IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

VINCENTE N. MUNA, Plaintiff v. PACIFIC DEVELOPMENT, INC., MATSINA LEUTA, and YOICHI MATSUMURA Defendant	)	Civil Action No. 96-1115 DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter came before the Court on defendants Pacific Development, Inc. et al.'s ("Pacific") motion for partial summary judgment. Pacific asks the court to dismiss the complaint of plaintiff Vincente N. Muna ("Muna") arguing his claims are barred by the exclusivity provision of the CNMI Workers' Compensation Act ("Act"). Plaintiff argued that he is exempted from coverage under the Act because 1) no notice of workers' compensation coverage was posted; 2) the injury he suffered was not "accidental" within the meaning of 9302(o); and 3) his injuries did not arise out of workplace events. The court, having reviewed the briefs, declarations, exhibits, and having heard and considered the arguments of counsel now renders its written decision.

[p. 2]

II. FACTS

Muna was hired by Pacific as a bus driver in July of 1994. His supervisor was Matsina Leuta ("Leuta"). While driving his bus in November of 1994, he had a radio conversation with Leuta, who was on duty as supervisor, where Leuta became angry and summoned him to the Duty Free Store parking lot ("DFS"). When Leuta arrived at the DFS, they had a verbal argument which ended with Leuta firing Muna and leaving him at the DFS. Muna asked Leuta three times to give him a ride

from the DFS and Leuta refused. Leuta then drove his van a short distance, stopped, got out, and started beating Muna with a hand held radio and his fists. Muna was taken to the hospital for his injuries and on his release, arrested by the police and incarcerated for approximately 24 hours. Muna then filed a written grievance with Yoichi Matsumura ("Matsumura"), who is employed by Pacific in a managerial position. There has been no claim filed with the Workers' Compensation Commission to date.

III. ISSUES PRESENTED

1. Whether the failure to post notice exempts an injured employee from the provisions of the Act.

2. Whether workers' compensation is the remedy for an employee assaulted by a co-employee or supervisor.

3. Whether the Act's use of the word "accidental" injury should be interpreted literally or as "unexpected."

4. Whether an injury which occurs during an employee's discharge will exempt the injured employee from coverage under the Act.

5. Whether the tort of defamation falls within the exclusivity provision of the Act.

IV. STANDARDS FOR SUMMARY JUDGMENT

On a motion for summary judgment, the court will view the facts in a light most favorable to the nonmoving party. Cabrera v. Heirs of De Castro, 1 N.M.I. 172 (1990). If the moving party meets its initial burden and demonstrates that as a matter of law it is entitled to the relief requested, the burden shifts to the nonmoving party to show a genuine dispute of material fact. Id at 176. The nonmoving party may defeat the motion for summary judgment if sufficient specific facts are produced showing there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986). **[p. 3]** However, conclusory allegations or denials cannot by themselves create an issue of material fact where none would otherwise exist. Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438 (2nd Cir.CT 1980). The Court's role in determining a motion for summary judgment is issue finding, not issue determination. Rachel Concepcion v. American International Knitters, 2 CR 940 (1986). For the purposes of the motion, the court will

view Muna's claims in the most favorable light, although factual disputes amongst the parties remain.

V. ANALYSIS

A. Backround of the Workers' Compensation laws

The Legislature established the Workers' Compensation Laws by PL 6-33 in 1989. Although there is no policy statement attached to PL 6-33, the general policies underlying the enactment of Workers' Compensation Laws across the United States can be imputed to our Commonwealth Code.

The purpose of a Workers' Compensation scheme is to compensate injured employees regardless of fault. 2A A. Larson, Workmen's Compensation, Sec. 65.11. Historically, the defenses of comparative negligence, assumption of risk, and contributory negligence served to prevent recovery to a large number of injured workers. *See* Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271 (Ind. 1994). In addition, under the master-servant laws of many states, an employer was not liable for the misconduct or negligence of a co-employee. Perille v. Raybestos-Manhattan-Europe, Inc., 494 A.2d 555 (Conn. 1985). By awarding fixed compensation, regardless of fault, the Workers' Compensation system does away with the uncertainty, delay, and expense of common law actions. Baker, 637 N.E.2d 1271. In addition, it serves to equally distribute the costs of production among producers and consumers, thereby assuring the stability of the marketplace. S.D. Borello and Sons, Inc. v. The Department of Industrial Relations, 769 P.2d 399 (Cal. 1989). The employer's resulting immunity from tort liability has been called the "heart and soul" of workers' compensation legislation because it has significantly benefitted workers, employers, and the State, both socially and economically, in assuring benefits to workers. Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla.App.1 Dist. 1985).

