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California Appellate Court Addresses when Employers Are Liable for Injuries Caused by Their Employees

By Helene Wasserman

Under facts never before addressed by a California court, a California Court of Appeal recently ruled that when an on-duty employee injures an individual while engaging in arguably personal pursuits, the employer is still liable for the injuries. *Vogt v. Herron Construction*, No. E052434 (Fourth Dist., Div. Two Nov. 1, 2011).

Background

Herron was the framing subcontractor on a construction project at which Performance Concrete was pouring concrete. Cruz was an employee of Herron and Vogt was an employee of Performance. Cruz's job did not involve driving, though he drove his personal vehicle to work, and, with permission, parked it at the jobsite.

Vogt requested that Cruz move his personal vehicle while on the worksite. While moving his vehicle, he ran over Vogt. Vogt and his wife sued Herron for the damages that ensued. Herron successfully convinced the trial court that the doctrine of *respondeat superior* did not apply because Cruz was not acting in the course and scope of his employment when the accident occurred, and summary judgment was granted in Herron's favor.

The appellate court disagreed. The analysis, in part, hinged on why Vogt asked Cruz to move his truck. Vogt testified that there were at least three reasons for the truck to be moved. First, Cruz's truck was blocking the cement truck. Second, Vogt was concerned about liability that could arise if the cement truck damaged Cruz's truck. Third, Vogt asked as "a courtesy" to Cruz. The court held that it was at least "inferable" that the moving of the truck advanced the construction project and, thus, was an "outgrowth" of the employment.

The court further noted that the accident occurred on the worksite, during the workday. Hence, it was hardly unusual or startling that there would be a car accident.

The court evaluated the facts in the context of other similar decisions. Past decisions determined that, where the injurious "act [was] necessary to the comfort, convenience, health, and welfare of the employee while at work," it would give rise to employer liability under *respondeat superior. DeMirjian v. Ideal Heating Corp.*, 129 Cal. App. 2d 758, 764-774 (1954). In *DeMirjian*, employees were forbidden to smoke on the shop floor, but allowed to smoke in the washroom. An employee who smokes stopped to fill his cigarette lighter with paint thinner (which was provided at work)

on his way to the washroom to smoke. He accidentally pressed the lighter button, and started a fire. The court in that case held the employer was responsible for the damage that ensued.

Conversely, the court analyzed *Bailey v. Filco, Inc.*, 48 Cal. App. 4th 1552 (1996), where the opposite result was reached. In *Bailey*, the employee left the workplace during a *paid* break to buy cookies for herself and another employee to eat while on duty. Her employer was aware of these "cookie runs." The employee got in a car accident while on this "cookie run." The jury found, and the appellate court affirmed, that the employer was not responsible because, while the employee was on duty (and being paid), the accident did not occur while the employee was at work.

The court in *Vogt* further determined that, because it was foreseeable that employees who bring their vehicles to a worksite may need to move them during work hours (in this case, to get out of the way of construction), then doing so is part and parcel of the employment relationship.

Note to Employers

The notion of what constitutes "acts necessary for the comfort, convenience, health, and welfare of employees while at work" has greatly expanded over time. While affording workplace smoke breaks has been abolished for the most part due to fire codes and smoking regulations, new acts "of comfort, convenience, health, and welfare" have arisen, such as allowing comfort or service animals in the workplace. One reading of the *Vogt* case could impose liability on an employer if an employee's comfort or service animal bites an employee or visitor. Employers need to be cognizant of employee conduct, and be certain that legally-mandated injury and illness prevention programs are current and that employees are trained in proper workplace safety. With the new year shortly upon us, it is the perfect time to review your policies and practices with a focus toward ensuring everything possible is done to avoid workplace accidents.

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