

WORKERS' COMPENSATION

Admit Or Deny? Does The Injury Arise Out Of Employment?

It is often difficult to determine whether to admit or deny a workers' compensation claim when there is a question of whether the injury arose out of the employment. These cases typically involve unique facts that must be examined on a case-by-case basis. In 2010, the Minnesota Workers' Compensation Court of Appeals decided two "arising out of" cases that can be helpful when deciding whether to admit or deny an injury.

In *Van Buren v. City of Willmar, et al.*, 70 W.C.D. 242 (W.C.C.A. April 30, 2010), the employee worked as a maintenance man for the City of Willmar Public Works Department. The employee's duties included snow removal, tree trimming, grass removal and maintenance of city parks. The employee began his workday at the Public Works garage where he received his work assignments. He then left the building but returned to the Public Works garage for his unpaid lunch break. The employee was not required to eat at the garage.

During the lunch break it was common for the employee and some of his coworkers to play basketball using a hoop located in the Public Works garage and installed by a supervisor.

The employer did not encourage employees to play basketball during their lunch hour.

On January 27, 2003, the employee was injured while playing basketball with his coworkers over his lunch break. The employee filed a claim for workers' compensation benefits and the employer and insurer denied primary liability. At hearing, the compensation judge found that the employee sustained the injury during the course of his employment. The employer and insurer appealed and the W.C.C.A. reversed the compensation judge's decision.

The W.C.C.A. rejected the employee's argument that playing basketball fell under the personal comfort doctrine, which extends coverage to "acts of an employee necessary to life, comfort, or convenience while at work, although personal to him and not technically acts of service..." According to the court, "...to expand the personal comfort doctrine to cover the present case and similar cases would have the practical effect of eliminating the 'course of' requirement found in the statute."

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HDBOB Announces The Addition Of New General Partner

Hansen, Dordell, Bradt, Odlaug and Bradt, P.L.L.P is pleased to announce that Colleen Kaufenberg has become a General Partner of the firm.

Colleen is a magna cum laude graduate of Saint Mary's University (Winona). She received her law degree in 1987 from Hamline University School of Law where she was on Law Review. Colleen is licensed to practice in Minnesota and the U.S. District Court – District of Minnesota. Colleen focuses her practice on workers' compensation litigation, employment litigation and counseling, civil litigation, personal injury and medical malpractice.

In addition to providing litigation and counseling services to clients, Colleen also provides training for insurance companies, as well as employers, regarding workers' compensation issues and various employment related issues in areas of discrimination, hiring, discipline and discharge, drafting and implementing employment policies and non-compete/confidentiality agreements, etc. This training is helpful for new and experienced claims specialists and is critical for employers to reduce the risk of employment litigation.



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EMPLOYMENT LAW**EEOC Cracks Down on Employer Automatic Termination Policies**

In the last year, the Equal Employment Opportunity Commission (EEOC) has been paying particular attention to employers that have a policy of automatically terminating employees who fail to return to work after they have exhausted their leave under workers' compensation, the Family and Medical Leave Act (FMLA), or employer paid leave policies.

This crack down is based upon the EEOC's Americans with Disabilities Act (ADA) Enforcement Guidance that states an employer may not apply a "no-fault" leave policy, under which employees are automatically terminated after they have been on leave for a certain period of time, to an employee with a disability who needs leave beyond the designated leave period.

When a disabled employee has exhausted his leave under workers' compensation, FMLA, or the employer's internal policies, the employer may be required to provide him or her with additional leave as a reasonable accommodation under the ADA. At this stage, the ADA requires the employer and employee, on a case-by-case basis, to engage in an "interactive process" to determine whether and what type of accommodation would be effective. The interactive process is a dialogue between employer and employee and includes the mutual sharing of information and sometimes includes obtaining information from the employee's health care provider. Depending on the facts and complexity of the accommodation request, this dialogue may be concluded after one conversation or may be ongoing. If the employee-requested accommodation is reasonable and does not impose an undue hardship on the employer's operation of the business,

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ESTATE PLANNING & PROBATE*Safeguarding Your Estate Part Two:*
Is A Revocable Living Trust The Answer?