[p. 4] The exclusivity provision, which makes workers' compensation the only form of recovery for injury covered by the Act, is the backbone of a workers' compensation scheme. It ensures that the sacrifices and gains of employers and employees are put into balance: employers accept limited liability without fault finding in exchange for immunity to tort prosecution. Larson, *supra*, at 65.11. Disrupting such a system should only be done with the utmost caution because certainty is a major benefit provided to all parties, and taking away that certainty chips away at the very system itself.

Therefore, terms of Workers' Compensation Acts should be construed liberally in favor of coverage in order to further the goals that led to their enactment. Industrial Commission of Wisconsin v. McCartin, 330 U.S. 622, 67 S.Ct. 886 (1947).

B. Notice

The exclusivity provision of the Act, Section 9305, provides:

> Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this chapter, is the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of such other employee's employment; provided that, if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death resulted from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

Muna argues that because Pacific did not notify him of his right to workers' compensation and did not file a claim with the Workers' Compensation Commission Administrator after the incident, the exclusivity provision of the Act does not apply. Muna cites to Brown Services, Inc. v. Fairbrother[1] for the proposition that failure to notify results in exemption from a workers' compensation scheme. In Fairbrother, the court found "no evidence in the record that pre-injury notice was given nor has appellant referred us to any." Fairbrother at 775. The court agrees that without any form of notice, it would be improper to apply the exclusivity provision of the Act.

[p. 5] However, in this situation, Pacific has met its burden to show that it gave notice to Muna of his ability to recover under worker's compensation by providing copies of the notices it posted in four of its offices along with an affidavit in support by Matsumura. Muna attempts to show through omission that he did not receive notice by providing a copy of the "employment policies and practices" booklet he received as part of his employment. However, an assertion unsupported by fact is not enough to overcome his burden to show notice was not provided. His assertion that he did not see any posted notices falls short of proof in evidentiary form and fails to raise an issue of fact after defendant has met its burden of proof.

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[1] 776 S.W.2d 772 (Tex.App.-Corpus Christi 1989).

In addition, the fact that Pacific did not file a claim will not exempt Muna from the Act. The Act provides that if an employer fails to provide a report to the Workers' Compensation Commission, the statute of limitations does not start to run. 4 CMC Sec. 9339(f). Generally, the failure of an employer to file a report of injury to the Commission will not cause any deprivation of tort immunity, although it may result in some sort of penalty, such as a fine. Larson, *supra*, at 67.25, 12-145. Such is the case here where failure to file a report of injury subjects Pacific to a five hundred dollar fine under 4 CMC Sec. 9339(e).

C. Arising out of and in the course of employment

The CNMI Workers' Compensation Act sets forth the circumstances under which it will apply to an injury or death of an employee. 4 CMC Sec. 9303(a) provides:

> Compensation shall be payable under this chapter in case of disability or death of an employee, but only if the disability or death results from an injury or illness arising out of and in the course of employment

The terms "arising out of and in the course of employment" are at issue. Muna claims that the incident did not arise out of and in the course of his employment because the alleged attack was motivated by Leuta's personal animosity toward Muna. However, the caselaw plaintiff relies on does not apply in this situation. The controlling statutes in the cases plaintiff cites specifically provide that an injury caused by a third person who intended to injure the employee because of personal reasons exempts the employee **[p. 6]** from coverage under Worker's Compensation in those states. Sanders v. Texas, 775 S.W.2d 762 (Tex.App.-El Paso 1989); Walsh Construction v. Hamilton, 363 S.E.2d 301 (Ga.App. 1987).

