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Fisher v. Halliburton: Fifth Circuit Invokes Common Sense To Defend Defense Base Act

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In March 2010, a federal district court in Texas ruled that the deaths and injuries sustained by a group of civilian convoy drivers in Iraq during insurgent attacks were not "accidents" caused by conditions of their employment and were, therefore, outside the scope of the protections afforded to contractors by the Defense Base Act ("DBA"). 42 U.S.C. § 1651, *et seq. Fisher v. Halliburton*, 703 F. Supp. 2d. 639 (S.D. Tex. 2010). We previously described and criticized the district court decision in this blog, noting that it was now unclear how, exactly, the DBA would fare in future litigation. But on January 12, 2012, the Fifth Circuit restored clarity— and common sense—to the application of the DBA by recognizing that the facts in *Fisher* presented "the quintessential case of a compensable injury arising from a third party's assault". Holding the DBA to be the exclusive remedy for damages, the Fifth Circuit vacated the district court's decision and remanded the case for further proceedings. *Fisher v. Halliburton*, 2012 WL 90136 (5th Cir. 2012).

The Fifth Circuit efficiently disposed of the district court's decision, beginning with a determination that the third party, i.e., insurgent, acts were directed against Plaintiffs "because of [their] employment." Forcefully disagreeing with the district court's conclusion that the employees were targeted for simply being Americans and not because they were providing logistical support to the U.S. Military, the court cautioned that such reasoning threatened the applicability of the DBA "on foreign soil" or to "those that support a war." Moreover, the court stated, if the reasoning of the district court were sustained, then "[t]he argument could always be asserted that an employee was killed or injured not because of her employment, but because she was an American." Accordingly, the circuit court found it to be "self evident" and "a matter of common sense that when insurgent forces in Iraq attack an Army-led fuel supply convoy, the insurgents are attacking the convoy because of its role in supporting the Army's operations in that country."

The Fifth Circuit then disposed of another argument raised by Plaintiffs in *Fisher, i.e*., that the Plaintiffs' injuries were caused by the defendant-contractor, who, they alleged, committed an intentional tort by failing to act to protect Plaintiffs from "substantially certain" injury at the hands of the insurgents. This argument, premised on intelligence reports and open-source news reports, reasoned that the defendant knew that the assaults would occur and did nothing to stop the convoys from moving forward. While recognizing that the "intentional tort exception" has not been applied in the Fifth Circuit to the either the DBA or the Longshore and Harbor Workers' Compensation Act ("LHWCA"), upon which the DBA is based, the court noted that, when applying this exception, other courts "consistently require that the employer have had a specific intent or desire that the injury occur" and that neither circumstance existed here. Moreover, the circuit court reiterated the purpose of the DBA and concluded that its "provisions admit of no exception for cases in which an employee claims his employer was 'substantially certain' that the employee would be assaulted by a third party because of his employment." The circuit court essentially recognized the difficulty in applying a "substantially certain" exception premised on purportedly informed conjecture derived from military intelligence and open-source news. To allow a "substantially certain" exception would undercut the very purpose of the DBA of "providing prompt relief for employees, and limited and predictable liability for employers." Therefore, the court concluded, coverage under the DBA precludes an employee from recovery from its employer "under a 'substantially certain' theory of intentional-tort liability."

Finally, the Fifth Circuit did agree with the district court that the DBA prevents an employee from bringing a fraud claim to recover damages for a DBA-covered injury. Echoing the sentiment of the lower court, the circuit court held that any deceit proven against the employer that led to the compensable injury "merges into that injury for purposes of compensation coverage."

In his book recounting his leadership of the American Expeditionary Forces in World War I, My Experiences in the World War, General John Pershing reflected that "military science is based on principles that have been deduced from the application of common sense in the conduct of military affairs." The Fifth Circuit's defense of the DBA in vacating and remanding the lower court's ruling in *Fisher v. Halliburton*, recognizes that the same application of common sense should be brought to bear in the application of U.S. law in the battlespace.