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OFF THE CLOCK AND ON THE HOOK: A PRIMER ON EMPLOYER LIABILITY FOR THE ACTS OF EMPLOYEES COMMITTED AWAY FROM WORK

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Employers may be held liable for injuries to third-parties caused by employees acting within the scope of their employment. However, subject to some exceptions, employers are generally not liable for damages arising from injuries caused by their employees while they are away from the work site. This article surveys the so-called "lunch break" and "coming and going" rules, and the exceptions to them under which employers may be held responsible for the acts of their employees when they are out of sight, if not out of mind.

THE LIMITS OF *RESPONDEAT SUPERIOR*

Under the doctrine of *respondeat superior*, an employer is vicariously liable for his or her employee's torts committed within the scope of employment. *Ducey v. Argo Sales Co*. (1979) 25 Cal. 3d 707, 721; *Tryer v. Ojai Valley Sch*. (1992) 9 Cal. App. 4th 1476, 1481; *see*, Cal. Civ. Code, § 2338.[1] An employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of *respondeat superior*, even though the employer has not authorized the employee to commit crimes or intentional torts. *Lisa M. v. Henry Mayo Newhall Mem'l Hosp*. (1995) 12 Cal. 4th 291, 296-297.

This doctrine is based on public policy that favors holding employers accountable for the acts of their employees on the grounds that an employer should be responsible for losses caused by the torts of its employees that occur in the conduct of the employer's enterprise. *Anderson v. Pac. Gas & Elec. Co*. (1993) 14 Cal. App. 4th 254, 258. The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise allegedly creates inevitable risks as a part of doing business. *Bailey v. Filco, Inc*. (1996) 48 Cal. App. 4th 1552, 1559. Imposing liability on employer serves three stated goals: "(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. [Citations omitted.]" *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 209. In practice, this doctrine serves to shift the risk of injury from potential victims to employers on the theory that " ' "losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." ' " *Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 967 (quoting *Hinman v. Westinghouse Elec. Co*. (1970) 2 Cal.3d 956, 959-960); *see*, *Mary M.*, *supra*, 54 Cal.3d 202, 208-209; *see also*, Cal. Civ. Code, § 2338.

The burden of proof is on the plaintiff to demonstrate that the negligent act was committed within the scope of employment. *Ducey*, *supra*, 25 Cal. 3d at 721; *Munyon v. Ole's Inc*., 136 Cal. App. 3d 697, 701 (1982). To hold an employer vicariously liable for the acts of its employee, the plaintiff must establish that the employee was " 'engaged in the duties which he was employed to perform' [or] 'those acts which incidentally or indirectly contribute to the [employer's] service.' " *Harris v. Oro-Dam Constructors* (1969) 269 Cal.App.2d 911, 916 (quoting *Kish v. California State Auto. Assn*. (1922) 190 Cal. 246, 249); *see*, *Boynton v. McKales* (1956) 139 Cal.App.2d 777, 789. Some courts have employed a two-prong test of vicarious liability. Under this test, an employer may be held vicariously liable for the acts of its employee if the employee's action is (1) "either required or 'incident to his duties'" or (2) "could be reasonably foreseen by the employer in any event. . . ." *Clark Equipment Co. v. Wheat* (1979) 92 Cal. App. 3d 503, 520 (citations omitted); *see*, *Bailey*, *supra*, 48 Cal. App. 4th at 1559-1560; *Alma W. v. Oakland Unified School Dist*. (1981)

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1 Civil Code section 2338 codifies the *respondeat superior* doctrine. *Rodgers v. Kemper Constr. Co*. (1975) 50 Cal. App. 3d 608, 618, n. 2. However, this section is not limited to employers and employees. *Lisa M. v. Henry Mayo Newhall Mem'l Hosp*. (1995) 12 Cal. 4th 291, 297, n.2 Rather, it addresses more broadly the liability of principals for their agents in that it makes the principal liable for negligent and "wrongful" acts committed by the agent "in and as part of the transaction of such [agency] business." *Id*. at 297, n.2.

123 Cal. App. 3d 133, 139; *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal. App. 4th 222, 227; *Spradlin v. Cox* (1988) 201 Cal. App. 3d 799, 809; *Avila v. Standard Oil Co*. (1985) 167 Cal. App. 3d 441, 447; *Jeffrey E. v. Central Baptist Church* (1988) 197 Cal. App. 3d 718, 721; *Martinez v. Hagopian* (1986) 182 Cal. App. 3d 1223, 1228. If the employee's act satisfies either part of this two-prong test, then the employer may be held liable. *Bailey*, *supra*, 48 Cal. App. 4th at 1559-1560; *Alma W*., *supra*, 123 Cal. App. 3d at 139.

No matter how the test is phrased, *respondeat superior* liability does not require that the employee's actions benefit the employer. *Perez*, *supra*, 41 Cal. 3d at 969; *Lisa M*., *supra*, 12 Cal. 4th at 297; *Bailey*, *supra*, 48 Cal. App. 4th at 1559-1560. However, "the employer is not liable when the employee is pursuing purely 'his own ends.' " *Harris*, *supra*, 269 Cal.App.2d at 916. *Respondeat superior* liability is not synonymous with strict liability. *Bailey*, *supra*, 48 Cal. App. 4th at 1560. Employers are not liable for every act of their employees committed during working hours. *Ibid*; *Alma W*., *supra*, 123 Cal. App. 3d at 139. Thus, the cases which have addressed occasions when plaintiffs may recover against employers for accidents occurring within the scope of the employee's employment under the *respondeat superior* doctrine "have established a general rule of liability with a few exceptions for cases where the employee has *substantially deviated from his duties for personal purposes*. [Citation omitted.]'" *Perez*, *supra*, 41 Cal. 3d at 968 (italics in original).

