

# Court of Claims of Ohio

The Ohio Judicial Center  
65 South Front Street, Third Floor  
Columbus, OH 43215  
614.387.9800 or 1.800.824.8263  
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MELISSA S. HANSEN

Plaintiff

v.

BOWLING GREEN STATE UNIVERSITY

Defendant

Case No. 2013-00050

Magistrate Holly True Shaver

## DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action against defendant alleging claims of negligence. The case proceeded to trial on the issues of liability and damages.

{¶2} At all times relevant hereto, plaintiff was employed by Chartwells, an independent contractor that operates within defendant's campus. Plaintiff served as a cook in a campus restaurant known as Coyote Jack's, or "CJ's," located in Kreischer Hall. Plaintiff began her employment during the fall semester of 2010. Plaintiff's supervisors were employed by defendant.

{¶3} Plaintiff testified that in December 2010, prior to classes ending for the winter break, she complained to her supervisors, Chad Carper, and Mike Drain, about a loose metal grate that covered the floor drain. The drain was located in the middle of the kitchen floor, and plaintiff had to walk over it multiple times throughout her shift to complete her work. Plaintiff advised her supervisors that sometimes when she stepped on the grate, it would detach from the drain and slide across the floor. Plaintiff's supervisors later informed her that a maintenance request had been placed.

{¶4} During the second week of January 2011, plaintiff returned to work. Plaintiff worked for approximately 11 days in the kitchen area, stepping on the drain cover without incident. However, on January 27, 2011, when plaintiff stepped on the

cover, it slipped off of the drain, and plaintiff's left foot went into the drain, resulting in injury to her left knee and foot. Plaintiff informed her supervisors about her injury and was advised to finish her shift. Plaintiff wrapped her leg in cellophane to stabilize it, applied ice to it, and completed her shift.

{¶5} Plaintiff completed an incident report and was later treated at the Wood County Hospital Emergency Room. (Plaintiff's Exhibit 3.) X-rays were taken, and plaintiff was provided crutches to keep weight off of her leg. Plaintiff received medical treatment through Ready Works, and received workers' compensation through Chartwells. Plaintiff returned to work in April, although she continued to suffer pain while walking, standing, stooping, and kneeling. Plaintiff testified that her lost wages and medical bills have been paid under her workers' compensation claim.

{¶6} Inasmuch as plaintiff's injuries were sustained in the course of her employment, the court finds that defendant is immune from liability for plaintiff's claims pursuant to R.C. 4123.74.

{¶7} R.C. 4123.74 states:

{¶8} "Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund, or during the interval the employer is a self-insuring employer, whether or not such injury, occupational disease, bodily condition, or death is compensable under this chapter."

{¶9} R.C. 4123.74 provides that workers' compensation damages provide the sole remedy in ordinary workplace negligence suits. *Hillman v. McCaughtrey*, 56 Ohio App.3d 100 (11th Dist.1989). "[F]or the purposes of workers' compensation immunity, an employee may have dual employment status." *Below v. Dollar General Corp.*, 163

Ohio App.3d 694, 2005-Ohio-4752, ¶ 15 (3rd Dist.). Whether a loaned servant is a customer's employee depends on who had the right to manage the manner or means of day-to-day control over the employee, not who was responsible for administrative human resources matters. *Cottrill v. Thermo Electron North America, LLC*, 4th Dist. Washington No. 09CA34, 2010-Ohio-2238, ¶ 24. Several factors to consider to determine who has the right to control the manner or means of doing the work include "who controls the details and quality of the work; who controls the hours worked; who selects the materials, tools, and personnel used; who selects the routes; the length of employment; the type of business; the method of payment; and any pertinent agreements or contracts." *Below, supra*, at ¶ 24.

{¶10} The evidence in this case shows that plaintiff was an employee of Chartwells, an independent contractor to provide food service. However, the area where plaintiff worked for Chartwells was located on defendant's premises, she sustained injury during the course of her employment, and her supervisors were employed by defendant. Accordingly, the court finds that defendant retained a degree of control over plaintiff's day-to-day duties and may also be considered plaintiff's employer for purposes of analysis. Although defendant contracted with Chartwells to perform maintenance of the kitchen area, the court finds that defendant retained the right to manage the day-to-day control over plaintiff as she worked. Thus, the court finds that plaintiff had dual employment status, as an employee of both Chartwells and defendant, for workers' compensation immunity. Accordingly, plaintiff's workers' compensation claim is her sole remedy for her workplace negligence suit.

{¶11} Even if defendant were not entitled to immunity, plaintiff must prove by a preponderance of the evidence that defendant owed her a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused her injuries. *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 81, 2003-Ohio-2573, citing *Meniffee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). Under Ohio

law, the duty owed by an owner or occupier of premises generally depends on whether the injured person is an invitee, licensee, or trespasser. *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 315, 1996-Ohio-137.