A revocable living trust is an important, powerful tool for estate planning, but it is not necessarily the right choice for everyone. This article, the second in a series of four, focuses on the most common type of trust used in an estate plan: a revocable living trust.

A revocable living trust is a trust that is created by an individual during his or her lifetime. The individual creating the trust (commonly called the "grantor" or "set-tlor") retains complete control over the assets contained within the trust and revoking or amending the terms of the trust agreement until he or she becomes incapacitated or dies, at which point a successor trustee takes over to administer the trust.

The primary purpose of creating a revocable trust is to avoid a probate proceeding. However, assets must be transferred to the trust while the person creating the trust is alive in order for the revocable trust to be effective in avoiding probate. Thus, if an individual fails to transfer an asset to the trust during his or her lifetime, a probate proceeding is generally necessary to transfer the asset from the deceased individual's estate to the trust.

While probate avoidance is often the main goal in creating a revocable trust, depending on family dynamics, avoiding probate may not be advisable due to the lack of court involvement. Sometimes a probate proceeding may be beneficial because the court decides controversies involving the assets, family disagreements, creditors' claims, etc.

In addition to probate avoidance, revocable trusts also provide for management of assets upon the incapacity of the individual. While revocable trusts do not have any inherent unique tax savings features, tax savings language can also be added to the trust document.

Revocable trusts as compared to a probate proceeding also offer greater confidentiality regarding an individual's assets, the value of assets and the identity of the beneficiaries.



When an original will is filed in a probate proceeding, it becomes a public record that can be obtained by any individual. In addition, the value of probate and non-probate assets held by the decedent at death is also public in probate proceedings. Many people do not want this type of information freely available to everyone. If that is a strong consideration for someone, a revocable trust may be a better estate planning tool.

Individuals interested in an estate plan, including a revocable trust or other types of trusts, should discuss the advantages and disadvantages with their attorney.

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FAMILY LAW

Wisconsin Divorce Basics

Divorcing is often more complicated and stressful than planning the wedding. The laws are numerous and vary from state to state. This article is the second in a two-part series providing an overview of what to expect when considering divorce in Wisconsin. The fall Quarterly provided an overview of the divorce process in Minnesota.

Residency Requirements:

To file for divorce in Wisconsin, either spouse must have lived in the state for a minimum of six months and in his or her county for a minimum of 30 days. To file for legal separation, rather than divorce, either spouse must reside in his or her county and the state of Wisconsin for at least 30 days.

Beginning the Divorce:

It is important to remember that each county has specific local rules. Before initiating a divorce, parties should consult with an attorney or contact the Clerk of Circuit Court or the Family Court Commissioner in their county.

A divorce begins by serving a Summons and Petition on the other spouse. These documents must be filed and a fee paid to the Clerk of Circuit Court. Spouses can also sign and file a Petition together as a joint filing. Upon filing, either spouse can immediately request a Temporary Hearing be set to address temporary living arrangements and need for spousal maintenance and/or child support. In order for the court to address these temporary issues, an Order to Show Cause and an Affidavit for Temporary Order must be filed.

If the parties have minor children, Wisconsin law requires the divorcing parents to attend a parenting education class or complete a mutually agreed upon Proposed Parenting Plan. The purpose of the class is to educate parents concerning the effects of divorce on children. If parents cannot agree on where their children will live or how their children will spend time with each parent, the court will require them to attend mediation. Mediation is a confidential process where a qualified person assists the parents in resolving disputes. If an agreement cannot be reached in mediation, each parent must submit a separate Proposed Parenting Plan within 60 days after the mediator notifies the court that no resolution has been reached. The court will then schedule a hearing or request a study on the issues of legal custody and physical placement.

