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Michigan Supreme Court Limits Employer Liability for Employee's Intentional, Unforeseeable Quid Pro Quo Sexual Harassment

In a significant change in Michigan sexual harassment law, on July 29, 2011 the Michigan Supreme Court issued a 4-3 decision in *Hamed v. Wayne County et al.*, which overruled its 1996 decision of *Champion v. Nation Wide Security Inc.* *Champion* had imposed strict liability on employers under Michigan's Elliott-Larsen Civil Rights Act (ELCRA) for the intentional, criminal sexual acts of its employees. In *Hamed*, the Court expressly overruled *Champion* and changed law which had been in place for the last 15 years. *Hamed* holds that an employer's liability for criminal acts of an employee under the ELCRA is now limited to those acts the employer could have reasonably foreseen.

Background

The plaintiff was arrested in Livingston County on a warrant for unpaid child support. She was transferred to the Wayne County jail due to additional outstanding warrants in Wayne County. When the plaintiff arrived at the jail, a male deputy subjected her to sexually charged comments and offers for better treatment in exchange for sexual favors. She resisted, and the deputy moved her to an area of the jail where there was no surveillance cameras and sexually assaulted her. The deputy was charged and convicted of criminal sexual conduct. The plaintiff sued Wayne County alleging claims under the public accommodations portion of the ELCRA for sexually hostile environment and quid pro quo sexual harassment (meaning she had been offered more favorable treatment in exchange for performing sexual favors).

The Court's Ruling

The *Champion* case had held that an employer was strictly liable for the criminal sexual acts of an employee who used the authority of his position to carry out sexual harassment. That rule would have led to Wayne County being held liable for the acts of the deputy in this case. However, the Court decided that its prior holding in *Champion* would no longer be the law in Michigan. The Court held that the common-law rule that an employer is not liable for the intentional and unforeseeable criminal acts of its employee was not abrogated by the ELCRA. According to the Court's majority, "Not only would holding employers vicariously liable for such acts be unfair, but doing so would attempt to further an impossible end by requiring employers to prevent harms they cannot anticipate, which are, in essence, unpreventable."

The Court found that the deputy's actions were expressly prohibited by the employer and there is no "fair basis" to hold the county strictly liable under the ELCRA. The Court then analyzed whether the deputy's actions were foreseeable. The deputy did have a disciplinary history, but nothing that suggested a propensity to engage in criminal sexual misconduct. His sexual assault of the plaintiff was found to be unforeseeable; thus, the Court decided that the county could not be held liable for the deputy's unforeseeable criminal acts committed outside the scope of his employment.

While *Hamed* overturns the strict liability holding of *Champion*, employers can still be found liable for criminal acts of their employees under the ELCRA if the acts were foreseeable. Under *Champion*, strict liability meant that employers were automatically liable and basically had no defense to a claim based on criminal acts. Under *Hamed*, employers

are no longer automatically liable. Liability now will turn on foreseeability of the act. The Court was clear that simply having engaged in some sort of unrelated criminal activity in the past likely would not be sufficient alone to give rise to foreseeability. However, past instances of improper or criminal sexual misconduct could lead to a finding that later acts were foreseeable.

Employers must remain vigilant for actions which can make future criminal acts of sexual harassment foreseeable. But, employers will now at least have the possibility of a defense to liability if one of their employees commits a sex crime in the workplace. Also, employers should continue to train employees on sexual harassment prevention and maintain and enforce sexual harassment prevention policies.

Text of the opinion may be viewed at <http://www.courts.michigan.gov/supremecourt/Clerk/10-11-Term-Opinions/139505.pdf>

If you have any questions about this Client Alert, please contact your Butzel Long attorney or the authors of this Client Alert.

Scott T. Patterson
248.258.2506
patterson@butzel.com

Shanta S.W. McMullan
313.225.7079
mcmullan@butzel.com

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