

Michigan Court Considers the Aided-in-the-Agency-Relation Exception

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Except for statutory violations, such as discrimination and retaliation, employers generally are not liable for their employees' misconduct committed outside the scope of their duties. In some states, however, employers can be liable when the employer-employee relationship itself aids employees in committing the misconduct. This is known as the aided-in-the-agency-relation exception. Whether Michigan is such a state is still up for debate. Based on a footnote in a prior Michigan Supreme Court decision, plaintiffs' lawyers in this state have argued that employers can be liable for employee wrongs like assault and battery when the employment relationship itself enables the misconduct, even when the conduct is directed against non-employees. Recently, in *Salinas v Genesys Health Sys*, the Michigan Court of Appeals took a short step to rein in that argument. Even so, the question remains whether employers will be liable for a variety of ordinary employee misconduct.

On the one hand, an employer will not be liable where the employment relation merely gives a bad employee access to the harmed party. In *Salinas*, plaintiff alleged that a hospital nurse sexually assaulted her while she was an intensive care patient and sued the hospital seeking damages for assault, battery and intentional infliction of emotional distress. Plaintiff argued that the hospital should be responsible because its employment of the nurse enabled the misconduct by giving the nurse access to her in her vulnerable condition. Rejecting the argument, the court observed that the aided-in-the-agency-relation exception does not clearly apply in Michigan, and, even if applicable, it does not create employer liability where the employment relation merely renders the complaining party *available* to an employee.

The *Salinas* court's refusal to reject the exception outright, however, is cause for some concern. *Salinas* did not completely free employers from liability for their employees' tortious conduct, particularly where employers render others more vulnerable to harm. As *Salinas* made evident, employers will not necessarily be held liable for exposing people who are already vulnerable – such as intensive care patients – to wrongdoers. But they can be liable where they actively make persons more vulnerable – as when they place employees under the supervisory authority of wrongdoers. This suggests that an employer might be responsible, for example, for ordinary torts committed by a supervisor against a subordinate employee.

Given the possibility of liability, employers can and should take steps to limit their exposure for employee wrongdoing, such as screening applicants for employment and implementing policies prohibiting acts of misconduct like assault and battery. Employers should also inform their workforce that a violation of such Company policies could lead to discipline up to and including discharge. By taking reasonable steps to prevent an errant employee from preying upon vulnerable persons, employers hopefully can steer clear of making others more vulnerable to misconduct and avoid litigation.

If you have further questions about this alert you may contact our Labor and Employment Group; Adam S. Forman at (313) 496-7654, email: forman@millercanfield.com; or Saura James Sahu at (313) 496-7653, email: sahu@millercanfield.com. This message is for general information only and should not be used as a basis for specific action without obtaining further legal advice.