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INJECTING FAULT INTO A NO-FAULT SYSTEM: THE AGGRESSOR DEFENSE IN WORK-RELATED FIGHT CASES*

*Judge Melissa Lin Jones***

INTRODUCTION

- Mr. Rodney Dickerson stepped aboard a pallet mounted on the front of a forklift and placed a case of vodka on his shoulder; as the pallet ascended to the second floor of the warehouse, it broke, and Mr. Dickerson fell to the ground. He sustained a concussion, multiple strains, and multiple contusions. He was awarded wage loss benefits and medical benefits.¹
- While operating a pipe-cutting grinder without using the safety shield, Mr. Edward F. Mooney severely injured his left hand. He was awarded temporary total disability benefits, interest on accrued benefits, medical benefits, and bad faith penalties.²
- Out of boredom, Mr. Roman Melech repeatedly pulled on his retractable identification badge. The badge snapped back, hit

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** Judge Jones is admitted to practice law in New York, the District of Columbia, Maryland, and Virginia. She is not engaged in the practice of law, and the contents of this article are not intended to provide legal advice. Views expressed in this article represent commentary concerning the law, the legal system, and the administration of justice. These views should not be mistaken for the official views of the District of Columbia Department of Employment Services nor for Judge Jones' opinion in the context of any specific case. The views expressed in this article do not necessarily represent the policies of the District of Columbia Department of Employment Services, and no official endorsement by the District of Columbia Department of Employment Services is intended or should be inferred.

1. Dickerson, 2011 WL 3401150, at *2, *4, *19 (D.C. Dep't Emp't Servs. July 27, 2011).

2. Mooney, 1997 D.C. Wrk. Comp. LEXIS 433, at *3-4, *19 (D.C. Dep't of Emp't Servs. Dec. 23, 1997).

him in the eye, and scratched his cornea. He was awarded medical benefits.³

Stupidity is compensable. In the no-fault system of workers' compensation, compensability is determined by the relationship between an event causing an injury and employment, not the relationship between an event causing an injury and a claimant's culpability, clumsiness, impulsiveness, incompetence, etc.⁴ If the accidental injury⁵ arises out of and in the course of employment, the claimant is entitled to benefits without regard to foreseeability or responsibility⁶—unless the injury is sustained during a work-related fight started by the claimant.⁷

On July 24, 1982, the District of Columbia private-sector Workers' Compensation Act ("Act") became effective.⁸ Under this new law, "[e]very employer subject to this chapter shall be liable for compensation for injury or death without regard to fault as a cause of the injury or death."⁹

This broad scope of liability for injuries arising out of and in the course of employment stems from a common purpose of all workers' compensation systems, namely protecting claimants by providing "a practical and expeditious remedy for work-related accidents or injuries [while simultaneously limiting] the economic burden on employers by providing that their liability under the Act [is] 'exclusive.'"¹⁰ When tort principles no longer apply, even actions

3. Melech, 2007 D.C. Wrk. Comp. LEXIS 306, at *3-5, *11 (D.C. Dep't of Emp't Servs. July 24, 2007) (explaining that the claim for wage loss benefits was denied because Mr. Melech's lost time did not exceed the statutory waiting period established by section 32-1505 of the District of Columbia Workers' Compensation Act of 1979).

4. *Id.* at *6.

5. To satisfy the requirement of an accidental injury, the claimant only needs to prove "something unexpectedly [went] wrong within the human frame." Wash. Metro. Area Transit Auth. v. D.C. Dep't of Emp't Servs., 506 A.2d 1127, 1130 (D.C. 1986).

6. *See id.* at 1128 & nn.1-2, 1129 n.4 (defining the term "injury" and noting that "the employer [is] responsible for all occupational injuries, regardless of fault").

7. *See Bird v. Advance Sec. (Bird II)*, H&AS No. 84-69, OWC No. 015644, at 1 (D.C. Dep't of Emp't Servs. June 7, 1985).

8. The District of Columbia has two workers' compensation acts in full force and effect simultaneously. In addition to the Act which governs claims brought by private sector employees, D.C. CODE §§ 32-1501 to 1545 (2001), the District of Columbia Government Comprehensive Merit Personnel Act of 1978 ("Public Sector Workers' Compensation Act"), governs workers' compensation claims brought by public sector employees, D.C. CODE § 1-601.01 to 636.03 (2001).

9. § 32-1503(b).

10. *Harrington v. Moss*, 407 A.2d 658, 660 (D.C. 1979).

ordinarily classified as foolhardy are compensable.¹¹

In 1985, the Director of the Department of Employment Services (“Director”) conducted administrative appellate review of workers’ compensation decisions.¹² In *Bird v. Advance Security*, the Director ruled that in order for injuries sustained in a fight to be compensable:

1. [T]he employment required the combatants to work in an environment which [brought] them together often enough for their temperaments and emotions to interact under strains of the workplace and which tended to increase the likelihood of friction between them; and

2. a finding that the injured employee was not the aggressor.¹³

In other words, if a claimant is at fault for initiating a physical altercation and is injured as a result of that altercation, the claimant’s resulting injuries are not compensable pursuant to the aggressor defense.¹⁴

The workers’ compensation system is a no-fault system. The relationship between the employee’s culpability and the event causing an injury is supposed to be irrelevant, but the *Bird* test injects fault into this no-fault system. Should the rules differ when the injury arises out of and in the course of a work-related, physical altercation initiated by the claimant?

“[T]he Act contains no exclusion from liability for injuries that result from poor judgment or misconduct;”¹⁵ however, the District of Columbia and a majority of states recognize the aggressor defense. Louisiana¹⁶ and California¹⁷ (among others) have codified the defense,

11. See § 32-1504(b).

12. See, e.g., *Bird II*, H&AS No. 84-96, at 1. In December 2004, administrative appellate review of Compensation Orders was delegated to the Compensation Review Board. § 32-1521.01. Before the creation of the Compensation Review Board, appeals of Compensation Orders were taken to the Director of the Department of Employment Services.

13. *Bird II*, H&AS No. 84-96, at 6.

14. *Id.*

15. Carter, 2005 D.C. Wrk. Comp. LEXIS 105, at *7-8 (Dep’t of Emp’t Servs. June 21, 2005) (explaining that a claimant, after clocking out and before vacating the employer’s premises, who was injured when she was handcuffed for attempting to speak to an individual under arrest was awarded workers compensation benefits).

16. LA. REV. STAT. ANN. § 23:1081(1)(c) (West through 2014 Legis. Sess.) (“(1) No compensation shall be allowed for an injury caused: . . . (c) to the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor.”).

and other states have developed it through caselaw.¹⁸

Some states recognize the aggressor defense as a total bar to eligibility for workers' compensation benefits; some states reject the aggressor defense as a bar to receiving workers' compensation benefits; some states that once recognized the aggressor defense as a bar to eligibility for workers' compensation benefits have come to reject that defense in whole or in part.¹⁹ The District of Columbia recognizes the aggressor defense,²⁰ but if the aggressor defense is to be included among other valid defenses in District of Columbia workers' compensation cases, it must be as a result of legislative action not judicial fiat injecting fault into a no-fault system.

I. THE GRABER CASE

Graber v. Sequoia Restaurant is the most recent District of Columbia workers' compensation case to apply the aggressor defense to an on-the-job fight.²¹ On August 9, 2009, Mr. Todd Allen Graber worked as a food server at Sequoia Restaurant.²² On that day, he was drinking on the job.²³ He also "was behaving aggressively towards his co-workers";²⁴ inside the restaurant, Mr. Graber "engaged in a heated discussion with a co-worker, Mr. Mehdi Brewer. . . although the substance of those words [is] unclear."²⁵ Another co-worker separated Mr. Graber and Mr. Brewer.²⁶

Mr. Brewer walked away toward the service area but stopped and began talking to someone.²⁷ He then turned fully away and was

17. CAL. LAB. CODE § 3600(a)(7) (West 2011) ("(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur: . . . (7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.")

18. See *infra* app. A, for a complete list of states that recognize an aggressor defense.

19. See *infra* app. A.

20. See *infra* app. A.

21. Graber (*Graber I*), 2011 WL 1980628, at *3 (Dep't of Emp't Servs. Apr. 13, 2011).

22. *Id.* at *1.

23. *Id.* at *3.

24. *Id.* at *5.

25. *Id.* at *2.

26. See *id.*

27. See *id.*

walking into the service area pass the computer terminal.²⁸ While Mr. Brewer was walking away, Mr. Graber struck Mr. Brewer in the back of the head.²⁹ In response, Mr. Brewer pivoted and punched Mr. Graber in the face.³⁰ Mr. Graber fell to the floor.³¹

At a local hospital, Mr. Graber underwent a right decompressive craniectomy.³² He “remained hospitalized for approximately five weeks” and “was diagnosed with a right temporal lobe intraparenchymal and basal ganglia hemorrhage.”³³ Even after discharge from the hospital, Mr. Graber continued to treat for uncontrolled seizures and migraines.³⁴

In order to determine Mr. Graber’s entitlement to workers’ compensation benefits, an administrative law judge noted that “to be compensable an injury must both arise out of, and in the course of the employment.”³⁵ Then, the administrative law judge analyzed whether Mr. Graber was the aggressor:

[I]t is clear to the Undersigned that the Claimant was the aggressor on August 9, 2009. Under the Bird analysis, the Undersigned does find that the nature of the Claimant’s employment does require regular contact with his co-workers, including Mr. Brewer which can cause a strain on emotions increasing workplace friction. However, the Claimant fails the second prong of the Bird test.

The surveillance footage the Undersigned reviewed (as well as the corroborating witness testimony) shows Mr. Brewer walking away from the Claimant when the altercation occurred. Indeed, in the instant before the Claimant pushed or struck the back of Mr. Brewer’s head, Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant. The Claimant chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer. As such, the Claimant can clearly be labeled the aggressor.³⁶

28. *See id.*

29. *See id.*

30. *See id.*

31. *See id.* It is unclear whether the punch or the impact with the floor rendered Mr. Graber unconscious.

32. *See id.*

33. *Id.*

34. *Id.*

35. *Id.* at *3. (citation omitted).

36. *Id.* at *4.

In the end, the administrative law judge ruled that Mr. Graber's injury was not compensable because he had acted with a willful intention to injure Mr. Brewer and because he had been the aggressor:

The Claimant argues several points in support of his contention that he is not the aggressor in the above altercation. First, the Claimant argues that the "aggressor defense" appears nowhere in the Act and as such is not a viable defense. The Claimant quotes § 32-1503(b) which states that the "Employer shall be liable for compensation for injury or death without regard to fault as a cause of the injury or death." However, as outlined above, the Claimant fails in this argument as the Claimant fails to note that § 32-1503(d) limits liability for compensation due to an injury to the employee, the Claimant, if the injury was occasioned solely by his intoxication or by his willful intention to injure himself or another. Thus, contrary to the Claimant's argument, the aggressor defense does find support in the statute in § 32-1503(d).

The Claimant points out that many cases which have follow[ed] Bird involve disputes between coworkers that [were] either prolonged or cases where the Claimant had acted in a physically aggressive manner. First, the argument that the length of the altercation is determinative in whether the Claimant is the aggressor is rejected. Whether or not the altercation lasted a matter of a few minutes or a few hours does not negate the fact that the Claimant came from behind Mr. Brewer and initiated physical contact in an aggressive way. No injury would have occurred to the Claimant had he not pushed/hit Mr. Brewer aggressively in the head, regardless of whether or not this occurred a few seconds, a few minutes, or a few hours into the altercation. The end result, regardless of time, is that the Claimant was the aggressor on the date of injury.

....

... Claimant's willful intention to injure another, Mr. Brewer, caused his injury to occur, and thus liability for compensation shall not apply. As I find the Claimant to be the aggressor in the altercation of August 9, 2009, no further discussion is warranted, including the Claimant's intoxication on that day, which also defeats his claim. I find an accidental injury did not occur on that date within the scope of the [A]ct as the Claimant was the aggressor. With this finding, all

other issues are rendered moot.³⁷

Mr. Graber's request for temporary total disability benefits from August 9, 2009 to the date of the formal hearing and continuing and for medical benefits was denied so he filed an appeal.

A. Mr. Graber's Arguments on Appeal to the Compensation Review Board

On appeal to the Compensation Review Board, Mr. Graber asserted the administrative law judge had erred in several ways. The arguments important to the aggressor defense are as follows: "[(1)] Was the presumption of compensability properly applied? [(2)] Were Mr. Graber's injuries occasioned solely by his intoxication or solely by a willful intent to injur[e] Mr. Brewer? [(3)] Does the aggressor defense impermissibly bar Mr. Graber's recovery under the [Act]?"³⁸

Initially, Mr. Graber attempted to convince the Compensation Review Board that he was not the aggressor; however, "[t]he scope of review by the [Compensation Review Board] is limited to making a determination as to whether the factual findings of the appealed Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the applicable law."³⁹ The Compensation Review Board is constrained to uphold a Compensation Order that is supported by substantial evidence even if the record also contains substantial evidence to support a contrary conclusion and even if the Compensation Review Board might have reached a contrary conclusion based upon an independent review of the record.⁴⁰

The administrative law judge unequivocally had ruled Mr. Graber was the aggressor.⁴¹ Because the administrative law judge's ruling was supported by substantial evidence, the Compensation Review Board accepted Mr. Graber's status as the aggressor and lacked authority to reweigh the evidence on that issue.⁴²

As for Mr. Graber's other arguments, the Compensation

37. *Id.* at *5-6 (citation omitted).

38. Graber (*Graber II*), 2011 WL 3625289, at *1-2 (D.C. Dep't of Emp't Servs. July 25, 2011).

39. *Id.* at *2.

40. *Marriott Int'l v. D.C. Dep't Emp't Servs.*, 834 A.2d 882, 885-86 (D.C. 2003) (noting "substantial evidence" as evidence that a reasonable person might accept to support a conclusion).

41. *Graber II*, 2011 WL 3625289, at *3-4.

42. *Id.*

Review Board recognized the Act contains several presumptions:

In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:

- (1) That the claim comes within the provisions of this chapter;
- (2) That sufficient notice of such claim has been given;
- (3) That the injury was not occasioned solely by the intoxication of the injured employee; and
- (4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.⁴³

However, the Compensation Review Board directed that the presumptions be read in conjunction with §32-1503(d) of the Act:⁴⁴ “[I]t is presumed that a work-related injury is compensable unless intoxication or a willful intention to injure or kill oneself or another is the sole cause of the injury. If either exception applies, the injury does not arise out of the employment and is not compensable.”⁴⁵

Mr. Graber’s injuries were not caused solely by his intoxication, but it was unclear if his injury solely was the result of a willful intention to injure Mr. Brewer.⁴⁶ If this issue had been dispositive, it would have required a remand for additional fact-finding, but ultimately, Mr. Graber’s status as the aggressor and his pursuit of a private animosity with no connection to his employment barred his eligibility for workers’ compensation benefits regardless of any willful intention to injure Mr. Brewer:

There is substantial evidence in the record to support the finding that the work-related altercation was over: Mr. Graber and Mr. Brewer walked in different directions, physically had separated, and had resumed their respective duties when Mr. Graber struck Mr. Brewer in the back of his head from behind. . . . Because the ruling that Mr.

43. D.C. CODE § 32-1521 (2001).

44. § 32-1503(d) (“Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another.”).

45. *Graber II*, 2011 WL 3625289, at *3.

46. *Id.*

Graber was the aggressor is supported by substantial evidence, this tribunal simply cannot review and reweigh evidence anew as Mr. Graber would prefer.

In addition, Mr. Graber argues that the aggressor defense inserts into the Act an impermissible element of fault. We disagree.

Although workers' compensation generally is a no-fault system, in specific instances such as intoxication, willful misconduct, and the aggressor defense, there is an element of fault that takes the activity and its consequences beyond the employment situation. Mr. Graber's argument may have been more persuasive if the altercation had been an uninterrupted one; however, because "Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant [and because Mr. Graber] chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer," the situation was a willful intent to injure another that degenerated into an altercation of private animosity and vengeance with no work connection.⁴⁷

Often in fight cases, as in *Graber*, several concepts are intertwined to reach the result. Consequently, understanding the facts of the *Bird* case and the justification for the *Bird* test is instrumental to assessing whether the *Bird* test impermissibly injects fault into a no-fault system.

II. THE BIRD TEST

According to Officer David R. Bird, on October 5, 1983, he received a telephone call at his post in the lobby of the World Bank where he worked as a security officer.⁴⁸ Officer Bird could not leave his post to deliver an emergency message to fellow officer Percy Tappin so he tried to reach Officer Tappin by calling a telephone in the parking garage used by World Bank employees.⁴⁹

Officer Tappin was stationed in a booth at the garage entrance, and parking attendants employed by Diplomat Parking frequently answered this telephone.⁵⁰ In fact, Mr. Sharif Mohamed, a Diplomat

47. *Id.* at 4 (alteration in original) (footnotes omitted).

48. *Bird v. Advanced Sec. & Am. Motorists Ins. Co. (Bird I)*, H&AS 84-69, OWC No. 0015644, at 3 (D.C. Dep't of Emp't Servs. June 1, 1985).

49. *Id.*

50. *Id.*

Parking employee, answered the telephone.⁵¹

Officer Bird told Mr. Mohamed there was an emergency call for Officer Tappin, but Mr. Mohamed hung up the phone.⁵² Mr. Mohamed hung up on Officer Bird two more times when Officer Bird called back.⁵³

While Officer Bird was on break, he accused Mr. Mohamed of being impolite.⁵⁴ Mr. Mohamed challenged Officer Bird to a fight, and Officer Bird said he would take it up with Mr. Mohamed's supervisor, Mr. Abraham Ankele.⁵⁵

The next day, Officer Bird arrived at the World Bank approximately thirty minutes before his shift; he regularly did so in order to change into his uniform, to punch-in, and to report to his post.⁵⁶ He went to the locker room, and Mr. Mohamed and Mr. Ankele were there.⁵⁷

Mr. Ankele asked Officer Bird about the telephone incident.⁵⁸ During this discussion, Mr. Mohamed approached Officer Bird, made obscene gestures, and used profanities.⁵⁹

The verbal exchange continued outside the locker room, and Mr. Mohamed hit Officer Bird on the head.⁶⁰ As Officer Bird tried to defend himself, he and Mr. Mohamed fell to the ground.⁶¹

This account is Officer Bird's version of the events.⁶² Mr. Mohamed, Mr. Ankele, and Officer Shadee Ansari offered different versions of the events.⁶³

According to Mr. Mohamed, the telephone calls on October 5, 1983, were from a female who wanted to speak to Officer Bird.⁶⁴ Mr. Mohamed did not relay the call to Officer Bird; instead, Mr. Mohamed told the female to call the security office.⁶⁵

Shortly thereafter, Officer Bird called Mr. Mohamed to ask why

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 4.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 4-5.

63. *Id.* at 5-7.

64. *Id.* at 5.

