WINTER 2018

atissue

A **STONE** | **DEAN** PUBLICATION

Connecting you to trending and relevant legal developments in California

inside this issue:

A Word from the Partners

Happy New Year to clients and friends of Stone | Dean! This Winter Edition of At Issue gives our readers a view into important issues that affect us all. We address the "parting of ways" between an employee and their employer, and offer insight when an employer is responsible for the conduct of its employee while at work. We also take this opportunity to report on two recent successful trials handled by our esteemed panel of trial attorneys in areas of premises liability and insurance law.

As we transition to a new year, we appreciate the opportunity to serve our clients with integrity and understanding, giving them exceptional value at every step of the way. Without our clients, we would not exist, so thank you for the loyalty and continued support. We hope you all have a safe, healthy and prosperous 2018!

Cheers,
Greg Stone and Kristi Dean

Q&A with
Kori Macksoud, Esq.

Kori Macksoud is the latest addition to Stone | Dean's team of attorneys. Having worked at the firm as a Law Clerk while working her way through law school, Kori passed the bar last year and now begins work as an Associate Attorney. We caught up with her to get her thoughts on the bar, her new position, and more. To read more about Kori Macksoud, Esq., visit her profile at http://stonedeanlaw.com/our-people/attorneys/kori-macksoud/.

Congratulations on passing the bar! What was the most difficult part of your preparation for taking the bar exam? The most difficult part of preparation for taking the bar exam is organizing your whole life to be put on pause. Bills, family, friends and so on. During bar prep you have to get into the mentality that you exist solely for bar preparation, and every factor imaginable is challenging your commitment to it.

What made you decide you wanted to be an attorney? I'm not sure. I feel like I was born to do it. I tell everyone if there is anything else in the world they would rather do, then do that. Law school alone is such a huge commitment and truly not for the faint of heart.

When did it first hit you that you're a lawyer? It still hasn't hit me.

What's the best way to unwind after a stressful day? I think the best way to de-stress is to count your blessings. I always try remember that there was a time in life when all I wished and hoped and prayed for was to be sitting here answering an ATTORNEY!!! Q&A.

What do you enjoy doing in your free time? I love to travel and have visited eight different countries so far, including France and Jamaica. I'm also a great lover of history. I really enjoy being entrenched in the histories of other cultures by reading about them and visiting their countries.

What's been the strangest part of transitioning from a staff member at the firm to a lawyer? Definitely the realization that the personal relationships that I have developed with staff members will change as a result of my new role in the firm.

Do you believe your time at Stone | Dean contributed to your education? 100% yes. In general, law school does not teach law practice. Rather, law school teaches theory. Stone | Dean has given me the most amazing opportunity to learn the practice of law hands-on, from some of the most wonderful, talented and committed attorneys.

If you could go back in time and tell yourself one thing when you began law school, what would it be? It's worth it.

How did you feel when you realized you had passed the bar? I just felt really accomplished and proud. It was the final piece to a massive puzzle. The best part was seeing how proud my parents were.

So far, what is your favorite part about being an attorney? Why? I don't know if I am qualified to have a favorite part yet. It is still very much a learning experience.

What type of legal work do you look forward to doing in the future? I look forward to every bit of it. I specifically look forward to having the opportunity to practice in the field of ethics, state licensure and perhaps wills, trusts and estates in the future.

You've done a lot of international traveling. If you could practice law in any other place in the world, where would it be, and why? I'm perfectly happy to practice law here. I think that the United States has one of the finest judicial systems in the world. Besides that, most of the places I've traveled to still require their attorneys to wear funny wigs!

Which type of law do you find most interesting? I find criminal law to be the most interesting, but only from a spectator's point of view. I don't know if I would be happy practicing in that arena.

Parting Isn't Always Such Sweet Sorrow

By Robyn McKibbin, Esq.

There are several ways the employment relationship can end. How it ends triggers different rights and obligations. This article addresses rights of employees and obligations of employers during an employee's voluntary resignation, involuntary termination, and layoffs.

Payments

When an employee quits with 72 hours' notice or more, the employer must pay all wages and accrued, unused vacation or PTO benefits on the last day of work. "Quitting" means leaving a job and includes retirement. If an employee gives less than 72 hours' notice, all wages and accrued, unused vacation or PTO benefits must be paid within 72 hours after notice is given.

Unless the employee specifically requests payment by mail, the employer may hold the final paycheck at the location the employee worked until it is picked up. If the employee requests his/her final check by mail, the mailing date is considered the payment date. If the employer mails the final paycheck without an employee's request, the employer risks waiting time penalties if the check is lost, or if the employee shows up to pick up the check after it was mailed and before it is delivered.