In the CNMI, our legislature has specifically provided that an injury "caused by the willful act of a third person inflicted upon any employee" falls within the Act as long as it arises "out of and in the course of employment." "Arising out of and in the course of employment" is a broader

definition that those put forth in the statutes contained in the cases presented by plaintiff. In addition, the Act does not specify any exceptions, such as those cited by plaintiff.[2]

Firing an employee is an integral part of the work relationship. Hill v. Gregg, Gibson, & Gregg, Inc., 260 So.2d 193 (Fla. 1972). Once the act of discharging an employee has begun, an employment related situation is created, as long as the assault was close enough in time and sequence to be part of the discharge. Woodward v. St. Joseph's Hospital of Atlanta, 288 S.E.2d 11 (Ga.App. 1981). Injuries which stem from the exercise of a supervisor's duties have been considered to arise in the course of an employment relationship. Tennaro v. Ryder System, Inc., 832 F.Supp. 494 (D.Mass. 1993). In addition, an injury will arise out of employment if the incident occurs in a place where the employee would reasonably be fulfilling the duties of employment or doing something incidental to that employment. Estate of Kimmell v. Seven Up Bottling Co., 993 F.2d 410 (4th Cir. 1993).

In this situation, Muna was fired from his employment with Pacific in the DFS parking lot, where he was with his bus, immediately preceding the alleged beating. Whether personal issues were involved, as Muna later claimed, or not, it is clear that the termination of his job was part of the altercation that took place. The incident was close in time and followed on the heels of Leuta's instructions to Muna regarding his bus. Muna was fired from his job immediately before the alleged altercation took place.

Muna's own handwritten statement, filed with Pacific after the incident, which was not disputed, stated that he communicated to Leuta by radio about where he was supposed to be, that he talked to another bus driver for an hour while his supervisor was trying to reach him, and that he did not want to **[p. 7]** head out of the parking lot going the same direction as another employee. He further explains in the statement that Leuta told him to remain in the parking lot, and when Leuta arrived, told Muna not to "talked [sic] to me like that" and threatened his job before firing him.

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[2] One of the cases plaintiff cites actually involves an appeal of an award by the State Board of Workers' Compensation. On the basis of the court's decision that the injury did not arise out of employment, but rather stemmed from a personal attack which was not covered by the applicable statute, the claimant lost his award. Walsh Construction v. Hamilton, 363 S.E.2d 301 (Ga.App.1987).

After being fired, Muna writes that he opened the driver's door of Leuta's car and asked for a ride. After being refused, he asked twice again to have a ride, the last time opening the door again. Muna writes he then said, "God demet [sic] you better drop me" before Leuta drove forward, then backward, then attacked Muna.

Muna, construing the facts in the light most positive to him, was in the parking lot with his bus, waiting for his supervisor to arrive. He could reasonably be expected to be fulfilling his work duties while attending his bus. In addition, Leuta, in firing Muna, was carrying out a supervisory duty. The assault took place shortly after Muna was fired. Therefore, any injury Muna sustained in this case arose out of Muna's employment under 4 CMC Sec. 9303(a).

D. Definition of "accidental"

Muna next argues that the definition of injury as "accidental" should be interpreted literally. Because this injury was intentional on the part of Leuta, he argues, the Act does not apply. The term "injury" as defined by 4 CMC Sec. 9302(o) provides:

> "Injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accident or injury. The term includes an injury caused by the willful act of a third person inflicted upon any employee in the course of his employment.

The term "accidental" has consistently been interpreted by courts to mean "unexpected." Gordon v. Chrysler Motor Corp., 585 N.E.2d 1362 (Ind.App 2 Dist. 1992); Baker v. Westinghouse Elec. Corp., 637 N.E.2d 1271 (Ind. 1994); Gallegos v. Chastain, 624 P.2d 60 (N.M.App.1981); Kandt v. Evans, 645 P.2d 1300 (Colo. 1982); Dickert v. Metropolitan Life Ins. Co., 428 S.E.2d 700 (S.C. 1993); Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla.App.1Dist. 1985); Jett v. Dunlap, 425 A.2d 1263 (Conn. 1979). Unexpected and unforeseen injuries are "accidental" from an employer's point of view where an employer did not expressly authorize or direct the co-employee to inflict the injury. Meerbrey v. Marshall Field and Co., 564 N.E.2d 1222 (Ill. 1990); Larson, *supra,* 2A Sec. 68.21. A deliberate **[p. 8]** assault by a co-employee or third person is an "accidental" injury by this definition. Larson, *supra* at 68.12, 13-11. This interpretation is supported by the Act, which includes willful acts of a third person against the employee as part of the

definition of accidental injury. 4 CMC Sec. 9302(o). Whether an act is willful on the part of a third person or willful on the part of a co-employee, it carries the same degree of unexpectedness for both employer and injured employee. The altercation that arose between Leuta and Muna in the course of their employment was not foreseeable or expected. As a result, it was accidental within the definition of 4 CMC Sec. 9302(o).

