Beyond the compensation bargain

Opening up tort liability for a workplace injury: The *Fermino* exception

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The employer's most powerful tactic in deflecting exposure is to relentlessly argue the workers' compensation exclusivity remedy rule. Defense attorneys will be adamant that Plaintiffs' claims are not subject to exception. Don't be worn down by employers' constant categorization of Plaintiffs' injuries as within the course and scope of their employment. In addition to statutory exceptions, there are court-made exceptions that may bypass employer immunity. Such situations may include fraud, false imprisonment, disability discrimination, sexual harassment, defamation and wrongful termination in violation of public policy. In these situations, the focus of the pleadings should be that the intentional employer conduct was completely outside the compensation bargain stemming from the employment relationship. The following article will discuss an approach to pleading a *Fermino* exception to Labor Code section 3602.

Opening up tort liability for a workplace injury

Fermino v. Fedco, Inc. (1994) 7 Cal.4th 701, arises from an employee action against her employer due to injuries she sustained when she was taken by her managers into an interrogation room at work and accused of stealing. The employee was held under threat of arrest in the room and interrogated with false information for over an hour. The trial court sustained the employer's demurrer and dismissed the action on the grounds it was barred by the exclusive remedy provisions of the workers' compensation law. The Supreme Court of California reversed. The Court held that the trial court erred because false imprisonment is an act of the employer stepping outside its proper role, violating the reasonable expectations of the employee and transgressing the limits of the compensation bargain.

In *Fermino*, the California Supreme Court described a "tripartite system for classifying injuries arising in the course of employment." (*Id.* at p. 713.) "First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system." (*Id.* at p. 713-714.) These injuries are subject to workers' compensation exclusivity. "Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under [Labor Code] section 4553." (*Ibid.*) These also are subject to workers' compensation exclusivity, but the employee is entitled to a 50 percent increase in compensation if the injury results from the employer's "serious and willful misconduct." (Lab. Code, § 4553.) "Third, there are

certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought." (*Fermino*, *supra*, at p. 714.) Intentional conduct is beyond the compensation bargain if it could not be considered a normal risk of employment or is contrary to fundamental public policy. (*Id.* at p. 714-715.) With this tripartite foundation, courts have formed the *Fermino* exception. The *Fermino* exception can be useful where a client has suffered an egregious workplace injury, yet the facts do not squarely fall into a statutory exception.

Conduct that is beyond the compensation bargain

As much as possible, plaintiffs must avoid characterizing their employer's conduct as intentional failure to maintain a safe workplace, intention to have an unsafe workplace, violation of safety regulations, knowledge of dangerous or defective conditions, disregard of employee safety, or knowledge that this act or omission will likely result in serious or fatal harm on the employee. Such characterization would arguably fall within the second category of the tripartite system, and thus be barred by the exclusive remedy doctrine.

The third classification of employer conduct has become known as the *Fermino* exception, which allows for civil remedy. Courts have strictly limited the intentional misconduct that fits within this category because of "the fears … that a holding in

plaintiff's favor would open up a Pandora's Box of actions at law seeking damages for numerous industrial diseases." (*Johns-Manville Products Corp. v. Superior Court*, (1980) 27 Cal.3d 465, 478.) Nevertheless, "nor can [the California Supreme Court] believe that the Legislature in enacting the workers' compensation law intended to insulate such flagrant conduct from tort liability." (*Ibid.*)

The Supreme Court in *Fermino* stated there are some instances in which, although the injury arose in the course of employment, the employer engaging in that conduct "'stepped out of [its] proper role' or engaged in conduct of 'questionable relationship to the employment.'" (*Fermino, supra,* 7 Cal.App.4th at p. 708.) It may also "be essentially defined as not stemming from a risk reasonably encompassed within the compensation bargain." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97.) The "'compensation bargain' cannot encompass conduct, such as sexual or racial discrimination 'obnoxious to the interests of the state and contrary to public policy and sound morality.'" (*Fermino, supra,* at 715.) Although it may seem that intentional violations of health and safety standards are contrary to public policy and sound morality, Plaintiffs should not plead themselves into this trap.

Intentional criminal conduct

For cases where it is clear that the employer will have a tough time arguing they were acting in pursuit of usual employer conduct, the Court in *Fermino* established "those classes of employers' intentional criminal conduct against the employee's person by means of violence and coercion, such as those enumerated in part 1, title 8 of the Penal Code, violate the employees' reasonable expectations and transgress the limits of the compensation bargain." (*Fermino, supra*, at 724, fn. 7.) In deciding that "false imprisonment committed by an employer against an employee was always outside the scope of the compensation bargain," the Court was persuaded by the fact that "the tort of false imprisonment was *criminal conduct* against the employee's person, not permissible conduct that only becomes intentionally tortious in light of the employer's supposed malicious state of mind." (*Id.* at p. 721.) This holding naturally followed the Court's designation of the tripartite system, where "what matters, then, is not the label that might be affixed to the employer conduct, but whether the conduct itself, concretely, is of the kind that is not within the compensation bargain." (*Id.* at 718.) The Court, in essence, held that intentional criminal conduct by the employer against the employee's person is contrary to public policy and sound morality, and is thereby outside of the scope of employment and not subject to the exclusivity rule.

Specifically pleading violence and coercion

When considering which claims to bring against an employer, Plaintiffs' attorneys must recognize the heightened expectation of *violence and coercion*, with respect to the physical, intentional, criminal conduct alleged against the employer in order to evoke the *Fermino* exception. A Plaintiff does not need a physical act to argue a *Fermino* exception; however, it can be used to buttress claims where there has been physical harm to the plaintiff.

Assault and battery claims have long been a recognized exception to the exclusive remedy rule. Yet the courts have been strict in limiting this exception to the classic assault and battery scenario.

For example, the requisite threat of physical force or violence has been met where a waitress employee was violently struck and thrown down by the restaurant co-owner/employer (*Magliulo v. Superior Court* (1975) 47 Cal.App.3d 760, 762), a hotel security guard was threatened by his supervisor at gun point and told that he was going to blow the security guard's head off (*Herrick v. Quality Hotels, Inns & Resorts, Inc.*, (1993) 19 Cal.App.4th 1608, 1612-1614), a co-employee attacked, beat, struck, assaulted, and raped plaintiff employee and employer engaged in positive misconduct by declining to suspend or discharge him (*Meyer v. Graphic Arts International Union* (1979) 88 Cal.App.3d 176, 177-179), and an employer attacked the employee without provocation, tearing his clothes and striking him in the face and body (*Conway v. Globin* (1951) 105 Cal.App.2d 495, 496-498).

Plaintiffs must plead sufficient facts to show that the requisite force and violence was used when they were injured. Pleading a mere "touching" will not accomplish a requirement of "physical force or threat of physical force." This language is helpful to implement early in litigation to signal to defense that their exclusivity arguments will need to be further tailored.

Conclusion

Many advocates are deterred from pursuing claims for injuries sustained while on the job. Exceptions to the workers' compensation exclusivity rule are hard fought for. Using the insights from *Fermino*, Plaintiffs can fortify their pleadings by articulating their claims using the language judges and defense counsel will be looking for.


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