

In Wood, the court relied on Crissman in granting an employer’s dismissal motion. Under the Crissman standard, the court said, “there must be allegations of final decision-making and policy-setting authority, such that the tortfeasor can be said to ‘speak for the company.’ Such allegations are absent here.”

In Kennedy, Alberts, and Reynolds, the courts relied on Crissman in considering both the tortfeasor’s decisional authority and the recent nature of the conduct in finding that the plaintiff’s claim could fit within the alter ego exception.

Thus, the Crissman standard has emerged as a distinct approach to defining the scope of the alter ego exception. Under the Crissman approach, the key factor in deciding whether an exception applies is whether the tortfeasor possessed sufficient decisional authority. Also, some courts have additionally considered whether the tortious conduct was repeated over time.

III. Resolving the Scope of the "Alter Ego" Exception

Neither the broad Johnson interpretation nor the strict Jablonski interpretation defines the appropriate scope of the alter ego exception. As Judge Rowver pointed out in Crissman, the broad interpretation is "overly loose, and would effectively abolish workers' compensation exclusivity for all intentional torts committed by supervisors. That result would be in conflict with Illinois Supreme Court's decision in Meerbry, which reasoned that workers' compensation exclusivity should not apply in cases where the employer itself committed the intentional tort.

It is reasonable and fair to say, as the Crissman standard does, that when a tort is committed by a key decisionmaker of an employer, it is truly committed by the employer. Moreover, as Judge Rowver emphasized, the Crissman standard is based on a "realistic and practical appraisal" of what it means to be an alter ego of an employer.

For these reasons, the state and federal courts of Illinois should uniformly adopt the Crissman standard for defining the alter ego exception to workers' compensation exclusivity. Then, the workers of Illinois would know with greater certainty whether they can go to court to obtain relief for intentional torts in the workplace. 

50. See, for example, Dario v Commonwealth Edison Co., 146 Ill. 2d F Supp 2d (ND Ill 1996); Roes v Gottlieb Memorial Hospital, No 91 C-6515, 1996 WL 15202 (ND Ill Mar 20, 1996); Alberts v Wigles Lumber Co., No 96 C-4297, 1995 WL 476664 (ND Ill Aug 9, 1995); Wood v Illinois Bell Telephone Co., No 93-C-5949, 1994 WL 194228 (ND Ill May 16, 1994); Reynolds v Hitachi Seiki USA, Inc., No 92-C-4281, 1993 WL 384559 (ND Ill Sept 26, 1993); Kennedy v Frisch, No 90 C-5610, 1995 WL 767979 (ND Ill Mar 1, 1993) (report of Executive Magistrate Judge Lefkow).

51. Rowan, 1996 WL 131716 at 2 (quoting Crissman, 60 Empl Prac Dec (CCH), at 73.001).

52. Wood, 1994 WL 194228 at 3 (quoting Crissman, 60 Empl Prac Dec (CCH), at 73.001).


54. Arthur Larson, 2A Larson’s Workers’ Compensation Law § 68.23.


56. Crissman, 60 Empl Prac Dec (CCH) at 73.001. As was discussed earlier, some post-Crissman decisions have treated Crissman as establishing a two-prong standard that looks both at the authority of the tortfeasor and whether the conduct is recurrent in nature. The addition of this second prong is misplaced. Although the court in Crissman did rely on the repeated nature of the conduct in finding the alter ego exception applicable, the court said: that when tortious conduct is recurrent, it may be covered by either the alter ego exception or the "expressly authorized" exception. In fact, the recurrent nature of the conduct is most relevant to the "expressly authorized" exception; where tortious conduct is repeated, it is likely that the employer knew about it and approved it.

57. According, the Crissman standard embraced by this article includes only the "authority" prong if the intentional tort is committed by an individual who possesses the requisite authority, the alter ego exception should apply.