Employer Liability for Employee Conduct
by Lisa Mann
05-01-2000

EMPLOYER LIABILITY FOR EMPLOYEE CONDUCT: When Does An Employer Have to Pay?

by
Lisa Mann
Modrall, Sperling, Roehl, Harris & Sisk, P.A.

Employers are well familiar with the fact that they are being sued for the acts of their employees. In increasing numbers of cases, however, employers are being confronted with lawsuits against their employees. The employees then usually turn to the employer, requesting the employer to pay for the defense of the lawsuit and, if an adverse result ensues, for any damages assessed against the employee. Such expenses can obviously mount into high dollar figures. When will an employer be liable for the acts of its employees? When does an employer have to provide its employees with the costs of defense? When does the employer have to indemnify the employee for any adverse judgment? These questions are, unfortunately, not always susceptible to simple answers.

Employer Liability for the Acts of Employees

New Mexico law provides that an employer will be held liable for the acts of its employees when those acts are within the course and scope of employment. The New Mexico Uniform Jury Instruction, given in all such cases where this is an issue, defines an act as falling within the "scope of employment" if:

(1) It was something fairly and naturally incidental to the employer's business assigned to the employee; and

(2) It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

UJI 13-407 NMRA 1998. Thus, a bar was held liable when its doorman employee assaulted a patron in the bar parking lot. Medina v. Graham's Cowboys, Inc., 113 N.M. 471, 827 P.2d 859 (Ct. App. 1992).

Not every act of an employee is necessarily taken in the course and scope of his or her employment. For example, a hotel escaped liability when an on-duty employee sexually assaulted a child on the hotel premises. The New Mexico Court of Appeals recognized that an innkeeper/employer was not an insurer of a patron for injuries inflicted by an employee. In that case, it was clear that the employee had acted outside the scope of his employment, so the employer could not be held liable for the employee's wrongful acts.

Whether or not the employer is held liable for the wrongful acts of its employee, the employer may be requested to provide a defense for an employee who is sued individually (with or without the employer), and may be asked to pay any judgment obtained against the employee. New Mexico law does not require private employers

to provide a defense or to indemnify employees who are sued for acts alleged to have occurred in the course and scope of employment. Nevertheless, there are good reasons for employers to consider providing a defense and/or indemnification to their employees.

First, when management employees are sued for actions taken in the course of their employment, the employer may feel that it is simply unfair to expect the employee to defend himself or herself against the litigation. As an example, if a personnel director is sued for having terminated a former employee, the employer may choose to provide a defense for the personnel director, who terminated the former employee at the direction of management. In that case, the interests of the employer and the personnel director are clearly aligned, whether the employer is named in the lawsuit or not.

Conversely, however, when a supervisor is sued for sexually harassing a subordinate employee, the employer may refuse to provide a defense and would refuse to indemnify the supervisor in the event an adverse judgment is obtained. Even in California, which requires employers to defend and indemnify employees, the employer is not required to indemnify a sexual harasser, even if the alleged acts occurred during work hours and on the employer's premises. The California court's reasoning is consistent with New Mexico law concerning the course and scope of employment: requests for sexual favors and inappropriate touchings are motivated for strictly personal reasons completely unrelated to the performance of the employee's job. For those reasons, sexual harassment is uniformly found to be conduct outside the scope of employment.

The question whether an employee's conduct occurs within the course and scope of employment also arises when an employer makes a claim that insurance coverage applies for the defense and/or indemnification of pending litigation. In one case from Ohio, Mumford v. Interplast, Inc., 696 N.E.2d 259 (Ohio App. 1997), for example, a group of employees went to a bar after work. The employees used company credit cards to buy drinks for Mumford, an under-age employee; then one of the employees took Mumford to a hotel and attempted to have sex with her. The same employee then took Mumford back to her car, which was parked at the company parking lot, and instructed her to remove her car from the parking lot, even though he knew she was intoxicated. Mumford took her car out of the parking lot and hit a utility pole, sustaining injuries. She sued the employees and her employer who, in turn, sued its insurance company, claiming that the insurance company had a duty to defend and indemnify the employer and its employees under a comprehensive business liability policy. The insurance company denied liability for defense or indemnification, on the grounds that the complaint failed to establish that the employees committed any negligent acts within the scope of their employment. The court agreed that the fact that the individually named employees paid for their drinks with a company credit card was insufficient to establish that the acts were within the scope of their employment. Accordingly, the individual employees were not "insureds" as defined under the insurance policy, and the insurance company had no duty to defend or indemnify them. Similarly, the insurance company had no duty to defend or indemnify the employer for Mumford's injuries as a result of her automobile accident, because her travel from her place of employment, hours after her work shift ended, was not related to her employer's business. 696 N.E.2d at 266-67.