TO HOLD AN EMPLOYER VICARIOUSLY LIABLE FOR THE ACTS OF ITS EMPLOYEE UNDER THE DOCTRINE OF *RESPONDEAT SUPERIOR*, THE PLAINTIFF MUST ESTABLISH A CAUSAL "NEXUS" BETWEEN THE EMPLOYEE'S TORT AND THE EMPLOYMENT.

To hold an employer vicariously liable for the acts of its employee under the doctrine of *respondeat superior*, the plaintiff must establish a causal "nexus" between the employee's tort and the employment. *Bailey*, *supra*, 48 Cal. App. 4th at 1560; *Lisa M*., *supra*, 12 Cal. 4th at 297. To establish the necessary nexus, the plaintiff must show that the employee's tort is engendered by or arises from the employee's work. *Lisa M*., *supra*, 12 Cal. 4th at 298. "That the employment brought tortfeasor and victim together in time and place is not enough." *Id*. Instead, in the context of both intentional and negligent torts, the incident leading to injury must be an "outgrowth" of the employment, inherent in the working environment, or typical of or broadly incidental to the enterprise that the employer has undertaken. *Lisa M*., *supra*, 12 Cal. 4th at 298; *see*, *Bailey*, *supra*, 48 Cal. App. 4th at 1560. Alternatively, courts have stated that the link between the employee's employment and the employee's tort must be "foreseeable in light of [the employee's] duties." *Alma W*., *supra*, 123 Cal. App. 3d at 142; *see*, *Bailey*, *supra*, 48 Cal. App. 4th at 1560. To be foreseeable in this context means that "the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business." *Harris v. Trojan Fireworks Co*. (1981) 120 Cal.App.3d 157, 163.

Whether the alleged act resulting in injury occurred within the scope of the employee's employment is usually a question of fact. *Ducey*, *supra*, 25 Cal. 3d at 722; *Tryer*, *supra*, 9 Cal. App. 4th at 1481 "However, the issue becomes a question of law when the facts are undisputed and no conflicting

inferences are possible." *Perez*, *supra*, 41 Cal.3d at 968; *see*, *Lisa M.*, *supra*, 12 Cal. 4th at 299. Where there are no material factual disputes as to the scope of the employee's employment, the court may resolve whether the employer is vicariously liable for the acts of its employee as a matter of law. *Lisa M.*, *supra*, 12 Cal. 4th at 299; *Tryer*, *supra*, 9 Cal. App. 4th at 1481; *Visueta v. General Motors Corp*. (1991) 234 Cal. App.3d 1609, 1613, 1616; *Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836; *see*, Code Civ. Proc., § 437c, subd. (c).)

"LUNCH BREAK" RULE

Attending to lunch off site is an activity that generally falls outside the scope of an employee's employment. It is well-settled that " 'an employee, while taking time away from his work for meals, is not in the service of his employer and that the latter therefore is not responsible for negligence of the employee during such periods of absence from work. . . . ' " *Peccolo v. City of Los Angeles*, 8 Cal. 2d 532, 539 (1937) (citations omitted); *see also*, *Martinelli v. Stabnau* (1935) 11 Cal. App.2d 38, 40-41 (concluding employee "not at the time of the accident actually performing any service for his employer" while the employee was driving home for lunch); *Helm v. Bagley* (1931) 113 Cal.App. 602, 605 (holding that worker "was in his own automobile and on his own business, which in no manner pertained to the business of his employer" in action arising from collision that occurred after worker bought groceries home for dinner); *McFadden v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 279, 281-282; *Mission Ins. Co. v. Workers' Comp. Appeals Bd.* (1978) 84 Cal.App.3d 50, 54-57. Thus, "California courts have recognized a general rule that when an employee travels to and from lunch in the employee's own car and is not engaged in furthering any end of the employer, the employee is not acting within the scope of employment. *Bailey*, *supra*, 48 Cal. App. 4th at 1567; *see*, *Peccolo v. City of Los Angeles* (1937) 8 Cal. 2d 532, 539; *Gipson v. Davis Realty Co*. (1963) 215 Cal. App. 2d 190, 209; *see also*, *Tryer*, *supra*, 9 Cal. App. 4th at 1482-1483. This rule may even preclude finding an employer vicariously liable when the employee is driving a company car to get lunch. *See*, *Gipson*, *supra*, 215 Cal. App. 2d at 209.

ATTENDING TO LUNCH OFF SITE IS AN ACTIVITY THAT GENERALLY FALLS OUTSIDE THE SCOPE OF AN EMPLOYEE'S EMPLOYMENT

For example, in *Tryer v. Ojai Valley Sch*., 9 Cal. App. 4th 1476 (1992), the Court of Appeal held that the "lunch break" rule applied to preclude the defendant school from being held liable for damages arising from a collision caused by one of its employee's during her lunch break because the collision occurred as the employee used her own vehicle to commute to a definite place of employment. *Id*. at 1482. It was undisputed that the school employed the employee part time to feed its horses twice a day at its two campuses during two work shifts. The school paid the employee by the hour for each shift from the time she arrived on one campus until she left the other campus. The school did not pay the employee for travel time to or from work or for travel expenses. On the day of the accident, the employee worked at both campuses during her morning shift between 6 a.m. and 9 a.m. After her morning shift, she left one campus to ride her own horse and to eat her lunch at her ranch. After lunch, the employee left her ranch and drove towards the school's other campus to begin her afternoon shift. *Id.* at 1479-1480. En route, her truck struck the decedent's automobile. Based on these facts, the Court of Appeal held that the trial court properly granted

summary judgment in favor of the school because the employee was on her own time when the accident occurred. In reaching this conclusion, the Court observed that the employee was not on any errand for the school at the time of the accident, and the accident occurred while the employee pursued her own interests on an unpaid break away from her designated place of work. *Id.* at 1483.

