

COPY

Legal
Research
& Writing

Memo
Date: October 29, 2012
To: Attorney Paul Lozada
From: 1st year associate
RE: NEW CLIENT, POTENTIAL DEFENSES

Memo
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Memo

THE COMPLAINT FROM PLAINTIFF ALLEGES MISS DEL'S WAS NEGLIGENT IN HIRING, RETAINING AND SUPERVISING HIS EMPLOYEE AND WAS THE CAUSE OF PLAINTIFFS INJURIES. THE POSSIBLE CAUSES OF ACTION FOR THIS CASE ARE NEGLIGENT HIRING, RETENTION, AND SUPERVISION, VICARIOUS LIABILITY, AND PREMISES LIABILITY.

NEGLIGENT HIRING, RETENTION, AND SUPERVISION

An employer may be held liable to a third party for the employer's negligence in hiring or retaining an employee who is incompetent or unfit. (*Roman Catholic Bishop v. Superior Court* (1996) 42 Cal. App. 4th 1556.)¹ Miss Del's hired an employee without knowing the employee was unfit. Miss Del's did a background check, which came back clear. What Miss Del's did not know previously to the attack is that the employee who assaulted the plaintiff may have used a fake name and birth date to apply for his employment, because he did in fact have a large criminal history of gang related crimes and violence.

We can use the case of *Roman Catholic Bishop v. Superior Court*, which held that the church was not responsible for the sexual assault made by one of their workers because there were no previous records that indicated the priest had a history of sexual abuse on a minor. Liability results because the employer had reason to believe that an undue risk of harm would exist because of the employment. (*Roman Catholic v. Superior Court*.) In our case, which is similar to this case, Miss Del's did not have a reason to believe that the employee would be a risk or cause harm to anyone by being employed, especially since the background check came back clear. Because of this, Miss Del's may not be held liable because they did not have knowledge

¹ *Roman Catholic Bishop v. Superior Court* (1996) 42 Cal. App. 4th 1556. * Hereinafter referred to as *Roman Catholic v. Superior Court*

prior to the incident that the employee had a criminal history, although there is a point that the plaintiffs might bring up in which are in the case of *Florez v. Autozone West, Inc.* (2008) 161 Cal. App. 4th 373.² In this case the worker, who had a previous juvenile history that did not show up in the background check, assaulted a customer. The plaintiffs in that case argued that Autozone could have discovered the records if only it had made a better effort to investigate his past and screening prior to hire.

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The question to ask Miss Del's is what effort did they make in screening the employee? The name and birth date that were used were false, but did the employer check an ID or social security card to see if the information about the employee was correct. If Miss Del's thoroughly checked the validation of the employee's answers, then Miss Del's did all they could do. The plaintiffs may also bring up that in *Florez v. Autozone West*, the records that were found after the assault occurred were only because they were juvenile records, which weren't allowed to be obtained by the employer. The plaintiffs would point out that Miss Del's employee was not a juvenile when the crimes occurred, making the records public knowledge for anyone to look up, so why were they overlooked? If the employee had no previous issues with violence at this employment, then Miss Del's would have no reason to believe the employee was unfit, and would not think to check the public records. It would be hard for Miss Del's to dig deeper if they did not have the employee's real name.

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We can use *Roman Catholic v. Supreme Court*, in which the employee of the church sexually assaulted one of the children who went there. The court held that the church was not liable for negligently hiring the priest because he had no previous record of any sexual assaults, so the church did not see the priest as unfit. Although this case is slightly different than ours, if Miss

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² *Florez v. Autozone West, Inc.* (2008) 161 Cal. App. 4th 373 *Hereinafter referred to as *Florez v. Autozone West*

Del's did all they could do for a background check and it came back clean, then we can use what the court said in this case and compare it to ours since there was nothing in either of the employees records when the background check was conducted for business' to see the employee as unfit. Neither the church nor the restaurant had prior knowledge of the danger the employees were to the business. Based upon this and prior cases, Miss Del's may not be held liable for their employees actions because they were not negligent in hiring, retaining, and supervising him unless an un-thorough background check was performed on the employee. Man
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VICARIOUS LIABILITY

An employer is vicariously liable for the torts of his employees committed within the scope of employment under respondeat superior. An employer may be held liable even if they did not authorize the tort. (*Rogers v. Kemper Construction Co.* (1975) 50 Cal. App. 3d 608.)³ R

The basic duties and tasks involved with restaurants and their staff is: making food, serving food, tending to customers of the restaurant, and cleaning up the restaurant. Making the customer leave happy is what the food industry is all about. Attacking a customer in the parking lot while he was leaving is not in the scope of the duty of employment. In the case of *Rogers v. Kemper*, the court explained foreseeability means that in the context of a particular business, an employees' conduct isn't so unusual that it would seem unfair to include the loss resulting from it among other costs of the business, which would make the attack unforeseeable. A
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The plaintiffs may also bring up how in the *Rogers v. Kemper* case, the defendant was found liable for his worker who assaulted a subcontracted worker while off the clock. The difference between that case and our case, is that the worker in *Rogers v. Kemper* was acting in the scope of

³ *Rogers v. Kemper Construction Co.* (1975) 50 Cal. App. 3d 608. *Hereinafter referred to as *Rogers v. Kemper*

Direct Point!

employment even though he was "off-duty". There was no evidence of personal malice unrelated to the employment. In our case however, the fight was entirely unrelated to the employment.

The employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employees work. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th at p. 297.)⁴ In this case, a doctor of the hospital sexually assaulted a patient when she went in to get an ultrasound. The assault of this case was the doctor's decision to engage in the conduct unrelated to his duties. His actions were not foreseeable from the nature of the work he was employed to perform. The reasons for doing so did not derive from events or conditions of employment.

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The nature of the work at a restaurant is customer service based. The attack to the plaintiff was not related to employment, but what appears to be gang related. This is based off of the security video of the inside of Miss Del's the day of the attack that our private investigator obtained. The fight is based off a gang correlation. This can relate to *Lisa M. v. Henry Mayo*, in the sense that the duties of employment had no connection to the personal decisions made by the employee to attack the victim.

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The plaintiff may bring up the statement in the case of *Rogers v. Kemper* that the court noted that the assailants and victims strangers until their work brought them together so the dispute could not derived from personal malice unrelated to the employment.

We can point out the "but for" causation, meaning that although the employment brought the victim together in place and time, it is not enough. The incident leading to the injury must be an outgrowth of the employment and the risk of the injury must be involved in the work environment. (*Lisa M. v. Henry Mayo*.) This case is similar to ours in a few ways. The reasons

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⁴ *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th at p. 297. *Hereinafter referred to as *Lisa M. v. Henry Mayo*.

that the employee assaulted the plaintiff were personally motivated, they were not generated by an outgrowth of workplace responsibilities. We do not know if the plaintiff and the employee in our case knew each other prior to the assault or had any gang correlation to one another, but the decision to attack the plaintiff was a personal attack on the employee's behalf. In Lisa M. v. Henry Mayo the court found that the reasons for attacking the plaintiff weren't provoked by the prescribed exam and even though the stage may have been set, the actions were his. Based on respondeat superior it is inconsistent and unfair to hold the hospital liable.

PREMISES LIABILITY

Business proprietors such as restaurants and bars owe a duty of care to their patrons to maintain the premises in a safe condition, which includes reasonable steps to secure common areas from foreseeable criminal acts of third parties likely to happen in the absence of these measures. (*Delgado v. Trax Bar & Grill* (2008) 36 Cal. 4th 224.)⁵

In the case of *Delgado v. Trax*, an assault occurred in the parking lot of the Bar and Grill. The fight was between patrons of the bar, the attacker being gang members. The security guard was given a forewarning of a fight and then asked the victim to leave, and when doing so he was attacked in the parking lot. This case is similar to ours because the plaintiff got attacked in the defendant's parking lot, but the difference is that the "third party" is Miss Del's employee. The security guard was told prior to the attack that a fight was likely to occur, where in our case the fight between the employee and the plaintiff was unforeseeable until the fight occurred.

There is a general duty of care to patrons by business proprietors, but no act to protect others from third parties unless the defendant had a special relationship with the other person. The general duty of maintenance is to take steps to secure common areas against foreseeable crimes from third parties likely to occur. (*Delgado v. Trax*.) If no similar crimes have happened Miss

⁵ *Delgado v. Trax Bar & Grill* (2008) 36 Cal. 4th 224. * Hereinafter referred to as *Delgado v. Trax*

Del's couldn't secure the common area against crime because it wasn't foreseeable. Crime in the parking lot of a restaurant is not likely. The security guard in the previous case did have prior notice of a fight while Miss Del's did not.

The only point the plaintiff may make is that the previous cases have been an attack by a third party, not an employee, which we will then bring up *Sharon P. v. Armon, Ltd.* (1999) 21 Cal. 4th 1181⁶, where the court held in the absence of prior similar incident or other evidence showing a foreseeable risk of a violent criminal assault, the business owner did not owe the plaintiff a duty to deter criminal assaults in its underground garage. (*Sharon P. v. Armon.*) Unless there were previous criminal attacks in the parking lot of Miss Del's, Miss Del's should not be held liable because the attack in the parking lot was not foreseeable.

CONCLUSION

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In this case, the plaintiff is trying to hold Miss Del's liable for the criminal attack to the plaintiff by the employee of the Miss Del's. Miss Del's hired the employee based off of his clear background check done by their national office, so Miss Del's had no reason to believe he would be unfit for the job. The fight that occurred was after the employee clocked out and was no longer engaging in duties within the scope of employment. The fight, which appears to be gang related, has no correlation with the business or employment duties. The fight would be unforeseeable considering Miss Del's did not know about the employee's violent history and no similar occurrences have happened in the parking lot prior to this attack. What the court needs to decide is should and could Miss Del's have done more in the background check process to make sure the employee was who he claimed he was at the time. If not, Miss Del's could not have foreseen these events based on what they knew about the employee.

⁶ *Sharon P. v. Armon, Ltd.* (1999) 21 Cal. 4th 1181. *Hereinafter referred to as *Sharon P. v. Armon.*

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ORGANIZATION EXCELLENT. EASY TO READ. CLEARLY
IDENTIFIED SECTIONS W/ SEPARATE TEXT
IN EACH.

FORMATTING OK, COULD BE BETTER W/ ITALICS
W/ ABBREVIATED CASE NAMES.

RULES GREAT USED RELEVANT CASES AND
BLANDED THEM INTO THE FACTS/ARGUMENT
NICELY.

ANALYSIS LOGICAL, RULE DRIVEN, BLENDED
W/ FACTS. GOOD JOB. ONLY COULD
BE BETTER IF WRITER COULD ANTICIPATE
THE OPPOSITE + DISCUSSED MORE
THOROUGHLY