GONZALEZ SAGGIO HARLAN

The GSH 60-Second Memo

Sponsored by the GSH Employment Group

August 26, 2009

Jerilyn Jacobs, Esq.

www.gshllp.com

(414) 277-8500

Want more Information on this topic?

CLICK HERE!

Side Jobs: When Your Employee is Seeing Someone Else

by Jerilyn Jacobs, Esq.

Side jobs can be the bane of every non-union employer. After all, the employees should be acting as representatives of their employer, bringing in new business, rainmaking -- not doing jobs on the side for cash. (If you own a union shop, on the other hand, the punishment the union can mete out to any member who does side jobs will likely exceed, by far, anything you could lawfully do as a "mere" employer). But the fact is that employees will often look to supplement their incomes, and doing what they do best -- because they do it for a living -- will be an attractive option.

So employers need a policy to deal with employees taking on side jobs. Whether the employer decides to ban them altogether, look the other way, or adopt a formal policy, one goal remains the same: to not be found liable when someone gets hurt as a result of an employee's side job and the employee does not have insurance to cover the damages.

That is what nearly happened to Silvan Industries in the case of *Behrendt v. Gulf Underwriters Ins. Co.*, 768 N.W.2d 568 (Wis. 2009). Silvan is a manufacturer of pressurized tanks, such as air

receivers and water tanks. Silvan had a policy of not allowing employees to make pressurized tanks on the side and even had a system in place to prevent it -- they cut holes in any tank they considered scrap, to make it unfit for pressurization. Nevertheless, an employee modified a scrap tank to make a 55 gallon oil tank for his son-in-law, who owned an oil change business. The son-in-law then utilized the services of a plumber to modify it to withstand pressure. An employee of the son-in-law was later injured when the tank exploded ten years after the original side job and he sued Silvan, alleging strict liability, vicarious liability, and negligence.

He lost his claims in the circuit court, the court of appeals, and ultimately, the Wisconsin Supreme Court; but the case nevertheless shows the risks employers face when it comes to employees' side jobs. The strict liability and vicarious liability claims required little discussion. Silvan did not manufacture the tank, so it could not be held liable under a strict liability theory; and because the side job was done solely for the employee's benefit with no benefit whatsoever to the employer, the vicarious liability claim failed as well.

But the negligence claim proved more complex. Nominally, at least, Wisconsin follows the minority view in the landmark case of *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y.1928) - that is, everybody owes to the world at large the duty of refraining from any acts that may unreasonably threaten others' safety. In practice, Wisconsin courts find many reasons to hold that, in individual cases, a defendant did not owe any duty to the plaintiff. That would seem a reasonable holding here; Silvan was nothing more than the plaintiff's employer's father-in-law's employer.

Nevertheless, the Supreme Court held that Silvan did owe a duty to the plaintiff. The court held, "The allegations are that the tank involved here was built at Silvan with its materials under a policy that permitted workers to fabricate personal projects at work. Under Wisconsin law and our *Palsgraf* minority approach, Silvan had a duty to exercise ordinary care under the circumstances so that its policy permitting side jobs did not create 'an unreasonable risk of injury' to [the plaintiff]."

Ultimately, though, the Wisconsin Supreme Court held that Silvan did not breach that duty of care. Silvan's policy prohibited employees from making pressurized tanks as side jobs, and Silvan took the additional step of cutting holes into any tanks that it considered scrap to prevent them from being used with air pressure. Under these circumstances, the court held Silvan did not breach its duty to use ordinary care, and summary judgment was properly granted to it by the circuit court.

Still, the employer had to litigate a case all the way to the Supreme Court, all because of something an employee did ten years earlier, while engaging in an activity that brought no benefit whatsoever to the employer.

When contemplating how to handle employees seeking to supplement their income with side jobs, employers need to take

GONZALEZ SAGGIO HARLAN

Office Locations:

Arizona
California
Illinois
Indiana
Iowa
Nevada
New York
Ohio
Washington D.C.
Wisconsin

www.gshllp.com

into consideration many factors. First, an employer needs to decide whether it will adopt a restrictive policy that prohibits all supplemental forms of employment or contracting, take a more moderate approach and adopt some variation of a notification policy whereby the employee is obligated to inform his or her employer of the source and circumstances of any side income and perhaps receive the employer's approval beforehand, or simply be silent on the matter and thereby tacitly allowing side jobs. Even if no explicit policy is adopted, a company can cite to its policies on ethics, use of company property, conflicts of interest, and noncompetition in order to ensure that its employees' focus and loyalty remains with it. Further, employers should also be careful to not try to regulate its workforce's off-duty conduct, as such an approach could lead to lawsuits for invasion of privacy. Finally, it's not just a matter of policy, because, as shown here, there are liability issues to consider.