

# RAISING THE STAKES: CORPORATE LIABILITY FOR EMPLOYEES' PRIVATE ACTS

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Companies typically view private employee misconduct outside of the workplace as falling outside the "course and scope" of employment such that the company is shielded from any liability. Corporate employers should be advised, however, that this "shield" may be more phantom than real.

Employment statutes such as Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act make only the "employer" subject to liability.<sup>3</sup> Courts construing these statutes have routinely held that employees are immune from individual liability under these statutes (because they do not constitute the "employer"<sup>4</sup>), whereas the company is liable for the employee's illegal harassment, retaliation or other misconduct committed in the "course and scope" of his or her employment.<sup>5</sup>

Corporate employers routinely assert that private acts of employee misconduct occurring outside of the workplace are beyond the "course and scope" of employment such that the company is not liable.<sup>6</sup> The RESTATEMENT OF AGENCY (hereinafter "RESTATEMENT"), however, is not so limited in its view.<sup>7</sup> Instead, it provides that conduct within the scope of employment may be either of the same nature as that authorized or "incidental to that authorized."<sup>8</sup> The RESTATEMENT sets forth multiple factors to consider "[i]n determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment..."<sup>9</sup> Applying these factors, the recent case of *Higgins v. Assmann Electronics, Inc.*,<sup>10</sup> provides a compelling example of an employee's private misconduct outside of the workplace resulting in a large judgment being entered against his corporate employer.

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<sup>3</sup> See 42 U.S.C. § 2000e-5 (1988) (Title VII); 29 U.S.C. §§ 621 to 634 (1988) (ADEA); see also 29 U.S.C. §§ 2611 to 2619 (1993) (Family Medical Leave Act).

<sup>4</sup> See, e.g., *Stults v. Conoco, Inc.*, 76 F.3d 651, 655 (5th Cir. 1996) (ADEA); *Williams v. Banning*, 72 F.3d 552, 554 (7th Cir. 1995) (Title VII); and *Grant v. Lone Star Co.*, 21 F.3d 649, 651 (5th Cir. 1994) (Title VII).

<sup>5</sup> See, e.g., *Sheridan v. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3rd Cir. 1996); *E.E.O.C. v AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1282 (7th Cir. 1995); *Miller v. Maxwell's Intern., Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). Courts construing state anti-discrimination laws have generally followed suit. See, e.g., *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404 (6th Cir. 1997) (construing Kentucky Civil Rights Act); *Dici v. Com. of Pa.*, 91 F.3d 542, 552 (3rd Cir. 1996) (construing Pennsylvania Human Rights Act); *Lenhardt v. Basic Inst. of Tech.*, 55 F.3d 377, 380 (8th Cir. 1995) (construing Missouri Human Rights Act).

<sup>6</sup> See, e.g., *Bouton v. BMW of N. Am. Inc.* 29 F.3d 103, 106-07 (3rd Cir. 1994) (discussing limitations on the course and scope doctrine with respect to employee misconduct); and *Farmers Ins. Group v. County of Santa Clara*, 11 Cal.4th 992, 1005 (1995) (same).

<sup>7</sup> See RESTATEMENT (SECOND) OF AGENCY §229(2) (1958).

<sup>8</sup> *Id.*

<sup>9</sup> Those factors are: "(a) whether the act is one commonly done by such servants; (b) the time, place, and purpose of the act; (c) the previous relations between the master and servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (f) whether the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent or departure from the normal method of accomplishing an authorized result; and (j) whether the act is seriously criminal." *Id.*

<sup>10</sup> 173 P.3d 453 (Ariz. App. 2007).

In *Higgins*, employee Kristina Higgins had previously been involved in a consensual sexual relationship with the company's vice president and chief executive officer, Ulrich Meyer.<sup>11</sup> Meyer was the company's highest-ranking officer in the United States and directly supervised Higgins.<sup>12</sup>

After termination of the sexual relationship, Meyer called Higgins at her home over Labor Day weekend.<sup>13</sup> Unable to reach her, Meyer went to her home and knocked on the door.<sup>14</sup> Receiving no answer, Meyer entered the home to discover Higgins and a male companion wearing only bath towels.<sup>15</sup> Meyer lost control, attacking the male companion, and then proceeding to attack Higgins, throwing her out the front door (where her towel came off and she hit a wall), and then punching her.<sup>16</sup> During the assault, Meyer told Higgins she was fired.<sup>17</sup>

Higgins called the police.<sup>18</sup> The next day Higgins's company cell phone was disconnected.<sup>19</sup> While Higgins did not return to work, a few days after the attack she went to the office (with a police escort) to collect her personal belongings.<sup>20</sup> The following day, the company's CFO and attorney wrote Higgins asking to meet with her.<sup>21</sup> Higgins responded by asking for her last paycheck and passport.<sup>22</sup> The CFO delivered these items with a written notice of termination.<sup>23</sup>

Higgins proceeded to file a complaint against both Meyer and the company for various claims, including a claim of wrongful termination under state law.<sup>24</sup> At trial, the jury found for Higgins on the wrongful termination claim and awarded her damages of \$300,000 against Meyer individually and \$400,000 against the company.<sup>25</sup>