THE FACT THAT AN EMPLOYEE IS PAID WHILE ON A BREAK DOES NOT COMPEL THE CONCLUSION THAT HIS OR EMPLOYER MAY BE HELD LIABLE FOR ANY INJURIES THAT OCCUR DURING HIS OR HER BREAK

The fact that an employee is paid while on a break does not compel the conclusion that his or employer may be held liable for any injuries that occur during his or her break. For instance, in *Bailey v. Filco, Inc*. (1996) 48 Cal. App. 4th 1552, the court addressed whether whether, as a matter of law, an employee was within her scope of employment when she drove during her ten-to-fifteen minute unscheduled, paid break to purchase cookies to eat back at work. *Id*. at 1558. The plaintiff in that case was injured in an automobile accident caused by an employee of defendant Filco, Inc., a retail business engaged in the sale and rental of electronic goods and appliances. The employee worked at Filco as a full-time, hourly sales cashier. Her duties included ringing up merchandise, selling small appliances, and renting videos. Her duties did not include driving. The employee never used her car for work purposes. Filco did not even request that the employee bring a car to work. During a paid, morning break while working at Filco, the employee got in her own car and drove off the work premises to another establishment to buy cookies for herself and another employee to eat while on duty back at work. The employee did not notify a supervisor that she was taking her break or leaving the premises. None of her supervisors asked or instructed the employee to buy the cookies or to run an errand for Filco. Nevertheless, the plaintiff sued Filco under a theory of *respondeat superior*. The jury found that the employee was not engaged within the scope of her employment at the time of the accident, and the trial court entered judgment for Filco.

On appeal, the plaintiff argued that the employee was acting within the scope of her employment as a matter of law when the car accident occurred. The Court of Appeal affirmed the judgment. In reaching this conclusion, the court held that the employee's trip to purchase cookies on her morning break did not encompass risks typical of or broadly incidental to Filco's business or the employee's duties; rather it was a substantial departure from her work duties and the plaintiff's resulting injuries were unforeseeable. *Id*. at 1564. The court observed that "[t]he fact she was being paid while on the break, in and of itself, is not enough to place her trip within the scope of employment," because the employee "was not 'at work' engaging in an act of comfort and convenience that had a nexus to her employment." *Id*. at 1565. As such, imposing liability on Filco did not serve or further the purposes of the doctrine of *respondeat superior* under these circumstances. *Id*. at 1566.

AN EMPLOYEE IS NOT CONSIDERED TO BE ACTING WITHIN THE SCOPE OF EMPLOYMENT WHEN GOING TO OR COMING FROM HIS OR HER PLACE OF WORK

"GOING AND COMING" RULE

Likewise, an employee is not considered to be acting within the scope of employment when going to or coming from his or her place of work. Anderson, supra, 14 Cal. App. 4th at 258. Under this rule, known as the "going and coming" rule, an employee going to and coming home from work is "ordinarily considered outside the scope of employment so that the employer is not liable for his torts." Hinman v. Westinghouse Elec. Co. (1970) 2 Cal.3d 956, 961.

ONE EXCEPTION TO THE GOING AND COMING RULE IS FOUND IN SITUATIONS WHERE THE EMPLOYEE'S "TRIP INVOLVES AN INCIDENTAL BENEFIT TO THE EMPLOYER, NOT COMMON TO COMMUTE TRIPS BY ORDINARY MEMBERS OF THE WORK FORCE."

Two theories the "going and coming" rule. Some courts have found that the employment relationship is "suspended" from the time an employee leaves until he or she returns to work. *Id.* at 961; *Tryer*, *supra*, 9 Cal. App. 4th at 1481; *Munyon*, *supra*, 136 Cal. App. 3d at 703; *Harris*, *supra*, 269 Cal.App.2d at 912-913. Other courts have determined that, in commuting to and from work, an employee is not rendering service to his or her employer. *Ibid*. Whether deemed a suspension of the employment relationship or a cessation of service to the employer, the situation is one in which the employee steps out of the course of his employment for the off-duty period, and injuries during such a period, in the absence of special arrangements with the employer, fall under the ban of the "going and coming" rule. *Arboleda v. Workmen's Comp. App. Bd.* (1967) 253 Cal.App.2d 481, 485-486. Courts apply the rule when the employee performs the employment services " 'at or in a particular plant or upon particular premises. . . .' " *Id*. at 916. Accordingly, the going and coming rule "has particular application to vehicle accidents of employees whose jobs do not embrace driving." *Harris*, *supra*, 269 Cal.App.2d at 917, fn. omitted.

