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Management Alert

Off-Duty Trip for Yoga and Yogurt Creates Tort Liability for Employer

Under the traditional "going-and-coming" rule, employers are not liable for torts that an employee commits while commuting to or from work. On September 17, 2013, in *Moradi v. Marsh USA, Inc.*, the California Court of Appeal held that, because an employer required an employee to use her personal vehicle for work-related trips during work hours, the employee was acting within the scope of her employment when she got in a car accident that took place while running personal errands on her way home after work.

The Facts

Marsh USA, Inc. is an insurance company that allegedly required some employees to use their personal vehicles to engage in sales and client development. Judy Bamberger was an insurance salesperson for Marsh who used her personal vehicle to commute to and from work, as well as to attend off-site appointments and meetings two to five times per week.

On the day of the accident, Bamberger used her personal vehicle to attend a company-sponsored program. At the end of the workday, she planned to stop for frozen yogurt and to attend a yoga class on her way home. As Bamberger was driving to the yogurt shop, she collided with Plaintiff Majid Moradi.

Moradi filed suit against Bamberger and Marsh. The trial court granted Marsh's motion for summary judgment on the ground that Bamberger was not acting within the scope of her employment at the time of the accident. Moradi appealed.

The Appellate Court Decision

The Court of Appeal reversed the trial court ruling and concluded that Bamberger was acting within the scope of her employment at the time of the accident because Marsh required her to use personal vehicle during work hours.

Under the legal doctrine of *respondeat superior*, an employer is vicariously liable for tortious actions committed by an employee if such actions are within the scope of the employee's employment. Generally, the going-and-coming rule immunizes employers from liability for torts committed by employees during their ordinary commutes because such activities are considered beyond the scope of employment.

There is, however, a "required-vehicle" exception to the rule. This exception arises where the employer derives sufficient incidental benefit from the use of the employee's personal vehicle. The exception can apply when the use of a personally owned vehicle is either required as part of the employment, or agreed to by the employee and relied upon by the employer.

The Court of Appeal concluded that Marsh was liable because the "required-vehicle" exception applied. The court was persuaded that Marsh received a sufficient incidental benefit by not providing office cars to its employees while possessing the means to require those employees to make off-site visits. In support of its finding, the Court of Appeal noted that Bamberger used her personal vehicle at least two to five times per week for work-related purposes. On the date of the accident, Bamberger had just used her car to attend a company-sponsored program, and she had planned to use her car the following day to meet a prospective client.

The Court of Appeal also concluded that holding Marsh liable was fair because Bamberger's planned stop was a foreseeable and minor deviation that did not change the incidental benefit to Marsh in having its employees use their personal vehicles during work hours. Under the test for *respondeat superior* liability, "foreseeability" merely means an employee's conduct is "not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." Thus, the Court of Appeal held that getting something to eat on the way home was a minor deviation, was foreseeable, and would support a finding of liability under a *respondeat superior* theory.

The court rejected the employer's argument that the "special-errand" exception, and not the "required-vehicle" exception, applied. The "special-errand" exception provides that an employer will be vicariously liable for an employee's tortious conduction only if the employee is running a "special-errand" for the employer during what would ordinarily be the employee's routine commute to or from work. Since Bamberger was merely heading home from her office, Marsh argued that the ordinary commute was still outside the scope of her employment.

The court, however, declined to apply the "special-errand" exception because Bamberger's job duties required frequent use of her personal vehicle, and Marsh required her to make her personal vehicle available for off-site visits. As a result, the required-vehicle exception to the going-and-coming rule applied, and Marsh was liable.

What *Moradi* Mean For Employers

In certain circumstances, the *Moradi* case has the potential to expand an employer's potential liability stemming from employee commutes to and from work. Consequently, employers who require their employees to use their personal vehicles for business purposes should carefully evaluate the situation, including considering steps to make sure that such activities are covered by the company's liability insurance policy.

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