

## FEBRUARY 1997 LAW REVIEW

### MOLESTATION LIABILITY EXAMINES SCOPE OF EMPLOYMENT & FORESEEABILITY

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In determining agency liability for sexual molestation by its employees, an employer is held to a higher standard of duty in the selection and continued retention of an employee where there exists a unique opportunity to commit a crime because of the employer/employee relationship. This is particularly true for public park and recreation agencies who are entrusted with the well-being of the children of the community. Particularly, where an employee is placed in a position of supervisory and/or disciplinary authority over children, an employer has a duty to properly screen the applicant. Moreover, an employer has a legal duty to continue to provide screening to determine if the applicant has been convicted of crimes involving moral turpitude. The following four factors are important in determining whether an employer can be held liable for sexual assaults committed by its employees:

(1) whether tortious act (i.e. conduct causing personal injury) was primarily employment-rooted; (2) whether the violence was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether the act occurred during the hours of employment.

All four factors need not be met before liability may be found. Instead, each case will be looked at on its own merits. Specifically, courts will determine whether the employer is was liable for its employee's criminal misconduct because it was either foreseeable or occurred within the scope of employee's authority. As illustrated by the sexual molestation cases described below, agency liability for alleged sexual molestation by its employees or agents tends to be the exception, rather than the rule.

#### SUBSTANTIAL DEVIATION?

In the case of *Cordts v. Boy Scouts of America*, 252 Cal.Rptr. 629 (Cal.App. 3 Dist. 1988), plaintiff alleged that defendant was liable under the doctrine of *respondeat superior* (i.e., the maser will be responsible) for the sexual molestation of her sons by their scoutmaster. The molestation occurred while plaintiff's sons were participating in scouting activities. In her complaint, Cordts alleged that the Boy Scouts of America (BSA) had failed to investigate the scoutmaster, who was discharged from the Air Force for improper sexual conduct. In addition, the scoutmaster had been convicted of child abuse in another situation. The trial court dismissed plaintiff's claims against BSA.

As noted by the appeals court, under the doctrine of *respondeat superior*, the principal or employer is

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liable for the wrongful acts of its agents or employees committed in ,or as part of, its business. On the other hand, the appeals court acknowledged that the tortious (injurious) activity of an agent or employee falls outside the scope of employment if it is motivated by personal malice, or constitutes a substantial deviation from duties for personal purposes. As described by the appeals court, the following “two-prong test” is applied by courts to determine whether the particular conduct of an agent or employee falls within the scope of the individual’s agency or employment:

Either (1) the conduct was required by, or incidental to, the duties of the agent or employee and hence was not a substantial deviation from duties for personal reasons.  
Or (2) the conduct would reasonably have been foreseen by the principal or employer in any event.

According to the court, the test is the same whether the agent or employee is paid or an unpaid volunteer. In assessing “whether an employee’s wrongful act was required by or incidental to his duties,” the court found “the law defines occupational duties broadly.” Further, the court noted the fact that an employee is not engaged in the ultimate object of his employment at the time of the wrongful act does not preclude attribution of liability to an employer. On the other hand, the appeals court rejected any suggestion that employers are strictly liable (i.e., liable without any proof of fault or negligence) for all actions of their employees during working hours. As a result, the appeals court found an employer is not vicariously liable for the employee’s actions, if the employee substantially deviates from his duties for personal purposes.

In this case, Cordts had argued the sexual misconduct was incidental to the scoutmasters duties because it occurred while her sons participated in scouting activities. Specifically, Cordts referenced language in the Scout Manual to support her contention that the scoutmaster’s duties included sex education. Further, Cordts alleged that the scoutmaster’s molestation of her sons occurred during such sex education instruction at scout meetings. Cordts acknowledged, however, that the molestation occurred in a back room, while her boys and the scoutmaster were out of the presence of the other scouts.

