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Issued by the Labor and Employment Practice Group July 24, 2006

Recent Michigan Court Opinions Address Employer Liability For Employee Misconduct

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Generally, an employer is not liable for intentional torts committed by their employees outside the scope of employment. However, Michigan courts recently re-examined employer liability for employee wrongdoing in three cases, and the results are mixed.

First, in *Zsigo v Hurley Medical Center*, the Michigan Supreme Court refused to adopt an exception recognized in other states that would hold employers liable for the intentional act of an employee where the employment relationship aided the employee in committing the tortious act.

In *Zsigo*, a nursing assistant employed by the facility and left alone in a patient's room in the course of his employment duties sexually assaulted a patient. The patient/plaintiff argued that, because the employment relationship created the opportunity for the assault to occur, the employer should be held liable. The Supreme Court disagreed and refused to recognize an exception where the only basis for liability is that the employee was "aided in accomplishing the tort by the existence of the agency relation." The court reasoned that such an approach would essentially create strict liability for employers.

However, the Michigan Court of Appeals recently upheld employer liability for the intentional act of an employee under a negligent retention theory in *Brown v Whittar Steel, Inc*. Under this theory, an employer may be liable for intentional torts committed by an employee acting beyond the scope of employment if the employer knew, or should have known, of the employee's vicious propensities. The appellate court recognized that knowledge of an employee's "vicious propensities" may be imputed where the employer was aware of sexually aggressive or predatory remarks made by the employee regardless of whether he had any prior criminal record or history of violence.

Finally, in *Perez v Ford Motor Co*, a case involving alleged sexual harassment by a supervisor, the appellate court held that an employer may be liable for an employee's misconduct if a hostile work

environment is created and if the employer has actual or constructive notice of the harassment. Generally, constructive notice is found where, objectively, the pervasiveness of the harassment gives rise to an inference of knowledge.

In *Perez,* the defendant had received several complaints from female employees (but not the plaintiff) about a supervisor's sexual harassment. Although the employer was unaware of any incidents involving the plaintiff, the appellate court held that constructive notice may be found based on the general work environment even where the employer is unaware of any specific instances relating to that particular plaintiff.

If you need further information concerning the cases above or require assistance in updating policies, please contact your Plunkett & Cooney attorney directly, or in the alternative, Plunkett & Cooney's Labor & Employment Law Practice Group Leader Theresa Smith Lloyd at (248) 901-4005.

Blmfield.PD.FIRM.767110-1