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EMPLOYMENT LAW

When Employees Go Bad: *An Employer's Guide to Preventing and Defending Suits Based on Employee Actions*

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Special to the Legal

Employers beware! On occasion, your employees may do bad things. Unfortunately, despite no apparent warning signs, it is the employer who may be on the hook for the wrongful acts of its employees.

Even employees who arrive at work on time and follow instructions may occasionally lose their cool — or worse. Such inappropriate, tortious or even the criminal conduct of an employee may have been unexpected, yet the employer may still be held accountable in limited circumstances.

Whether it be the Fortune 500 company or the local Laundromat, nearly every employer must hire employees who interact with others and who are expected to maintain a certain code of conduct. When the employee breaks that code of conduct, it is often the employer (the deep pocket) that is held under scrutiny.

An employer's first contact with prospective employees occurs at the interview stage. It is here employers are tasked with the nearly impossible chore of reviewing the information available — a resume, references and perhaps a criminal background and credit report — and evaluating whether a prospective employee is an appropriate fit. In this sense, the employer is like a poker player who must make a calculated decision based on a limited amount of information. Speed-daters are not expected to propose marriage after speaking with a potential mate for 30 seconds. Yet the employer is expected to do just that during the interview stage.

Accordingly, the possibility remains that an applicant who appears to be a match may break the rules down the road. An employer



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must not wait until a lawsuit based on the actions of its employees before it takes remedial action. Armed with certain tools set forth in this article, the well-prepared employer may improve its position to defend itself in the face of a civil action asserting the common theories of employer liability: negligent hiring, negligent supervision or an indirect or derivative theory of vicarious liability based on the wrongful acts of an employee.

An employer may be held responsible for damages resulting from foreseeable risks caused by its employees. The test is whether an injury was caused by an employee not suited for the job at hand (negligent hiring) or by an employee acting within the scope of his or her employment and for his or her employer's benefit (vicarious liability). In the first instance, a plaintiff may seek damages from an employer who should have foreseen that a particular employee, perhaps with skeletons in the closet, should never have been hired, under a negligent hiring or negligent supervision theory.

For example, when an outsourced bookkeeper is found to have been embezzling funds on the job, it is likely that the temporary placement firm that hired the bookkeeper may be held liable for negligent hiring if the employee had embezzled in the

past. On the other hand, when an employee causes harm to a third party who is not a coworker (and thus, workers' compensation immunity does not apply), a plaintiff may recover pursuant to a theory of vicarious liability. For example, an employer moving company may be held vicariously liable for damages sustained when its employee drops a couch on a customer's foot. Generally, these legal theories have the same end: plaintiff seeks recovery from the employer because the employer should have foreseen something. Whether it be negligence or vicarious liability, experience has taught careful employers tricks of the trade to reduce the likelihood of a plaintiff's verdict. Employers: Read on.

THE ELEMENTS OF VICARIOUS LIABILITY

Any employment environment with the potential for physical confrontation is susceptible to a claim of vicarious liability. Pursuant to that theory, an employer may be held liable for the torts of an employee when those torts are committed by the employee within the scope of employment and were committed in furtherance of the employer's business. A common example is that of an employee bartender or bouncer who causes physical injury when "escorting" a patron out of a bar with allegedly excessive force. Often, the employer/owner of the bar may be found liable for the tortious conduct of the employee because that injury was caused by actions undertaken for the benefit of the bar.

When confronted with a claim of vicarious liability, an employer must address the following questions with respect to the employee's conduct: Was the allegedly tortious conduct the kind the employee was hired to perform? Did it occur substantially within the authorized time and space limits? Was

it actuated, at least in part, by a purpose to serve the master? If force was intentionally used, was such force foreseeable by the employer?

If the answers are in the affirmative, the employer may be liable for the criminal, intentional or negligent conduct of its employee pursuant to the doctrine of vicarious liability.

While the bouncer/bar scenario may appear to be a clear case when vicarious liability applies, other situations are not as clear. For example, imagine that several contractors are employed by a major construction company to build a residential high-rise in a busy, downtown neighborhood. While one of the contractors operates a bulldozer, another directs vehicular traffic on the street away from the bulldozer. When a disgruntled motorist tires of waiting for the bulldozer, leaves his vehicle, and confronts the person directing traffic, is the employer vicariously liable when the employee directing traffic beats the driver to a pulp? According to one court, vicarious liability was appropriate.

Compare the bouncer/bar scenario to an elementary school teacher who allegedly sexually assaults a student on school property. Clearly, the employee/teacher was not acting for the school's benefit when she assaulted the student. Therefore, by that measure vicarious liability should not apply. The school, however, will not avoid liability unless the teacher's actions were unforeseeable. In other words, if the teacher has some telltale scandal in her past, the school may be liable for failing to discover and to disclose it. In this scenario, it is the school's conduct in hiring and supervising the teacher, rather than the teacher's actions, which become the focus.

ELEMENTS OF NEGLIGENT HIRING AND NEGLIGENT SUPERVISION

An employer may be held liable for the conduct of its employees when that conduct could have been foreseen based on an employee's prior bad acts or as a result of improper supervision. Unlike vicarious liability, however, the culpable conduct is not imputed to the employer in this context. Rather, it is the employer who may be declared negligent based on failure to detect an employee's propensity to commit the alleged wrong because of an undetected blemish in his or her employment record or because of inadequate supervision.

When confronted with a claim of negligent hiring or supervision, an employer must address whether it: provided improper or ambiguous orders; failed to institute appropriate work-place regulations; employed inappropriate persons for positions involving risk of harm to others; or negligently oversaw the employee's activity. If a plaintiff can establish that the employer knew or had reason to know of a particular employee's unfitness or dangerous attributes and could reasonably have foreseen that such qualities created a risk of harm to others, the employer may be directly liable to the plaintiff under a negligence theory.

TOOLS OF THE TRADE

Whether defending a potential claim of vicarious liability, negligence or both, a key inquiry is what the employer knew and when. Accordingly, the proactive employer is invested in its employees from the initial interview through retirement. Complete a thorough background review of the employee and document that carefully. This process includes contact with references and a review of available criminal background and financial information. Maintain a written workplace employment policy that sets expectations, clearly establishes roles and creates pathways for reporting, investigating and resolving alleged wrongdoing. Maintain sufficient oversight over employees to ensure that rules are followed without infusing a feeling of paranoia or distrust. When confronted with rumors or other reports of alleged wrongdoing of an employee, react quickly to investigate the accusations and document the investigation carefully. Complete periodic employee training with a particular emphasis on settings with the potential for physical confrontation.

By way of an example, the following facts have helped to defeat claims raised against employers:

- A comprehensive pre-hire investigation did not reveal any negative employment history.
- Although the employer was aware of poor feedback concerning the employee prior to the incident in question, that feedback did not concern the particular allegations at issue against the employee.
- An employee's file was free of any incidents apart from the alleged wrong in question.
- The employee's actions were not foreseeable in that they were intended for the personal benefit of the employee.

All employers must be aware of the potential for lawsuits based directly, or indirectly, on the acts of its employees. Of course that risk of suit increases for the employer as the number of employees rises. The lesson to be learned is that even the most careful employers cannot eliminate all vicarious liability and negligent hiring/supervision risk. However, it is those employers who maintain clear policies, efficiently carry out those policies and who clearly document this process that are in the best position to reduce the risk of liability. Hopefully this article has heightened employers' awareness of the potential for liability and has provided a workable approach to assist in the employment and supervision of their employees. •

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