65. *Id.*

Mr. Mohamed had told the female to call the security office.⁶⁶ Officer Bird called Mr. Mohamed an obscene name, and Officer Bird challenged Mr. Mohamed to a fight at the end of the day.⁶⁷

The next day, Mr. Mohamed and Mr. Ankele were in the locker room when Officer Bird arrived.⁶⁸ Officer Bird began talking in an aggressive tone and asked why Mr. Mohamed had not waited for him after work the day before.⁶⁹ Then, as Mr. Mohamed was leaving the locker room, Mr. Ankele left to call security, and Officer Bird began hitting Mr. Mohamed on the head.⁷⁰ Both men fell to the ground.⁷¹

Mr. Ankele provided a third version of the events.⁷² According to him, Mr. Mohamed told him that a female had called for Officer Bird and that Mr. Mohamed did not transfer the call or deliver a message to Officer Bird.⁷³ Mr. Mohamed also told Mr. Ankele that Officer Bird came to the parking-attendant booth and yelled at Mr. Mohamed.⁷⁴

The next day, Mr. Ankele and Officer Bird were in the locker room when Mr. Mohamed entered.⁷⁵ Officer Bird brought up the telephone calls, and the two men began arguing and name-calling; Officer Bird challenged Mr. Mohamed to a fight, but Mr. Ankele did not see who threw the first punch.⁷⁶

Finally, Officer Ansari saw Officer Bird and Mr. Mohamed in a heated argument outside the parking attendant booth.⁷⁷ Each was holding the other by the collar, and when Mr. Ankele tried to separate them, he was pushed away.⁷⁸

Officer Bird injured his right thumb during the fight so he filed a claim for permanent partial disability benefits.⁷⁹ At the formal hearing, Officer Bird's employer argued that because the fight had taken place before the start of Officer Bird's tour of duty, it did not arise out of

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 6.

72. *Id.*

73. *Id.* at 6-7.

74. *Id.* at 7.

75. *Id.* at 6.

76. *Id.*

77. *Id.* at 7.

78. *Id.*

79. *Id.* at 3.

and in the course of employment.⁸⁰ The administrative law judge rejected this argument.⁸¹

Officer Bird's employer also argued that Officer Bird was not injured while acting in furtherance of his employment because the telephone call that had precipitated the animosity was not work-related.⁸² Without making any specific finding as to the content of the telephone call, the administrative law judge rejected this argument as well.⁸³ Even assuming the call was personal, an on-the-job assault is compensable if "the work of the participants brought them together and created the relations and conditions which resulted in the clash."⁸⁴ Because the fight had taken place in a locker room shared by the participants, because Officer Bird had passed by Mr. Mohamed's duty post in order to report to his own post, and because Officer Bird's patrol of the premises had brought him in contact with Mr. Mohamed, the conditions of employment had created the environment for the fight.⁸⁵

Finally, Officer Bird's employer argued the claim was barred by Officer Bird's willful intention to injure another.⁸⁶ In response, the administrative law judge specifically ruled, "[b]ased on the testimony of Ankele, whom I find to be a credible and a candid witness, I find that the evidence does not establish who struck the first blow."⁸⁷ Although Officer Bird had shown aggressive behavior, the administrative law judge could not conclude he had willfully intended to injure Mr. Mohamed.⁸⁸

The administrative law judge recommended awarding Officer Bird five percent permanent partial disability of his right thumb, but on appeal, the Director rejected the administrative law judge's recommendation and denied Officer Bird's request for benefits.⁸⁹ Although the Director found no error regarding the administrative law judge's conclusion on the issue of "in the course of employment" so far as it related to Officer Bird's pre-tour activities, the Director disagreed with the administrative law judge's broad reading of

80. *Id.* at 7.

81. *Id.*

82. *Id.* at 7-8.

83. *Id.*

84. *Id.* at 8.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 9.

89. *Bird II*, H&AS No. 84-69, at 2.

Hartford Accident and disagreed that the assault arose out of Officer Bird's employment⁹⁰:

For the work to "create the relations and conditions which resulted in the clash", [sic] I think that *Hartford Accident* at a minimum requires: 1) a showing that the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them; and 2) a finding that the injured employee was not the aggressor.⁹¹

The Director went on to explain why Officer Bird was not entitled to benefits pursuant to this test:

In *Hartford Accident* there were two environmental factors which tended to increase the likelihood of friction between the fight participants. First, there existed a supervisor-supervisee relationship between the fight participants. Disputes will often develop within such relationships based on the different notions of how, how fast, how well or how carefully a particular task should have been, was, or should be performed. In many instances, a supervisor's performance rating depends upon the performances of his supervisees. Pressures on the supervisees from supervisors sometimes erupt into violence or heated verbal exchanges.

Second, the nature of the duties of the claimant, a grocery helper, and the supervisor, a checker, assured that they would come into contact regularly. Thus, the more opportunities which arose for their temperaments and emotions to cross paths, the greater the likelihood of friction.

In this proceeding Claimant was a security guard principally stationed near the main receptionist area inside of a World Bank building. The parking garage attendant worked outside and under that building. Claimant and the parking attendant would have occasion to see each other on the parking area when Claimant arrived at work or when he was on patrol and sometimes in the locker room when Claimant changed clothes.

Although Claimant's occasional visits to the garage area to park or remove his car or to perform a security function and his use of the

90. *Id.* at 3.

91. *Id.* at 6.

locker rooms might have brought him into contact with the parking attendant, it cannot reasonably be concluded that the nature of their respective duties or their employment relationship was likely to increase friction. Moreover, there is no evidence in the record that Claimant was required to drive to work or to come to work in his street clothes. While the World Bank may have permitted Claimant's use of the locker rooms, that fact is insufficient to justify a conclusion that the employment created the relations and conditions which resulted in the clash. Indeed, if that were the case, any two employees who have occasion to ride an employer's elevators together, to use the same bathroom facilities or to see one another in the company cafeteria and who engage in a personal fight, would sustain compensable injuries. Hartford Accident, however, does not go so far.

At the end of Hartford Accident Judge Rutledge attempted to reconcile his view with those expressed in Fazio by pointing out that "claimant there was the aggressor in the physical assault." In Ackerman, moreover, the Court once again noted that Hartford Accident was limited to circumstances where the claimant was not the aggressor. In light of those remarks, I must conclude that injuries resulting from a fight with a co-worker are not compensable under Hartford Accident unless the claimant is not the aggressor.

In this proceeding, the evidence tends to support the view that Claimant was the aggressor. Regardless of who struck the first blow, it was Claimant who first approached the parking attendant and who seemed bent on settling a score. I accept, moreover, the [administrative law judge's] finding that claimant "challenged Mohamed to go outside to fight." Based on these facts, I find Claimant to have been the aggressor and that under Hartford Accident his injuries did not arise out of his employment.

Because I find that Claimant's claim for benefits must be denied on the grounds that his injuries did not arise out of his employment, I need not reach the second issue of whether Claimant's intent to fight constitutes a willful intent to injure another.⁹²

The statutory language from the Longshoremen's and Harbor Workers' Compensation Act that Justice Rutledge interpreted in *Hartford Accident* is almost identical to the language in the Act.⁹³ In

92. *Id.* at 6-7 (citations omitted).

93. Compare 33 U.S.C.A. § 903(c) (1996) (originally enacted as Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 1426 (1927)) ("No compensation shall be

Hartford Accident, the claimant's injuries from a work-related assault were compensable:

Nor is it necessary, as these cases show, that the particular act or event which is the immediate cause of the injury be itself part of any work done for the employer by the claimant or others. Otherwise no award could be given for many injuries now compensated, such as those caused by stray bullets, unexplained falls, objects falling from outside the employer's premises and work, many street risks, horseplay, most assaults and many other causes. "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business." Not that the act is in the line of duty, or forwards the work, or creates special risk, but that the work brings the employee within its peril makes it, for purposes of compensation, "part of the work."

Recognition that this is so came more easily as to physical than as to human forces. As with street risks, the early disposition in cases of human action was to emphasize the particular act and its nature, except anomalously when it involved merely negligence of the claimant or fellow employees. The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (i.e., nonculpable, but injurious) behavior was not difficult. So with that of strangers, including assault by deranged persons, and their negligence intruding into the working environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men

payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."), and *Hartford Accident & Indem. Co., v. Cardillo*, 112 F.2d 11, 17 (D.C. Cir. 1940) (quoting the exact language from the Act of 1927), with D.C. CODE § 32-1503(d) (2001) ("Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another.").

together, work brings these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. "Old Man River" is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.

But resistance to application of the broad and basic principle has been most obstinate perhaps where the particular act immediately causing injury involves responsible volition by the claimant or others. The extreme instances are those containing an element of illegality or criminality. The horseplay and assault cases are illustrative. Confusion and conflict still reign in these realms.

Several factors have sustained the resistance. One is the hangover from common law conceptions of profiting by one's own wrong. But this applies as well, in logic, to contributory or one's own exclusive negligence. Another was the now thoroughly dissipated notion that voluntary responsible action cannot be accidental. The volitional character of the act also raised a supposed analogy to "independent, intervening agency" in tort causation. There was, further, an assumed essential opposition between "personal" acts and those of an "official" (i.e., related to the work) character. An assault necessarily involves emotional make-up and disturbance. In a broad sense nothing is more personal. Quarreling is always so. This accounts for the early disposition to regard all injuries from wilful assault as not compensable, a view also necessarily dictated, except rarely when duty requires fighting, if tendency of the particular act to forward the work or direct connection with line of duty are the tests of liability. But that view now is repudiated universally in recognition that work causes quarrels and fights. That they involve volition and fault, have no tendency to forward the work, and are permeated with the personal element of anger no longer suffices to break the causal connection between work and injury. Emotional disturbance is not of itself an "independent, intervening cause" or a "departure from the work."

But differences remain as to when work causes quarrels. So long as the claimant is merely the victim, not a participant, it makes little difference whether the fighting is by fellow employees or strangers to the work or what is the immediate occasion for the dispute. The same is true in horseplay. It is sufficient that the work brings the

claimant within the range of peril by requiring his presence there when it strikes. But conflict becomes acute when the claimant participates. There are two lines of division, which partially overlap. One is concerned with whether the claimant is the aggressor. Another turns on whether the dispute arises immediately over the work or about something else. One view limits compensable causation to quarrels relating directly to the work. It disconnects the precipitating incident from the working environment, though that alone may have produced it. So isolated, its immediate relevance to the work becomes the [determining] consideration. Momentary lapses from duty, as in horseplay, kidding and teasing, which often explode into bursts of temper and fighting become "departures from the work," "independent, intervening causes" or "purely personal matters." Their immediate irrelevance overcomes and nullifies the part played by the work in bringing the men together and creating the occasion for the lapse or outburst. The other view rejects the test of immediate relevancy of the culminating incident. That is regarded, not as an isolated event, but as part and parcel of the working environment, whether related directly to the job or to something which is a by-product of the association. This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. Any other view would reintroduce the conceptions of contributory fault, action in the line of duty, nonaccidental character of voluntary conduct, and independent, intervening cause as applied in tort law, which it was the purpose of the statute to discard. It would require the application of different basic tests of liability for injuries caused by volitional conduct of the claimant and those resulting from negligent action, mechanical causes and the volitional activities of others.

The limitation, of course, is that the accumulated pressures must be attributable in substantial part to the working environment. This

implies that their causal effect shall not be overpowered and nullified by influences originating entirely outside the working relation and not substantially magnified by it. Whether such influences have annulling effect upon those of the environment ordinarily is the crucial issue. The difference generally is as to the applicable standard. It is not, as is frequently assumed, the law of “independent, intervening agency” applied in tort cases. It cannot be prescribed in meticulous detail, but is set forth in the statute, not only in the broad presumptions created in favor of compensability, but more explicitly in the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by the claimant. The provision is: “No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by the *willful intention of the employee to injure or kill himself or another.*”

This provision, reinforced by the statutory presumptions and the Act’s fundamental policy in departing from fault as the basis of liability and of defense, except as specified, is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, illegality, etc., unless it amounts to the kind and degree of misconduct prescribed in definite terms by the Act. It is entirely inconsistent with reading into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault. We are committed by the statutes and our previous decisions against the test of immediate relevancy of the precipitating act to the task in hand.⁹⁴

Regretfully, Justice Rutledge went on to note, “Claimant may have been at fault, but he was the aggressor neither in the banter nor in the physical encounter[,]” and he did distinguish Fazio on the grounds that “claimant there was the aggressor in the physical assault.”⁹⁵

Based upon his narrow reading of *Hartford Accident*, the Director adopted a two-prong test to determine the compensability of injuries sustained during a fight at work; despite a connection between employment conditions and the fight, so long as the claimant was the aggressor, the claimant’s injuries are beyond the scope of employment and are not compensable.⁹⁶ To understand why the *Bird*

94. *Hartford Accident*, 112 F.2d at 14-17 (footnotes omitted).

95. *Id.* at 18.

96. *Bird II*, H&AS No. 84-96, at 7.

test goes against basic principles of workers' compensation law in the District of Columbia requires an understanding of those principles including no-fault liability, the presumption of compensability, arising out of and in the course of employment, positional risk, and willful misconduct and willful intention to injure.⁹⁷

III. FUNDAMENTALS OF DISTRICT OF COLUMBIA WORKERS' COMPENSATION

A. No-Fault Liability

Private-sector employers in the District of Columbia are subject to the Act, and in exchange for limits on employers' economic burdens, claimants receive a practical and expeditious process for resolving issues about compensation for on-the-job accidents.⁹⁸ Workers' compensation adjudication is not synonymous with tort litigation, and there are important distinctions between the two systems; "[i]n tort law the beginning point is always a person's act, and the act causes certain consequences. In worker[s'] compensation law the beginning point is not an act at all; it is a relation or condition or situation—namely, employment."⁹⁹

With the focus on the employment relationship, neither negligence nor fault is supposed to be a bar to recovery.¹⁰⁰

97. See *infra* pp. 25-38.

98. *Harrington v. Moss*, 407 A.2d 658, 660-61 (D.C. 1979). See also D.C. Code § 32-1504 (2001) of the Act:

(a) The liability of an employer prescribed in §32-1503 shall be exclusive and in place of all liability of such employer to the employee, his legal representative, spouse or domestic partner, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law on account of such injury or death.

(b) The compensation to which an employee is entitled under this chapter shall constitute the employee's exclusive remedy against the employer, or any collective- bargaining agent of the employer's employees and any employee, officer, director, or agent of such employer, insurer, or collective-bargaining agent (while acting within the scope of his employment) for any illness, injury, or death arising out of and in the course of his employment; provided, that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law for damages on account of such injury or death. In such action the defendant may not plead as a defense that injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

99. 1 Arthur Larson, et al., *CHAPTER 3 THE FIVE LINES OF INTERPRETATIONS OF "ARISING"*, in Larson's Workers' compensation Law § 3.06 (Matthew Bender & Co. ed., 2014).

100. 1 Arthur Larson, et al., *CHAPTER 1 THE NATURE OF WORKERS' COMPENSATION*,

Nonetheless,

[t]he most familiar and persistent effect [of applying the tort-connection fallacy] is the difficulty lawyers and judges feel in reconciling themselves to the notion that the employee's misconduct causing his or her own injury must really be altogether disregarded. So, in various forms such as added- risk doctrines, and in various troublesome categories, such as assault and horseplay cases, fault concepts have at times crept into compensation decisions.¹⁰¹

When the focus shifts from the employment relationship to the claimant's misbehavior, the tort-based concept of fault inappropriately affects resolution of the claim.

B. The Presumption of Compensability

Private-sector claimants also receive the benefit of the very foundation of the Act—the presumption of compensability.¹⁰² Pursuant to section 32-1521(1) of the Act, there is a rebuttable presumption that an accidental injury arises out of and in the course of employment thereby entitling the claimant to medical benefits and wage loss benefits: “[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary: (1) [t]hat the claim comes within the provisions of this chapter.”¹⁰³ In order to benefit from the presumption of compensability, the claimant initially must show some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.¹⁰⁴

Once the presumption of compensability has been invoked, the burden shifts to the employer to come forth with substantial evidence “specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event;”¹⁰⁵ in

in Larson's Workers' compensation Law § 1.01 (Matthew Bender & Co. ed., 2014).

101. *Id.* § 1.02.

102. § 32-1521.

103. *Id.*

104. *Ferreira v. D.C. Dep't of Emp't Servs.*, 531 A.2d 651, 655 (D.C. 1987); *Wash. Hosp. Ctr. v. D.C. Dep't of Emp't Servs.*, 744 A.2d 992, 996 (D.C. 2000) (“[O]nce an employee offers evidence demonstrating that an injury was potentially caused or aggravated by work-related activity, a presumption arises that the injury is work-related and therefore compensable under the Act.”).

105. *Waugh v. D.C. Dep't of Emp't Servs.*, 786 A.2d 595, 600 (D.C. 2001) (citation omitted).

the absence of evidence to the contrary, a claim is deemed to come within the provisions of the Act.¹⁰⁶ On the other hand, if the employer successfully rebuts the presumption of compensability, the burden returns to the claimant to prove by a preponderance of the evidence (without the benefit of the presumption of compensability) the disability arose out of and in the course of employment.¹⁰⁷

The thresholds for invoking and for rebutting the presumption of compensability are low.¹⁰⁸ Frequently, application of the presumption of compensability is the starting point for analyzing a claim for benefits,¹⁰⁹ but application of the presumption of compensability lacks consistency.

C. Arising Out of and in the Course of Employment

The presumption of compensability applies to the issue of whether an injury arises out of and in the course of employment thereby making any resulting disability compensable.¹¹⁰ Section 32-1501(12) of the Act defines “injury” as

an accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of third persons directed against an employee because of his employment.¹¹¹

“[T]here is no requirement of an unusual occurrence[;] to show that he or she suffered an ‘accidental injury’ a [claimant] need prove only that something unexpectedly went wrong within the human frame,”¹¹² but in order to be compensable, an injury must arise out of and in the course of employment.¹¹³

“Arising out of” and “in the course of” are two distinct elements of every workers’ compensation claim although proof of

106. *See id.*

107. *Id.*

108. *See id.* at 599.

109. *Id.*

110. *Waugh*, 786 A.2d at 599.

111. D.C. CODE § 32-1501(12) (2001).

112. *Wash. Metro. Area Transit Auth. v. D.C. Dep’t of Emp’t Servs.*, 506 A.2d 1127, 1128 (D.C. 1986).

