Master and Servant: Employee of National Guard is entitled to compensation under Employers' Liability Law

Harry S. Sicula

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation

Harry S. Sicula, Master and Servant: Employee of National Guard is entitled to compensation under Employers' Liability Law, 9 Marq. L. Rev. 120 (1925).
Available at: http://scholarship.law.marquette.edu/mulr/vol9/iss2/12

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
of occupations is indicative of the tendency of the courts to confine the application of licensing and regulatory statutes in derogation of a common right strictly to the specific instances enumerated in the statute.\textsuperscript{15}

The Legislature of Wisconsin is blessed with a foresight most unusual in state legislatures, having avoided this question entirely. Not only has it passed a statute requiring barbers to be licensed,\textsuperscript{36} but it has included a chapter regulating beauty parlors.\textsuperscript{37} This statute contains this definition: "Barbering is shaving, trimming the beard, cutting the hair, shampooing, scalp or face massage of a male over ten years of age for payment."\textsuperscript{718} It is specific and leaves no need for interpretation. The chapter regulating beauty parlors provides that "no person shall follow the occupation of beauty parlor manager, operator or apprentice without a license."\textsuperscript{19} It is significant that although the statute has taken great pains to define the occupation of barbering most exactly, yet upon the definition of a beauty parlor it is ominously silent. Apparently the courts are not alone in their trepidity of encroaching upon the exclusive domain of the "deadly sex," for the Wisconsin Legislature, though bolder, appears equally ignorant of the artificial aids to pulchritude employed by the "female of the species."

WILL C. GOBEL.

Master and Servant: Employee of National Guard is entitled to compensation under Employers' Liability Law.—Can a national guardsman recover a compensation award under the Workmen's Compensation Act for injuries suffered while serving in his capacity as a guardsman or in doing any work connected therewith? This question has been answered in the affirmative by the recent case of Nebraska National Guard v. Morgan, (Neb. 1924) 199 N. W. 557. One Morgan was employed as a carpenter to erect shed kitchens for each of the companies of the Nebraska National Guard which were to gather for an encampment near the city of Ashland in August, 1923. Plaintiff was employed on July 23 and worked for six consecutive days until he met

\textsuperscript{34} The italics are writer's.

\textsuperscript{36} "A corporation engaged in producing, buying and selling oil, and oil products, owning and using tank cars solely for transporting its own products, which ownership is necessitated by the failure of railroads to provide cars, is not engaged in the business of owning tank cars within the Laws of Florida 1913, sec. 6421 . . . and by sec. 46 imposing such tax on 'any corporation owning, controlling or operating tank cars.'" Texas Co. v. Amos, 81 So. 471, 77 Fla. 327; Matthews v. State, 214 S. W. 339, 85 Tex. Cr. App. 469. "Under Motor Vehicle Law, par. 289, defendant telephone repairer, while using automobile furnished him by employer to convey himself and necessary materials from place to place, held not a chauffeur." People v. Dennis, 166 N. Y. Supp. 318.

"The mere giving of massage treatments professionally falls within the profession of a trained nurse and one who gives such treatments is not required to be licensed." People v. Hettinger, 150 Ill. App. 448.

\textsuperscript{38} Chap. 158, Wis. Ann. Stats. 1923.

\textsuperscript{37} Chap. 159, Wis. Ann. Stats. 1923.

\textsuperscript{38} Sec. 158.01, Wis. Stats.

\textsuperscript{39} Sec. 159.02, Wis. Stats.
with the accident which resulted in the injuries for which he claimed compensation. It was contended by the state which appealed from the award made to plaintiff, that Morgan was not an employee of the state of Nebraska; and the Supreme Court of Nebraska, in affirming the award made by the labor commissioner and by the district court, held "that the Nebraska National Guard is a governmental agency of the state within the Employers' Liability Law, and an employee thereof is entitled to compensation for injuries received in consequence of an accident arising out of and in the course of such employment." ¹

It is surprising to note that a question of this nature has never been brought before our Wisconsin Supreme Court, but we are assured of a decision on this question in the near future, for an appeal is to be taken from a ruling by Judge E. Ray Stevens of the Circuit Court of Dane County, in a similar case under our Workmen's Compensation Act. In this pending case it was the contention of the state that the Wisconsin National Guard is a part of the federal army. In overruling this contention, Judge Stevens says: "Plaintiff was in the state militia camp under order of the governor, and in charge of officers appointed by the state. In the absence of other controlling facts, it follows that he was an employee of the state during the period of his training at Camp Douglas." ²

In view of the fact that our Supreme Court will have to pass upon the status of the Wisconsin National Guard under the Workmen's Compensation Act, in deciding this case on appeal, it is interesting to see if there are any cases in this state or any similarity between our Compensation Act, and that adopted in Nebraska, which would warrant a ruling favorable to guardsmen who may be placed in a like situation as that of Clifford Johnson.