For instance, in *Arboleda v. Workmen's Comp. App. Bd.* (1967) 253 Cal.App.2d 481, the order of the board denying an award of death benefits to the widow of an employee who was killed in an automobile accident on his way to work was affirmed, despite the fact that the employee was reporting for his second shift of the day because he worked a split shift. In reaching this conclusion, the Court of Appeal explained:

> The law as it now stands imposes on the employee the not inconsiderable risks of present day traffic conditions between his home and his place of employment. [Citation omitted.] It also imposes these risks upon him when he leaves the employer's premises during a lunch period. [Citation omitted.] The law, in fact, imposes on the employee all of the risks which he encounters after he leaves the service of the employer, the place of work and its special risks, and goes beyond the dominion and control of the employer. [Citation omitted.] In all of these cases it cannot be denied that the trip to and from the employer's premises places the employee in a position of peril in which he would not have been but for his employment. The Legislature has not seen fit to shift any of these risks to the employer.

Id. at 483. Thus, the court held, "Petitioner here comes squarely within the going and coming rule," and "Petitioner has not shown that he comes within any recognized exception to that rule." *Id*. at 485-486.

INCIDENTAL BENEFIT EXCEPTION

However, relying primarily on worker's compensation cases, courts of this State have recognized several exceptions to the "going and coming" rule.[2] *Ducey*, *supra*, 25 Cal. 3d at 722; *Hinman*, *supra*, 2 Cal.3d at 961; *see*, *Tryer*, *supra*, 9 Cal. App. 4th at 1481; *Munyon*, *supra*, 136 Cal. App. 3d at 703. One exception to the going and coming rule is found in situations where the employee's "trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." *Hinman*, *supra*, 2 Cal.3d at 962.

In the seminal case of *Hinman v. Westinghouse Elec. Co*. (1970) 2 Cal.3d 956, for instance, the California Supreme Court found that this exception applied in an action arising from an accident caused by Frank Herman, an elevator constructor's helper employed by the defendant employer, Westinghouse Electric Company. Although Herman's work was assigned from a central office, he did not ordinarily report to that office. Instead, he went directly from home to the jobsite. At the end of each work day, he returned home from the jobsite. Herman was paid travel expenses and was also paid for "travel time" depending on how far away the job was from the Los Angeles City Hall. The accident precipitating the action occurred as Herman was returning home from a job that was approximately fifteen to twenty miles from City Hall. *Id*. at 958-959.

Under these circumstances, the Supreme Court declined to shield the employer from liability under the going and coming rule, concluding that it had realized a substantial economic benefit from Herman's work off-site which exposed others to increased risk of harm. The court observed that by paying for travel time and travel expenses, the employer derived a benefit by attracting employees from beyond the employer's normal labor market, and therefore the employer was best positioned to assume this risk as a cost of doing business. The Court Reasoned:

> There is a substantial benefit to an employer in one area to be permitted to reach out to a labor market in another area or to enlarge the available labor market by providing travel expenses and payment for travel time. It cannot be denied that the employer's reaching out to the distant or larger labor market increases the risk of injury in transportation. In other words, the employer, having found it desirable in the interests of his enterprise to *pay for travel time and for travel expenses and to go beyond the normal labor market or to have located his enterprise at a place remote from the labor market*, should be required to pay for the risks inherent in his decision.

Hinman, *supra*, 3 Cal.3d at 962 (emphasis added). The court, however, expressly declined to decide whether

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2 Although the test under the workmen's compensation law of "arising out of and in the course of the employment" is not identical with the test of "scope of employment" under the doctrine of *respondeat superior*, the two tests are closely related in that they are both concerned with the allocation of the cost of industrial injury. *Hinman*, *supra*, 2 Cal. 3d at 962, n.3. Consequently, courts of this state often cite workers' compensation cases in tort cases to interpret the going and coming rule, and its exceptions. *Ducey*, *supra*, 25 Cal. 3d at 722; *Tryer*, *supra*, 9 Cal. App. 4th at 1482; *Munyon*, *supra*, 136 Cal. App. 3d at 702; *see*, *Bailey v. Filco, Inc*. (1996) 48 Cal. App. 4th 1552, 1562 (observing "in the development of the respondeat superior doctrine, courts have occasionally looked toward workers' compensation cases for guidance.")

the mere payment of travel expenses would reflect a sufficient benefit to the employer so that the employer should bear responsibility for the risk of injuries to innocent third parties. *Id*. at 962-963.

By this same reasoning, the mere fact that an employee travels off-site is not sufficient to invoke this exception. For the incidental benefit exception to apply, the plaintiff must also establish that the employer provided travel expenses *and* payment for travel time to the employee at the time the accident occurred, while the employer was providing a tangible benefit to his or her employer. Thus, implied benefits to an employer rendering the going and coming rule inapplicable have been found in cases where the employer paid for or reimbursed travel time, *Hinman*, *supra*, 2 Cal.3d 956; where the employee was traveling from night school at the employer's request, *Dimmig v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal.3d 860; and where the employee commuted in a company car due to the employer requiring access to or use of the car during the work day. *Lazar v. Thermal Equipment Corp*. (1983) 148 Cal. App. 3d 458; *Huntsinger v. Glass Containers Corp*. (1972) 22 Cal. App. 3d 803.

FOR THIS EXCEPTION TO APPLY, THE PLAINTIFF MUST ESTABLISH A "CLEAR NEXUS BETWEEN THE ALLEGED BENEFITS TO THE EMPLOYERS AND THE TORTS THEMSELVES."