113. § 32-1501(12); *Grayson v. D.C. Dep’t of Emp’t Servs.*, 516 A.2d 909, 911 (D.C. 1986).

one may incidentally establish the other.¹¹⁴ “Arising out of” refers to “the origin or cause of the injury;” an accident occurs “in the course of employment” when it takes “place within the period of employment, at a place where the employee may reasonably be expected to be, and while he [or she] is reasonably fulfilling duties of his [or her] employment or doing something reasonably incidental thereto.”¹¹⁵

“In the course of” refers to “the time, place and circumstances under which the injury occurred;”¹¹⁶

the “in the course of” requirement may be satisfied where an injury occurs “in the performance of an activity related to employment, which may include . . . an activity of mutual benefit to employer and employee.” Under *Kolson*, what counts for the purposes of the “in the course of” analysis is whether the activity at issue “relate[s] to [one’s] employment.” That an activity is beneficial to both the employer and the employee *may*, but does not necessarily, illustrate that relation.¹¹⁷

Furthermore, when assessing “arising out of and in the course of employment,” a quantum approach applies:

That approach to analysis of “arising out of and occurring in the course of employment” questions derives from Larson’s Workers’ Compensation Law, §29.01 (2000 Ed.) (Larson’s), which includes the following:

The discussion [in the treatise] of the coverage formula, “arising out of and in the course of employment”, was opened with the suggestion that, while “course” and “arising” were put under separate headings [in the treatise] for convenience, some interplay between the two factors would be observed in various categories discussed. . . . [T]he two tests, in practice, have not been kept in air-tight compartments, but have to some extent merged into a single concept of work-connection. One is almost tempted to formulate a sort of quantum theory of work-connection: that a certain minimum quantum of work-connection must be shown, and if the “course” quantity is very small, but the arising quantity is large, the quantum will add up to the necessary minimum, as it will also when the arising quantity is

114. *Kolson v. D.C. Dep’t of Emp’t Servs.*, 699 A.2d 357, 359-60 (D.C. 1997).

115. *Id.* at 361.

116. *Id.*

117. *Bentt v. D.C. Dep’t of Emp’t Servs.*, 979 A.2d 1226, 1235 (D.C. 2009) (citation omitted).

very small but the “course” quantity is relatively large.

But if both the “course” and “arising” quantities are small, the minimum quantum will not be met.¹¹⁸

If an injury does not arise out of employment or does not occur in the course of employment, it is not compensable.¹¹⁹

D. Positional Risk

When evaluating whether an injury “arises out of” employment, there are three possible origins of that injury: “[(1)] risks distinctly associated with the employment, [(2)] risks personal to the claimant, and [(3)] ‘neutral’ risks-i.e., risks having no particular employment or personal character.”¹²⁰

Risks associated with employment universally are compensable; risks personal to the claimant universally are not compensable.¹²¹ The positional risk test determines the compensability of neutral risks: “Under the positional-risk test, an injury arises out of employment so long as it would not have happened but for the fact that conditions and obligations of the employment placed claimant in the position where she was injured.”¹²²

Furthermore, this test is to be construed liberally to further the principles underlying workers’ compensation: “Fault has nothing to do with whether or not compensation is payable. The economic impact on an injured workman and his family, is the same whether the injury was caused by the employer’s fault or otherwise.”¹²³ In the end, the positional-risk test removes any requirement of “a causal relationship between the nature of the employment and the risk of injury. Nor need the employee be engaged at the time of the injury in activity of benefit to the employer.”¹²⁴

118. Lewis, 2006 WL 850906, at *2 (D.C. Dep’t of Emp’t Servs. Feb. 16, 2006) (footnotes omitted) (quoting 2 ARTHUR LARSON ET AL., *Chapter 29 Conclusion: Work-Connection as Merger of “Arising” and “Course”*, in LARSON’S WORKERS’ COMPENSATION LAW § 29.01 (Matthew Bender & Co. ed., 2014)).

119. See Lewis, 2006 WL 850906, at *1.

120. *Bentt*, 979 A.2d at 1232.

121. *Id.*

122. *Id.*; *Georgetown Univ. v. D.C. Dep’t of Emp’t Servs.*, 830 A.2d 865, 872 (D.C. 2003).

123. See *Grayson v. D.C. Dep’t of Emp’t Servs.*, 516 A.2d 909, 912 (App. D.C. 1986) (quoting *Whetro v. Awkerman*, 174 N.W.2d 783, 785 (Mich. 1970)).

124. *Clark v. D.C. Dep’t of Emp’t Servs.*, 743 A.2d 722, 727 (D.C. 2000) (citations omitted.)

The concept of positional-risk frequently applies when assessing the compensability of assaults in the workplace.¹²⁵ For example, Ms. Janet Clark's claim for workers' compensation benefits was denied because an administrative law judge ruled Ms. Clark's injuries did not arise out of her employment as a dialysis technician with BMA Capitol Hill;¹²⁶ an unknown assailant in BMA Capitol Hill's parking lot shot Ms. Clark for unknown reasons.¹²⁷ The District of Columbia Court of Appeals reversed the denial of benefits because BMA Capitol Hill had not presented sufficient evidence to rebut the presumption of compensability.¹²⁸

The sole issue presented at the formal hearing was whether the assault arose out of and in the course of Ms. Clark's employment.¹²⁹ Ms. Clark's presence in her employer's parking lot was sufficient to invoke the presumption of compensability, and the burden shifted to BMA Capitol Hill to rebut the presumption;¹³⁰ however, the administrative law judge reasoned that because Ms. Clark's assailant had targeted her as the owner of a particular automobile in the parking lot and had said something prior to the attack that "may reasonably be construed to denote a relationship predicated upon factors other than claimant's position as a dialysis technician with employer," BMA Capitol Hill had rebutted the presumption of compensability.¹³¹ When weighing the evidence, the administrative law judge ruled Ms. Clark "had failed to produce any evidence affirmatively linking the motive behind the assault to her employment [and had failed to] establish any connection between the geographic location of her employment and the assault."¹³² Ms. Clark's claim for benefits was denied.¹³³

The Director affirmed the denial by noting that there was substantial evidence in the record for the administrative law judge to conclude that "this was not a random act of violence, and that it was targeted specifically to the owner of the red car, namely the claimant."¹³⁴ Therefore, the Director found that there was substantial evidence in the

125. *See id.*

126. *Id.* at 726.

127. *Id.* at 724.

128. *Id.* at 729-31.

129. *Id.* at 725.

130. *Id.*

131. *Id.* at 726. (quoting Clark, 1994 LEXIS 200, at *8 (D.C. Dept' of Empt' Servs. Mar. 24, 1994)).

132. *Id.*

133. *Id.*

134. *Id.* at 726.

record for the administrative law judge to find that claimant's injury did not arise out of her employment.¹³⁵

Ms. Clark filed an appeal with the District of Columbia Court of Appeals.¹³⁶ With the motive for the assault unknown, the finding that Ms. Clark's "assailant had some motive to target her specifically is not the same as a finding that he had a personal, non-work related motive to do so."¹³⁷ Analyzing the positional-risk test in conjunction with the presumption of compensability, the Court noted that

[p]ursuant to the positional-risk test, an injury arises out of employment so long as it would not have happened but for the fact that conditions and obligations of the employment placed claimant in a position where he was injured. "This theory supports compensation, for example, in cases of stray bullets, roving lunatics, and other situations in which the only connection of the employment with the injury is that its obligations placed the employee in the particular place at the particular time when he or she was injured by some neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." On the other hand, "when it is clear that the employment contributed nothing to the episode, whether by engendering or exacerbating the quarrel or facilitating the assault, the assault should be held noncompensable even in states fully accepting the positional risk test, since that test applies only when the risk is 'neutral.'"¹³⁸

[A]nd that

where an employee is assaulted by a third party on the

135. *Id.*

136. *See Id.* at 724.

137. *Id.* at 730; *cf.* Smith, 1997 D.C. Wrk. Comp. LEXIS 564, at *16 (Dep't of Emp't Servs. Aug. 14, 1997).

[Ricky Hugue] had come onto employer's premises in order to obtain some of the money which he believed, rightly or wrongly, claimant had borrowed from him in 1994. The physical confrontation in which the two individuals became involved was purely personal in nature and in no way founded upon the premise that employer or anyone else other than claimant was the object of Hugue's inquiry. Hugue, upon hearing claimant had no money which he could borrow, despite having been told by claimant he might obtain some of the money if he would stop by the store on a pay day, expressed outward displeasure at claimant for appearing to have deceived him. Although the identity of the aggressor is unclear on the record, the inescapable conclusion is that claimant's fractured left ankle occurred due to a matter unrelated to claimant's duties and responsibilities as a meat cutter.

Smith, 1997 D.C. Wrk. Comp. Lexis 564, at *16.

138. *Clark*, 743 A.2d at 727 (citations omitted).

employer's premises or otherwise in the course of employment, the employee's resulting injuries are presumed covered under the Workers' Compensation Act unless the employer presents substantial evidence that the assault was motivated by something entirely personal to the employee and unrelated to the employment. For this reason, even if the assault remains unexplained, it is compensable under the Act. This policy comports with the humanitarian purpose of the Workers' Compensation Act; it results in compensation for those employees assaulted at work who simply do not know or cannot prove the motive behind the assault.¹³⁹

E. Willful Misconduct and Willful Intention to Injure

Even if an injury does arise out of and in the course of employment, some jurisdictions bar recovery of workers' compensation benefits when a claimant engages in willful misconduct.¹⁴⁰ In those jurisdictions, willful misconduct may mean violating a rule or a statute in a way that takes the claimant outside the scope of employment.¹⁴¹ In the District of Columbia, however, "the Act exempts from liability neither injuries where the employee is injured while willfully violating an employer's rules nor injuries where the employee is injured by gross neglect of his duties";¹⁴² recovery is barred only when a claimant's misconduct is part of an intentional plan or attempt to injure oneself or another.¹⁴³

The Act specifically states that in the absence of evidence to the contrary, it shall be presumed an injury was not occasioned by a claimant's willful intention to injure oneself or another,¹⁴⁴ but the Act does not define "willful intention."¹⁴⁵ In this absence of a statutory definition, "two factors have figured in the cases interpreting the 'willful intent to injure' exception: 'the factor of seriousness of the claimant's initial assault, and the factor of premeditation as against

139. *Id.* at 728 (citation omitted). Ultimately, so long as employment conditions exposed the claimant to the risk or danger connected with the accident, the resulting injury is compensable. See D.C. Code § 32-1501(12) (2001).

140. See Jones, 1991 WL 11003994 (D.C. Dep't of Emp't Servs. Feb. 20, 1991).

141. *Id.* at *4.

142. Mooney, 1997 D.C. Wrk. Comp. LEXIS 433, at *5-7, *19 (D.C. Dep't of Emp't Servs., Dec. 23, 1997).

143. Whitesides, 2007 D.C. Wrk. Comp. LEXIS 389, at *9 (D.C. Dep't of Emp't Servs., Oct. 4, 2007).

144. § 32-1521(4).

145. § 32-1501.

impulsiveness.”¹⁴⁶

Importantly, this defense is not defined by the results of the conduct. For example, Mr. Kenneth Skeen worked as a floorman in a gentleman’s club.¹⁴⁷ When he saw a patron in the club clicking the trigger of a pistol, he charged that patron, and the patron shot him.¹⁴⁸ The patron ran out of the club, and Mr. Skeen followed.¹⁴⁹ In a nearby alley between two houses, the patron shot Mr. Skeen twice more.¹⁵⁰ In response, Mr. Skeen hit the patron with a pipe he had found during the chase.¹⁵¹

At a formal hearing, Mr. Skeen’s employer conceded that Mr. Skeen may not have demonstrated an intent to injure the patron by pursuing that patron, but it argued that by continuing to pursue the patron and by grabbing a piece of pipe, Mr. Skeen had demonstrated a willful intention to injure the patron.¹⁵² An administrative law judge disagreed:

Employer’s argument is unpersuasive. I find that claimant’s actions in pursuing the [patron] were spontaneous and amount to an impulsive and instinctive reaction to the [patron’s] act of pointing a gun at claimant and pulling the trigger.

Claimant was a very candid witness. I find his testimony both reliable and credible. Thus, I find credible claimant’s testimony that less than a minute elapsed between the time the [patron] pointed the gun at claimant and pulled the trigger in the hallway and the time claimant was shot in the alley between the two houses. I find it inconceivable that claimant’s behavior during this brief period of time manifested a premeditated intent to injure the [patron].

In addition, I find credible claimant’s testimony that claimant found the piece of pipe between the two houses after he was shot by the [patron] and that he did not have the pipe in his hand when he left the bar. Thus, there is no credible evidence which establishes that claimant used any threatening language or gestures indicative of willful intent.

146. Skeen, 1983 WL 482640, at *4 (D.C. Dep’t of Emp’t Servs., Aug. 30, 1983) (citation omitted).

147. *Id.* at *2.

148. *Id.* at *3.

149. *Id.* at *2-3.

150. *Id.* at *3.

151. *Id.*

152. *Id.* at *4.

Regarding the factor of seriousness of the initial assault, claimant argues that he did not make the initial assault, and did not hit the [patron] until he already had been shot. Employer argues that claimant's attack on the [patron] is of such seriousness that it manifests a willful intent to injure the [patron].

Employer's argument concerning this factor is also unpersuasive. I find credible claimant's testimony that he did not hit the [patron] until after he had been shot. Thus, the only initial assault claimant made was, while unarmed, charging at an armed man. I find it inconceivable that claimant's charging at the armed [patron] was of such seriousness that it manifests a willful intent to injure the [patron]. Indeed, in the cases cited by Professor Larson where the "willful intent to injure" defense was successfully invoked, the initial assault was considerably more serious than in the instant case.¹⁵³

The standard for proving willful intention to injure is high, especially in conjunction with the statutory presumption against the applicability of this defense. An intent to injure another requires premeditation or deliberation; it requires more than a reaction which leads to an injury, even a serious injury.¹⁵⁴ As a result, the defense of willful intention does not often succeed in the District of Columbia and is not equivalent to acting with hostility or aggression; therefore, it is not the equivalent of a statutory aggressor defense.

IV. APPLICATION OF THE AGGRESSOR DEFENSE: AGGRESSOR VS. PROVOCATEUR

Given that there is no statutory aggressor defense in the District of Columbia, it should come as no surprise that there is no statutory or regulatory definition of an aggressor in this context. One administrative law judge defined "aggressor" by stating "overbearing physical retaliation, which may not be warranted by the initial assault, does not equate to aggression. The aggressor is the individual who instigates the physical confrontation, not necessarily the one most damaged in its aftermath."¹⁵⁵ The application of the *Bird* test has gone beyond denying benefits only to the worker who threw the first punch.¹⁵⁶

153. *Id.* at *4-5 (footnote omitted) (citations omitted).

154. *Id.* at *4.

155. Sims, 2003 WL 23303752, at *6 (D.C. Dep't of Emp't Servs. Sept.-24, 2003).

156. Mansaray, 2002 D.C. Wrk. Comp. LEXIS 8, at *16 (D.C. Dep't of Emp't Servs. Jan. 25,

Mr. Sulaiman Mansaray was employed by the Grand Hyatt Hotel Washington as a dishwasher.¹⁵⁷ Mr. Mansaray regularly worked with other dishwashers supplied to the hotel by a temporary employment agency.¹⁵⁸

Mr. Mansaray had a habit of treating the temporary workers with rudeness and contempt, and on December 29, 2000, Mr. Mansaray directed numerous disparaging comments toward Mr. Ramon Adams.¹⁵⁹ Mr. Mansaray was admonished to stop treating his co-workers with disrespect, but he persisted.¹⁶⁰

In response to Mr. Mansaray's comments, Mr. Adams twice approached Mr. Mansaray in a manner that gave the appearance that he was going to strike Mr. Mansaray.¹⁶¹ Both times, Mr. Adams was restrained and was removed from the situation.¹⁶²

Late in the evening, Mr. Adams was sorting glassware when Mr. Mansaray interrupted Mr. Adams' work by stacking a rack of coffee cups on top of the glassware Mr. Adams was sorting.¹⁶³ Mr. Adams demanded Mr. Mansaray remove the coffee cups; Mr. Mansaray refused, and Mr. Adams threw the rack to the floor.¹⁶⁴ At this point, for the third time that night, Mr. Mansaray made disparaging comments about Mr. Adams.¹⁶⁵

Mr. Adams approached Mr. Mansaray quickly, but Mr. Mansaray retreated to an adjacent hallway.¹⁶⁶ When Mr. Adams caught up to Mr. Mansaray, he beat him about the head and face.¹⁶⁷ An administrative law judge found Mr. Mansaray, "instigated the fight by provoking Mr. Adams with insults and taunts which had previously caused Mr. Adams to respond in a fashion that was potentially violent and which could reasonably have been expected to cause a normal person of average sensibilities to react with violence."¹⁶⁸

There was no dispute that Mr. Mansaray had not struck the first

2002).

157. *Id.* at *3.

158. *Id.* at *4.

159. *Id.* at *5-6.

160. *Id.* at *6-7.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at *7-8.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at *9.

blow.¹⁶⁹ His pattern of conduct, however, had “the potential to provoke a person of average sensibilities to respond with violence, a variant of the ‘fighting words’ concept,” and his continued taunting even after Mr. Adams twice had been on the verge of violence “put him on notice that his conduct was capable of and perhaps even likely to lead to an altercation in which he might sustain injury.”¹⁷⁰ The administrative law judge concluded Mr. Mansaray’s injuries were not compensable:

[C]laimant engaged in a course and pattern of abusive, insulting, and intentionally offensive and knowingly provocative behavior, repeatedly and in the face of employer workplace rules prohibiting such conduct and a specific admonition from his direct supervisor on the night in question to desist therefrom, and was therefore an “aggressor” whose claim for compensation is barred. Where the misconduct of the claimant reaches the point where an average person of normal sensibilities could be expected to respond with violence, and where that misconduct has been shown through the relationship and behavioral response of a particular individual to pose a significant likelihood that continuing in that course of misconduct will lead to a violent response, and where that misconduct is not significantly useful or necessary to the employer, and is in fact prohibited by the employer, the misconduct can be considered to establish that the claimant is an “aggressor” whose injuries resulting from the response to the misconduct are not compensable under the Act.¹⁷¹

Pursuant to *Mansaray*, a claimant who did not throw the first punch still qualifies as the aggressor if his actions provoke an average person of normal sensibilities to strike. This case hints at the practical difficulties Larson envisioned and the Montana Workers’ Compensation Court acknowledged in *Kuykendall v. Liberty Northwest*:

Contrary to *Liberty*’s argument, the Montana Supreme Court has not held that the aggressor is automatically precluded from receiving workers’ compensation benefits. Only a minority of jurisdictions continue to allow the aggressor defense as an absolute bar to recovery. Larson explains the practical difficulties in applying the aggressor defense as follows:

169. *Id.* at *16.

170. *Id.* at *16-17.

171. *Id.* at *19-20 (footnote omitted).

[L]ong after a quarrel is over, it is often almost impossible to determine who really started it. Many a parent [has] been forced to sit in belated judgment on this issue between two children, the testimony consisting of 'He hit me'; 'Yes, but she called me a stinker'; 'But before that he grabbed my book'; and so on. One cannot read the facts behind the aggressor cases without seeing how closely the average factory scuffle follows this pattern.

....