In the opinion of the appeals court, the misuse of one’s authority to facilitate sexual misconduct is, generally, solely for personal purposes and entirely unrelated to one’s occupation. Accordingly, the appeals court found the scout leader’s sexual molestation of the scouts constituted a substantial deviation from his duties for personal purposes. The appeals court, therefore, concluded that such conduct was not incidental to his duties as an agent of the BSA.

Having found the conduct of the scoutmaster was not within the scope of his duties as an agent of the BSA, the appeals court then applied the second prong of the test described above, i.e, whether such

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behavior was reasonably foreseeable to BSA. Specifically, the issue was whether the BSA could have reasonably foreseen that its scoutmaster would sexually molest his boy scouts.

In so doing, the appeals court distinguished between foreseeability as a test for negligence and foreseeability in the context of *respondeat superior*. In negligence, the appeals court noted that "foreseeability" means "a level of probability which would lead a prudent person to take effective precautions." On the other hand, the court found foreseeability, as a test of *respondeat superior*, must be examined in the context of the particular enterprise. Specifically, the appeals court would find foreseeability under the doctrine of *respondeat superior* where an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the costs of the employer's business.

Applying this foreseeability principle to this particular case, the appeals court found sexual misconduct between a scoutmaster and his charges was so unusual and startling that it would be unfair to hold BSA liable under the doctrine of *respondeat superior* for damages caused by this activity. The appeals court, therefore, affirmed the judgment of the trial court in favor of the BSA.

### EMPLOYMENT PERMITS TOUCHING?

Similarly, in the case of *M.V. v. Gulf Ridge Council of Boy Scouts*, 529 So.2d 1248 (Fla.App. 2 Dist. 1988), the minor plaintiff, M.V., was allegedly molested by an employee of the defendant boy scout council. In his complaint, plaintiff alleged that the alleged Council was negligent in retaining and supervising its employee while M.V. was attending the Council's boy scout camp. The trial court granted summary judgment to the Council.

On appeal, the issue whether the Council could be held liable for alleged emotional distress caused to a boy scout by the intentional homosexual acts of a first aid attendant at a camp operated by Council. According to the appeals court, to be liable for negligent retention and supervision under the doctrine of "respondeat superior," the Council had to have "constructive or actual knowledge of the employee's unfitness to work as a first aid attendant at the camp." As cited by the appeals court, the "convenient test" for determining the applicability of *respondeat superior* is "whether the employee was doing what his employment contemplated":

Under doctrine, employer liable for negligent acts of employees quintessential factor in determining master's liability for the servant's wrongs, either intentional or negligent whether the servant acted within the real or apparent scope of the master's business. There is no liability for the master when the servant steps aside from his employment to

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commit a wrongful act to accomplish some purpose of his own... [On the other hand] an employer may be liable for the intentional act of the employee under *respondeat superior* if the employee's misconduct occurred within the scope of employment.

Applying these principles to the facts of the case, the appeals court characterized the alleged wrongful act of the Council's employee as "a mixed bag" involving "medically permitted touching followed by unpermitted touching." Accordingly, the appeals court found the trial court had erred in granting summary judgment to the defendant Council.

In the opinion of the appeals court, the facts of this case presented a jury question of "whether the employee's intentional tort was within the scope of his employment with the Council" as a first aid attendant at the camp. The appeals court, therefore, reversed the judgment of the trial court in favor of defendant and remanded (i.e., sent back) this case for further proceedings consistent with this opinion. On remand, a jury would determine whether the employee's molestation was within the apparent scope of authority which would allow a first aid attendant to have physical contact with the scouts attending the Council's camp.