Moreover, for this exception to apply, the plaintiff must establish a "clear nexus between the alleged benefits to the employers and the torts themselves." *McGovert v. United States*, 2004 U.S. Dist. LEXIS 14692, *11 (N.D. Cal. July 14, 2004); *see*, *Lisa M*., *supra*, 12 Cal. 4th at 297; *Bailey*, *supra*, 48 Cal. App. 4th at 1560; *see also*, *Hinojosa v. Workmen's Comp. Appeals Bd.* (1972) 8 Cal.3d 150, 157 (finding exception applied where the employer directly derived both monetary and workplace-efficiency related benefits by requiring that employees use their own vehicles to travel to diverse worksites throughout the day, and the accident stemmed directly from the benefit to the employer of having private cars at the workplace). Where the link between monetary savings to the employer and the accident giving rise to the action is merely tangential, the employer may not be held liable for any resulting damages under the implied benefit exception to the going and coming rule. *McGovert*, *supra*, 2004 U.S. Dist. LEXIS 14692, *11

WHERE THE LINK BETWEEN MONETARY SAVINGS TO THE EMPLOYER AND THE ACCIDENT GIVING RISE TO THE ACTION IS MERELY TANGENTIAL, THE EMPLOYER MAY NOT BE HELD LIABLE FOR ANY RESULTING DAMAGES UNDER THE IMPLIED BENEFIT EXCEPTION TO THE GOING AND COMING RULE.

The mere fact that an employer pays an employee's travel expenses, by itself, is insufficient to hold the employer liable under this exception. "Whatever the motivation, the essential purpose of the automobile trip does not change. If, as the going and coming rule denotes, the trip between home and the fixed place of work is primarily for the employee's benefit, the fixed reimbursement allowance does not alter that fact." *Harris*, *supra*, 269 Cal.App.2d at 917.

For instance, in *Caldwell v. A.R.B., Inc*. (1986) 176 Cal.App.3d 1028, the employee was an apprentice pipefitter who received a $10.00 travel allowance, pursuant to a union contract, because his job site was more than 15 miles from the local union office. He received the allowance regardless of whether he drove his own car. While driving home

from the job site, the employee was involved in an automobile accident in which he was killed and the plaintiff was injured. The *Caldwell* court found the payment of a travel allowance, without more, did not provide a benefit to the employer sufficient to impose on the employer the liability for the plaintiff's injuries. *Id.* at 1041. The court concluded that the payment of a travel allowance did not provide a sufficient benefit to the employer so as to impose liability for the plaintiff's injuries.

THE MERE FACT THAT AN EMPLOYER PAYS AN EMPLOYEE'S TRAVEL EXPENSES, BY ITSELF, IS INSUFFICIENT TO HOLD THE EMPLOYER LIABLE UNDER THIS EXCEPTION.

SPECIAL ERRAND EXCEPTION

Under the going and coming rule, employers may not be held liable for injuries arising from common "commute trips by ordinary members of the work force." *Hinman*, *supra*, 2 Cal. 3d at 962. However, an employer may be held liable for injuries arising from a negligent act committed by an employee while the employee was engaged in a special errand or mission for the employer. *Ducey*, *supra*, 25 Cal. 3d at 722; *Anderson*, *supra*, 14 Cal. App. 4th at 261; *Munyon*, *supra*, 136 Cal. App. 3d at 703. "When the employee is engaged in a 'special errand,' either as part of his regular duties or at the specific order or request of his employer, the employee is considered to be in the scope of his employment from the time he commences the errand until he returns, or until he deviates from his special errand for personal reasons. [Citation omitted.]" *Munyon*, *supra*, 136 Cal. App. 3d at 703; *see*, *Blackman v. Great Am. First Sav. Bank* (1991) 233 Cal. App. 3d 598, 602. Thus, "extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own" so that the commute "bestows a special benefit on the employer by reason of the extraordinary circumstances" are actionable exceptions to the going and coming rule. *Hinjosa v. Workmen's Comp. Appeals Bd.* (1972), 8 Cal.3d 150, 157.

AN EMPLOYER MAY BE HELD LIABLE FOR INJURIES ARISING FROM A NEGLIGENT ACT COMMITTED BY AN EMPLOYEE WHILE THE EMPLOYEE WAS ENGAGED IN A SPECIAL ERRAND OR MISSION FOR THE EMPLOYER.

Examples of actions considered "special errands" include "getting or returning tools, attending a social function where the employee's attendance is expected and it benefits the employer, and returning to the employee's home from a service call for the employer's business when the employee is on call at his own home for his employer's business. [Citations omitted.]" *Munyon*, *supra*, 136 Cal. App. 3d at 703. For instance, in *Harris v. Trojan Fireworks Co.* (1981) 120 Cal.App.3d 157, the plaintiffs were injured by an intoxicated employee of the defendant while he was driving home from a Christmas party held by the employer on the employer's premises. The accident occurred after work and away from the employer's premises. The trial court sustained a demurrer to the complaint and dismissed the action.

The appellate court reversed the trial court's order, holding that the complaint pleaded sufficient facts which, if proven, would support a jury determination that the employee's actions were within the scope of his employment. In reaching this conclusion,

the court explained that "[t]he underlying philosophy which holds an employer liable for an employee's negligent acts is the deeply rooted sentiment that a business enterprise should not be able to disclaim responsibility for accidents which may fairly be said to be the result of its activity." *Id*. at 163. Thus, under the circumstances before it, the court held "it can be fairly said that liability attaches where a nexus exists between the employment or the activity which results in an injury that is foreseeable"(i.e., where "the employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among the other costs of the employer's business.") *Ibid*.; *see*, *Lisa M*., *supra*, 12 Cal. 4th at 297; *Bailey*, *supra*, 48 Cal. App. 4th at 1560.