The test for course of employment is not based on whether claimant was the initial aggressor, which he was not, or on whether he escalated the situation such that the roles were switched and he then became the aggressor. Rather, as stated in *Pinyerd*, the test is whether there was a "*reasonable connection between*" the fight and claimant's resulting injury "*and the conditions under which he [the claimant] pursued his employment.*" The connection exists in this case. "It is universally agreed that if the assault grew out of an argument over the performance of the work, the possession of the tools or equipment used in the work, . . . the assault is compensable."¹⁷²

Unlike the District of Columbia, however, Montana rejects the aggressor defense.¹⁷³

V. THE *BIRD* TEST AND...

A. *No-Fault Liability*

Each of these topics thus far plays an important role in the workers' compensation system. Applying the *Bird* test in the context of each one demonstrates the problems inherent in accepting the aggressor defense.

As noted previously, in exchange for limits on employers' economic burdens, the workers' compensation system was established to give claimants a practical and expeditious remedy for resolving issues delaying compensation for on-the-job injuries.¹⁷⁴ So long as the claimant was injured "while acting within the scope of his employment,"¹⁷⁵ those issues are not intended to include fault; "[e]very

172. Kuykendall, 1997 WL 148246, at *8-9 (Mont. Worker Comp. Ct., Mar. 17, 1997) (citations omitted).

173. *Id.* at *8.

174. *Harrington v. Moss*, 407 A.2d 658, 660 (D.C. 1979).

175. D.C. Code § 32-1504(b) (2001).

employer subject to this chapter shall be liable for compensation for injury or death without regard to fault as a cause of the injury or death.”¹⁷⁶

Consistent with these concepts, the first prong of the *Bird* test requires the claimant prove “the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them.”¹⁷⁷

Satisfying this portion of the test brings the claimant’s aggressive activity within the scope of employment because employment conditions created the frictions culminating in a fight; personal animosities brought into the workplace are not compensable.¹⁷⁸ Thus far, the *Bird* test merely restates the foundation for any compensable workers’ compensation claim.

The second prong of the *Bird* test, however, injects fault into a no-fault system: “The injured employee was not the aggressor.”¹⁷⁹ Regardless of the work-related origin of the altercation so long as “he started it,” the claimant’s injuries summarily are not compensable, but the claimant’s role as the aggressor does not change the fact that the fight was work-related.¹⁸⁰ Colorado recognizes this important consideration in its rejection of the aggressor defense:

Judicial recognition of an initial aggressor defense would be inconsistent with the aims of the Workers’ Compensation Act. It would introduce the common law concept of fault into a comprehensive statutory scheme designed to allocate cost and ensure compensation, not analyze culpability. Such analysis of ‘who threw the first punch’ is contrary to quick and efficient

176. § 32-1503(b).

177. *Bird II*, H&AS No. 84-96, OWC No. 0015644, at 6 (D.C. Dep’t of Emp’t Servs. June 1, 1985).

178. See Pinto, 2000 D.C. Wrk. Comp. LEXIS 212, at *1, *11-22, *76-77 (Dep’t of Emp’t Servs. June 29, 2000); *Bird II*, H&AS No. 84-69, at 1, 3.

I find that the claimant’s injuries arose out of and in the course of her employment with the employer as a banquet waitress. I further find that the evidence reflects claimant’s injuries arose from a work related incident and not from a personal dispute between the combatants that was imported into the workplace and the claim is therefore not barred and is compensable under the Act.

Pinto, 2000 D.C. Wrk. Comp. LEXIS 212, at *21.

179. See discussion *supra* pp. 42-43; *Bird II* H&AS No. 84-69, at 6.

180. See *Bird II*, H&AS No. 84-69, at 7; *Triad Painting Co. v. Blair*, 812 P.2d 638, 648 (Colo. 1991).

administration of disability benefits. The Workers' Compensation Act of Colorado does not expressly authorize a defense against an initial aggressor in an altercation leading to an otherwise compensable injury. In the absence of such express authorization, we decline to read an initial aggressor defense into the statutory scheme.¹⁸¹

The issues do not stop here.

B. *The Presumption of Compensability*

If the first prong of the *Bird* test requires an analysis of whether the claimant's actions arise out of and in the course of employment, the presumption of compensability is implicated,¹⁸² but the presumption of compensability has been applied inconsistently in cases involving an alleged claimant-aggressor.¹⁸³ Sometimes the aggressor defense has been applied when invoking the presumption of compensability; in *Smith*, an administrative law judge required the claimant not be the aggressor in order to trigger the presumption of compensability: "Based on the record testimony, and reports submitted herein, claimant has presented evidence of the two basic facts required to invoke the presumption: an injury and a work related activity that she did not instigate, which potentially contributed to the injury."¹⁸⁴

Sometimes the aggressor defense has been applied when rebutting the presumption of compensability; in *Sims*, the employer's defense that the claimant was the aggressor was not sufficient to rebut the presumption of compensability:

Although there is no question that the incident on October 24, 2002 was directly related to claimant's employment duties and responsibilities, employer has adduced some evidence to support its argument that claimant was the aggressor in this incident. There is testimonial and contemporaneous documentary evidence to indicate that claimant either assaulted, or restrained Shavae inappropriately, such that the child had to be shielded and protected from the teacher. However, claimant's testimony of how the incident occurred, and the incident reports which support her

181. *Triad Painting Co.*, 812 P.2d at 644-45 (footnote omitted).

182. See discussion *supra* pp. 42-43; *Ferreira v. D.C. Dep't of Emp't Servs.*, 531 A.2d 651, 655 (D.C. 1987); *Sims*, 2003 WL 23303752, *4 (Dep't of Emp't Servs. Sept. 24, 2003).

183. See, e.g., *Smith*, 2003 D.C. Wrk. Comp. LEXIS 349, *1, 7-11 (Dep't of Emp't Servs. Dec. 23, 2003); *Sims*, 2003 WL 23303752, at *5-6; *Coates*, 2001 D.C. Wrk. Comp. LEXIS 283, *1, *7-10 (Dep't of Emp't Servs. Jan. 25, 2001).

184. *Smith*, 2003 D.C. Wrk. Comp. LEXIS 349, at *10.

testimony, are the version of events which was officially accepted by employer.

There is no documentary or testimonial evidence, other than claimant's, to address the beginning of the altercation; it is clear, however, that no one else witnessed the beginning of the scuffle on October 24, 2002. The observations reflected in the incident reports and testimony at hearing were made *after* claimant and Shavae were actively engaged in combat. Since Ms. Washington (who testified that she observed claimant swinging at a cowering Shavae) did not see the beginning of the confrontation, claimant's testimony, as to what initially occurred, is uncontradicted. It is noted that overbearing physical retaliation, which may not be warranted by the initial assault, does not equate to aggression. The aggressor is the individual who instigates the physical confrontation, not necessarily the one most damaged in its aftermath.

Employer attempts to use the aggressor defense to defeat the compensability of this claim. In order to rebut the statutory presumption of compensability, the evidence adduced by employer has to meet the standard of being specific, credible and comprehensive.

There is not substantial record evidence to support employer's contention that claimant was the aggressor on October 24, 2002. Therefore, employer fails to rebut the presumption of compensability; the October 24, 2002 incident, in which claimant sustained several injuries, arose out of and in the course of her employment.¹⁸⁵

Sometimes the presumption of compensability has not applied at all:

The evidence in this case consists of the testimony of the claimant and the testimony of Mr. Cooper. Claimant testified that he arrived at the employer's offices, went directly to the administrative area, and advised Mr. Cooper of the pay dispute involving Flippo. He testified initially that Mr. Cooper advised him that he would have to wait until

185. *Sims*, 2003 WL 23303752, at *6 (footnote omitted) (citations omitted); *Mansaray*, 2002 D.C. Wrk. Comp. LEXIS 8, *1, *9-17 (Dep't of Emp't Servs. Jan 25. 2002). "[E]mployer's evidence [that Mr. Mansaray was the aggressor] is sufficient to overcome the presumption invoked by claimant's evidence. The evidence will therefore be considered without reference to the presumption, and with claimant having the burden of establishing entitlement to compensation under the Act, by a preponderance of the evidence." *Mansaray*, 2002 D.C. Wrk. Comp. LEXIS 8, at *17 (citation omitted).

Mr. Cooper was not busy to deal with the issue; later he changed that testimony, and said that no such instruction was given. He testified that the date of the incident was June 6, but after prodding by his attorney, he changed the date to June 13. He testified initially that Mr. Cooper did ask him to leave the office prior to the physical contact between them, but he later denied any such request or order to leave was given. While the claimant's testimony was in these and other respects inconsistent, lacking in detail, confused, non-responsive and vague, Mr. Cooper's was detailed, straightforward, consistent and responsive. Mr. Cooper testified as is set forth in the Findings of Fact. Further, while Mr. Cooper's version of events appears to make a certain amount of sense, e.g., an angry and disgruntled worker accosted his supervisor over an alleged pay dispute, the claimant's version doesn't, e.g., a busy supervisor engaged in dispatching workers to various sites makes an unprovoked assault on the claimant, who was merely requesting assistance in a pay dispute.

Taking these matters into account, and further considering that claimant's testimonial demeanor was hurried and at times unconvincing, I accept employer's version of the event in preference to claimant's. As such, claimant has failed to demonstrate that he was not the aggressor, as he must do in order to prevail under the Bird test, and the claim therefore must be denied.¹⁸⁶

Importantly, the presumption of compensability is invoked by a minimal showing of "some evidence of the existence of two 'basic facts': a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability,"¹⁸⁷ and once invoked, a claimant is entitled to the presumption that "the claim comes within the provisions of [the Act]."¹⁸⁸ If the aggressor defense continues to apply, it must apply uniformly. An altercation at work that satisfies the first prong of the *Bird* test suffices to invoke the presumption of compensability because satisfying that portion of the test requires the same proof that is required to invoke the presumption of compensability.¹⁸⁹

The aggressor defense is an affirmative one; therefore, if it is to act as a bar to recovery at all, it should not apply until the rebuttal stage of the presumption analysis, and then, the burden of proof should rest with the employer. Until the defense is proven, the claimant is entitled

186. *Coates*, 2001 D.C. Wrk. Comp. LEXIS, at *7-10 (citation omitted).

187. *Ferreira*, 531 A.2d at 655.

188. D.C. CODE § 32-1521(1) (2001); *Ferreira*, 531 A.2d at 655.

189. See discussion *supra* pp. 42-43; *Ferreira*, 531 A.2d at 655.

to the benefit of the presumption that the injury arises out of and in the course of employment.¹⁹⁰ Failure to apply the presumption of compensability when the first prong of the *Bird* test has been satisfied circumvents the humanitarian purpose of the Act by minimizing (if not eliminating) the employer's burden to present substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."¹⁹¹ Repeatedly (and appropriately), the relationship between the event causing the injury and employment must remain the focus.

C. Arising Out Of and In the Course of Employment

Considering the employment relationship, in *Bird*, the Director concluded the claimant's injury did not arise out of his employment.¹⁹² Since *Bird*, administrative law judges have utilized "arising out of" or "in the course of" or both to deny benefits when the claimant is the aggressor.

In *Williams*, the administrative law judge relied upon "arising out of" to deny benefits:

Injuries resulting from a fight with a co-worker [are] not compensable unless the claimant is not an aggressor. Moreover, to be compensable, the injury must arise both out of and in the course of employment. Since claimant was the aggressor, his injuries cannot be said to have arisen out of his employment. Therefore, claimant's claim is not compensable.¹⁹³

The administrative law judge in *Coates* relied upon "in the course of" to deny benefits; "I find and conclude [the claimant-aggressor] did not sustain an accidental injury in the course of his employment."¹⁹⁴ The same administrative law judge who decided *Coates* decided *Wolford*, and in *Wolford*, the administrative law judge relied upon both "arising out of" and "in the course of" to deny benefits; "I find and conclude [the claimant-aggressor] did not sustain an accidental injury arising out of and in the course of his employment."¹⁹⁵

190. See §§ 32-1504(b), -1521(1).

191. *Waugh v. D.C. Dep't of Emp't Servs.*, 786 A.2d 595, 598, 600 (D.C. 2003).

192. *Bird II*, H&AS No. 84-96, at 6.

193. *Williams*, 1987 D.C. Wrk. Comp. LEXIS 100, at *9 (Dep't of Emp't Servs. Dec. 10, 1987) (citation omitted).

194. *Coates*, 2001 D.C. Wrk. Comp. LEXIS 283, at *9-10.

195. *Wolford*, 2001 D.C. Wrk. Comp. LEXIS 222, at 15 (Dep't of Emp't Servs. Nov. 21, 2001).

Admittedly, there are times when a claimant's "fault" may sever the connection between employment and disability. By statute, failure to attend an independent medical examination or failure to cooperate with vocational rehabilitation may result in suspension of benefits:

If at any time during such period the employee unreasonably refuses to submit to medical or surgical treatment or to an examination by a physician selected by the employer, or to accept vocational rehabilitation the Mayor shall, by order, suspend the payment of further compensation [and] medical payments . . . during such period, unless the circumstances justified the refusal.¹⁹⁶

Such failures may be cured so benefits can be reinstated, but in other instances the claimant's "fault" terminates entitlement to wage loss benefits. For example, Mr. Frank Robinson was injured while working for Flippo Construction Company.¹⁹⁷ Following a short absence, Mr. Robinson returned to work for Flippo in a light-duty position at his pre-injury wage.¹⁹⁸

After approximately two months in the light-duty position, Mr. Robinson was terminated for violating Flippo's attendance rules.¹⁹⁹ For approximately six months, Mr. Robinson could not find new employment so he filed a claim for temporary total disability benefits for that closed period of unemployment, but Mr. Robinson was not entitled to wage loss benefits.²⁰⁰ Because he had not suffered any wage loss during his light-duty assignment, Mr. Robinson's post-termination wage loss was not attributable to his compensable injury.²⁰¹

The severance of the employment from the disability is understandable under these circumstances. The wage loss resulting from the termination for failure to comply with attendance rules does not arise out of or in the course of employment because it is unrelated to the on-the-job accident or the compensable injury, but there is a fine distinction between fault that does sever the work-connection and fault that does not:

In the present case, the primary contentions of the petitioner rest on

196. D.C. Code § 32-1507(d) (2001).

197. Robinson v. Dep't of Emp't Servs., 824 A.2d. 962, 963 (D.C. 2003).

198. *Id.*

199. *Id.*

200. *Id.* at 964-65.

201. *Id.*

questions of law. First, Upchurch[, the claimant,] argues that the Director relied on an incorrect legal standard by affirming the [administrative law judge's] finding of no compensable wage loss "because [Upchurch] was fired from his job for reasons not related to the work injury." If read as urged by the petitioner, the Director's decision would clearly rest on a misstatement of the law. This court can find no authority, from any jurisdiction or legal treatise, which would support the proposition that termination severs the causal link between injury and wage loss. To the contrary, according to one of the leading authorities on workers' compensation law, the "[m]isconduct of the employee, whether negligent or wilful, is immaterial in compensation law, unless it takes the form of deviation from the course of employment, or unless it is of a kind specifically made a defense in the jurisdictions containing such a defense in their statutes." If the Director did indeed consider the termination of the petitioner as a basis in law for denying benefits, such a determination would not withstand judicial scrutiny as it would find no support in the District of Columbia Workers' Compensation Act. Specifically, the Act does not provide that the subsequent termination of an employee, whether related or unrelated to a work injury, is a defense for an employer who denies an obligation to pay disability compensation. Rather, the Act creates a presumption that an employee's injury is compensable upon a showing by substantial evidence of a disability and a work-related event which had the potential to cause such a disability.

The [employer, The Washington Post,] does not contend that the law is otherwise, but argues for a different interpretation of the language in the Director's decision. Under this interpretation, the Director did not consider Upchurch's termination as a basis in law for denying him disability benefits, but rather the Director agreed with the [administrative law judge] that the petitioner had no wage loss directly resulting from the work injury which would entitle him to disability, and was simply further describing that petitioner had been fired from his job. This interpretation would render the decision legally valid, if supported by substantial evidence. Disability is an economic and not a medical concept, and any injury that does not result in loss of wage-earning capacity cannot be the foundation for a finding of disability. . . .

It is possible that the Director's decision may have been intended to refer to the [administrative law judge's] conclusion that "any wage loss claimant has incurred since January 26, 1998, is the result of [the claimant's] personal choices including his failure to

keep employer informed of his 'on-call' status, and to attend school and not the result of a work injury." Nevertheless, the textual language of the Director's decision is ambiguous and potentially legally erroneous. One reading would render his decision reversible, as it would be based on an incorrect legal standard, and another would justify its validity.²⁰²

Even though certain forms of culpable behavior statutorily may remove a claimant's actions from the scope of employment, by its very terms, the first prong of the *Bird* test requires the employment bring the combatants together "often enough for their temperaments and emotions to interact under strains of the workplace . . . which tends to increase the likelihood of friction between them."²⁰³ Such a showing encompasses only a fight that arises out of and in the course of employment even though there may be little, if any, connection to the furtherance of the employer's business or the performance of actual job duties. It is more than a coincidence that the fight started at work; it started at work because of strains and frictions caused by the conditions of employment, and

[i]t is the character and nature of the assault which determines whether it arises out of the employment, not the culpability or lack of culpability or the parties involved. It is the assault itself which arises out of the employment; and who initiates the altercation has no bearing on that question, [the character and nature of the assault itself is what] relates to common law culpability considerations.²⁰⁴

In the end, who started the fight does not affect whether it is an incident of employment.²⁰⁵ In other words, if a fight arises out of and in the course of employment, it does so for both the aggressor and the victim:

As stated in 4 NACCA Law Journal 53: "Where the assault is directly connected with the work, and arises out of work-quarrels, as distinguished from personal quarrels, the assault is compensable without determining questions of aggressors or innocent parties. Courts are not justified in making exceptions for 'aggressors' where

202. *Upchurch v. D.C. Dep't of Emp't Servs.*, 783 A.2d 623, 628 (D.C. 2001) (citations omitted).

203. *Bird II*, H&AS No. 84-96, at 6.

204. Samuel B. Horovitz, *Assaults and Horseplay Under Workmens' Compensation Laws*, 41 ILL. L. REV. 311, 347 (1946) (footnote omitted).

205. *See Myszkowski v. Wilson & Co.*, 53 N.W.2d 203, 207 (Neb. 1952).

the legislature has not done so by express provisions. An assault that arises out of work-arguments as distinguished from personal grudges, is clearly causally related to the employment, regardless of who strikes the first blow, and hence 'arises out of' the employment. Furthermore, to make a distinction between aggressors and innocent victims adds further complications as to what constitutes an aggressor, and is judicial legislation in a remedial act intended to widen, not narrow, the rights of workers. In tort law, who strikes the first blow may be material on assumption of risk, contributory negligence, intervening cause, and on other questions. But in compensation law, the question of 'arising out of' depends simply on the causal relation to the work, in which the question of 'aggressors' is a court made, not legislative, exception."²⁰⁶

Any such distinction is a thinly veiled substitute for blaming the aggressor.²⁰⁷

D. Positional Risk

Any distinction between victim and aggressor cannot be reconciled by the positional risk test. The positional risk test only applies to neutral risks.²⁰⁸ Therefore, because the *Bird* test only compensates work-related fights, there is no need to rely upon the positional risk test. In other words, pursuant to *Bird*, in order to be compensable, the genesis of the fight must be associated with the employment.²⁰⁹ If the genesis of the fight is associated with the employment, in order for the second prong of the *Bird* test to void compensability, being the aggressor must render the activity outside the scope of employment, but by its plain language, the first prong already required an employment nexus.