Waiting time penalties continue the departing employee's wages on a day-to-day basis until the final paycheck is delivered, up to a maximum of 30 days. The penalties apply to exempt and nonexempt employees alike.

When an employer terminates an employee, final payment is due upon termination and must be paid where the employee is located at the time of termination. Certain industries are granted exceptions to the final paycheck requirement. If an employee works remotely, the final paycheck must be delivered to the employee when the employer informs the employee, "You're fired." Similarly, an employee who is hired to work only one day must be paid at the end of that day.

Commissions are wages and are subject to the same rules about timing of payments. However, many commission plans delay payment to the employee until payment is received from the client/customer by the employer. Any amounts that can be readily calculated at the time of separation should be paid to the employee. Commissions not yet "earned," e.g., payment not yet received, are not subject to the final paycheck deadline.

If an employee authorized direct deposit of wages, this ceases immediately upon termination. The employer can pay final wages by direct deposit only if the employee voluntarily authorizes the employer to do so and the wages are deposited upon termination. The employer cannot make the employee wait until the next normal pay period for his/her final paycheck.

Severance pay is not required by law. Employers should be cautious when offering severance pay to a departing employee because it sets a precedent for future terminations. Not offering severance to a subsequent employee may be deemed discriminatory. Employers typically offer one (1) to two (2) weeks of severance pay for each year of employment. Some employers are more generous.

Severance pay is usually not considered wages for the purposes of determining eligibility for unemployment benefits. Meaning, an employee will not receive less unemployment benefits if severance is paid.

Unemployment Benefits

Employees who are involuntarily terminated usually are entitled to receive unemployment benefits. Benefits are paid to employees if they:

- Have received enough wages during the base period to establish a claim;
- Are totally or partially unemployed;
- Are unemployed through no fault of his/her own;
- Are physically able to work;
- Are available for work;
- Are ready and willing to immediately accept work;
- Are actively looking for work; and
- Are approved for training before training benefits can be paid.

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Stone | Dean's Shannon Carpinelli is Vegas Strong

Whether it's for paying their bills or receiving settlement checks, many of Stone | Dean's clients know and work with our controller, Shannon Carpinelli. Having worked alongside Gregory Stone for over 27 years, her experience spans everything from secretarial and paralegal work, to life as controller and office manager. In fact, Shannon has worked beside Greg since before the inception of Stone & Rosenblatt, and been with him longer than anyone else at Stone | Dean.

Following the horrendous news of the Route 91 tragedy in Las Vegas, firm staff were horrified to find out that Shannon was in attendance. Relief came quickly once news broke that she was safe, but never had tragedy struck so close to home. Stone | Dean is ever thankful for Shannon's safe return and strength in the wake of all that's happened.

Shannon attributes the source of her strength to support groups, family, and friends. Online support groups have given her the chance to connect and share experiences with other Route 91 survivors. The tragedy has created a bond between her and the group of five friends who were in attendance, and together they share Route 91 bracelets, Vegas Strong hats, shirts, and survivor stickers.

Case In Focus: Know Your Limits

Leslie Blozan wins at trial, even though the client is found negligent.

Facts

Leslie Blozan won a jury verdict for an insurance wholesale broker client in a case of claimed professional negligence. A pawnshop obtained business insurance, including theft coverage, from its retail broker (commonly referred to as the insured's agent). The agent bought the coverage through a Stone | Dean client, a surplus lines broker.

Pawnshop insurance is a specialized product with unique coverages and exclusions. The insured objected to paying the large premium for the special coverage, and opted to buy a standard policy, with standard exclusions and limitations, for a premium value at 50% of what the specialized policy cost. Although the surplus line broker informed the retail agent that this was not the best policy for the business, the agent and pawnshop agreed they wanted to buy the cheaper policy.

Unfortunately, the pawnshop suffered a large theft loss. Had the pawnshop bought the specialized policy, coverage for the loss would have been severely limited because valuable jewelry was left in the display case overnight. The policy purchased had no such requirement, but had a special limit of $2,500 for items of jewelry valued above $100. The shop claimed the jewelry loss was $750,000, and the insurance company only paid $16,000.

The pawnshop sued the agent and surplus lines broker for professional negligence. The claim was that both defendants should have known what was in the policy and informed the store owner about the $2,500 limitation so he could have made an informed decision.

