

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

DECEMBER 3, 1996

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1822-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**PATRICIA M. MORRIS (Deceased),
KIM WALCZAK and ROB MORRIS,
individuals,**

Plaintiffs-Appellants,

v.

**LABOR AND INDUSTRY REVIEW COMMISSION
and STATE OF WISCONSIN and GREAT
ATLANTIC and PACIFIC TEA COMPANY,
d/b/a KOHL'S FOOD STORES,**

Defendants-Respondents,

**KOHL'S FOODS, INC.,
CRAWFORD and COMPANY and
CONTINENTAL INSURANCE COMPANY,**

Defendants.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL J. BARRON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Kim Walczak and Rob Morris, the children of Patricia Morris, deceased, appeal from the trial court's order affirming a decision of the Labor and Industry Review Commission. The issue is whether Patricia Morris's death arose out of her employment. Pursuant to this court's order dated July 23, 1996, this case was submitted to the court on the expedited appeals calendar. See RULE 809.17, STATS. Upon review of the briefs and the record, we affirm.

The facts are undisputed. Morris was employed as a delicatessen manager at Kohl's Food Store. She was killed by her husband at the store in the employee break room one morning about two hours after she arrived at work. Robert Morris located Patricia Morris in the break room when directed there by a Kohl's employee. After entering the room, he talked briefly with his wife, shot her in the head, and then shot himself. Morris and her husband were separated at the time and she had previously obtained a restraining order against him. They are survived by their children, Kim Walczak and Robert Morris, who were fifteen and thirteen years old at the time of the killing.

Ten years later, the children filed an application for death benefits under the Workers' Compensation Act. The hearing examiner denied benefits to the children because, among other things, Patricia Morris's death was the result of a purely personal problem and there was no showing that Kohl's could have, or should have, protected her from her husband. The commission affirmed.¹

For an accident to be compensable under the Workers' Compensation Act, it must "arise out of" employment. See § 102.03, STATS. To determine whether an accident "arises out of the employment," Wisconsin courts have adopted the positional risk doctrine. According to that doctrine,

¹ This court reviews the decision of the commission, not that of the circuit court. *Stafford Trucking, Inc. v. DILHR*, 102 Wis.2d 256, 260, 306 N.W.2d 79, 82 (Ct. App. 1981).

an accident arises out of the employment when the connection between the employment and the accident is such that the obligation or circumstances of the employment places the employee in the particular place at the particular time when he is injured by a force which is not solely personal to him.

Cutler-Hammer, Inc. v. Industrial Comm'n, 5 Wis.2d 247, 253, 92 N.W.2d 824, 827 (1958). Stated differently,

an accident arises out of employment when by reason of employment the employee is present at a place where he is injured through the agency of a third person, an outside force, or the conditions of the location of the employment constitut[e] a special zone of danger.

Id. at 253-54, 92 N.W.2d at 828.

Where an assault is entirely personal, an employee may not be entitled to recover.

It is particularly important to keep constantly in mind that the motivation of the assault, ... must not be 'personal vengeance stemming from contact with the employee outside the employment.' When it is clear that the origin of the assault was purely private and personal, *and 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

Goranson v. DILHR, 94 Wis.2d 537, 556-57, 289 N.W.2d 270, 279-80 (1980) (emphasis added) (citation omitted).

There was credible and substantial evidence to support the commission's determination that the work environment at Kohl's Foods contributed nothing to the assault and that the assault could have occurred at any time or place. Morris's employment did not place her in a position of peril, like a teller working at a bank window or a person working in isolation. The work environment itself must be a causative factor in the assault in order for the injury to be compensable under the Worker's Compensation Act. Cf. *Applied Plastics, Inc. v. LIRC*, 121 Wis.2d 271, 279, 359 N.W.2d 168, 172 (Ct. App. 1984) (death was compensable because victim was in a "zone of special danger" due to his work because he was the target of one who, like assailant, wished to extort money from the company); *Allied Mfg., Inc. v. DILHR*, 45 Wis.2d 563, 569, 173 N.W.2d 690, 693 (1970) (death was compensable because the isolated environment in which the decedent was placed increased the risk of attack and constituted a causative factor in the attack); *Nash-Kelvinator Corp. v. Industrial Comm'n*, 266 Wis. 81, 86, 62 N.W.2d 567, 570 (1954) (an assault which occurred in a factory was compensable because the claimant's presence in the factory in association with other workmen involved exposure to the risk of injury from the acts of those about him). Although Morris was killed in the employee lounge, which had only one exit, making it difficult for her to escape her husband's attack, there was nothing about the work environment that increased the risk of attack or made it a "zone of special danger." The fact that the employee lounge had only one door is not enough, absent some additional work-related hazard, to make it a potentially dangerous work environment. The commission reasonably concluded that the work environment itself did not contribute to the murder.

Because the work environment did not contribute to Morris's death, the commission properly considered the motivation for the assault in making its decision. See *Jenson v. Employers Mut. Cas. Co.*, 161 Wis.2d 253, 271, 468 N.W.2d 1, 8 (1991) (where the work environment is a causative factor in an assault, whether the motive is connected to work is immaterial). Morris had obtained a temporary restraining order against her husband because of past acts of violence and threats of future violence. The commission found ample evidence that Morris's death arose out of emotional problems and marital difficulties between Morris and her estranged husband. Because the assault arose from personal vengeance stemming from contact with Morris outside her employment and the work environment did not contribute to the episode, the murder is not compensable.

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.