206. *Id.* at 208.

207. See Alverenga, 2005 D.C. Wrk. Comp. LEXIS 4, at *13-14 (D.C. Dep't of Emp't Servs. January 10, 2005) (noting that "[b]ecause of the mutual benefit to claimant and employer, which was derived from claimant's having been exposed, on a daily basis, to a potentially volatile interaction with Mr. Martinez, [a co-worker and the aggressor in this fight,] the injuries sustained as a result of this incident are, potentially, compensable. In that the terms and conditions of the employment placed claimant in the position wherein he sustained injury from the willful actions of Mr. Martinez, the injury was incidental to [the claimant's] employment"); Reta, 2000 D.C. Wrk. Comp. LEXIS 512, at *23-24 (D.C. Dep't of Emp't Servs. November 27, 2000) ("I find based upon the evidence in the record, the facts in the instant matter, and the applicable rule in *Bird*, that the claimant was not the aggressor, and therefore his injuries arose out of and in the course of his employment.").

208. Georgetown Univ. v. D.C. Dep't of Emp't Servs., 830 A.2d 865, 872 (D.C. 2003).

209. Pinto, 2000 D.C. Wrk. Comp. LEXIS 512, at *13 (D.C. Dep't Emp't Serv. June 29, 2000).

E. Willful Misconduct and Willful Intention to Injure

The statutory defense that is the most difficult to exclude as a justification for the aggressor defense is willful intention to injure because there is a natural aversion toward rewarding bad behavior.

Since the advent of workmen's compensation legislation the majority of courts have denied recovery to the aggressor in an assault. Various reasons were asserted to support the interposition of this "aggressor" defense: the employee starting an injurious affray was not performing any duty for, or advancing any interest of, the employer and was not hired to incite trouble; rather, the aggressive employee was acting for his own wrongful purposes and had voluntarily abandoned his employer's work. This result was not surprising since it conformed to the common law cliché that one cannot profit from his own wrong.²¹⁰

Nevertheless, despite a statutory exclusion of a claimant's willfully, intentionally inflicted injuries,²¹¹ close scrutiny of the *Bird* test establishes compensability even if the claimant was the aggressor in a work-related fight.²¹² The statutory language of §32-1503(d) of the Act is clear: "Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another."²¹³

The plain language of §32-1503(d) of the Act does not create an aggressor defense per se nor does it rebut (much less abolish) the presumption of compensability. There simply is no exemption from liability for injuries sustained when the claimant is injured "while willfully violating an Employer's rules nor . . . where the employee is injured by gross neglect of his duties."²¹⁴ In fact, the same section of the Act that creates the presumption of compensability creates a presumption that an injury is not occasioned "by the willful intention of the injured employee to injure or kill himself or another."²¹⁵

In *Bird*, the Director actually did not reach the issue of whether an intention to fight constitutes a willful intention to injure per §32-1503(d) of the Act: "Because I find that Claimant's claim for benefits

210. *Recent Cases*, 38 MINN. L. REV. 77, 84 (1953) (footnotes omitted).

211. D.C. CODE § 32-1503(d) (2001).

212. *Bird II*, H&AS No. 84-69, OWC No. 0015644, at 7 (D.C. Dep't of Emp't Servs. June 7, 1985).

213. § 32-1503(d).

214. See *Gomez-Salmanca*, AHD No. 08-039, OWC No. 641-284, at *11.

215. § 32-1521(4).

must be denied on the grounds that his injuries did not arise out of his employment, I need not reach the second issue of whether Claimant's intent to fight constitutes a willful intent to injure another."²¹⁶ After *Bird*, however, the willful intention language in section 32-1503(d) of the Act has been used to afford "additional statutory support" for the *Bird* test.²¹⁷

Remarkably, the willful intention language has not been defined except in a public sector workers' compensation case decided six years after *Bird*.²¹⁸ Ms. Velerie Jones was a secretary at District of Columbia General Hospital; her job responsibilities included processing time and attendance records in her supervisor's absence.²¹⁹ On August 14, 1989, Ms. Jones argued with her supervisor over her own use of leave time and accused a co-worker of abusing leave time.²²⁰ When Ms. Jones' co-worker came to the supervisor's office to turn in a missing leave slip, an argument of heated words erupted between Ms. Jones and the co-worker:

Ms. LeSane[, Ms. Jones' co-worker,] then called claimant a b - - - -. Claimant then called Ms. LeSane's mother a b - - - -. Ms. LeSane walked over towards claimant and shook her hands at claimant and told her to say it again. Claimant did so and Ms. LeSane pointed her finger in claimant's face. Claimant pushed away Ms. LeSane's hand. The two began to push, shove and scratch each other. Claimant's hand got caught up in Ms. LeSane's earrings and Ms. LeSane's glasses fell to the floor. Ms. LeSane reached down to pick up her glasses and, when she did so, claimant grabbed a vase and threw it at Ms. LeSane. The vase struck Ms. LeSane in the back of her head, although Ms. LeSane had thrown up her hand to protect herself. The two began fighting again. [Ms. Jones' supervisor], who was present throughout the incident and had tried to stop the two from quarreling and fighting, was finally successful and Ms. LeSane and

216. *Bird II*, H&AS No. 84-69, at 7.

217. Williams, 1988 D.C. Wrk. Comp. LEXIS 8, at *3 (D.C. Dep't of Emp't Servs. Nov. 23, 1988) ("[S]ince claimant's [(Mr. Ethelbert Williams')] aggressive behavior precipitated the altercation in which claimant was injured, claimant was not entitled to compensation benefits. Moreover, as additional statutory support for the *Bird* test, the [administrative law judge accepted the Director's reference] that D.C. Code, [§32-1503(d)] provides that liability for compensation shall not apply where injury to the employee was occasioned solely by his willful intention to injure himself or another."). The administrative law judge gave no explanation of how the willful misconduct provision in the Code justifies that support). *Id.* at 3-4.

218. See Jones, 1991 WL 11003994, at *3-5 (D.C. Dep't of Emp't Servs. Feb. 28, 1991).

219. Jones, 1991 WL 11003994, at *1-2.

220. *Id.* at *2.

claimant stopped fighting.²²¹

The hospital's defense against Ms. Jones' claim for wage loss benefits and medical benefits related to her neck and back injuries was that Ms. Jones' disability was caused by her willful misconduct and, therefore, was not compensable.²²² In analyzing this defense, the administrative law judge considered the following:

Neither the Act nor its legislative history defines willful misconduct nor has any case been brought to my attention which has dealt with the interpretation of these terms or standards to be applied in construing the willful misconduct language of the [Public Sector Workers' Compensation Act].

Research reveals that the willful misconduct defense and similar terms, e.g. serious and willful misconduct, intentional and willful misconduct, appear in a few workers' compensation statutes. One state which has similar statutory language is New Hampshire. Under

221. *Id.* Although decided after *Bird* and although the *Jones* case involves a physical altercation, the *Bird* aggressor defense is not mentioned in *Jones*. In fact, in a footnote, the administrative law judge specifically declined to address the aggressor defense. *Id.* at *6 n.9. At that time, the failure of the administrative law judge to apply the *Bird* test would not have been noteworthy. Because the Director adopted the *Bird* test while interpreting the private sector act, it did not necessarily apply to the public sector cases. Nonetheless, by June 1996, the *Bird* test was being applied to public sector cases without recognition of its private sector roots:

An injury resulting from a fight with a co-worker does not arise out of the employment unless the injured employee and the co-worker worked in an environment which brought the two together often enough for their temperaments to interact under the strains of the workplace and which tends to increase the likelihood of friction between them. Additionally, the injured employee must not be the aggressor.

....

In fact, the question of willful misconduct is not pertinent to a determination of whether or not claimant's injury arose out of and in the course of his employment where the origin of the claimant's injury was the work-related quarrel he had with his assailant. The work-related quarrel was a direct causal factor in the ensuing assault which resulted in claimant's injuries; however, because claimant was the aggressor in this case, his injuries did not arise out of and in the course of employment.

Crowder, 1996 D.C. Wrk. Comp. LEXIS 268, at *5-7 (D.C. Dep't of Emp't Servs. June 11, 1996) (citations omitted).

222. *Jones*, 1991 WL 11003994, at *3. Pursuant to section 1-623.02(a) of the Public Sector Workers' Compensation Act:

(a) The District of Columbia government shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty, unless the injury or death is:

- (1) Caused by willful misconduct of the employee;
- (2) Caused by the employee's intention to bring about the injury or death of himself or herself or of another; or
- (3) Proximately caused by the intoxication of the injured employee.

D.C. CODE § 1-623.02(a) (2001).

its workers' compensation statute, an employer is not liable for an injury to an employee which is caused by serious or willful misconduct.

In the New Hampshire case of *Newell v. Moreau*, 55 A.2d 476 (N.H. 1947), the terms "serious or willful misconduct" were considered. The salient facts of *Newell* are these. The decedent, Newell, was employed to supervise truck drivers, one of whom was one Oscar Palmer who had been at odds with Newell over the manner in which claimant performed his work. Two weeks before the incident which led to Newell's demise, an altercation took place in which Palmer backed the decedent up against a pile of lumber and verbally threatened him. On the day of the fatal altercation, Newell criticized Palmer and a verbal argument followed. Newell physically prodded Palmer to hurry him along. Newell told Palmer "you are all done." Palmer suggested that the two settle outside. Newell took off his coat and assumed a fighting stance. Palmer struck Newell and Newell fell, striking his head and fatally fracturing his skull. The lower court found that Newell was the aggressor and that his conduct was of such a threatening nature as to create a reasonable apprehension of an intent to inflict physical harm on Palmer. The lower court ruled that claimant's injury and death were caused by his serious or willful misconduct and, therefore, not compensable. An appeal was filed.

The Supreme Court of New Hampshire determined, however, that Newell had committed an assault but that it was a simple assault and not aggravated and further stated that, in determining whether the assault is serious or willful, it was the misconduct that would be considered and not the result. It held that the simple assault was not willful misconduct. In a rehearing in *Newell*, the court stated that willful imports misconduct which is deliberate, not merely a thoughtless act done on the spur of the moment.

In a Massachusetts case, the court had to consider whether a claimant who lost his eye in a scuffle was guilty of serious and willful misconduct. The court reasoned that the question of whether a claimant is guilty of serious and willful misconduct was a question of fact and that, in determining whether claimant was guilty of such conduct, consideration should be given to all the "immediately attending circumstances." It was the court's conclusion that the findings of the Industrial Accident Board that claimant was not guilty of serious and willful misconduct was supported by substantial evidence. Accordingly, the decision of the Industrial Accident Board

was affirmed.²²³

The administrative law judge's analysis in *Jones* fails to provide justification for an aggressor defense. In *Newell v. Moreau*, New Hampshire rejected the aggressor defense:

The defense of "aggressor" is not to be found in our statute or in other compensation laws. By the application of tort reasoning the defense has been judicially inserted in some compensation cases. We have already refused to read in a similar defense in sportive assaults (*Maltais v. Assurance Society*, [40 A.2d 837 (N.H. 1944)]) and we see no reason for its judicial insertion in this assault.²²⁴

Similarly, Massachusetts rejected the aggressor defense twenty years before *In re Tripp's Case*:

The striking of the first blow is not the sole and ultimate test as to whether the injury arose out of the employment. We think it is possible for an injury to arise out of the employment in the broad sense of the workmen's compensation law . . . even though the injured employee struck the first blow. We must constantly remind ourselves that in compensation cases fault is not a determining factor, whether it be that of the employee alone or that of the employee contributing with the fault of others, unless it amounts to the "serious and wilful misconduct" of the employee which . . . bars all relief to him. Apart from serious and wilful misconduct, the question is whether the injury occurred in the line of consequences resulting from the circumstances and conditions of the employment, and not who was to blame for it. Our own decisions have long since passed the point where it could be contended that an intentional assault upon the employee by a third person necessarily broke the causal relation between the employment and the injury. . . . So even where the employee himself strikes the first blow, that fact does not break the connection between the employment and the injury, if it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect.²²⁵

The administrative law judge in *Jones* continued the analysis of other jurisdictions by reviewing case law in Georgia.

223. *Jones*, 1991 WL 11003994, at *3-4 (footnotes omitted) (citations omitted).

224. *Newell v. Moreau*, 55 A.2d 476, 479-80 (N.H. 1947).

225. *Dillon's Case*, 85 N.E.2d 69, 71-72 (Mass. 1949).

The state of Georgia has a statutory provision which bars compensation for willful misconduct. [In a case involving speeding by a police officer,] [w]illful misconduct was defined in *Georgia Department of Public Safety v. Collins*, 232 S.E.2d 160 (Ga. 1977) as conduct including all conscious or intentional violations of law or rules of conduct, obedience to which is not discretionary as distinguished from inadvertence, unconscious or involuntary violations. The court further stated, however, that mere violations of instructions, orders, rules, ordinances or statutes do not, without more, constitute willful misconduct.²²⁶

In 1982, the Georgia code provision the administrative law judge relied upon from *Georgia Department of Public Safety v. Collins*²²⁷ (section 114-105) was recodified at section 34-9-17:

(a) No compensation shall be allowed for an injury or death due to the employee's willful misconduct, including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or for the willful failure or refusal to use a safety appliance or perform a duty required by statute.²²⁸

Although Georgia has a willful misconduct provision in its workers' compensation act and although it recognizes a version of the aggressor defense, its aggressor defense is not based upon the willful misconduct defense:

[D]efendant in error contends that the director has found that the claimant was the aggressor in the assault, and, there being evidence to sustain this finding, under the ruling of *Fulton Bag and Cotton Mills v. Haynie*, 43 Ga. App. 579, 159 S.E. 781, this court is compelled to affirm his decision. That ruling is, "[u]nder the provisions of the Workmen's Compensation Act, a claimant is not entitled to compensation where the injury to the deceased employee was the result of a fight between him and a fellow employee *in which the deceased employee was the aggressor*. In such a case the injury was not an accident arising out of the employment within the meaning of the act." We admit the weight of counsel's argument. However, we are unable to agree that in *every* case where the claimant is *in fact*, the aggressor in a fight with a coemployee, in the course of his employment, he should be denied compensation. It is true that in some cases an active participation of an employee in

226. *Jones*, 1991 WL 11003994, at *4 (footnote omitted).

227. *Georgia Dep't of Pub. Safety v. Collins*, 232 S.E.2d 160, 161 (Ga. Ct. App. 1977).

228. GA. CODE ANN § 34-9-17(a) (West, Westlaw through 2014 Reg. Sess.).

a fight with another employee would constitute an assault and would label such employee the aggressor. However, it is also true that in some cases an active intervention on the part of an employee may be for the protection of his master's property, and in such cases he would not be guilty of an assault so as to label him an aggressor.²²⁹

The administrative law judge in *Jones* then turned to a Michigan case:

In *Brady v. Clark Equipment Company*, 249 N.W.2d 388 (Mich. 1976), claimant [became] irate because a co-employee was telling other employees that claimant had to obtain a loan to purchase a camera. Claimant sought out his co-employee. A fight followed and claimant sustained a skull fracture. The Michigan court held the claimant's injury was compensable. The rule applied by the court was that the injury arose out of the employment unless it could be shown that claimant received his injury while perpetrating a malicious assault of such gross and reprehensible nature as to constitute intentional and willful misconduct.²³⁰

The Michigan Supreme Court reversed *Brady* the year after the lower court decision was issued.²³¹ Thus, it was bad law when the administrative law judge cited it.

Next, the administrative law judge turned to a Louisiana case: "In *Velotta v. Liberty Mutual Insurance Co.*, 132 So.2d 51 (La. 1961), the court stated that the term 'willful' rules out acts which are instinctive and impulsive so that even violent blows might fail to give rise to this defense if sportive and unpremeditated."²³²

As the administrative law judge noted, *Velotta* allowed for exceptions to Louisiana's aggressor defense. Significantly, those exceptions arose out of the general willful misconduct defense in effect at the time:

The defendant insurer, however, denied that plaintiff was totally and permanently disabled and also set up the affirmative defense that the sole and proximate cause of the altercation was words or actions of plaintiff, Velotta, and that he was therefore barred from recovery under the Workmen's Compensation Act by virtue of

229. *Scott v. Travelers Ins. Co.*, 174 S.E. 629, 633 (Ga. Ct. App. 1934).

230. *Jones*, 1991 WL 11003994, at *4.

231. *Brady v. Clark Equip. Co.*, 249 N.W.2d 388 (Mich. Ct. App. 1976), *rev'd*, 282 N.W.2d 921 (Mich. 1997).

232. *Jones*, 1991 WL 11003994, at *4.

the terms of LSA-R.S. 23:1081 which provide that no compensation shall be allowed for “injury caused (1) by the injured employee’s wilful intention to injure himself or to injure another. . . .”²³³

Since 1983, Louisiana’s aggressor defense has been codified separately from its defense of willful misconduct:

(1) No compensation shall be allowed for an injury caused:

(a) by the injured employee’s wilful intention to injure himself or to injure another, or

. . .

(c) to the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor.²³⁴

Similarly, none of the remaining cases from *Jones* that follow or support the proposition that the willful misconduct language in the Act justifies an aggressor defense:

In *Harris v. Dobson & Company*, 132 A. 374 (Md. 1926) the Court of Appeals said that willful misconduct may consist of a disregard of rules or orders but there must be something more than thoughtlessness, heedlessness or inadvertence. In *Karns v. Liquid Carbonic Corporation*, 338 A.2d 251 (Md. 1975), the Court of Appeals said willful misconduct may be found where the employee intended to place himself in a position whereby he might expect to meet with injury or death and, in carrying out his intention, meets his death as a result of the injuries sustained.

Black’s Law Dictionary (5th ed. 1979) states that willful misconduct of an employee “(u)nder Workers’ Compensation Acts, precluding compensation, means more than mere negligence, and contemplates the intentional doing of something that is likely to result in serious injuries, or with reckless disregard of its probable consequences.”

Webster’s New Collegiate Dictionary (1981) defines “willful” as

233. *Velotta v. Liberty Mut. Ins. Co.*, 132 So.2d 51, 52 (La. 1961).

