*Virginia McInerney* *Legislative Service Commission*

# Am. H.B. 498*

125th General Assembly
(As Reported by S. Insurance, Commerce and Labor)

**Reps. Faber, Buehrer, Young, Gibbs, Wagner, Seitz, Brinkman, Aslanides, Setzer, Reinhard, Combs, Hagan, Niehaus, Collier, Clancy, D. Evans, Schaffer, Fessler, Webster, Cates, Blasdel, Calvert, Carmichael, Core, Daniels, DeWine, C. Evans, Flowers, Gilb, Hollister, Hoops, Kearns, Martin, Peterson, Reidelbach, Schlichter, Schmidt, Schneider, Taylor, Widowfield, Wolpert**

## BILL SUMMARY

- Creates a statutory cause of action for an employment intentional tort.

## CONTENT AND OPERATION

### ***Background***

In 1999, the Ohio Supreme Court declared section 2745.01 of the Revised Code unconstitutional as it currently exists and therefore unenforceable (*Johnson v. BP Chemicals, Inc.* (1999), 85 Ohio St.3d 298). That statute creates an employment intentional tort, and requires the employee to prove, by clear and convincing evidence, that the employer deliberately committed all of the elements of an intentional tort (sec. 2745.01(B), as repealed by the bill). An employment intentional tort is defined by that statute to mean "an act committed by an employer in which the employer deliberately and intentionally injures, causes an occupational disease of, or causes the death of an employee." In *Johnson*, the Ohio Supreme Court held that the statute (1) imposed excessive standards on the plaintiff with a heightened burden of proof ("clear and convincing" evidence), (2) undermines the purpose of the Workers' Compensation Law by allowing employer immunity for intentional acts, and (3) represents an attempt by the General Assembly to govern intentional torts in employment, which is beyond the reach of

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* *This analysis was prepared before the report of the Senate Insurance, Commerce and Labor Committee appeared in the Senate Journal. Note that the list of co-sponsors and the legislative history may be incomplete.*

constitutional empowerment to enact laws providing for the comfort, health, safety, and general welfare of all employees (*Johnson* at 308).

Subsequently, in 2001 the Supreme Court held that in light of the decision made in *Johnson*, the requirement to bring a cause of action for an employment intentional tort within one year under section 2305.112 of the Revised Code is "null and void" (*Funk v. Rent-All Mart, Inc.* (2001), 91 Ohio St.3d 78, 79, *citing Mullins v. Rio Algom* (1999), 85 Ohio St.3d 361). The Court held in *Funk* that "a cause of action alleging bodily injury as a result of an intentional tort by an employer pursuant to *Blakenship v. Cincinnati Milacron Chemicals* (1982), 69 Ohio St.2d 608," is governed by the two-year statute of limitations under R.C. 2305.10, unless the circumstances clearly indicate a battery or any other intentional tort enumerated in the Revised Code (*Funk* at 81).

***Operation of the bill***

The bill repeals the current statute declared unconstitutional and creates a new statutory cause of action for intentional torts in employment. It also specifies the burden of proof of an injured employee. Under the bill, an employer is not liable in an action brought against the employer by an employee or by the dependent survivors of a deceased employee for damages resulting from an intentional tort committed by the employer during the course of employment unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur. Under the bill "substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death. The bill specifies that the deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result (see **COMMENT**). The bill also specifies that its provisions do not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112. of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121. and 4123. of the Revised Code, contract, promissory estoppel, or defamation. (Sec. 2745.01.)

The bill eliminates the requirement that a cause of action for an intentional tort be brought within one year of the employee's death or the date on which the employee knew or through the exercise of reasonable diligence should have known of the injury, condition, or disease (sec. 2305.112, repealed by the bill). The bill does not specify a time limit to file a cause of action. It appears, then, that the statute of limitations for an employment intentional tort would be two years,

unless a battery or any other enumerated intentional tort occurs (sec. 2305.10, not in the bill, and *Funk* at 81).

## COMMENT

In law, a "rebuttable presumption" is an evidentiary rule of law typically used in court proceedings that takes a set of facts and makes a specified inference as to the meaning of those facts (i.e., presumption). The presumption normally remains in force until disproved by the side in the dispute against whom it operates, and if not disproved or if no other evidence is offered to counter its effect, the presumption often will be sufficient to win the case for the party in whose favor it exists.

## HISTORY

| ACTION | DATE | JOURNAL ENTRY |
|---|---|---|
| Introduced | 05-13-04 | p. 1931 |
| Reported, H. Commerce & Labor | 11-09-04 | p. 2202 |
| Passed House (60-34) | 11-10-04 | p. 2250 |
| Reported, S. Insurance, Commerce & Labor | --- | --- |

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