In Nebraska, an employee is defined as, "Every person in the service of the state or any governmental agency created by it, under any appointment or contract of hire, express or implied, oral or written." ³

The Wisconsin Act includes in its definition of an employee the clause, "Every person in the service of the state, or of any county, city, town, village, or school district therein under any appointment, or contract of hire, express or implied, oral or written, except any official of the state, or of any county, city, town, village, or school district therein." ⁴

The only material difference between these two definitions is, that the Nebraska definition contains the phrase "governmental agency," while the Wisconsin Act includes all employees of the state and of its political subdivisions. ⁵ It can readily be seen that this phrase "political subdivisions" is analogous to the phrase "governmental agency" as used in the Nebraska Compensation Act.

The question therefore is, "Is the National Guard a state or federal

¹ Nebraska National Guard v. Morgan, decided in July, 1924. Reported in 199 N. W. 557.
² Judge Stevens in the Clifford Johnson Case.
³ Comp. Stat. 1922, 3038 Subdivision 1.
⁴ Comp. Stat. 1923, Sec. 102.34 to 102.34.
⁵ Note 15 on Page 6 of Report of Industrial Commission of Wisconsin, 1921.
institution? If it is a state institution then any member thereof can claim awards under our Compensation Act for injuries received while exercising duties within the scope of his employment. If, on the other hand, it is the federal Government which has exclusive control over the state militia, it follows that the members thereof are federal employees and can not claim under the state Compensation Act, for they are not employees of the state nor of any political subdivisions thereof.

It is provided in the constitution of the United States that Congress shall have the power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline provided by Congress.\(^6\)

It is also stated that Congress is to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.\(^7\)

It would seem that the framers of our fundamental law intended that Congress is to have exclusive control over the militia of each state, but it has been held that these provisions do not give to Congress powers over the militia beyond the specific objects enumerated. After a detachment of the militia has been called forth, and has entered into the services of the United States, the authority of the general Government over such detachment is exclusive.\(^8\)

The National Guard or State Militia is a body of state troops and, until "called forth" by the President, it is under the control of the state. The President may call forth such "troops" for specific purposes and when so called forth and assembled they come under the control of and into the service of the United States.\(^9\)

It has been further held that the time when an enlisted man ceases to be a state militia man and becomes a national militia man of the federal Government, is when he is mustered into the service of the United States and refusal to be mustered into the federal service is the act of a state militia man.\(^10\) In this case Justice Washington in speaking for the court said, "So long as the militia are acting under the military jurisdiction of the state to which they belong, the powers of legislation over them are concurrent in the general and state government.

It is sometimes said that as the state National Guard receives aid toward defraying expenses, in the way of funds from the federal treasurer, such National Guard surely was intended for federal control and the members thereof are employees of the national Government. But this seems to have been settled in an early case in which it was ruled "That the mere fact that the State Militia has been so organized as to entitle it to receive federal aid does not prevent its maintenance from being a necessity of state government.\(^11\)

---

\(^6\) Subsection 16 of Sec. 8 of U. S. Constitution.
\(^7\) Subsection 15 of Sec. 8 of the U. S. Constitution.
\(^8\) *Duffed v. Smith*, 6 Binney 306; *Houston v. Moore*, 5 U. S. 19; *Dunne v. People*, 94 Ill. 120.
\(^10\) *Houston v. Moore*, 5 Wheaton 1.
The cases throughout the United States tend to hold that the militia was intended for use by the state. It is to be the "police force of the state." As expressed in Ruling Case Law "It may be laid down as a generally accepted rule that the organized militia of the states is a state institution—a governmental agency. It is part of the executive branch of the state government to be used as a last resort to compel obedience to the laws." It is a domestic force as distinguished from regular "troops" and is only liable to be called into service when the exigencies of the state make it necessary.