234. LA. REV. STAT. § 23:1081(1)(a),(c) (West through 2014 Legis. Sess.).

“obstinately and often perversely self-willed;” “done deliberately;” “intentional.” It imports something more than mere exercise of will in doing the act, that is, a wrongful intention to do an act that one knows or ought to know is wrongful or forbidden by law and involves premeditation and determination to do the act, though known to be forbidden. An employee may not be guilty of willful misconduct because he acted imprudently, unwisely, on the spur of the moment or impulsively.

According to 99 CJS Workmen’s Compensation Section 258 (1958), “willful” implies that the action must be intentional, with a purpose more or less deliberate. It has been held, however, that while it is true that a willful act, in most cases, may be said to be wrongful, the intent to do a wrongful act is not a necessary element.²³⁵

Harris, Karns, and Williams Construction Co., are good law regarding willful misconduct. None of these cases, however, substantiates an aggressor defense created from a willful misconduct defense.²³⁶

In *Harris*, the decedent was a laborer digging a ditch; he had been told not to work in the ditch until the foreman had shored it up; however, against those orders, he resumed digging until the ditch collapsed and crushed him.²³⁷ Mr. Harris’ intentional disregard of rules and orders was willful misconduct that barred his claim for benefits.²³⁸ His action, unlike that of an aggressor, was more than thoughtless or heedless.²³⁹

In *Karns*, the claimant, a truck driver, was injured in a single-vehicle accident that occurred when he was driving while intoxicated.²⁴⁰ Intoxication qualifies as willful misconduct and bars a claimant’s request for benefits if the intoxication is the sole cause of the claimant’s injuries, not if intoxication is merely contributory.²⁴¹ By analogy, even if a fight qualifies as willful misconduct, only injuries sustained solely as a result of throwing the first punch should be barred.²⁴²

235. *Jones*, 1991 WL 11003994, at *5 (footnote omitted) (citations omitted).

236. *Id.*

237. *Harris v. R.P. Dobson & Co.*, 132 A. 374, 375-76 (Md. 1926).

238. *See id.*

239. *See id.* at 376.

240. *Karns v. Liquid Carbonic Corp.*, 338 A.2d 251, 253-54 (Md. 1975).

241. *Id.* at 253.

242. Willful misconduct could not bar recovery for injuries if the aggressor instigated the fight with words because words alone could not be the sole cause of an injury.

In *Garrison*, the claimant fell from a forty-foot ladder while employed as a tree trimmer;²⁴³ that the claimant occasionally suffered dizzy spells as a result of a previous injury did not make his climbing the ladder reckless and unreasonable so as to amount to willful misconduct.²⁴⁴ Poor judgment is not willful misconduct whether climbing a ladder or starting a fight.

Virginia has a statutory defense of willful misconduct, but in the case the administrative law judge relied on *King v. Empire Collieries Company* the Virginia Supreme Court interpreted the section of the Virginia Workermen's Compensation Act barring recovery for a willful failure to comply with a statutory duty:

Section 14 of the compensation act (Acts 1918, chapter 400) . . . is as follows: "No compensation shall be allowed for an injury or death due to the employee's wilful misconduct, including intentional self-inflicted injury, or growing out of his attempt to injure another, or to intoxication or wilful failure or refusal to use a safety appliance or perform a duty required by statute, or the wilful breach of any rule or regulation adopted by the employer and approved by the Industrial Commission, and brought prior to the accident to the knowledge of the employee. The burden of proof shall be upon him who claims an exemption or forfeiture under this section."

The paragraph we are asked to construe is that denying compensation for an injury due to a "wilful failure or refusal to . . . perform a duty required by statute."²⁴⁵

Like Louisiana, Virginia has codified the aggressor defense separately from its defense of willful misconduct:

No compensation shall be awarded to the employee or his dependents for an injury or death caused by:

1.The employee's willful misconduct or intentional self-inflicted injury; [or]

2.The employee's attempt to injure another[.]²⁴⁶

In *Young*, the West Virginia Supreme Court of Appeals interpreted

243. *Williams Constr. Co., v. Garrison*, 400 A.2d 22, 23 (Md. Ct. Spec. App. 1979).

244. *Id.* at 26.

245. *King v. Empire Collieries Co.*, 139 S.E. 478, 479 (Va. 1927).

246. VA. CODE ANN. § 65.2-306(A) (West 2014).

its willful misconduct defense as it applies to violation of a statute designed for the claimant's protection:

On the whole we think the evidence shows that the claimant in this case was fully acquainted with the statute and the rule governing his employment, and that he deliberately and intentionally violated both the statute and the rule, as well as the direct instruction of his superior.

Under these circumstances, the compensation commissioner and the appeal board were in error in awarding compensation, and their action in so doing will be reversed.²⁴⁷

West Virginia does not have a general willful misconduct defense created by statute²⁴⁸ and does not recognize the aggressor defense: "Where an altercation arises out of the employment, the fact that claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Workmen's Compensation Act, for injuries claimant sustained in the altercation."²⁴⁹

Finally, the administrative law judge concluded in Jones:

Viewed against the backdrop of cases cited hereinbefore and the definitions of the word "willful" and the words "willful misconduct", I do not find that claimant's conduct was willful. It is clear, in the instant case, that claimant participated in misconduct but not that this conduct was willful. As the court observed in Newell:

[t]he inevitable result of associating men together in work is the same stress and strain that affect human mortals generally. Arguments, horseplay and some deviation from the planned schedule are bound to occur: they are compensable (and not necessarily considered willful) when related to the work. That an assault may arise from an argument is to be expected as much as that a battery will occur from horseplay. There is no logical reason for recovery in one case and denial in the other so long as

247. *Young v. State Comp. Comm'n*, 14 S.E.2d 774, 777 (W. Va. 1941).

248. *Cf. Geeslin v. Workmen's Comp. Comm'r*, 294 S.E.2d 150, 156 n.4 (W. Va. 1982) (quoting *Thompson v. State Comp. Comm'r*, 54 S.E.2d 13 (W. Va. 1949)) ("Willful misconduct is not limited to the violation of statutory law or safety rules: it may consist of engaging deliberately, consciously, or advertently, or with reckless disregard of consequences, in practices known to be dangerous." However, *Thompson* narrowly construed the rule. The court therein awarded compensation to a claimant who had jumped on a moving train in order to get to his workplace more quickly, stating that claimant's act was "inadvertent.""). The West Virginia Court of Appeals "has been reluctant to find such misconduct." *Id.* at 156.

249. *Id.* at 155.

the injury or death is the result of the employment[.]

The court in *Newell* also observed:

[a]rguments, altercations and assaults are as inevitable as they are undesirable. Where they arise out of the employment, they may be properly regarded as an employment hazard. Such actions are misconduct but are not serious misconduct unless of a grave and aggravated character. Such actions are not willful misconduct unless deliberate or premeditated.

In the instant case, the facts are in dispute as is the likely case in fights. I have found, however, that the argument began because of a dispute concerning use of leave. Words were exchanged. A finger was pointed in claimant's face. Claimant reacted instinctively by pushing it away. The two combatants began pushing and shoving each other. While Ms. LeSane was reaching for her glasses and was off guard, claimant impulsively grabbed a vase and threw it at Ms. LeSane. The fight continued with both parties sustaining injury. The facts, as found in this case, do not lead me to believe that the misconduct, which led to the injury, though wrongful, was intentional or deliberate.²⁵⁰

Although Ms. Jones' conduct was impulsive, it was not deliberate or premeditated; therefore, the administrative law judge ruled that Ms. Jones' conduct was not willful and that her injuries were compensable,²⁵¹ but more importantly, none of the cases the administrative law judge relied on supports maintaining an aggressor defense created by caselaw. Something more than careless instinct is necessary to qualify as willful misconduct. New Jersey best explains why a statutory defense of willful misconduct does not conclusively prevent an aggressor from recovering workers' compensation benefits:

We do not consider that the Legislature meant to punish a workman for a playful shove, an angry curse, or even an impulsive slap or punch, by depriving him of compensation. Where the act does not arise out of a privately motivated, purely personal feud, where it does not amount to willful misconduct or a willful intention to injure another (thereby importing premeditated and deliberate action), it is not for the court to read a new exception, covering

250. Jones, 1991 WL 110033994, at *5-6 (D.C. Dep't of Emp't Servs. Feb. 28, 1991) (footnotes omitted) (citations omitted) (quoting *Newell v. Moreau*, 55 A.2d 476, 481 (N.H. 1947)).

251. *Id.* at *6-7.

aggressors, into the clear and unequivocal text of the Workmen's Compensation Act, R.S. 34:15-7. To do so would be to rule out negligence, contributory negligence, assumption of risk and other common law defenses pre-dating the act, in all types of compensation cases except those involving assaults.²⁵²

For the most part, on-the-job fights fall outside the definition of willful misconduct in that they are unintentional, impulsive acts in response to impassioned employment-related events or conditions. Unless there is a specific statutory provision barring recovery by an aggressor, the general defense of willful misconduct is not sufficient to deny an aggressor workers' compensation benefits; it merely reinstitutes the tort defenses of contributory negligence and assumption of risk based on the aggressor's culpability.

CONCLUSION: VIABILITY OF THE AGGRESSOR DEFENSE

The workers' compensation system is designed to provide swift relief for injuries caused by an event related to employment (including the conditions of employment and the reactions to those conditions), and without explicit statutory authority, the *Bird* case inappropriately adopted a fault-based defense in on-the-job fight cases, the aggressor defense. Distinct from the tort system, neither fault nor blame is a legitimate defense in the workers' compensation system.²⁵³

"Prior to 1947, the aggressor defense was accepted by nearly every jurisdiction in the country[.]"²⁵⁴ The justifications were varied—an aggressor cannot profit from misconduct; an aggressor is not performing employment duties; an aggressor is not furthering the employer's business.²⁵⁵ None of these justifications appreciates the fundamental tenets of workers' compensation law or the plain language of the *Bird* test itself.

252. *Martin v. Snuffy's Steak House*, 134 A.2d 789, 798 (N.J. Super. Ct. App. Div. 1957).

253. To call it a no-fault system is something of a misnomer. As mentioned previously, fault finds its way into workers' compensation in the form of suspension of benefits for failure to attend an independent medical examination, failure to cooperate with vocational rehabilitation, and defenses in cases involving horseplay, intoxication, suicide, and a willful intention to injure one's self or another. Based upon the research in this article, there may be implications for these other fault-based defenses. Additional research is ongoing at this time, and comprehensive consideration of those issues not developed in this article is forthcoming.

254. Gail Boreman Bird, *Workmen's Compensation: The Aggressor Defense Resurrected*, 24 HASTINGS L. J. 567, 573 (1973). The aggressor defense still is accepted by a majority of jurisdictions in the country. See *infra* app. A.

255. Bird, *supra* note 254, at 572 (noting a number of examples of past justification for the aggressor defense).

The administrative law judge who decided *Jones v. District of Columbia General Hospital* relegated to a footnote an important consideration that virtually would be ignored in future, District of Columbia work-related fight cases:

I have not addressed the so-called aggressor defense in concluding as I have. A majority of jurisdictions reject the view that the initiation or renewal of a fight by claimant deprives the claim of the arising out of the employment quality. The aggressor defense has also been roundly criticized as an attempt to insert a fault-based concept into workers' compensation law. Furthermore, the aggressor defense does not appear in [the Act] and the fact that a claimant struck the first blow does not necessarily break the chain of causation when the incident originates in the employment.²⁵⁶

By its very nature the *Bird* test includes only assaults borne out of an employment environment that acts as a catalyst by bringing the combatants together in a way that results in a fight. Barring compensability because the claimant initiated that work-related event ignores the fundamentals of workers' compensation law including the presumption of compensability as well as the distinction between an impulsive, thoughtless, or rash act that is the equivalent of negligence and an intentional, deliberate, or willful act in order to sever compensability. If such a distinction is to be drawn at all, it must come from the legislature not from judicial fiat reintroducing the tort-based defenses of contributory negligence and assumption of risk into the workers' compensation system.

256. *Jones*, 1991 WL 11003994, at *7 n.9.

APPENDIX A

*The Aggressor Defense Across the United States*²⁵⁷

State	Recognizes Aggressor Defense as a Bar to Receiving Benefits	Statute or Case Law or Both
Alabama	Yes	<i>Martin v. Sloss-Sheffield Steel & Iron Co.</i> , 113 So. 578, 579 (Ala. 1927).
The decedent was not, when killed, in the discharge of any duty of his employment, nor in the pursuit of the master's business, notwithstanding that the original causa belli was connected with that business. The conclusion we think, is clear that the decedent was renewing a quarrel because of his purely personal anger and resentment; and he was assaulted and slain by Henry Anderson for reasons that were purely personal to him, and not because he was an employee, or because of his employment, or because he was engaged in the duties of his employment.		
Alaska	Yes	I. ALASKA STAT. ANN. § 23.30.120 (2012). II. Marsh Creek, L.L.C., AWCAC Appeal No. 08-001 (Alaska Workers' Comp. App. Comm'n Mar. 13, 2009) (footnote omitted), available at http://labor.state.ak.us/wccomm/memos-finals/D_101.pdf .
I. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of		

257. With the exception of North Carolina, the examples in the following table directly quote the relevant cases and statutes. Thus, internal quotations are designated with double quotation marks. In addition, an indent of the quoted material replicates the source's format (i.e., the quoted material was indented in the original source). When there is a reference to more than one legal source (e.g., a case law and a statute), the reference is indicated by roman numerals.

substantial evidence to the contrary, that . . . (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

II. The presumption in AS23.30.120(a)(4) exists because AS 23.30.235(1) bars compensation for an injury “proximately caused by the employee’s wilful intent to injure or kill any person.” An injury brought about by acting on a willful intent to injure or kill is not compensable as an accidental injury. Thus, when examining workplace fight cases, the board, if sufficient evidence is raised to overcome the presumption, must determine if the injured employee acted on a willful intent to injure another. To do so, the board must determine if the injured employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice or (b) an impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; and, (2) did an act that reasonably could be expected to cause injury to himself or another.

Arizona	No	Colvert v. Indus. Comm’n of Ariz., 520 P.2d 322, 324 (Ariz. Ct. App. 1974) (citation omitted).
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Arizona’s workmen’s compensation laws were enacted to provide the workman with compensation for injuries “arising out of and in the course of his employment.” The concept of fault and other common law doctrine based on fault have been eliminated in the employment setting. To adopt the “aggressor rule” defense would interject back into the workmen’s compensation laws such a fault concept.

....

We therefore hold that where injuries are received as a result of a work related disagreement, the injuries arose out of and in the course of employment and are thus, by statute, compensable. We further hold that given the work-related assault, it is immaterial as to who was the aggressor for to base a defense on such a distinction would be to interject a fault concept into the workmen’s compensation laws, which concept is completely foreign to the

purpose and intent of these laws.

Arkansas	No	Johnson v. Safreed, 273 S.W.2d 545, 549-550 (Ark. 1954) (citation omitted).
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Of course, where the aggression of the claimant is so violent as to come within the express legislative exceptions of wilful misconduct or wilful intent to injure, he may not recover even though the assault arises out of the employment. But wilful intention to injure another usually denotes premeditated or deliberate misconduct and it cannot reasonably be said to denote an impulsive or instinctive punch with the fist or similar thoughtless acts which are trivial in origin though serious in result. The applicable rule is stated in Larson's Workmen's Compensation Law, §11.15(d), as follows:

"The words 'wilful intent to injure' obviously contemplate behavior of greater gravity and culpability than the sort of thing that has sometimes qualified as aggression. Profanity, scuffling, shoving or other physical force not designed to inflict real injury do not seem to satisfy this stern designation. Moreover... the adjective 'wilful' rules out acts which are instinctive or impulsive, so that even violent blows might fail to give rise to this defense if they were spontaneous and unpremeditated.

When the foregoing principles are considered in the case at bar, we are convinced that the framers of our statute did not intend to preclude recovery where the aggressive act amounted to nothing more than a light blow on the shoulder with the first administered impulsively in a sudden altercation by one who was attempting to protect himself from serious bodily injury. We accordingly conclude that the acts of appellant under the undisputed facts were not of that serious or deliberate character necessary or essential to evince a wilful intention on his part to injure [another]."

California	Yes	CAL. LAB. CODE § 3600(a)(7) (West 2012)
<p>(a) Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person except as otherwise specifically provided in Sections 3602, 3706, and 4558, shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes death, in those cases where the following conditions of compensation concur:</p> <p>....</p> <p>(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.</p>		
Colorado	No	Triad Painting Co. v. Blair, 812 P.2d 638, 644, 45 (Colo. 1991) (footnote omitted).
<p>Judicial recognition of an initial aggressor defense would be inconsistent with the aims of the Workers' Compensation Act. It would introduce the common law concept of fault into a comprehensive statutory scheme designed to allocate cost and ensure compensation, not analyze culpability. Such analysis of "who threw the first punch" is contrary to quick and efficient administration of disability benefits. The Workers' Compensation Act of Colorado does not expressly authorize a defense against an initial aggressor in an altercation leading to an otherwise compensable injury. In the absence of such express authorization, we decline to read an initial aggressor defense into the statutory scheme.</p> <p>....</p> <p>An injury sustained in an assault resulting from a work- related dispute is compensable under the Workers' Compensation Act of</p>		

Colorado. In addition, an injury otherwise compensable under that act is not rendered non-compensable by the fact that the claimant was the initial aggressor.

Connecticut

No

Stulginski v. Waterbury Rolling Mills Co., 199 A. 653, 658 (Conn. 1938).

The adoption of a rule, that if an injured employee was the aggressor he could not recover compensation, though the injury arose out of the conditions of the employment, would require a definition of terms which would be extremely difficult. Certainly to hold that no matter what provocation and angry words there might have been between the parties, he who struck the first blow, slight though it might be, would be denied compensation would be neither reasonable nor in accordance with sound principles. That the injured employee was the aggressor would certainly be a factor, in some cases an important factor, to be considered in determining whether the chain of causation between the conditions of the employment and the injury had been broken. But it would have that effect as bearing upon the question whether there had intervened personal motives, designs, or the like, sufficient to constitute an intervening cause.

Delaware

Likely

I. DEL. CODE ANN. tit. 19, § 2353(b) (West 2006).

II. Seinoth v. Rumsey Elec. Supply Co., No. 00A09006JOH, 2001 WL 845661, at *1 (Del. Super. Ct. April 12, 2001), *aff'd*, 784 A.2d 1081 (Del. 2001).

I. (b) If any employee be injured as a result of the employee's own intoxication, because of the employee's deliberate and reckless indifference to danger, because of the employee's wilful intention to bring about the injury or death of the employee or of another, because of the employee's wilful failure or refusal to use a reasonable safety appliance provided for the employee or to

perform a duty required by statute, the employee shall not be entitled to recover damages in an action at law or to compensation or medical, dental, optometric, chiropractic or hospital service under the compensatory provisions of this chapter. The burden of proof under this subsection shall be on the employer.

II. Under Delaware law, an employee not participating in such horseplay may recover compensation for injuries sustained as a result of another employee's horseplay. An employee who participates, however, in such horseplay, which is prohibited by the employer, may not recover for injuries suffered as a result of horseplay, since the activity is determined to be outside the course and scope of employment.