Legal Standard of Professional Negligence

Ordinarily, a case of professional negligence requires testimony from an expert witness. Liability for professional negligence is based on the professional's duty of care, and breach of that duty. Breach of duty involves failure to act in accordance with industry standards. In this case, there was no standard of care expert testimony. Instead, the retail and wholesale professionals testified and plaintiff argued they were experts in the field.

Plaintiff claimed the retail agent was negligent because he did not know the contents of the policy and was unaware of the $2,500 jewelry limitation until after the insurance company invoked that limit. Plaintiff claimed the broker was negligent in not expressly disclosing the $2,500 limitation, and negligent in selling this type of policy for a pawnshop.

The duties of a retail agent and a wholesale broker differ. The agent has direct contact with the insured, prepares the insurance application and is charged with having sufficient knowledge of the insured's business to have an understanding of the insured's needs. Although a retail agent is not required to make specific recommendations, the agent must be aware of the general business operations as well as the contents of a policy sold.

An insurance wholesale broker's duties are more limited. Generally, the duty is only to provide the coverage requested by the retail agent. The wholesale broker quotes the policy based on the application and on the terms an insurer's underwriter requires. The retail agent receives the quote and is supposed to provide the quote to the insured, obtain the insured's consent to purchase the policy, and request that coverage be bound. The wholesale broker then binds coverage, issues a binder, and in this case, issues the policy. As long as the documents are consistent, the wholesaler has discharged its duties.

Trial and Verdict

The retail agent testified he was unaware of the policy limitations. He claimed he discussed the quote and policy with the insured, but admitted he did not actually read the entire policy. He never questioned the wholesale broker about any aspect of the coverages or limitations, nor did he inform the broker that the insured maintained a large stock of valuable jewelry.

The wholesale broker testified the $2,500 limitation was standard in every commercial property policy of the type sold to the pawnshop. He did not expressly inform the retail agent about the limit because it was commonly known in the industry. He claimed he did tell the retail broker that this was not the best policy for a pawnshop and that if there was better coverage available, the retailer should buy that. However, since the pawnshop and retailer wanted the standard policy, the wholesaler sold it. The quote listed all of the standard policy forms, which were all available for review to the broker. Both pawnshop and retailer were given notice of the policy terms and limitations.

Trial lasted seven days. The jury deliberated for one full day and came back with a verdict of negligence against the retailer and wholesaler. Even though they found the wholesale broker was negligent, the jury believed the negligence was not a substantial factor in causing plaintiff's harm. A verdict of $250,000 was rendered against the retail agent, representing the full limits of the property policy. The jury awarded no damages to plaintiff on behalf of the wholesaler.

From the inception of the case, Stone | Dean offered settlement to avoid costs of defense. Plaintiff never wavered from its demand for 100% recovery. The wholesale broker made a "statutory offer," which is an offer made pursuant to Code of Civil Procedure section 998. If an offer is made, the party to whom the offer is made must meet or exceed the offer at trial in order to avoid paying certain trial costs and expenses not otherwise recoverable. Since plaintiff failed to recover more than the offered amount at trial, Stone | Dean's client was able to submit a cost bill to recover costs and fees, exceeding $20,000.

Case In Focus: Violation of Company Policy is Not a Violation of Law

Defense verdict: Jury agrees a violation of grocery store's own policy does not necessarily mean the store violated the law, finds no negligence, and awards nothing to plaintiff.

As reported in the Los Angeles Daily Journal, Gregory Stone obtained an outright defense verdict on a Los Angeles County Superior Court slip and fall case. "I am proud I was able to obtain the defense verdict efficiently and effectively without the expense/use of any expert witnesses," Greg said.

Facts

The entire incident was captured on the store's video surveillance system. An unidentified customer is seen dropping a bottle of vodka and then leaving the area. A store security guard comes upon the spill; he assesses it, and then is seen leaving the area to get help to clean it up. For the short time the guard steps away, the plaintiff is seen walking through the area and falling hard, landing in the spill and on broken glass. Paramedics transported plaintiff to the local emergency room.

The plaintiff sustained a fractured elbow requiring two surgeries with a required future surgery to remove the hardware. For the most part, the injury and treatment were not disputed.

Unfortunately, despite repeated attempts by the defense, the parties could not reach an out of court settlement requiring the matter be resolved by jury trial.

Trial and Verdict

The store's policy provides under no circumstances should an employee leave a spill. Plaintiff's attorney and his expert argued, the guard should have stayed at the spill to warn customers and wait or ask someone to assist in getting the manager. The guard's failure to do so violated the store's own policy and as such violated the reasonable standard of care.