AN EMPLOYEE WHO IS ASKED TO PERFORM WORK AT IRREGULAR TIMES MAY ALSO BE FOUND TO BE INVOLVED IN A "SPECIAL ERRAND" ON BEHALF OF HIS EMPLOYER

Likewise, the court in *O'Connor v. McDonald's Restaurants* (1990) 220 Cal.App.3d 25 found this exception may apply where the employee volunteered for a special work party to clean up the defendant employer's premises. After completing the cleanup, the employee and several fellow workers went to another employee's house where they "talked shop" and socialized. *Id*. at 28. The employer conceded that the employee's participation in the cleanup constituted a special errand for his employer; thus, the only issue was whether he had abandoned that errand when he went to the coworker's house. *Id*. at 33. Under these circumstances, the Court of Appeal held that a question of fact existed as to whether the employee was still engaged in a special errand for his employer when he collided with a motorcyclist after leaving the coworker's house. *Id*. at 33.

An employee who is asked to perform work at irregular times may also be found to be involved in a "special errand" on behalf of his employer. However, the application of this exception on such occasions is limited in scope. In *General Ins. Co. v. Workers' Comp. Appeals Bd*. (1976) 16 Cal.3d 595, 601, for instance, the Supreme Court noted that the special errand rule does not apply when the only special component is the fact that the employee began work earlier or left work later than usual. Thus, California courts have rejected any blanket "on-call" exception to the going and coming rule. *Le Elder v. Rice* (1994) 21 Cal. App. 4th 1604, 1609 (concluding "[p]ublic policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of the accident"); *see*, *McGovert*, *supra*, 2004 U.S. Dist. LEXIS 14692, *17.

Encouraging employees to engage in socially beneficial conduct, such as carpooling, does not amount to a special errand or mission. *See*, e.g., *Anderson*, *supra*, 14 Cal. App. 4th at 262. Thus, in *Caldwell*, *supra*, 176 Cal.App.3d at 1036-1038, the court found that encouraging an employee to provide a coworker ride home was not a special errand, when the employer made no specific order or request to provide the ride.

CALIFORNIA COURTS HAVE REJECTED ANY BLANKET "ON-CALL" EXCEPTION TO THE GOING AND COMING RULE

PERSONAL COMFORT EXCEPTION

Acts "necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take him outside the scope of his

employment. . . ." *Alma W.*, *supra*, 123 Cal. App. 3d at 139 (citations omitted); *see*, *Bailey*, *supra*, 48 Cal. App. 4th at 1560; *DeMirjian v. Ideal Heating Corp*. (1954) 129 Cal. App. 2d 758, 765. Rather, such acts are "incidental risks" of any employer's business that are within the scope of employment. *Bailey*, *supra*, 48 Cal. App. 4th at 1562. Thus, courts have devised a "personal comfort" exception to the going and coming rule, which provides that "the course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient performance by the employee." *State Comp. Ins. Fund v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 925, 928. However, this exception does not apply to "acts which are found to be departures effecting a temporary abandonment of employment." *Id*.

For the "personal comfort" exception to apply, the plaintiff must establish that the employee was being compensated, and was performing substantial services in connection with his or her employment, at the time the alleged injury occurred. *See*, *Mission Ins. Co.*, *supra*, 84 Cal. App. 3d at 53; *see also*, *Western Greyhound Lines*, *supra*, 225 Cal. App. 2d at 521; *Rankin v. Workmen's Comp. Appeals Bd*. (1971) 17 Cal.App.3d 857. This exception does not apply to injuries inflicted by an employee during a lunch break where his or her hourly wage does not include the lunch hour. *Mission Ins. Co.*, *supra*, 84 Cal. App. 3d at 57. "Where the cases have allowed recovery on the 'personal comfort theory' or as an exception to the 'going and coming rule,' the injuries have occurred either on the employer's premises or at a time when the employee was being compensated for his labors, or at a time when the employee was performing some special service off the premises at the instance and request of the employer and for the employer's benefit. [Citations omitted]." *Rankin*, *supra*, 17 Cal.App.3d at 880.

For example, in *Lazar v. Thermal Equipment Corp*. (1983) 148 Cal. App. 3d 458, the employee of defendant Thermal Equipment Corporation was on call as a troubleshooter on weekends and after normal business hours. The employee occasionally drove directly from his home to a jobsite. Due to the nature of the employee's duties, the employer permitted the employee to take the company truck home on a daily basis and use it for personal purposes. The employer bought gas for the truck. On the day of the subject accident, the employee hit the plaintiff after leaving work for the day in the company truck. At the time of the accident, the employee was heading to a store to buy personal items before heading home. The *Lazar* court concluded that, as a matter of law, the employee was acting within the scope of employment because his personal errand was a minor deviation from his work duties and foreseeable. *Id*. at 464-465. Given the employee's use of the company truck in the past and his duties as an on-call troubleshooter, the Court found the employer derived a special, tangible benefit from the employee's commute to and from work. *Id*. at 463. In reaching this conclusion, the *Lazar* court stated, "While [the acts necessary to the comfort convenience, health, and welfare of the employee] standard was suggested for deviations 'at work,' we think it is applicable to deviations made on the way home, in the employer's vehicle, when the trip home benefits the employer." *Id*. at 466.