Fees & Costs:

There is a court filing fee of \$184.50 for a divorce or legal separation. If a party requests financial support as part of the action, the filing fee is increased by approximately \$10. The spouse that files the Summons and Petition typically pays this fee. Additional local fees and court costs may become neces-

sary depending on the complexity of the case. For example, if the court requests a study regarding the issues of legal

custody and physical placement for the children, the civil filing fee is \$300 plus additional local fees.

If a party is low-income or cannot afford an attorney or court fees, help and forms are available through the county and on the web at <http://www.wicourts.gov/services/public/prose.htm>. Parties are advised to proceed cautiously when attempting to represent themselves in a divorce.

Timeframe:

There is a mandatory 120-day waiting period from the date of filing before the court can grant a divorce, even if the parties reach agreement on all issues.

Final Divorce:

A divorce is resolved at the final hearing. In some counties, the court automatically schedules hearings for each case. In other counties, parties may have to contact the court to schedule the final hearing. If agreement is reached, the parties will need to provide a written agreement known as a Marital Settlement Agreement to the court. If no agreement is reached, the parties need to be prepared to present their case by calling witnesses and presenting exhibits. Parties are advised to consult with an attorney months before a scheduled final hearing.

After the court approves the Marital Settlement Agreement or enters a decision at the final hearing, the spouse that filed for divorce must submit a Judgment of Divorce. The Judgment of Divorce outlines all of the court-ordered terms that the parties must follow. At any time within six months of granting the divorce, the parties may ask the court to vacate the judgment and reinstate the marriage.

Remarriage After Divorce:

Once the divorce is granted, it is unlawful for either party to marry again until six months after the court grants the Judgment of Divorce. If a party does remarry before the six-month time period has elapsed, that marriage is void.



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The court noted that cases applying this rule have limited it to activities which involve only slight deviations from the work and are reasonable under the circumstances (i.e. getting a cup of coffee while working from a home office). The court also rejected the argument that playing basketball was akin to horseplay, which has been found compensable. Activity which is labeled as horseplay is activity which carries such obvious risk of injury that a prudent employer would be expected to prohibit the activity.

A second "arising out of" case decided by the W.C.C.A. was *Dorr v. National Marrow Donors Program, et al.*, slip op. (W.C.C.A. July 7, 2010). In *Dorr*, the employee was a salaried senior search strategy specialist who generally worked weekdays between 9:00 a.m. and 5:00 p.m. Twice a year the employer sponsored conferences that were held at a location away from the employer's premises. Attendance at the conferences was not mandatory but the employer paid for all expenses in attending the conferences except mileage to and from the location.

The employer's fall conference took place on a Saturday and the employee was scheduled to make a presentation at the conference. While driving to the conference in her personal vehicle, a deer ran onto the road and crashed into the employee's car. As a result of the

collision, the employee was left a quadriplegic. She filed a claim and primary liability was denied based upon the employee not being in the course of her employment when she was injured. A compensation judge held that the employee's injury was not related to her employment and denied the employee's claim.

On appeal, the W.C.C.A. acknowledged that generally an employee is not in the course of employment during the commute from home to the employer's premises. However, the court reversed the compensation judge and awarded benefits under the special errand exception. The court found that (1) there was an express or implied request by the employer that the employee perform services after working hours when she had actual fixed hours of employment; (2) the trip involved on the errand was an integral part of her service performed; and (3) the work performed, although related to the employment, was special because it was not one which was regular and occurred during the normal working hours.

The W.C.C.A. dismissed the argument in favor of denying coverage because the employee was not being paid for mileage because to do otherwise would mean that employers could avoid liability in any special errand case simply by refusing to pay mileage expenses.



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the EEOC will expect the employer to offer the accommodation.

This rationale is the basis for several recent EEOC enforcement actions filed and/or settled. In each of these actions, an employee was automatically terminated after his or her legally protected leave had been exhausted. After employees filed complaints with the EEOC, the agency's investigation uncovered what it considered to be widespread violations of the ADA because of employers' policies of automatic termination upon the exhaustion of leave.

Given the EEOC's scrutiny of such termination policies, it is recommended that employers take a close look at leave-of-absence policies, as well as procedures in administering and enforcing them.



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