Greg argued the store policy, while evidence, does not mean the store fell below the standard of care. The guard used his best judgment and was reasonable under the circumstances. The jury agreed and found in favor of the defense, awarding the plaintiff $0. By court order, the plaintiff is responsible to reimburse the defendant for its court costs.

The win was a combined effort. Suzanne Feffer worked up the case with Greg stepping in to do the actual jury trial.

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Employees are ineligible for benefits if they are out of work for one of the following reasons:

- Voluntary quit without good cause;
- Discharge for willful misconduct; or
- Refusal of suitable work.

Workforce Reduction

Sometimes employers face sudden or periodic downturns in their business and need to reduce their workforce. Generally, there is no law that dictates how the employer must select employees for layoff (of course, there are exceptions in certain industries). However, how the employer selects workers for layoff could trigger unlawful discrimination and retaliation statutes.

An employee who believes they were selected for layoff because of membership in a protected class, e.g., pregnant, over 40 years old, etc., or participation in a protected activity, e.g., advocating for the creation of a union, filing a harassment complaint, voicing safety complaints, etc., can file a claim against the company under state and federal anti-discrimination and anti-retaliation statutes. Businesses facing employee lawsuits should retain legal counsel and contact Stone | Dean's Employment Practice Group immediately.

Typically, employers select the last hired to be the first fired. But employers should still take certain considerations into account:

- Has the employee filed a workers' compensation claim?
- Is the employee on a protected leave of absence?
- Is everyone selected for layoff the same gender, nationality, or religious creed?

Start with defining a legitimate business reason for the layoff and set objective criteria to determine which positions are essential and which are not. **And don't forget to document the criteria and selection process.**

Before implementing a layoff, employers should consider other cost reductions such as reduced wages or benefits, reduced hours, and improved internal processes.

Clocked on the Clock:
When is an Employer Responsible for the Conduct of Its Employee While at Work?

By Gregory Stone, Esq. & Gregg Garfinkel, Esq.

What if, as an employer, your employee gets into a physical altercation with a customer while on the clock, causing significant physical injury to that customer? Is the employer responsible for that employee's conduct? What if the conduct had no relationship to the job that the employee was hired to perform?

Surprisingly, this scenario has faced Stone | Dean's clients on several occasions. For example, one pending case involves allegations that, while a customer in a retail establishment exited the bathroom, he bumped into an employee. The employee had words for the customer and a physical altercation ensued. The customer lost the "Bathroom Brawl" and sustained significant injuries. The employer also lost the fight as well because it was sued for its employee's actions.

Under the doctrine of Respondeat Superior (Latin: "let the master answer" also known as the "master-servant rule"), an employer may be vicariously liable for the wrongful acts committed by its employee(s). The rule is based on the policy that losses caused by the torts or wrongful acts of employees, which logically are certain to occur in the conduct of the employer's enterprise, should be placed on the enterprise as a cost of doing business. The basic test for vicarious liability is whether the employee's wrongful act was committed within the scope of employment.

Factors in Determining Course and Scope

There is no bright line test for determining whether an employee's conduct was within the scope of his/her employment. The determination of scope of employment can be a difficult task. However, California courts have identified a variety of factors to be considered and weighed, including:

- the intent of the employee;
- the nature, time and place of the employee's conduct;
- the work the employee was hired to do;
- the incidental acts the employer should reasonably expect the employee to do;
- the amount of freedom allowed to the employee in performing his or her duties;
- and the amount of time consumed in the personal activity.

In addition, an employer may escape liability for the willful, malicious, or criminal actions of its employee, where the employee's misconduct does not arise from the conduct of the employer's enterprise, but instead arises from a personal dispute.

For the respondeat superior doctrine to apply, it is not necessary that the employee's conduct be motivated by a desire to serve the employer's interests. But there must be a "causal nexus to the employee's work." An employer is not liable when an employee inflicts an injury out of personal malice not related to their job. The requirement that a tort be engendered by, or arise from, the work is not satisfied by a mere "but for" test.

This argument arises when excessive force is used in apprehending a shoplifter or in dealing with a belligerent customer. Stone | Dean has handled many cases where liability was imposed upon the employer when an employee was a "little too enthusiastic" in apprehending a shoplifter, or where a customer was punched in the face by an employee when complaining too loudly about the service they received at a fast food establishment.

Example of Employer Not Being Held Liable

"That the employment brought tortfeasor and victim together in time and place is not enough."

The necessary link between the employment and the injury may be described in various ways: "the incident leading to injury must be an 'outgrowth' of the employment; the risk of tortious injury must be 'inherent in the working environment' or 'typical of or broadly incidental to the enterprise [the employer] has undertaken.'"

