An Employer's Liability for Employee's Acts

Employers, and not the employees themselves, will often be held liable for the conduct of their employees. This is true even if the employer had no intention to cause harm and played no physical role in the harm. To understand why, you have to understand two basic concepts that underlie employer liability.

First, employers are seen as directing the behavior of their employees and accordingly, must share in the good as well as the bad results of that behavior. By the same token that an employer is legally entitled to the rewards of an employee's labor (profit), an employer also has the legal liability if that same behavior results in harm.

Second, when someone is injured or harmed and needs to be compensated, who is the most likely to pay: the employee or the employer? Fair or not, the legal system is interested in making the victim whole, and assigning liability to the employer rather than the employee has the best chance of meeting that goal.

Job-Related Accidents

Employers are vicariously liable under the doctrine of "respondeat superior" for the negligent acts or omissions by their employees in the course of employment. The key phrase is "in the course of employment". For an act to be considered within the course of employment, it must either be authorized by the employer or be so closely related to an authorized act that an employer should be held responsible.

This means that there is a significant difference between an employee that causes a job-related accident and an employee who causes an accident while on the job that is unrelated to his or her employment. Courts sometime use the terms "detour" or "frolic" to signify the difference.

A detour is a deviation from explicit instructions, but so related to the original instructions that the employer will still be held liable. A frolic on the other hand, is simply the employee acting in his or her own capacity rather than at the instruction of an employer. Here are some examples to illustrate the difference:

- **Example 1a**: A company loans its sales staff vehicles to enable them to make sales calls in the area. Late at night, a sales person drives out to a bar for purely personal fun and hits a pedestrian. The employer will likely not be held responsible because, although the car is owned by the employer, the employee was using the car for personal, not business, reasons when the accident occurred.
- **Example 1b**: A company loans its sales staff vehicles to enable them to make sales calls in the area. As part of doing business, the company encourages its sale staff to take potential clients out for dinner and drinks. One night, after taking a client out for drinks, the employee is driving home and hits a pedestrian. The employer likely will be held responsible since it encourages sales people to take clients out for food and drinks, and that is precisely what the employee was doing when the accident occurred. Employer liability would be more ambiguous in this example if the employee turned out to be intoxicated (something the employer might have expected to happen, but likely would have warned the employee against).
- **Example 2a**: A company gives its employees cell phones to enable them to call into meetings and stay in touch while traveling. While away from the office, an employee calls in for a telephone conference, becomes distracted, and hits another car causing serious injury. The employer is likely liable for the car accident.
- **Example 2b**: A company gives its employees cell phones to enable them to call into meetings and stay in touch while traveling. An employee decides to call his mom to let her know that he'll be in town next week to visit. During the call he becomes distracted and runs into another car causing serious injury. The employer is likely not liable for the car accident, unless a jury decides that the employer should have known that employees would use the phone for personal calls and took no steps to prevent misuse of the phone.

Finally, a special type of work-related accident occurs when one employee injures another employee while on the job. Workers' compensation protects you from being sued by your employee provided that the employee was acting within the scope of his or her job when the accident occurred. Instead of filing a lawsuit, the employee would submit a claim to receive payment for lost wages, medical bills, etc.

Negligent Hiring or Retention

Negligent hiring or retention liability, unlike job related misconduct, arises from acts performed by an employee outside the scope of his or her employment. The most common example of this is to hold an employer liable for the criminal conduct of an employee, which is obviously outside the scope of employment. The basis for liability is that the employer acted carelessly in hiring a criminal for a job that the employer should have expected would expose others to harm. Here are a few examples:

- **Example 1**: An ice cream sales company hires a man convicted of sexually assaulting a minor to drive its ice cream truck and sell ice cream to children. The business is likely liable because it was negligent in hiring a man known to have assaulted minors, and then giving him access to those minors as customers.
- **Example 2**: An elder care facility hires a woman convicted of fraud and identity theft against elderly people to look after and care for the facilities patients. The business is likely liable because it was negligent in hiring a woman who was already convicted of scamming the elderly and giving her access to potential victims.
- **Example 3**: A cable company hires a man without a background check and directs him to go to customer's houses and install cable equipment. It turns out he's been convicted twice of rape, and while at a customer's house to install equipment, he rapes the occupant. The business is likely liable because it was negligent in hiring someone who has access to private houses without a background check, as well as being liable for hiring someone with a history of rape to meet privately with customers in their home.

The key to most negligent hiring and retention cases is providing employees with access to potential victims without doing the necessary examination of the employees'. Accordingly, to avoid liability for negligent hiring, an employer should always run a background check on an employee, and be especially careful if the employee has contact with the public. If you as an employer become aware of something after the fact, then handle the matter immediately to avoid negligent retention liability.

Harassment

Workplace harassment of employees by other employees has become an increasingly problematic source of business liability for employers. Workplace harassment violates federal law if it involves discriminatory treatment based on: race, color, sex (with or without sexual conduct), religion, national origin, age, disability, genetic information, or the employee's opposition job discrimination or participation in an investigation or complaint proceeding under the Equal Employment Opportunity Commission.

Workplace harassment does not include simple teasing, offhand comments, or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a "tangible employment action," such as hiring, firing, promotion, or demotion.

Even if the harassment did not lead to a "tangible employment action", the employer can still be held liable unless it proves that:

- The employer exercised reasonable care to prevent and promptly correct any harassment; and
- The employee suffering the harassment unreasonably failed to complain to management or to avoid harm otherwise.

To avoid workplace harassment liability, employers should establish, distribute and enforce a policy prohibiting harassment, and set out a procedure for making complaints. Preferably, the policy and procedure should be in writing. Small businesses owners may avoid liability through less formal means. For example, if a business is sufficiently small that the owner maintains regular contact with all employees, the owner can tell the employees at staff meetings that harassment is prohibited, that employees should report such conduct promptly, and that a complaint can be brought straight to any supervisor or the business owner.

Finally, it is not enough to simply create a harassment policy. A business must also conduct prompt, thorough, and impartial investigations into any complaint that arises, and undertake swift and appropriate corrective action to fulfill its responsibility to "effectively prevent and correct harassment."

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