Conversely, in Parish of Christ Church v. Church Ins. Co., 166 F.3d 419 (1st Cir. 1999), a church parish sought insurance coverage for an action brought by an ex-employee claiming defamation, invasion or privacy and employment discrimination in connection with the termination of her employment. The insurance policy excluded personal injury as a result of an offense "directly or indirectly related to the employment" of the person injured. The court found no duty to defend or indemnify, because it found that defamatory statements providing an explanation for termination or directed to performance were "related to" employment. Accordingly, the policy exclusion precluded insurance coverage and the insurance company had no duty to defend or indemnify the church parish in connection with the ex-employee's litigation against her employer. 166 F.3d at 421.

In dealing with insurance questions, the courts distinguish between the duty to defend and the duty to indemnify, finding the duty to defend broader and more easily implicated than the duty to indemnify. In one case from Florida, for example, an employer sued its insurer for its failure to defend and indemnify under a general liability insurance policy. The plaintiff sued the employer for injuries sustained when one of the employer's employees got into a fistfight during business hours. The appellate court found that there was no duty to indemnify the employer because the fistfight was an intentional battery that was motivated by purely personal concerns. The appellate court did not disturb the lower court's finding that because the complaint alleged that the employee was acting within the course and scope of employment, the insurance company had breached its duty to provide a defense to the employer.

The question of whether insurance coverage is available for employment-related claims necessarily involves an examination of the kind of insurance coverage purchased by the employer. The newer Employment Practices Liability Insurance policies are designed to provide coverage for various types of employment-related conduct. Even these policies, however, may contain exclusions for acts committed with dishonest, fraudulent, criminal or malicious purpose or intent, and/or punitive damages. Alternatively, an employer may seek coverage under commercial general liability ("CGL") policies or employers' liability policies. These policies also may contain exclusions or definitions that preclude coverage for employment-related claims. Thus, the covered entity may be construed as excluding individual employees, but including the employer itself.

In one case, for example, an employee sued her employer and its president for sexual harassment committed by the president. The company then sought coverage for defense and indemnification for itself and its president under its CGL and employers' liability policies. The court agreed that the CGL policy did not cover the claims, because of an exclusion for bodily injury to an employee arising out of and in the course of his employment. However, under the employers liability insurance policy, the insurer was required to pay all sums the employer was required to pay as damages because of bodily injury to the employer's employees. The policy excluded "bodily injury intentionally caused or aggravated by you," and "damages arising out of ... harassment, ... discrimination against or termination of any employee[.]" Because there was no evidence that the employer intended to harass the plaintiff, and liability was imposed on the employer for a hostile work environment, the court found that the employers' liability policy exclusion did not specifically exclude coverage for vicarious liability resulting from hostile workplace sexual harassment. Accordingly, the court found it reasonable for the employer to expect coverage for its

vicarious liability resulting from the intentional torts of its employee. Although the court found that there was no coverage for any liability found against the company president for harassment, the insurer did have a duty to defend both the company president and the company, because the duty to defend was broader than the duty to indemnify. Schmidt v. Smith, 684 A.2d 66, 76-77 (N.J. Super. 1996), aff'd, 713 A.2d 1014 (N.J. 1998).

Private employers faced with litigation against employees are well-advised to place their insurance carriers on notice immediately of the existence of such claims. Even when they have done so, the employer may well have to decide whether it will provide a defense and/or indemnify the employee, assuming insurance coverage may not be available. Even when employers believe that they want to defend their employees, they should consider informing those employees that the employer reserves the right not to pay any judgment, or to seek reimbursement for attorneys' fees. Such a "reservation of rights" letter may be essential, in the event an adverse judgment ultimately results.