In other words, simply because the employee was provided access to a customer, and committed an intentional act against the customer, doesn't make the employer liable. In one case of note, Stone | Dean defended a moving and storage enterprise that was sued when one of its employees carved a derogatory comment about its customer on the customer's new pine dresser while moving their goods to a new city. While the case ultimately settled, it was clear to the parties involved that the conduct was not within the employee's scope of employment.

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In another case, Lisa M. v. Henry Mayo Newhall Memorial Hospital, in which an ultrasound technician performed an ultrasound examination and then, under false pretenses, molested the patient, the California Supreme Court sought to clarify the standard of vicarious liability for intentional torts.

Courts may consider whether the tort was foreseeable in the sense that the employment is "such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." The conduct should not be so "unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business."

Applying those principles to the facts in Lisa M., the Supreme Court held the defendant hospital was not vicariously liable for the sexual molestation committed by its employee.

Evidence established "but for" causation in that the technician's employment made it possible for him to meet the patient and to be alone with her in circumstances which made the assault possible. However, the technician's actions were personally motivated by "propinquity and lust" and "were not generated by or an outgrowth of workplace responsibilities, conditions or events." The conduct was not foreseeable in the sense needed for respondeat superior liability. Rather, the assault "was the independent product of [the employee's] aberrant decision to engage in conduct unrelated to his duties. In the pertinent sense, therefore, [the employee's] actions were not foreseeable from the nature of the work he was employed to perform."

Turning back to the Bathroom Brawl, there were no facts to suggest that this altercation was anything other than a personal dispute between an employee and a customer. The fight that occurred had no factual correlation between the performance of the employee's assigned job function and the dispute. Simply stated, other than bringing the employee and the customer together, the employer did not engage in any behavior (active or passive) to increase the risk of this incident. Since there were no facts to demonstrate that this was anything more than a verbal and physical dispute between an employee and a customer, we successfully took the position that liability should not attach to the employer.

Takeaways

Employers are not absolutely/strictly liable for the acts of their employees while on the employer's premise. The law does not consider them as insurers of the safety of all who frequent the employer's business. The determination of whether an employee's conduct is within her/his scope of employment, and the attendant imposition of liability against the employer, involves analyzing many factors. However, what is clear is that where an incident is borne solely out of an employee's spite and ill will toward another, liability will not be imposed against an employer.

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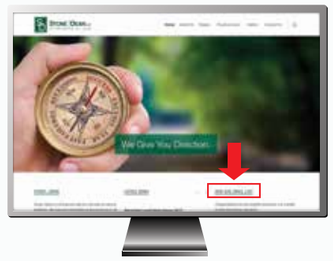

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NEWS & ANNOUNCEMENTS

➔ We are pleased and privileged to announce that our Certified Law Clerk, Kori Macksoud, passed the California Bar Examination on November 17, 2017. Kori was sworn-in weeks later in December, making her the most recent addition to Stone | Dean's team of excellent attorneys. Congratulations, Kori, and everyone else who passed!

➔ In January, Kristi Dean and Robyn McKibbin attended CIWA's California Insurance Industry Conference held in La Jolla, California. The California Insurance Wholesalers' Association is a group of carriers, general agents, wholesale brokers and vendors servicing the excess and surplus line insurance industry and provides its members with invaluable information and business opportunities. Stone | Dean is a proud affiliate and sponsor of CIWA.

➔ In October, Leslie Blozan was successful with another summary judgment against a plaintiff who claimed injury from a fall. Stone | Dean's client had properly inspected and cleaned the floor before a small child dropped yogurt. A minute after the spill, plaintiff stepped in the yogurt, slipped and fell. The court agreed the store did not have adequate time to discover the hazard. Lacking notice, there was no liability and judgment was entered in favor of the store.

➔ Gregory Stone was a presenter at a Kroger attorney conference in Cincinnati in October attended by counsel from across the country. Greg presented on the topic of "Reptile Lawyering" and also received an award for Defense Victories, recognizing his jury trial victories for Kroger over the last 27 years.

➔ Congrats to Gregory Stone and Suzanne Feffer for receiving an outright defense verdict for one of Stone | Dean's retail clients on a slip and fall jury trial. Sue worked the case up and then Greg picked it up from there and tried it to a jury — true team effort!

➔ Stone | Dean sponsored the Golf Classic hosted by the Insurance Brokers and Agents of Burbank, Glendale, and Pasadena in late October. The firm was a Closest-to-the-Tee Sponsor at Hole 8 and handed out Stone | Dean golf towels to IBA-BGP members.

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