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Mark I. Schickman, Editor
Cathleen S. Yonahara, Assistant Editor
Freeland Cooper & Foreman LLP

Vol. 23, No. 10
August 26, 2013

What's Inside

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Furloughs

Sequestration has brought furloughs to the front of the news as employers cut back on employees' workweeks to save money. But furloughs bring with them potential wage and hour law and benefits issues. At www.HRHero.com, you can find the following tools to ensure you're complying with the law:

- HR Sample Policy: Wage and Salary Administration, www.HRHero.com/lc/policies/401.html
- HR Sample Policy: Employee Classification, www.HRHero.com/lc/policies/402.html

RESPONDEAT SUPERIOR

Hotel accountable for injuries caused by intoxicated employee

by Michael Futterman and Jaime Touchstone

A Marriott employee got drunk at the company's annual holiday party. After getting home safely, he ventured out again to drive a coworker home and struck another car, killing its driver. The driver's parents filed a wrongful death lawsuit against the employee and the hotel. The trial court held that Marriott wasn't liable for the employee's actions after he arrived home. The court of appeal reversed, finding Marriott could be held vicariously liable for its employee's conduct if a jury determines his intoxication occurred within the scope of his employment.

Company's holiday party ends in tragedy

In December 2009, the Marriott Del Mar Hotel hosted its annual holiday party as a "thank you" to employees and to encourage holiday spirit and teambuilding. Employees weren't required to attend the party. The hotel managers initially planned to serve only beer and wine and limit consumption to two drinks per person, but they didn't enforce the limit and decided to serve hard alcohol. Drinking on the job wasn't unusual at the hotel. Employees sometimes finished alcohol left over from parties, tasted new cocktails, and otherwise drank alcohol at the hotel.

Michael Landri, one of the hotel's bartenders, attended the holiday party. He drank before the party and brought a flask of whiskey, which his managers refilled from the hotel's liquor supply. He consumed alcohol throughout the evening and became intoxicated. Another hotel employee drove him home after the party.

Twenty minutes after arriving, Landri left his house to drive a coworker home. He struck another vehicle and killed its driver, Dr. Jared Purton. Landri's blood-alcohol content exceeded the legal limit, and he allegedly was traveling more than 100 miles per hour when he rear-ended Purton's vehicle.

Landri pleaded guilty to gross vehicular manslaughter while under the influence of alcohol, for which he received jail time. Purton's parents sued him and the hotel for the wrongful death of their son. The hotel asked the trial court to dismiss the case on the grounds that the accident didn't occur within the scope of Landri's employment; as a result, it couldn't be held responsible for Purton's death. The trial court agreed, ruling that the hotel's potential liability ended when Landri arrived home after the party. Purton's parents appealed, and the court of appeal reversed the decision.

Employer's responsibility for employee's actions

The doctrine of *respondeat superior* permits an employer to be held

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Mark I. Schickman, Editor
Freeland Cooper & Foreman LLP, San Francisco
415-541-0200 • schickman@freelandlaw.com

Cathleen S. Yonahara, Assistant Editor
Freeland Cooper & Foreman LLP, San Francisco
415-541-0200 • yonahara@freelandlaw.com

CALIFORNIA EMPLOYMENT LAW LETTER (ISSN 1531-6599) is published biweekly for $547 per year by **BLR®—Business & Legal Resources,** 100 Winners Circle, Suite 300, P.O. Box 5094, Brentwood, TN 37024-5094.

vicariously liable for torts, or wrongful acts, committed by an employee acting within the "scope of employment." The modern justification for imposing vicarious liability on an employer is based on a policy of risk allocation, which effectively assigns responsibility to the employer as a cost of doing business.

"Scope of employment" is interpreted broadly and includes risks created by the employer that may be foreseeable or incidental to its business. To determine if a risk is "foreseeable," courts examine the context of the particular business and ask whether the employee's conduct is so unusual or startling that it would seem unfair to include the resulting loss among other costs of the employer's business.

Notably, employers may be held liable for an employee's careless, willful, or malicious acts even if those acts violate company rules. It follows that if an intoxicated employee causes injury, *respondeat superior* is appropriate if the alcohol consumption occurred within the scope of employment—i.e., if it occurred with the employer's permission and conveyed a benefit to the employer or was a common occurrence.

In this case, Landri's intoxication, which caused him to become an "instrumentality of danger," appeared to have occurred with the hotel's permission. The hotel provided alcohol to employees who attended its holiday party. The hotel sponsored the party, and the party served the company's business purposes. Hotel managers disregarded the two-drink limit and, in addition to beer and wine, served and consumed hard liquor with employees. Further, they refilled the flask of Jack Daniel's that Landri brought to the party.

The alcohol consumption at the party benefited the hotel by allegedly improving employee morale and employer-employee relations. Additionally, it wasn't uncommon for employees to regularly consume alcohol at the hotel. Based on those factors, a jury could find that Landri acted in the scope of his employment when he consumed alcohol at the hotel's holiday party.

Safe trip home didn't exonerate Marriott

The hotel contended that Landri acted outside the scope of his employment when the accident occurred. The crux of its argument was that for an employer to be vicariously liable, the accident itself, not the consumption of alcohol, must occur when the employee is acting within the scope of employment. Put simply, the hotel argued its potential liability for Landri's conduct ended when he arrived home safely after the party. In support of that argument, it pointed to the "going and coming" rule, which states that absent certain circumstances, an employer generally is not liable for injuries caused by employees traveling to and from work.

The court of appeal rejected the hotel's argument. Rather than focusing on the time of the accident, the court held that the proper question was whether Landri was acting in the scope of his employment at the time he became intoxicated, which was when the risk of accident was created. There was no reasonable justification for limiting the hotel's liability simply because he made it home safely from the party. It's irrelevant that the car accident caused by his excessive drinking occurred at a time when he was no longer "at work." Under the circumstances, the hotel's potential liability continued until the risk created by his intoxication dissipated.

The hotel further complained that it had no right to control Landri's personal conduct, and by imposing liability, the court would be requiring employers to monitor employees who drink alcohol at work functions and

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escort them home. The court of appeal disagreed. The hotel created the risk of harm at its holiday party by allowing an employee to consume alcohol to the point of intoxication. It could have lessened the risk by, for example, prohibiting smuggled alcohol and enforcing the two-drink limit. Alternatively, it could have eliminated the risk entirely by forbidding alcohol at the party.

If an employer chooses to allow employees to consume alcohol at events that benefit the company, fairness requires that the hotel should shoulder the cost of the serious injuries caused by the alcohol consumption. *Alan Purton v. Marriott International, Inc.* (California Court of Appeal, 4th Appellate District, 7/31/13).

Bottom line

The *Purton* decision expands employers' potential vicarious liability for injuries caused by careless or reckless employees. In assessing the risks of serving alcohol at company-sponsored parties and events, consider implementing policies to reduce those risks, including enforcing consumption limits, serving food, and monitoring employees who have overindulged. Ignoring the risks may not only affect your bottom line, but, more important, may prove tragic if a third party is injured by an intoxicated employee's reckless conduct.

The authors can be reached at Futterman Dupree Dodd Croley Maier LLP in San Francisco, mfutterman@fddcm.com and jtouchstone@fddcm.com.