New Mexico Public Employers Must Defend and Indemnify

The New Mexico Tort Claims Act requires public employers to provide "a defense, including costs and attorneys' fees, for any public employee" whose liability is sought for a tort or constitutional violation committed by the public employee while acting within the scope of his duty. § 41-4-4(B) NMSA (1999 Supp.). The same Act also requires the employing governmental entity to pay any judgment or settlement entered against a public employee for tort or constitutional violation, if the employee was acting within the scope of his duty, § 41-4-4(D), and even to pay an award of punitive damages, subject to the same qualification. § 41-4-4(C). These duties (defense and indemnification) continue even after employment has terminated, if the events on which liability is based occurred during the employee's period of employment. § 41-4-4(G), (H).

To enable governmental entities to indemnify and provide a defense as required under the Tort Claims Act, the statute provides for the creation of a public liability fund to be overseen by State Risk Management. NMSA §§ 41-4-23 - 41-4-25. That public liability fund covers the risks specified in the Tort Claims Act. State Risk Management is then charged with overseeing the public liability fund. NMSA §§ 15-7-2, 15-7-3; 41-4-23 - 41-4-25.

Because the public employer's duty to defend and indemnify its employees is specified by statute, there is usually little controversy over whether the New Mexico public employer must provide a defense to an employee. In one case, however, San Miguel County brought an action against its sheriff, and the sheriff asserted that the County was liable for his attorneys' fees in defending against the action, relying on the New Mexico Tort Claims Act. Bd. of County Commissioners of San Miguel County v. Risk Management Div., 120 N.M. 178, 899 P.2d 1132 (1995). The New Mexico Supreme Court found that the Tort Claims Act did not apply, because by its terms, it was the exclusive remedy for actions for damages against the government. Accordingly, the Act did not interfere with "the traditional right" to bring an action against a government official for failure to perform a required duty, and the sheriff had no right to a defense or indemnification by State Risk Management. 120 N.M. at 181, 899 P.2d at 1135.

As in the private employer context, the question that is more likely to arise is whether the employee was acting within the scope of his duty. That question frequently arises in cases analyzing whether the Tort Claims Act's waiver of immunity applies. In those cases, an injured plaintiff seeks to impose liability on a governmental entity and/or its employee for the acts of the employee. Because the New Mexico Tort Claims Act does not waive sovereign immunity for acts taken by state employees that are not within the scope of their duties, the governmental entity may seek to dismiss the claim on the grounds that sovereign immunity was not waived for that act. For example, in Rivera v. New Mexico Highway and Transportation Dep't, 115 N.M. 562, 855 P.2d 136 (Ct. App.), cert. denied, 115 N.M. 545, 854 P.2d 872 (1993), a construction company employee brought a claim against the State Highway and Transportation Department to recover for injuries sustained when he was struck by a vehicle on the highway after the Department's employee threw container of water on him, in violation of the Department's rules prohibiting horseplay. In that case, the Court found that the employee's horseplay did not take place in the course and scope of his employment, because it could not "be seen as remotely furthering the employer's interest". 115 N.M. at 565, 855 P.2d at 139.

Similarly, when an off-duty policeman began chasing an automobile many miles from his precinct, pulled that automobile over by showing his police badge and rifle and then, drove the vehicle without headlights through a fence and into a field, wrecking it and injuring one of the passengers, it was clear that the police officer's conduct was not authorized. Nevertheless, the New Mexico Court of Appeals held that the employee's action, even if unauthorized, would be considered to be in the scope of employment if it:

(1) is the kind the employee is employed to perform;

(2) occurs during a period reasonably connected to the authorized employment period;

(3) occurs in an area reasonably close to the authorized area, and

(4) is actuated, at least in part, by a purpose to serve the employer.

Because application of these factors made it clear that no reasonable jury could conclude that the police officer was acting within the course and scope of his employment when he terrorized the automobile driver and passengers, the court dismissed the claim against the city that employed the police officer.

CONCLUSION

Imposition of liability on employers for the acts of their employees typically turns on whether the employees' actions were taken within the course and scope of employment. That question is not always easily resolved. Sometimes it is necessary to provide a defense to the employee, even when it is ultimately decided that the employee was not acting within the course and scope of employment. By doing so, however, the employer may be able to avoid the adverse consequence of having the employee fail to defend against the lawsuit and adverse findings being made that bind the employer as well. Private employers should review insurance coverage available to them for employment related claims, and consider whether that

insurance is adequate. Public and private employers alike should review whether their training adequately informs public employees of prohibited conduct in the workplace.