### EMPLOYEES' DUTIES, UNEXPECTED?

In the case of *Randi F. v. High Ridge YMCA*, 524 N.E.2d 966 (Ill.App. 5 Dist. 1988), plaintiffs alleged that their 3 year old daughter was beaten and sexually assaulted by a teacher's aide at a day care center operated by the defendant YMCA. The parents argued that the YMCA was liable because the alleged assault and molestation took place during the course of employee's employment at day care center. Specifically, the parents contended that the scope of employment in this instance included the "care, custody, control, supervision and discipline of Randi and the other children." In response, the YMCA argued that it could not be held liable under the doctrine of *respondeat superior* for the acts of this particular employee because those acts were "not done within the scope of employment." The trial court agreed and dismissed plaintiff's claims against the defendant YMCA. Plaintiff appealed.

As noted by the appeals court, under the doctrine of *respondeat superior*, "an employer may be liable for the negligent, willful, malicious or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer." On the other hand, the appeals court acknowledged that "the employer is not liable to an injured third party where the acts complained of were committed solely for the benefit of the employee."

In determining "whether an employee's act was committed within the scope of his employment," the appeals court stated it would determine "whether the act was conducted substantially within the

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constraints of authorized time and location of the employment.” In addition, the court would also consider “whether the conduct was actuated at least in part by a purpose to further the employer's business.” According to the appeals court, “if an employee commits an intentional tort with the dual purpose of furthering the employer's interest and venting personal anger *respondeat superior* may apply.” In particular, under the doctrine of *respondeat superior*, the appeals court noted that an employer may be liable for an employee's sexual assault where such intentional misconduct is “not unexpected in light of the employee's duties.”

The specific issue in this instance was, therefore, whether the employee had “departed from the scope of employment by acting purely for her own interest, rather than at least in part for the employer.” Under the circumstances of this case, the appeals court found that the employee was “not acting within the scope of her employment, but solely for her own benefit when she assaulted and sexually molested plaintiffs' daughter”:

It cannot reasonably be said that assaults by a teacher's aide at a day center are encompassed in her duties, or were similar to those duties or could have been anticipated by her employer. We hold that under facts presented, the assault and sexual molestation of a 3 year old child by a teacher's aide at a day care center is a deviation from the scope of employment having no relation to the business of the day care center or the furtherance thereof.

The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant YMCA.

### REASON TO ANTICIPATE ASSAULT?

In the case of *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 38 (Tex. 1995), plaintiffs sued the defendant boys club following the sexual molestation of their boys by defendant's volunteer worker. Plaintiffs alleged that defendant Boys Clubs had negligently accepted the volunteer worker without investigation or screening and negligently failed to supervise him. The trial court granted defendant's motion for summary judgment.

The court of appeals affirmed finding defendant could not reasonably foresee the volunteer worker's assaults on the boys. Accordingly, in the absence of an element of proximate (i.e., legal) cause, the appeals court found that summary judgment on the plaintiffs' negligence actions was proper. Plaintiffs then appealed to the state supreme court. The issue before the state supreme court was, therefore, whether defendant's failure to investigate, screen, or supervise its volunteers proximately caused the alleged sexual molestation.

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As described by the state supreme court, the elements of a negligence cause of action are a duty, a breach of that duty, and damages proximately caused by the breach of duty. In particular, the state supreme court noted that the components of proximate cause are “cause in fact” and “foreseeability.” According to the state supreme court, the test for cause in fact was whether the negligent act or omission was a substantial factor in bringing about injury, without which the harm would not have occurred. Further, the court stated that foreseeability, the other aspect of proximate cause, required that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission.

Applying these principles to the facts of the case, the state supreme court held, as a matter of law, that the defendant’s failure to investigate, screen, or supervise its workers was not legal cause, i.e., “the cause in fact”, of the sexual molestation. In the opinion of the state supreme court, if defendant had investigated their volunteer’s criminal record, the resulting information, two misdemeanor DWI (i.e., driving while intoxicated) convictions, would not have caused the club reasonably to anticipate his subsequent sexual assaults on the boys. Further, the court found the volunteer worker’s criminal record would not have precluded his working at the boys club. The state supreme court, therefore, affirmed the judgment of the lower court of appeals in favor of the defendant Boys Clubs.