In addition, to invoke the "personal comfort" exception the plaintiff must still establish a nexus between the employee's tort and the employee's duties. *Lisa M.*, *supra*, 12 Cal. 4th at 297; *Bailey*, *supra*, 48 Cal. App. 4th at 1561. In *Bailey v. Filco, Inc*. (1996) 48

Cal. App. 4th 1552, the plaintiff argued that she need not establish any such nexus to prevail against the defendant employer under this exception "so long as the employee engages in an act of comfort and convenience while on a paid break." *Id*. at 1561. The Court of Appeal rejected this argument, stating:

> This argument would . . . allow an employee to engage in any act of personal comfort and convenience while on break and still be considered within the scope of employment. This would make *respondeat superior* liability, in these contexts, synonymous with strict liability. Such a result directly contradicts the recognition that *respondeat superior* liability is inapplicable when an employee has substantially deviated from his or her duties for personal purposes. [Citations omitted.]

Id. at 1561. Moreover, the Court insisted that a substantial nexus between the tort and the employee's duties was required, because "it would strain logic to dispense with the nexus requirement on the rationale that the employee had been engaged in an act of personal comfort and convenience; such an act tends to take an employee farther from the scope of employment rather than closer." *Ibid*.

TO INVOKE THE "PERSONAL COMFORT" EXCEPTION THE PLAINTIFF MUST STILL ESTABLISH A NEXUS BETWEEN THE EMPLOYEE'S TORT AND THE EMPLOYEE'S DUTIES

The Supreme Court found such a nexus in *Western Greyhound Lines v. Industrial Acci. Com*. (1964) 225 Cal. App. 2d 517. In that case, the Supreme Court affirmed an award of worker's compensation benefits to a bus driver who was assaulted during a coffee break at a restaurant across the street from the employer's premises. Speaking for the court, Justice Taylor explained that the injuries were nevertheless work-related in that she was exposed to the danger she encountered as a Greyhound employee because the employee would not have been at the restaurant in the first place had she not been working on a late night shift, and she "was drinking coffee because she had been driving a bus and would be again in a short time." Since she was paid during this time, the Court further held that her employment continued during the time she was on her coffee break. Under these circumstances, the court concluded that the employee's injuries occurred in the course of and arose out of her employment. *Id*. at 521.

Likewise, the Court of Appeal held that the personal comfort exception applied in *DeMirjian v. Ideal Heating Corp*. (1954) 129 Cal. App. 2d 758. In *DeMirjian*, an employee left his work station to go smoke in the washroom on the premises and use its facilities. The defendant employer prohibited employees from smoking anywhere in the shop except the washroom. The employee typically smoked in the washroom four or five times daily. On his way to the washroom on the day of the accident, the employee stopped to fill his empty cigarette lighter with fluid from a thinner drum located next to the aisle near the washroom. While filling the lighter, the employee accidentally ignited it and started a fire. The fire caused extensive damage to the plaintiffs' building in which both the defendant employer and plaintiffs operated their businesses. The trial court granted the defendant employer a directed verdict, which the plaintiffs appealed.

The *DeMirjian* court reversed the trial court. The court observed that "acts necessary to the comfort,

convenience, health, and welfare of the employee while at work, though strictly personal to himself and not acts of service, do not take [the employee] outside the [scope] of his employment[,]" and employers necessarily contemplate that an employee will engage in such acts. *Id*. at 765. The court then found that the employee's trip to the washroom was within the scope of employment because using the facilities and smoking were acts necessary to the employee's "health" and comfort. *Id*. at 771. However, the court also found the employee's act of stopping to fill the lighter was a deviation from the duties of his employment, which presented a question of fact for the jury to decide as to whether the deviation was substantial enough to be a complete departure from the employer's business so as to justify finding that the employee's tort was outside the scope of his employment. *Id*. at 772. In reaching this conclusion, the court observed that "deviations which do not amount to a turning aside completely from the employer's business, so as to be inconsistent with its pursuit, are often reasonably expected," but a deviation that is "so material or substantial as to amount to an entire departure" from the employer's business may release the employer from liability. *Id*. at 766.

ANOTHER EXCEPTION TO THE GOING AND COMING RULE ARISES WHEN THE EMPLOYER REQUIRES AN EMPLOYEE TO USE AN EMPLOYER'S VEHICLE, OR THE EMPLOYEE'S OWN VEHICLE, IN CONNECTION WITH HIS OR HER EMPLOYMENT AT THE TIME TO THE ALLEGED ACCIDENT

REQUIRED-VEHICLE EXCEPTION

Another exception to the going and coming rule arises when the employer requires an employee to use an employer's vehicle, or the employee's own vehicle, in connection with his or her employment at the time to the alleged accident. *Ducey*, *supra*, 25 Cal. 3d at 723. However, cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business. *See, Hinojosa*, *supra*, 8 Cal.3d at 157 (holding employer liable for car accident involving one of its farm laborers who traveled among seven noncontiguous fields); *Smith v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 814, 816, 825 (holding employer liable for car accident involving social worker whose job required regular use of vehicle during work hours to visit clients in the field); *Richards v. Metropolitan Life Ins. Co*. (1941) 19 Cal.2d 236, 242 (arising from accident involving outside insurance sales agent who was required to use vehicle daily to meet prospects and customers in a territory allocated to him by the company); *Lazar*, *supra*, 148 Cal. App. 3d at 462-63 (finding exception applied where the employee was acting within the scope of his employment when he was driving a company car on a personal errand after work because he was permitted to commute in the car in order to have it available at all times); *Huntsinger v. Glass Containers Corp*. (1972) 22 Cal.App.3d 803, 810 (arising from accident involving traveling repairman whose job entailed extensive use of a truck in field to visit customers.) To hold the employer responsible for the tortious acts of its employee under the "required-vehicle" exception, the plaintiff must show that, as a condition of his or her employment, the employer required the employee to commute to work in his or her personal car; or that the employee's job otherwise required him or her to use his or her vehicle to perform the duties of the job, such as to travel from location to location during the day. *Ducey*, *supra*, 25 Cal. 3d at 723; *Hinojosa*, *supra*, 8 Cal. 3d at 161. Where running errands for his or her employer is not a condition of the employee's employment, the employer may not be

held liable for any injuries to others committed by the employee while he or she is performing an occasional or incidental errand under this exception. *Ducey*, *supra*, 25 Cal. 3d at 723; *Hinson v. Workmen's Comp. Appeals Bd.* (1974) 42 Cal. App. 3d 246, 251.