On appeal, the company argued that it could not be held vicariously liable for Meyer's actions, characterizing them as outside of the "course and scope" of his employment.<sup>26</sup> Applying the RESTATEMENT, the Court noted that "conduct within the scope of employment may be either of the same nature as that authorized or incidental to that authorized."<sup>27</sup> Analyzing the RESTATEMENT factors (discussed in note 9, *supra*) the Court found that several of them did weigh against a finding that Meyer's actions were within the course and scope: (1) his acts were outside of the office on a holiday weekend; (2) the corporation was unaware of the personal relationship between Meyer and Higgins such that it had no reason to expect Meyer to act in this manner; and (3) firing Higgins furthered only Meyer's personal interests.<sup>28</sup> Despite these, however, the Court found that several other factors weighed in favor of a determination that Meyer's actions were within the course and scope of his employment: (1) Meyer was in complete control of the company's day to day operation; (2) Meyer was the only person authorized to terminate

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<sup>11</sup> *Id.* at 456 ¶ 2.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 456 ¶ 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 456 ¶ 4.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 456 ¶ 5. Meyer asserted a claim of wrongful termination under the Arizona Employment Protection Act (Ariz.Rev.Stat. §23-1501 *et. seq.* - "AEPA") which provides for wrongful termination claims against an "employer" resulting from termination in violation of state statute, or in retaliation for such acts as the employee's refusal to violate state statutes or the constitution, whistleblowing, etc. Because the AEPA does not define or otherwise limit the definition of "employer" (*id.*), the Court in *Higgins, supra*, held that supervisors such as Meyer may be individually liable (in addition to the employer) for violations of the AEPA. *Id.* at 457-58 ¶¶ 8 & 13.

<sup>25</sup> *Id.* at 456 ¶ 5.

<sup>26</sup> *Id.* at 457 ¶ 7.

<sup>27</sup> *Id.* at 461 ¶ 29.

<sup>28</sup> *Id.* at ¶¶ 30-31; compare RESTATEMENT §229(2)(b), (f).

employees such as Higgins; and (3) Meyer had Higgins's company cell phone disconnected the next day.<sup>29</sup>

The Court noted that, while Meyer's conduct was criminal, acts may be within the course and scope "even if forbidden or done in a forbidden manner, and even if consciously criminal or tortious."<sup>30</sup> Thus, the Court noted, "[t]he question is whether at the time the injury occurred the employee was performing a service in furtherance of his employer's business, not whether it was done in a manner exactly as the employer prescribed."<sup>31</sup>

The Court affirmed the jury's determination that Meyer's conduct was incidental to his authority as company CEO and was exercising this authority on behalf of the company (albeit in an improper manner) such that *the company was vicariously liable for Meyer's wrongful termination of Higgins*.<sup>32</sup>

*Higgins* demonstrates how private employee misconduct occurring outside of the workplace can nevertheless be within the "course and scope" of employment and result in vicarious liability to the corporate employer. Even in jurisdictions where courts have interpreted anti-discrimination statutes to more strictly limit vicarious corporate liability in these circumstances, the *Higgins* case nevertheless demonstrates the additional risks present to corporate employers under state and local employment statutes which, as demonstrated above, may provide for broader corporate liability for employee misconduct occurring outside of the workplace.

For a more thorough analysis of your state and local employment laws, and an analysis of how to minimize corporate liability under them, contact your local USLAW Firm.

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<sup>29</sup> Notably, the RESTATEMENT (THIRD) OF AGENCY, adopted in 2006, does not continue to incorporate a list of factors but, instead, phrases the scope of employment analysis "in more general terms." *Id.* at §7.07 cmt. b. This revision, however, does not appear to have changed that acts incidental to those authorized may still fall within the course and scope of employment. *Id.* at cmt. b, illus. 5-6, & cmt. d. While some jurisdictions have surmised that the RESTATEMENT (THIRD) is a substantial departure from the analysis under the RESTATEMENT (SECOND); see *Baker v. Saint Francis Hosp.*, 126 P.3d 602, 609 n. 2 (Okla. 2005) (Opala, J., concurring); the Court in *Higgins, supra*, was bound by precedent to apply the RESTATEMENT (SECOND) analysis that was adopted during the 48 years this version of the RESTATEMENT had previously been in effect. Given the substantial duration the RESTATEMENT (SECOND) was in effect, many (if not most) other courts will likely be bound by similar precedent in their jurisdictions.

<sup>29</sup> *Higgins, supra* at ¶¶ 30-31; compare RESTATEMENT §229(2)(b), (f).

<sup>30</sup> *Higgins, supra* at ¶ 32 (quoting *State v. Schallock*, 941 P.2d 1275, 1284 (Ariz. 1997)).

<sup>31</sup> *Id.* (quoting *Ortiz v. Clinton*, 928 P.2d 718, 723 (Ariz. App. 1996)).

<sup>32</sup> *Id.* at 461-62 ¶¶ 31-34. The Court also upheld the company's liability for wrongful termination on the basis of ratification, noting that after Meyer's actions the company proceeded to consider Higgins as terminated, independently supporting that Meyer's actions were "valid and within the scope of his employment." *Id.* at ¶ 33.