District of Columbia	Yes	<i>Bird II</i> , H&AS No. 84-69, OWC No. 015644, at 1 (D.C. Dep't of Emp't Servs. June 7, 1985).
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For the work to "create the relations and conditions which resulted in the clash", I think that *Hartford Accident* at a minimum requires: 1) a showing that the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them; and 2) a finding that the injured employee was not the aggressor.

Florida	Yes	<i>Tucker Taxi, Inc. v. Schofield</i> , 107 So. 2d 188, 191 (Fla. Dist. Ct. App. 1958) (emphasis added) (citations omitted).
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The order of the Full Commission reversing the order of the Deputy Commissioner is bottomed on the proposition that his findings do not reflect a 'willful intention' to injure another-the defense contemplated by the statute-and, further, that the bare finding that the employee had been the "aggressor" was not sufficient to bar recovery. This is a play on semantics with which we cannot agree. The term 'intention' as used in the statute means

an act that is premeditated and deliberate. The finding of the Deputy Commissioner that Schofield was *attempting* to injure his superior and that this was a *deliberate act of aggression* is tantamount to a finding of willfulness in that behalf, and eliminates instinctive or impulsive acts. The right to compensation turns on the question of whether Schofield made an assault upon McNally with the willful intention to injure or kill him.

It is generally held, apart from the express statutory defenses provided by our statute, that the aggressor in an admittedly work-connected fight cannot recover compensation. Our statute does little if anything more than to reiterate the rule of the caselaw to the effect that a subordinate employee engaged in aggression against his superior thereby performs no service and no duty for his employer, and the hazard that such subordinate employee may receive injury from his own acts of aggression against his superior are not a risk of his employment and, therefore, do not arise 'out of' and 'in the course of' his employment.

Georgia	Yes	Scott v. Travelers Ins. Co., 174 S.E. 629, 633 (Ga. Ct. App. 1934) (quoting Fulton Bag & Cotton Mills v. Haynie, 159 S.E. 781, 781 (Ga. Ct. App. 1931)).
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"Under the provisions of the Workmen's Compensation Act, a claimant is not entitled to compensation where the injury to the deceased employee was the result of a fight between him and a fellow employee *in which the deceased employee was the aggressor*. In such a case the injury was not an accident arising out of the employment within the meaning of the act." We admit the weight of counsel's argument. However, we are unable to agree that in *every* case where the claimant is *in fact*, the aggressor in a fight with a coemployee, in the course of his employment, he should be denied compensation. It is true that in some cases an active participation of an employee in a fight with another employee would constitute an assault and would label such employee the aggressor. However, it is also true that in some cases

an active intervention on the part of an employee may be for the protection of his master's property, and in such cases he would not be guilty of an assault so as to label him an aggressor.

Hawaii	Yes	I. HAW. REV. STAT. § 386-3(b) (West, Westlaw through 2014 Legis. Sess.). II. Souza, 2008 HI Wrk. Comp. LEXIS 63, at *12-13 (Haw. Labor & Industrial Relations Aug. 7, 2008).
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I. (b) No compensation shall be allowed for an injury incurred by an employee by the employee's wilful intention to injure oneself or another by actively engaging in any unprovoked non-work related physical altercation other than in self-defense, or by the employee's intoxication.

II. Claimant was the aggressor on September 14, 2005. [Based upon conditions and tensions arising out of employment on a construction site,] Claimant was looking to start a fight with Mr. Lopez.

....

[A]ny injuries sustained by Claimant on September 14, 2005 were the result of his own intentional acts in starting a confrontation with Mr. Lopez, Claimant's threatening remarks about Mr. Lopez, Claimant's approaching Mr. Lopez's truck in a threatening manner, Claimant's attempt to strike Mr. Lopez while he was still in the truck, and then continuing to attack Mr. Lopez, who tried to stop the attack and acted in self- defense.

....

Any injuries sustained by Claimant on that date were the result of his wilful intention to injure another and are not compensable. Claimant's intention to injure another can be readily established

by his interactions with Mr. Lopez, his verbal threats and attempts to strike Mr. Lopez, and the seriousness of the damage to property caused when Claimant attempted to maintain his attacks against Mr. Lopez.

Idaho	Yes	IDAHO CODE ANN. § 72-209(3) (2006)
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(3) The exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer or surety, provided that such exemptions from liability shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer, its officers, agents, servants or employees, the loss of such exemption applying only to the aggressor and shall not be imputable to the employer unless provoked or authorized by the employer, or the employer was a party thereto.

Illinois	Yes	Triangle Auto Painting & Trimming Co. v. Indust. Comm'n, 178 N.E. 886, 889 (Ill. 1931).
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Injuries compensable are those arising out of the conditions under which the employee is required to work, and may properly include injuries arising out of a fight in which the injured employee was not the aggressor, when the fight was about the employer's work in which the employees were then engaged, but it is not within the intent of the act that an employee be protected against the consequences of a fight in which he was the aggressor, though the fight be over matters of his employer's work in which such employees are then engaged. The risk of injury in such a case cannot be said to be incidental to the employment, but rather the result of such employee's own rashness.

Indiana	Yes	Berryman v. Fettig Canning Corp., 399 N.E.2d 840, 843 (Ind. Ct. App. 1980).
An employee injured in a fight with a fellow employee in which the employee is found to be the aggressor cannot have compensation under the Workmen's Compensation Act.		
Iowa	Yes	I. IOWA CODE § 85.16(1) (West 2009). II. Maresh, 1995 IA Wrk. Comp. LEXIS 91, at *12-17, 22-23 (Office of Ia. Workers' Comp. Comm'n May 31, 1995).
<p>I. No compensation under this chapter shall be allowed for an injury caused:</p> <p>(1) By the employee's willful intent to injure the employee's self or to willfully injure another.</p> <p>II. The undersigned believes it is important that there seems to be no dispute to the fact that after the parties had their original discussion claimant's brother [(a co-worker)] left defendant employer's office of claimant and went into other parts of the plant and soon thereafter the claimant followed him. Claimant obviously was upset, angry and felt his character was impugned by the comment or conversation of his brother. The dispute between the parties is who swung at who first or made the first initial contact which ultimately resulted in claimant ending up on the floor with his head being hit against the floor.</p> <p>....</p> <p>The undersigned believes one of the most important factors as to this incident wouldn't even have occurred or at least occurred at the particular place and time that it did if claimant had not left his</p>		

office and had stayed in his office and not eventually follow his brother out of the claimant's office. Although claimant obviously was upset and angry, it was claimant's action on leaving his office that resulted in the confrontation that in fact took place.

It appears from the evidence that claimant, upon leaving his office, was looking for another confrontation with his brother. When his brother allegedly came towards him and grabbed him, the brother commented to the claimant that the results might be the same as a confrontation claimant had with another employer sometime earlier. The undersigned believes the inference is that the claimant got the worse of that situation physically and that might happen in this situation. There is no question that claimant voluntarily followed his brother from his office and there was no other reason the undersigned could determine other than that he was going to confront his brother. From the animosity that obviously existed between the claimant and his brother, one could conclude that claimant was going to have a confrontation with his brother and that this confrontation would result in some physical contact in which an employee would be injured, the employee being either claimant or his brother. The undersigned feels that this might be stretching the interpretation of 85.16(1) and result in an injury to the claimant or to his brother. The undersigned does not believe that it was claimant's intent to injure himself but he intended to confront his brother and again with the animosity existing it would not be far fetched to believe that physical altercation would and was going to take place and an injury could be expected.

....

The undersigned also finds that the defendants have proven their affirmative defense per 85.16(1) on the basis that the claimant willfully intended to leave his office after the verbal confrontation with his brother and that he intended to have a confrontation with his brother and it would be reasonable for him to expect that there would be a physical confrontation in which he could expect to injure himself or willfully injure another.

Per the above finding, the undersigned finds that claimant did not incur an injury which arose out of and in the course of his employment on February 7, 1991. The undersigned also finds that there was no causal connection as to claimant's alleged work injury and the disability which he claims he has.

....

It is further found that the injury was also caused by the employee's (claimant) intent to injure the employee's self or wilfully injure another as claimant. After an initial conversation or discussion with another employee, claimant's brother, an angry and irritated claimant followed the employee and should have known or expected to have a confrontation with said employee and should have reason to expect such confrontation would have resulted in a physical confrontation which the employee should reasonably know could cause him serious physical injury.

Kansas	Yes	KAN. STAT. ANN. § 44-501(a)(1)(E) (West 2008).
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(a)(1) Compensation for an injury shall be disallowed if such injury to the employee results from . . . (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

Kentucky	Yes	I. KY. REV. STAT. ANN. § 342.690(1) (LexisNexis 2011). II. Hall v. Clark, 360 S.W.2d 140, 141 (Ky. 1962).
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I. If an employer secures payment of compensation as required by this chapter, the liability of such employer under this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of

such injury or death. . . . The liability of an employer to another person who may be liable for or who has paid damages on account of injury or death of an employee of such employer arising out of and in the course of employment and caused by a breach of any duty or obligation owed by such employer to such other shall be limited to the amount of compensation and other benefits for which such employer is liable under this chapter on account of such injury or death, unless such other and the employer by written contract have agreed to share liability in a different manner.

II. [I]t is clear that whatever ill feeling existed between West and Clark had its origin and its nurture in their employment, and not in circles outside the place of their employment.

While society is reluctant to reward an aggressor ordinarily, just when the aggression begins is another question. In the instant case, did the aggression begin when West ran through the lone puddle in the road and sloshed its contents at Clark? Or did it begin when Clark struck West? Or was it when West shot Clark after they had been separated? Where the fight arises spontaneously after prolonged ill feeling on the job as it did here, it is difficult to conclude that the aggressor (assuming he can be ascertained) actually has so taken himself out of the scope of his employment as to justify denying his dependents compensation.

Louisiana	Yes	LA. REV. STAT. § 23:1081 (West through 2014 Legis. Sess.).
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(1) No compensation shall be allowed for an injury caused . . . (c) to the initial physical aggressor in an unprovoked physical altercation, unless excessive force was used in retaliation against the initial aggressor.

Maine	Yes	Gray's Case, 121 A. 556, 557 (Me. 1923).
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Claimant's injury arose, not out of his employment as a contributing proximate cause, but in broadest view only in the

course of that employment. When his antagonist fled, the quarrel ceased. Not content, however, to leave the matter stand, the claimant pursued his vanquished though still insulting foe, and becoming himself the assailant waged action anew.

This was aside from any duty relating to his contract of service as a backtender, either directly or indirectly. It was aside from any risk immediately connected with his work and flowing therefrom down the channel of natural result; apart from any protection of his employer's interests; it was unrelated to his employment even incidentally. It was, in the angle of the existing situation, the claimant's purely personal affair, voluntary and perhaps disciplinary in its inception, certainly painfully disastrous in its ending. Injuries resulting in the course of employment from assaults to gratify feelings of resentment or enmity are not compensable.

Maryland	Yes	Hill v. Liberty Motor & Eng'g Corp., 45 A.2d 467, 472 (Md. 1946) (citations omitted).
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In the case at bar the employment did not require the deceased to be at the place where the injury occurred, a place provided for changing clothes and, according to the testimony before us, Hill never changed his clothes either before or after work. Neither did the work in any way cause the horse-play[, a violent scuffle,] as in many of the cases cited, such as air hose cases. The horse-play in the case at bar [an assault] is the kind which could very well have occurred at any place in no way connected with the employment. According to the evidence before us, the injury was not caused by the act of a fellow employee, but by the act of the injured himself.

Massachusetts	No	Dillon's Case, 85 N.E.2d 69, 71-72 (Mass. 1949) (citations omitted).
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The striking of the first blow is not the sole and ultimate test as to whether the injury arose out of the employment. We think it is possible for an injury to arise out of the employment in the broad

sense of the workmen’s compensation law . . . even though the injured employee struck the first blow. We must constantly remind ourselves that in compensation cases fault is not a determining factor, whether it be that of the employee alone or that of the employee contributing with the the fault of others, unless it amounts to the ‘serious and wilful misconduct’ of the employee which . . . bars all relief to him. Apart from serious and wilful misconduct, the question is whether the injury occurred in the line of consequences resulting from the circumstances and conditions of the employment, and not who was to blame for it. Our own decisions have long since passed the point where it could be contended that an intentional assault upon the employee by a third person necessarily broke the causal relation between the employment and the injury. . . . So even where the employee himself strikes the first blow, that fact does not break the connection between the employment and the injury, if it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect.

Michigan	No	Stewart v. Chrysler Corp., 87 N.W.2d 117, 118-119 (Mich. 1957).
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Larson refers here, of course, to Dillon’s Case, 324 Mass 102 (85 NE2d 69), from which I quote with intent of adoption as follows:

“The striking of the first blow is not the sole and ultimate test as to whether the injury arose out of the employment. We must constantly remind ourselves that in compensation cases fault is not a determining factor, whether it be that of the employee alone or that of the employee contributing with the fault of others, unless it amounts to the ‘serious and wilful misconduct’ of the employee which . . . bars all relief to him. Apart from serious and wilful misconduct, the question is whether the injury occurred in the line of consequences resulting from the circumstances and conditions of the employment, and not who was to blame for it. . . . So even where the employee himself strikes the first blow, that fact does not break the connection between the employment and the injury, if

it can be seen that the whole affair had its origin in the nature and conditions of the employment, so that the employment bore to it the relation of cause to effect.”

Minnesota	No	Jolly v. Jesco, Inc., 135 N.W.2d 746, 748 (Minn. 1965) (footnote omitted).
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Since our Workmen’s Compensation Act does not expressly grant [the aggressor] defense to an employer, we adopted the view that the death arose “out of and in the course of employment” within the meaning of Minn. St. 176.021, subd. 1, without regard to aggression. We said ([in *Petro v. Martin Baking Co.*] 239 Minn. 307, 311, 58 N.W.[2d] 735):

“When the accumulated pressures of work-induced or work-aggravated strains and frictions finally erupt into an affray which results in injury to one of the participants, it is artificial to say that an injury to the one who struck the first blow did not arise out of the employment but an injury to the recipient of that blow did arise out of the employment.”

... [A]lthough the decedent was the instigator and continuous aggressor, the assault was clearly rooted in the work and not a personal affair. Moreover, the nature and spontaneity of the assault makes the arguments for allowing benefits in this case stronger than in *Petro*. We are not inclined to depart from our prior decision as relators urge. To do so would inject the concept of fault into legislation designed to eliminate common-law defenses and to shift the burden of work injuries to the cost of industrial production. It would also give rise to a host of perplexing issues including that of determining who was the aggressor. Furthermore, since *Petro* and *Cunning v. City of Hopkins*, 258 Minn. 306, 103 N.W.2d 876, where the problem was again extensively reviewed and the intention of the statutory provision under review examined, the legislature has not seen fit to provide that aggression, unlawful conduct, or willful intention to injure another be a defense to recovery of benefits. No persuasive

reasons are advanced why the defense of aggression should be imposed by judicial decision, and we decline to do so.

Mississippi

Likely

Fisher, 2011 WL 561292, at *5 (Miss. Workers Comp. Comm'n Jan. 19, 2011) (citations omitted).

This is a fight between co-workers and it is apparent from the testimony and the credibility of the witnesses that the subject matter of the quarrel was not related to the employment. The Employer and Carrier witnesses corroborated each others testimony that when the Claimant came into work the morning of December 2, 2008, he was angry. Both Mr. Downing and Mr. Gowdy testified they expected trouble from the Claimant. In addition, there was testimony from both Mr. Downing and Mr. Gowdy that the Claimant threw the first punch and said he was going to "beat Bill's ass." Under Mississippi Workers' Compensation Law no compensation shall be payable if it was the willful intention of the employee to injure himself or another. The Claimant provided no testimony other than his own that Mr. Downing instigated the attack. When a claimed injury is denied by the employer, and the claimant presents to a hearing without any evidence of substance other than his own testimony, that claimant cannot prevail unless his testimony is credible and consistent, is not substantially disputed and is reasonable within the factual setting of the claim. In this case, the Claimant's version of events was substantially disputed.

Missouri

Yes

I. MO. ANN. STAT. § 287.120(1) (West, Westlaw through 2014 Legis. Sess.).

II. *McCutchen v. Peoplease Corp.*, 195 S.W.3d 421, 425 (Mo. Ct. App. 2006) (Citations omitted).

I. (1) The term "accident" as used in this section shall include, but not be limited to, injury or death of the employee caused by the

unprovoked violence or assault against the employee by any person.

II. [I]f the assault was provoked by the claimant he is not entitled to benefits under the workers' compensation statute. The claimant does not need to actually strike his assailant first to be considered the initial aggressor. Furthermore, an employee reacting violently to a verbal assault can be considered as the initial aggressor.

Montana	No	Kuykendall, 1997 MTWCC 12, at *8-9 (Mont. Workers' Comp. Ct. Mar. 17, 1997) (citations omitted).
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[T]he Montana Supreme Court has not held that the aggressor is automatically precluded from receiving workers' compensation benefits. Only a minority of jurisdictions continue to allow the aggressor defense as an absolute bar to recovery. Larson explains the practical difficulties in applying the aggressor defense as follows:

"[L]ong after a quarrel is over, it is often almost impossible to determine who really started it. Many a parent [has] been forced to sit in belated judgment on this issue between two children, the testimony consisting of 'He hit me'; 'Yes, but she called me a stinker'; 'But before that he grabbed my book'; and so on. One cannot read the facts behind the aggressor cases without seeing how closely the average factory scuffle follows this pattern."

Nebraska	No	Myszkowski v. Wilson & Co., Inc., 53 N.W.2d 203, 208 (Neb. 1952).
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Suggestion is also made that claimant was the aggressor. We do not so find. But even if such were true it would not necessarily defeat recovery. As stated in 58 Am. Jur., Workmen's Compensation, § 266, p. 768: "The fact that the assault was provoked by the employee, or that he was the aggressor in the affray, does not necessarily render the injury noncompensable,

although it may do so where such provocation or aggression amounted to wilful misconduct.”

As stated in 4 NACCA Law Journal 53: “Where the assault is directly connected with the work, and arises out of work- quarrels, as distinguished from personal quarrels, the assault is compensable without determining questions of aggressors or innocent parties. Courts are not justified in making exceptions for ‘aggressors’ where the legislature has not done so by express provisions. An assault that arises out of work- arguments as distinguished from personal grudges, is clearly causally related to the employment, regardless of who strikes the first blow, and hence ‘arises out of’ the employment. Furthermore, to make a distinction between aggressors and innocent victims adds further complications as to what constitutes an aggressor, and is judicial legislation in a remedial act intended to widen, not narrow, the rights of workers. In tort law, who strikes the first blow may be material on assumption of risk, contributory negligence, intervening cause, and on other questions. But in compensation law, the question of ‘arising out of’ depends simply on the causal relation to the work, in which the question of ‘aggressors’ is a court made, not legislative, exception.”