In the face of these decisions it can be seen that it is the state which is to assume control over its National Guard, once it is organized. The rule can be made applicable to Wisconsin as it has been made in other states. Our statutes provide for the organizing of a National Guard and the Governor is made the commander-in-chief of such organization. Our state makes appropriations toward the maintenance of this institution when formed. The company is to constitute a corporate body when formed.

It has always been and rightfully should be the policy of the state to encourage enlistment in these forces which are so necessary for state aid in case of emergencies, but is a refusal to duly compensate an injured guardsman in harmony with such policy? Will not such an attitude toward those who may have cause to claim compensation rather result in a discouragement of enlistment on the part of public spirited citizens?

Other states have appreciated the sacrifice made on the part of its citizens who answered the call to the defense of the state. They have made appropriations in every form to provide for its militia man. Such laws, which resulted in a tax assessment upon the public at large, were declared constitutional as being for a public use. It was settled that the Legislature has the power to provide for compensation to members of the National Guard who may be injured while performing any duty, lawfully ordered by their superior officer. A provision of this nature by general statute was held to create a moral obligation by a state to a soldier who enlists, and who is afterwards injured while performing a lawfully ordered duty, without any fault of his own.

A War Department Decision in 1904 held that "As the militia forces while participating in joint maneuvers are not "called forth" in the manner or for any of the purposes prescribed in the constitution, they continue to be state forces, and do not at any time pass into the service of the United States, and claims for damages on account of injuries sustained during the participation in such maneuvers can not be adjusted by the War Department and should be presented to the state in whose service the parties were when the injuries were received.

So we can infer from this decision by the War Department that the injured militia man must look to his relief from the state, which it de-

---

Vol. 18 R. C. L. Paragraph 51; Chic. v. Chic. League Ball Club, 196 Ill. 54; Dunn v. People, 94 Ill. 120.


Woodall v. Darst, 77 S. E. 264.

War Department Decisions, Feb. 15, 1904: 27 Cyc. 504, Section 93.
It is unjust to create a situation in which an injured militia man should have to seek his remedy under the Federal Act only to be met by a decision such as rendered by the War Department as mentioned above. In the light of these cases, few in number, but which illustrate the trend of the opinions on this subject, it is evident that the state should assume its responsibility as an employer under the Workmen's Compensation Act as it has done in its other institutions.

HARRY S. SICULA.

Municipal Corporations: Rights of abutting owner.—There are several rights which the courts recognize as inherent in property abutting on a street. The right to egress and ingress, to light and air, to public view, to have the street continued as a public highway, unless it becomes useless, inconvenient and burdensome, and whatever adds to the value of the street to the abutter are examples.

Can a hotel restrain taxicabs from parking in front of its place of business? This question has arisen and been disposed of in the recent Wisconsin case of the Park Hotel Co. v. Ketchum et al (Wis. 1924) 199 N. W. 219. The Park Hotel of Madison as lessee brought an action to enjoin defendant and others from parking their taxicabs upon the street abutting plaintiff's property while waiting for passengers. The superior court issued an order restraining the defendants from driving their cabs up to the curb upon the street abutting upon the premises so occupied by the plaintiff, and stopping their cabs for a longer period than was reasonably necessary to discharge or take on passengers. The Supreme Court held that parking for the purpose of waiting for or discharging passengers was a legitimate use of the streets which did not conflict with the rights of an abutter.

Where the use of the streets is not a legitimate use the courts have enjoined it at suit of an abutter who claims his rights are being violated. The Missouri Court has decided that a city ordinance which licensed and gave to produce stands spaces on the street, was invalid as conflicting with the rights of an abutter. They are a nuisance when built upon the streets, although sufficient space be left open for passage of vehicles and pedestrians.

An early New Jersey decision holds that the Legislature was without power to authorize a market to be held upon the street without compensating the abutter owners. Upon a cursory glance of the authorities, it is apparent that the courts have gone as far as possible to protect the rights of abutters.

1 McQuillin on Municipal corporations, 1322.
2 Davis v. City of Appleton, 109 Wis. 580-85 N. W. 515.
3 Lahr v. Metropolitan Elevated R. Co. 104 N. Y. 268.
5 Commonwealth v. Roxbury, 8 Mass. 457.
6 Park Hotel Co. v. Ketchum, 199 N. W. 219.
7 Schropp et al v. City of St. Louis, 117 Mo. 131, 22 S. W. 828.
9 State v. Laverack, 34 N. J. law, 201.