Unless an injury is intentional on the part of the employer, the Worker's Compensation provisions are best equipped to compensate an injured employee. See Larson, *supra*, at Sec. 68, p. 13-1 et. seq. There is no compelling reason to create employer tort liability for the intentional acts of a co-employee or third party upon an injured employee.

This is not to say that a common law action does not remain against an intentional tortfeasor: it does. 4 CMC 9342; Brown v. Trefz & Trefz, 327 S.E.2d 556 (Ga.App.1985); Dickert v. Metropolitan Life Ins. Co., 428 S.E.2d 700 (S.C. 1993). A person who commits an intentional tort should not be protected by the Workers' Compensation laws. Allowing such a person to escape liability for an intentional act goes against all notions of fairness. In most jurisdictions, employees remain liable for their intentional torts because it would thwart the socially beneficial purpose of the Workers' Compensation laws to allow an intentional tortfeasor to escape liability for misdeeds using a law enacted to protect injured workers. Larson, *supra*, sec. 72.21.[3] Further, as Workers' Compensation benefits are paid out of employers' premiums, allowing an intentional tortfeasor to shift his liability to such a fund would be an unjust result. Elliott v. Brown, 569 P.2d 1323 (Alaska 1977). As a result, the common law claims made against Leuta will stand.

An intentional injury committed by the employer itself must fall outside of the Act. Allowing an employer to intentionally harm a worker and then hide behind the Act would be unconscionable. However, unless an employer or its alter ego expressly authorizes or commands an assault or **[p. 9]** intentionally harms an employee, it is in the position of any third party and the incident may be

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[3] Thirty-four states have exceptions to co-employee immunity for intentional torts. Larson, *supra* at p. 14-143 (Nov. 1996 Supp. p. 130).

regarded as one more type of workplace mishap which would trigger Workers' Compensation for the injured employee. Larson, *supra*, Sec. 68.21.

To be regarded as an alter ego, it is necessary for a co-employee to have a direct influence controlling the company. Griffith v. Keystone Steel & Wire, 887 F.Supp. 1133 (C.D. Ill. 1995). Further, having an ownership interest and being an officer or director are factors in determining whether an employee can qualify as an alter ego of a company. Al-Dabbagh v. Greenpeace, Inc., 873 F.Supp 1105 (N.D.Ill 1994); Dickert v. Metropolitan Life Ins. Co., 428 S.E.2d 700 (S.C. 1993); 2A Larson, 68.21, 68.22.

Leuta, in his supervisory position, was only one level of employee with responsibility and authority and did not hold office in the corporation. As such, he was not acting as an alter ego of his employer. Because the employer or its alter ego did not cause any intentional tort, Muna's injuries will fall within the exclusivity provision of the Act.

E. Defamation

Muna additionally raises the claim of defamation in his complaint. He argues that because Leuta yelled at him in a public place before firing him in front of onlookers, he was humiliated and suffered emotionally. If the defamation claim arose directly out of the work situation, it will be covered by workers' compensation. Becker v. Automatic Garage Door Opener Co., 456 N.W.2d 888 (Wis.App. 1990); Lovelace v. Long John Silver, 841 S.W.2d 682 (Mo.App. 1992). Whether a claim for defamation arose directly out of a work situation should be looked at in the context of each particular situation. In this case, the yelling took place in the parking lot where Muna was with his bus in the course of his employment. The fact that the discharge of employment took place in a public parking lot was not unusual in this case, as a bus driver could reasonably be assumed to be discharging his duties in such a place. Therefore, Muna's defamation claim is barred by the exclusivity provisions of the Act.

F. Other claims

Likewise, Muna's claims for negligence and infliction of emotional distress are barred by the exclusivity provision of the Act because they arose out of his employment as discussed infra. The mere fact that emotional claims are involved rather than physical claims is not enough to bring these claims outside of the Act. Chinnery v. Government of the Virgin Islands, 865 F.2d 68 (3rd Cir. 1989).

VI. CONCLUSION

Therefore, it is ordered that plaintiff's first, second, third, fourth, fifth, sixth, and seventh causes of action are dismissed as against Pacific and Matsumura. However, all common law claims against Leuta may remain as there are issues for trial which cannot be determined in this motion for summary judgment.

So ordered this 10 day of August, 1998.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Presiding Judge