Nevada	Likely	Mauer v. Employers Ins. Co. of Nev., 983 P.2d 411, 411, 413 (Nev. 1999) (footnotes omitted).
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This appeal asks us to decide whether a self-inflicted workplace injury resulting from an employee’s impulsive, angry act is compensable under Nevada’s workers’ compensation law. We conclude it is not.

. . . .

[That a] self-inflicted injury under the circumstances of these cases is not the result of an “accident” fits well with this state’s statutory definition of that term. NRS 616A.030 defines “accident” as “an unexpected or unforeseen event happening suddenly and

violently, with or without human fault, and producing at the time objective symptoms of an injury.” What is missing in this case. . . is the element of unexpectedness or unforeseeability. The result of Mauer’s angry act cannot be characterized as either unexpected or unforeseeable. Thus, we hold that an intentional violent act that produces a foreseeable and reasonably expected self-injury is not an “accident” and the resulting injury is not covered under Nevada’s workers’ compensation law.

New Hampshire	No	Newell v. Moreau, 55 A.2d 476, 479-480 (N.H. 1947) (citation omitted).
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The defense of “aggression” is not to be found in our statute or in other compensation laws. By the application of tort reasoning the defense has been judicially inserted in some compensation cases. We have already refused to read in a similar defense in sportive assaults and we see no reason for its judicial insertion in this assault.

New Jersey	No	Martin v. Snuffy’s Steak House, 134 A.2d 789, 798, 799 (N.J. Super. Ct. App. Div. 1957) (citation omitted).
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We do not consider that the Legislature meant to punish a workman for a playful shove, an angry curse, or even an impulsive slap or punch, by depriving him of compensation. Where the act does not arise out of a privately motivated, purely personal feud, where it does not amount to willful misconduct or a willful intention to injure another (thereby importing premeditated and deliberate action), it is not for the court to read a new exception, covering aggressors, into the clear and unequivocal text of the Workmen’s Compensation Act. To do so would be to rule out negligence, contributory negligence, assumption of risk and other common law defenses pre-dating the act, in all types of compensation cases except those involving assaults.

....

The aggressor defense in assault cases, except in the limited number of situations to which we have referred, is out of harmony with the modern view of industrial responsibility to employees who suffer work- connected injuries. In our view there is no reason for our courts to get caught up, as have so many other jurisdictions, in the endless quest to determine the hairline difference between aggressors and non-aggressors, with all the lack of logic, inconsistency and often injustice which attend such effort. As we read our appellate cases of recent years, their clear purpose is to give the words “arising out of and in the course of” employment the broad construction which our Workmen’s Compensation Act intended.

New Mexico	Yes	Lee, 2002 WL 32069739, at *2 (N.M. Workers’ Comp. Amdin. Feb. 15, 2002).
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Worker is not entitled to any benefits. This is because Worker’s injuries were incurred as a result of an altercation with another employee initiated by Worker. The altercation was contrary to Employer’s policies and constituted an abandonment of the course of employment.

New York	No	Comm’r of Taxation & Fin. v. Bronx Hosp., 97 N.Y.S.2d 120, 122-123 (App. Div. 1950).
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In the case before us we think it is entirely immaterial whether decedent be viewed as the aggressor or the innocent victim. Our statute contains no defense that an “aggressor” or “participant” is to be denied recovery in horseplay cases or those of malicious assaults. Its insertion is purely judicial, justified by no legislative fiat, and sustained only by the court’s conclusion that culpable persons should not benefit by their own wrong—the very defense that the compensation act rejects. Negligence or guilt or assumption of risk are all banned as defenses in our compensation

law. The victim of work-inducted assaults should be given compensation rights, without importing narrow common-law rules barring an aggressor, and without indulging in mental gymnastics to determine who struck the first blow. Using the word "aggressor" as a defense to an award is to bring back into the compensation law common law defenses which have been outlawed.

North Carolina	No	Rankin v. Brown Mfg. Co., 193 S.E. 389 (N.C. 1937).
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The Supreme Court of North Carolina reversed and set aside an order of the Superior Court of Cabarrus County which had directed the North Carolina Industrial Commission to make specific findings regarding whether the deceased or the other participant in a fight was the aggressor; such findings are "manifestly immaterial."

North Dakota	Yes	N.D. CENT. CODE § 65-01-02(10)(b)(4) (2010).
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(b) The term [compensable injury] does not include:

....

(4) [a]n injury that arises out of an altercation in which the injured employee is an aggressor. This paragraph does not apply to public safety employees, including law enforcement officers or private security personnel who are required to engage in altercations as part of their job duties if the altercation arises out of the performance of those job duties.

Ohio	Yes	Lowe v. Cox Paving, Inc., 941 N.E.2d 88, 92 (Ohio Ct. App. 2010).
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"[A]n injury that results from an animosity fueled by both personal and work-related quarrels should be compensable when the work-related quarrel exacerbated the situation and, thus, establishes a

causal connection between the injury and the employment.”		
[A]ppellant must present facts establishing that he was not an instigator of the assault.		
Oklahoma	Yes	Terry Motor Co. v. Mixon, 361 P.2d 180, 181 (Okla. 1961).
An injury inflicted upon a workman engaged in the duties of his employment through an assault or prank of a co-employee is regarded as one arising out of employment within the meaning and purview of the Workmen’s Compensation Act unless the injured workman acted as the aggressor, initiator or voluntary participant in the frolic or combat in which he was injured.		
Oregon	Yes	I. OR. REV. STAT. § 656.005(7)(b)(A) (West 2003). II. OR. REV. STAT. § 656.018(3)(a) (West 2003). III. Kessen v. Boise Cascade Corp., 693 P.2d 52, 53 (Or. Ct. App. 1984).
I. (b) “Compensable injury” does not include . . . (A) [i]njury to any active participant in assaults or combats which are not connected to the job assignment and which amount to a deviation from customary duties.		
II. (3) The exemption from liability given an employer under this section . . . shall not apply:		
(a) If the willful and unprovoked aggression by a person otherwise exempt under this subsection is a substantial factor in causing the injury, disease, symptom complex or similar condition.		

III. [Oregon Revised Statute §656.005(7)(b)(A)]—often referred to as the “aggressor defense”—clearly contemplates a four-part test. In order to be barred from receiving compensation, (1) the claimant must be an active participant, (2) in assaults or combats, (3) which must not be connected to the job assignment and (4) which must amount to a deviation from customary duties.

Pennsylvania	No	Schueller v. Amour & Co., 176 A. 527, 529 (Pa. Super. Ct. 1935).
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Even assuming that decedent struck the first blow, it still was an altercation which grew out of the business and not as the result of a personal animosity. In *Meucci v. Gallatin Coal Co.*, [123 A. 766 (Pa. 1924)], where a controversy arose between the foreman and the employee as to the number of cars taken out by the employee, the fact that claimant struck the first blow and in turn was struck by the foreman, resulting in the loss of an eye, did not bring the facts within the exception of the act [for injuries caused by a third person because of a personal reason rather than an employment-based reason]. In *Vordy v. Joseph Horne Co.*, 96 Pa. Super. 550 [(Pa. Super. Ct. 1929)], where a dispute arose over the absence of paper towels, and finally without being attacked the other employee struck decedent with a piece of pipe and killed him, compensation was sustained. In *Dalton v. Gray Line Motor Tours*, 95 Pa. Super. 289 [(Pa. Super. Ct. 1929)], Judge Gawthrop said: “The mere fact that claimant touched Heaton’s arm did not make him such a violator of the law as to deprive him of compensation. It was not so serious an offense as to cause the claimant to lose his status as an employee and become a criminal, bringing upon himself the injury for which he seeks compensation.” In the present case the fact that decedent struck first (assuming it to be true) was not such an assault under the circumstances as would exclude him or his dependents from compensation.

Rhode Island	Likely	Gaudette v. Glas-Kraft, Inc., 163 A.2d 23, 24-25 (R.I. 1960).
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While petitioner was [washing his hands at a sink only large

enough for two people,] another fellow employee, Albert Ducharme, came between [the petitioner and a co-worker] and pushed petitioner away from the sink. The petitioner thereupon grabbed Ducharme by the shirt and pushed him away. He then dropped his hand and while he was talking to another employee he was struck in the face by Ducharme. As a result of the blow petitioner suffered a broken nose and was totally incapacitated for work for a period of a little over a month.

....

Assuming that the use of the sink was incidental to petitioner's employment, the question whether the assault was caused by the use of the sink or from some other cause is, in the first instance, a question of fact. The trial commissioner found as a fact that the quarrel was a private one; that while petitioner was not the aggressor, he nevertheless carried on the argument beyond what the commissioner believed could be said to have been reasonable; and that in the circumstances he had failed to prove by a fair preponderance of the evidence that his injuries arose out of and in the course of his employment, connected therewith and referable thereto as required by [the Rhode Island Workers' Compensation Act].

It is reasonable to assume that he based such findings on his determination from the evidence before him that the assault was attributable, not to the use of the sink but to the private quarrel which occurred and was caused by petitioner's action in grabbing and pushing Ducharme prior to the assault. This assumption, which we believe is implicit in the trial commissioner's ultimate finding, is also supported by the decision of the full commission which stated that "the dispute which precipitated the assault in no way concerned the work which the petitioner or his assailant was required to do for the respondent, nor did it concern the conditions under which the work was required to be performed."

South Carolina	No	Kinsey v. Champion Am. Serv. Ctr., 232 S.E.2d 720, 721-722 (S.C. 1977) (footnote omitted) (citations omitted).
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The [statutory provision barring workers' compensation benefits for injuries caused by the willful intention of an employee to injure or kill himself or another] does not afford a defense based merely on who strikes the first blow. Its application is limited to "those cases where it is shown that the acts of the employee are so serious and aggravated as to evince a wilful intent to injure."

One reason for the limited application of the aggressor defense is that the statutory language creating the defense is injury resulting from "wilful intention" which has been interpreted as meaning a "deliberate intention or formed intention." If an altercation is spontaneous, impulsive, instinctive or otherwise lacking a deliberate or formed intention to do injury, the statutory defense is unavailable.

South Dakota	Yes	Fuller, HF No. 2, 2012/13, at *2, 3 (S.D. Dep't of Labor Mar. 22, 2013) <i>available at</i> https://dlr.sd.gov/workerscomp/de/c/2_fuller.pdf .
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On May 14, 2012, Claimant and a co-worker, Adrian Fornal (Fornal), were setting forms and tying rebar, while preparing a driveway for a concrete pour. Before they were finished, Claimant walked about a block up the street where their foreman, Kyle Gustafson, was stripping forms.

When Claimant returned to the driveway where Fornal was working, words were exchanged between Fornal and Claimant. The exchange was likely related to the fact that Claimant had walked off before all the work had been completed.

After the exchange, Claimant took off his sunglasses and threw

them down, then threw his tape measure and hit Fornal with it and put up his fists. It is more likely than not that Claimant [then] threw the first punch of a physical altercation which left Claimant requiring medical treatment.

....

[Claimant’s provocative actions] combined with the facts that he made no attempt to defuse the situation or retreat prior to engaging in the altercation and then willingly engage in the fight is misconduct within the meaning of [the willful misconduct provision in the workers’ compensation act] even if he did not throw the first punch of the altercation. His actions were a substantial factor in causing the injury and he had knowledge that his actions [were] likely to result in serious injuries.

The Department concludes that the injuries Jens Fuller suffered on May 14, 2012 are not compensable because they were proximately caused by his willful misconduct.

Tennessee	No	Woods v. Harry B. Woods Plumbing Co., Inc., 967 S.W.2d 768, 773 (Tenn. 1998).
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[T]he common law aggressor defense as it relates to workers’ compensation claims under the [Tennessee Workers’ Compensation Law] is abolished in Tennessee and does not bar the decedent’s recovery.

Texas	Yes	I. TEX. LABOR CODE § 406.032(1)(B) (2006). II. Fed. Underwriters Exch. v. Samuel, 160 S.W.2d 61, 63 (Tex. 1942).
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I. An insurance carrier is not liable for compensation if: (1) the injury . . . (B) was caused by the employee’s wilful attempt to

injure himself or to unlawfully injure another person.

II. Our Workmen's Compensation statute . . . provides: "The term 'injury sustained in the course of employment' as used in this law, shall not include:

4. An injury caused by the employee's willful intention and attempt . . . to unlawfully injure some other person"

The above statute is plain and unambiguous. It, in effect, says that if an employee covered by insurance under our Workmen's Compensation Law is injured in the course of his employment, said injury is not compensable if it is caused by the employee's willful intention and attempt to unlawfully injure some other person. Simply stated, the above statute means that if an employee receives an injury in the course of his employment he cannot recover compensation therefor if such injury results from his making an unlawful assault upon another person with the intention of injuring him.

Utah	Unlikely	Prows v. Indus. Comm'n of Utah, 610 P.2d 1362, 1364-1365 (Utah 1980) (footnotes omitted) (citations omitted).
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In his treatise, *The Law of Workmen's Compensation* (1979), Professor Arthur Larson (hereafter 'Larson') lists four "actual or suggested treatments of the problem" of participants in horseplay:

1. The "aggressor defense" which results in the denial of compensation in any case where the injured employee instigated or participated in the horseplay. It is reasoned that by instigating the horseplay the employee has voluntarily stepped aside from his employment.

2. The New York Rule which permits even an instigator of or participant in horseplay to recover if the horseplay was a regular incident of the employment as distinguished from an isolated act.

3. The view that an instigator or participant should be treated the same as a non-participant since it is the conditions of the employment that induce the horseplay.

4. The rule proposed by Larson that an instigator or participant should recover if, by ordinary "course of employment" standards, his indulgence in horseplay does not amount to a substantial deviation from the employment.

As the basis for the fourth approach above, Larson proposes a four-part test to analyze any particular act of horseplay to determine whether the horseplay constitutes such a substantial deviation as to justify denying compensation to a participant therein. Whether initiation of or participation in horseplay is a deviation from course of employment depends on (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.

This Court has heretofore had only one occasion to examine the issue of horseplay in the workmen's compensation setting. In *Twin Peaks Canning Co. v. Industrial Commission*, [196 P. 853 (Utah 1921)], an award of compensation to the dependents of a worker who was killed as a result of horseplay in which "the deceased was the instigator and the principal, if not the sole actor" was affirmed by this Court. The analysis in *Twin Peaks* turned on whether the deceased employee could be said to have been killed while "in the course of" his employment in light of his activities in using an elevator located on the premises of his employer, the use of which elevator by the deceased was allegedly forbidden by the employer. Although the words "deviation from employment" are nowhere found in the *Twin Peaks* opinion, it is clear that the Court was wrestling with the question of when a deviation from the assigned duties of an employee was sufficient to take that employee out of the course of his employment. In our view, the analysis in *Twin*

Peaks though lacking the formal structure of the test proposed by Larson is founded on the same general principles. We therefore adopt Larson's four-part test to determine whether a particular act of horseplay constitutes such a deviation that it can be said that the resulting injury did not arise in the course of the employment and hence is not compensable.

Vermont	Likely	Teixeira, 1997 WL 823704, at *3 (Vt. Dep't of Labor and Indus. Nov. 7, 1997).
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In the case at bar, the claimant was taking a [required] break from work at the time of the alleged injury. The purpose of the break was rest. The claimant's action [(telling a joke about a co-worker's wife)] in instigating the assault [that resulted in the claimant's injuries] certainly deviated from the purpose of a work break. The disorder that ensued as a result of the claimant's comments was a serious deviation and, moreover, constituted a complete abandonment of the claimant's duties. While the claimant has argued that he was merely telling a joke and, therefore, did not significantly deviate from his duties, that is not the case. The claimant repeated the comment several times with the clear intention of provoking Mr. Wade. This is a complete and serious deviation from his duties. The facts further demonstrate that the activity engaged in by the claimant was not an accepted part of the employment. The breaks were intended as a time in which the employees could relax and socialize, not engage in insulting conduct by making derogatory comments about co-employees' wives.

Virginia	Yes	Stillwell v. Lewis Tree Serv., Inc., 624 S.E.2d 681, 684 (Va. Ct. App. 2006) (footnote omitted) (citation omitted).
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In *Farmers Manufacturing Co. v. Warfel*, 144 Va. 98, 131 S.E. 240 (1926), the Virginia Supreme Court observed that an employee is not entitled to workers' compensation benefits "where a

[claimant] suffers injuries from an assault when the claimant is himself in fault as the aggressor.” The rationale for denying benefits to the aggressor is that, “in such cases the proximate cause of the injury is not the employment, but the fault of the claimant.” In other words, if an employee is at fault in causing a fight and is injured during the course of that fight, those injuries do not “arise out of” the aggressor’s employment because the injuries were not proximately caused by the employment, but rather, by “the fault of the claimant.”

Accordingly, where a claimant’s injuries are incurred during a fight with another employee, those injuries “arise out of” the employment only if the fight “[1] was not a mere personal matter, but grew out of a quarrel over the manner of conducting the employer’s business, and . . . [2] *the injured employee was not responsible for the assault.*”

Washington	No	Johnson, 1993 WA Wrk. Comp. LEXIS 1119 (Wash. State Bd. Indus. Ins. App. July 21, 1993).
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The aggressor doctrine’s focus is simply “who started it”. While such a simplistic approach may appear very appealing, its application proves more difficult. The facts involving assaults are often confused, and as in the case involving Ms. Johnson, subject to conflicting testimony regarding the events. Additionally, denying benefits to the aggressor fails to take into consideration the reason the participants are placed in the situation or the reasons which form the basis for the conflict.

We can see no reason to continue to try to apply the aggressor doctrine. We are persuaded by the rationale set forth by Professor Larson which rejects the aggressor doctrine. We believe the better approach is to abandon the aggressor doctrine and to analyze cases involving assaults in the work place under a broader course of employment analysis, thus taking into consideration all relevant facts.

West Virginia	No	Geeslin v. Workmen's Compensation Comm'r, 294 S.E.2d 150, 155 (W. Va. 1982).
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Where an altercation arises out of the employment, the fact that claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Workmen's Compensation Act, W. Va. Code, 23-1-1, et seq., for injuries claimant sustained in the altercation.

Wisconsin	Yes	Stone, Claim No. 2003-034689 (Wis. Labor and Indus. Review Comm'n Apr. 14, 2006) available at http://dwd.wisconsin.gov/lirc/wcdc/csns/998.htm .
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In short, simply being in a fight at work does not automatically mean that a worker's injury is noncompensable. However, a worker deliberately steps out of the course employment if he "initiat[es] the incident and mak[es] the assault on his own accord."

Wyoming	Likely	I. WYO. STAT. § 27-14-102(a)(xi)(C) (2013). II. Kilburn Tire v. Meredith, 743 P.2d 874, 877 (Wyo. 1987).
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I. (xi) "Injury" does not include . . . (C) Injury due solely to the culpable negligence of the injured employee.

II. We define culpable negligence as "serious and willful misconduct" of a "grave and aggravated character."