{¶12} Where the premises upon which work is performed by an independent contractor remains under control of the principal employer while work is being performed, a servant of the contractor is an invitee for purposes of premises liability. *See Ford Motor Co. v. Tomlinson*, 229 F.2d 873, 880 (C.A.6 1956). The court finds that defendant was a principal employer while plaintiff performed her work, and, accordingly, plaintiff was an invitee on defendant's premises. An invitee is defined as a person who comes "upon the premises of another, by invitation, express or implied, for some purpose which is beneficial to the owner." *Baldauf v. Kent State Univ.*, 49 Ohio App.3d 46, 47 (10th Dist.1988). An owner or occupier of premises owes its invitees "a duty of ordinary care in maintaining the premises in a reasonably safe condition and has the duty to warn its invitees of latent or hidden dangers." *Armstrong, supra*, at 80. "[T]o establish that the owner or occupier failed to exercise ordinary care, the invitee must establish that: (1) the owner of the premises or his agent was responsible for the hazard of which the invitee has complained; (2) at least one of such persons had actual knowledge of the hazard and neglected to give adequate notice of its existence or to remove it promptly; or (3) the hazard existed for a sufficient length of time to justify the inference that the failure to warn against it or remove it was attributable to a lack of ordinary care." *Price v. United Dairy Farmers, Inc.*, 10th Dist. Franklin No. 04AP-83, 2004-Ohio-3392, ¶ 6.

{¶13} Chad Carper testified that he was plaintiff's supervisor, and that he was an employee of defendant. As the assistant manager, Carper requested a work order for the floor drain in December after plaintiff had complained about the condition. Carper testified that even though he was employed by defendant, he had a duty to report

maintenance issues in the kitchen to Chartwells for repair, because Chartwells was responsible for maintenance of the kitchen area.

{¶14} On December 20, 2010, Carper sent an email to Larry Holland, an employee of Chartwells, regarding the drain cover. Carper received a response from Holland stating that the repair had been completed on December 30, 2010. (Defendant's Exhibit J.) In his deposition, Carper testified that a second work order was pending at the time of plaintiff's accident. At trial, however, Carper testified that he thought his deposition testimony was inaccurate and that there was only one work order that was ever issued about the floor drain before plaintiff's accident. Carper identified the incident reports that he completed for both Chartwells and defendant. (Plaintiff's Exhibits 3, 3A, and 4).

{¶15} Magdy Abdu-Zeid, general manager of Kreischer Hall, testified that he was employed by defendant. According to Abdu-Zeid, Chartwells was responsible for both the daily operation of food service and the facilities management of CJ's. Abdu-Zeid testified that he and his staff would submit maintenance work orders to Chartwells. Abdu-Zeid testified that he conducted a "site-check" of the drain cover after the repair was made in December, and that he was able to walk on it without incident. According to Abdu-Zeid, the only other work order regarding the drain cover was placed after plaintiff was injured.

{¶16} Bradley Leigh testified that he was defendant's executive director of business operations. Leigh stated that he drafted the contract between defendant and Chartwells. (Defendant's Exhibit I.) Section 3.7.1 of the contract states that Chartwells shall provide all custodial services, repairs and maintenance for all interior spaces in the New Dining Centers, for all food-related areas in defendant's buildings, and for the kitchen areas at the Bowen-Thompson Student Union (BTSU). (Defendant's Exhibit I.)

{¶17} Upon review of the evidence, the court concludes that plaintiff has failed to prove her negligence claim by a preponderance of the evidence. The evidence shows that plaintiff complained of a hazardous condition in December, that a repair was made on December 30, and that she walked on the floor drain cover for approximately 11 work days without incident. Although the repair ultimately failed on January 27, 2011, the court cannot conclude that defendant had actual or constructive knowledge that the repair of the floor drain was ineffective until after plaintiff was injured. On the contrary, the evidence shows that Carper reported the hazard, the hazard was repaired, and the repair was effective until January 27, 2011. The evidence does not show that another work order was pending when plaintiff sustained injury. In fact, plaintiff's own testimony demonstrates that she thought that the repair had been successful, because she was able to walk on it for 11 days before she was injured. In sum, the court finds that defendant did not have superior knowledge of a hazardous condition, and that defendant exercised ordinary care when it reported the need for repair to Chartwells in December and then conducted a site check after the repair was completed.

{¶18} For the foregoing reasons, judgment is recommended in favor of defendant.

{¶19} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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HOLLY TRUE SHAVER  
Magistrate

cc:

Brian M. Kneafsey, Jr.  
Assistant Attorney General  
150 East Gay Street, 18th Floor  
Columbus, Ohio 43215-3130

Marc G. Williams-Young  
1000 Adams Street, Suite 200  
Toledo, Ohio 43624-1507

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