RECENT DECISION HOLDING NO VICARIOUS LIABILITY ON PART OF CITY FOR ALLEGED SEXUAL ASSAULT BY FIREFIGHTERS

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In M.P. v. City of Sacramento (2009) 177 Cal.App.4th 121, the Third Appellate District declined plaintiff/appellant's efforts to expand the scope of vicarious liability set out in Mary M. v. City of Los Angeles to a situation involving the alleged sexual assault of plaintiff by on- and off-duty Sacramento firefighters. In rejecting plaintiff's arguments and affirming the trial court's finding of no vicarious liability on summary adjudication, the M.P. court also observed that not only is the precedent of Mary M. limited to those situations involving uniformed on-duty police officers, but its viability is dubious given the fact the Chief Justice of the California Supreme Court has called it an "aberrant holding" that was "wrongly decided."

The M.P. court goes through a detailed discussion of the events of the alleged assault, which occurred during the "Porn Star Costume Ball." In brief, plaintiff was a photographer at the event and decided to hang out with the firefighters on their fire engine "believing she could trust [them]." Some of the firefighters were drinking. Plaintiff alleged the City of Sacramento Fire Department had a policy that allowed firefighters to take fire trucks and engines to "bars and parties, and with captains present, pick up on women and take women on their fire trucks" where they allegedly took advantage of the goodwill firefighters had post-9/11. Based on this scenario, plaintiff/appellant claimed the precedent of Mary M. should control and the City should be vicariously liable to her for the "egregious conduct" of the firefighters and "undue risk" they posed to the public, and because the City "ratified" the firefighters' conduct.

The Court of Appeal ruled that "as a matter of law, the alleged sexual assault by firefighters in this case was not conduct within the scope of their employment and cannot support a finding that their employer, the City of Sacramento, is vicariously liable for the harm. The trial court so ruled—a decision we now uphold." [1]

While ordinarily a public entity is "not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person," there is an exception to the rule: "'A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action

[1] This case has a very convoluted procedural history; for purposes of this summary, I will confine the discussion to the motion for summary adjudication on the vicarious liability issue.

against that employee or his personal representative.' Simply stated, a public entity employer 'is vicariously liability for the torts of its employees committed within the scope of the employment.'"

Though imposition of vicarious liability is a "departure from the general tort principle that liability is based on fault," it is a "rule of policy" based on risk allocation. The Supreme Court has set out three policy reasons for imposing vicarious liability on an employer for the tortious conduct of employee acting within the scope of his employment: "1) To prevent recurrence of the tortious conduct; 2) to give greater assurance of compensation for the victim; and 3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury."

The appellate court also observed an employer's vicarious liability is not limited to an employee's negligent acts—an intentional and even criminal act may fall "within the scope of employment, but only if the act has a 'causal nexus to the employee's work.'" Typically, whether a particular act was "within the scope of employment" is a question of fact. However, it becomes a question of law "when the facts are undisputed and no conflicting inferences are possible."

Based on the reasoning set out in cases like Lisa M. v. Henry Mayo Newhall Memorial Hospital and Farmer's Insurance Group v. County of Santa Clara, the court said "both the Mary M. decision itself, and subsequent decisions by the California Supreme court dictate we not extend vicarious liability to the alleged sexual assaults by the firefighters in this case."

The court also went through the policy considerations at play in reaching its decision: 1) the victim failed to explain how imposition of vicarious liability in this case would prevent the "recurrence of such untypical, tortious conduct;" 2) while vicarious liability might give a "greater assurance" of victim compensation, the consequential costs of compensating victims in this manner are unclear and may do more harm than good; and, 3) it would "be inequitable to impose vicarious liability on the City, which gained no 'benefit from the enterprise that gave rise to the injury.'"

This is a good decision for all employers, not just public entity employers, because it not only states the aberrational nature of the Mary M. decision, but because it relies on and reinforces the importance of those decisions that have held sexual misconduct by an employee is not, as a matter of law, the basis for imposing vicarious liability on the employer. "In some cases, the relationship between an employee's work and the wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of the employment."

The appellant has filed a petition for review with the Supreme Court and respondent has

filed an answer to the petition. An update on the status of the petition may be found by going to the appellate court website: http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1919561&doc_no=S176223

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