DUAL PURPOSE EXCEPTION

When the employee is attending to both personal and work-related errands while out of the office, the going and coming rule does not apply. "[W]here the [employee] is combining his own business with that of his [employer], or attending to both at substantially the same time, no nice inquiry will be made as to which business the [employee] was actually engaged in when a third person was injured; but the [employer] will be held responsible, unless it clearly appears that the [employee] could not have been directly or indirectly serving his [employer]. [Citations omitted.]" *Ryan v. Farrell* (1929) 208 Cal. 200, 204; *see*, *Perez*, *supra*, 41 Cal.3d at 970; *Gipson v. Davis Realty Co.* (1963) 215 Cal.App.2d 190, 210. The key to the dual purpose exception is establishing that the employee was performing services for or on behalf of the employer at the time of the alleged accident. Thus, in *Tryer v. Ojai Valley Sch.* (1992) 9 Cal. App. 4th 1476, the Court of Appeal found that this exception did not apply where the employee was not on an errand for the defendant school at the time of the accident, and the accident occurred while the employee pursued her own interests on an unpaid break away from her designated place of work. *Id.* at 1483.

THE KEY TO THE DUAL PURPOSE EXCEPTION IS ESTABLISHING THAT THE EMPLOYEE WAS PERFORMING SERVICES FOR OR ON BEHALF OF THE EMPLOYER AT THE TIME OF THE ALLEGED ACCIDENT

BUNKHOUSE EXCEPTION

Finally, employers may be found liable for injuries arising from an accident that occurred en route to or from housing furnished by the employer for the employee's use. The rule in California is that "[w]here the employment contract contemplates, or the work necessity requires that the employee live or board on the employer's premises, the employee is considered to be performing services incidental to such employment during the time he is on such premises." *Aubin v. Kaiser Steel Corp*. (1960) 185 Cal. App. 2d 658, 661. This exception, popularly termed the "bunkhouse rule," is predicated on the theory that "an injury or death suffered by an employee during his reasonable use of the premises, although occurring during nonworking hours, is within the course of his employment because he is thereby earning and collecting a part of his wages." *Id*. It is thus well settled in California "that if an employee is required to live or board on the premises of his employer, either by the terms of his contract of employment or the necessities of the work, an injury received while on the premises may be compensable, though the employee is not at work at the time of the injury." *Union Oil Co. v. Industrial Acci. Com.* (1931) 211 Cal. 398, 403.

For example, in *Tarasco v. Moyers* (1947) 81 Cal. App. 2d 804, the employee, driving his own car, was on his way from working in a field owned by his employer, a farm partnership, to the farm partnership's headquarters when he collided with a bus. The employee and his family lived free of charge at the company headquarters, where he was required to return his tools each evening after work. The court held that the

employee was actually engaged in performing a part of his duties of employment by returning to his residence and returning his tools to headquarters at the end of the workday because this was a required part of the job, for which the employer provided gasoline to the employee to perform. *Id*. at 809. These facts indicated that the employee was engaged in performing a part of his duties of employment in going to his allotted residence on the farm and in returning his working tools at the end of the day. Therefore the Court of Appeal concluded that the "going and coming rule" did not apply under the circumstances. *Ibid*.

EMPLOYERS MAY BE FOUND LIABLE FOR INJURIES ARISING FROM AN ACCIDENT THAT OCCURRED EN ROUTE TO OR FROM HOUSING FURNISHED BY THE EMPLOYER FOR THE EMPLOYEE'S USE

The Court of Appeal reached the same conclusion in *Aubin v. Kaiser Steel Corp*. (1960) 185 Cal. App. 2d 658. In that workers' compensation case, the court found a mine company liable for an employee's collision with a company-owned train where the employee was driving his own car on a personal trip after working hours, because the accident occurred on a private road on the employer's property, where the employee was required to live in light of the fact that "there were no adequate housing facilities within a reasonable distance." *Id.* at 662. The road, which crossed the railroad tracks, was the only means of access to his employment, and the only means of egress from his employment to his residence. The court found that the employee's use of the private road on company property, and his exposure to the danger of collision with a company-owned train on the property, were peculiar to his employment. *Id*. at 663. The court therefore held that the "bunkhouse rule" applied even though the employee was required to make payment for the board and room supplied to him by his employer "at a reduced rate lacking in profit." *Id*. at 662.

CONCLUSION

Under both the lunch break rule and the going and coming rule, employers are generally not responsible to third-parties for the negligence of their employee while they are away from work. To escape the consequences of an absolute prohibition against holding employers responsible for the acts of their employees while they are off company premises, courts have devised limited exceptions to permit victims to hold employers accountable for injuries they have suffered at the hands of errant employees. However, these exceptions are limited to those situations in which the alleged injuries occurred in connection with the employee's work, for which he or she was being compensated. Accordingly, in those instances in which an injury occurs while the employee is attending to a personal errand on an unpaid break away from his or her designated place of work, the victim may still not recover damages against the employee's employer under the theory that they are a cost of doing business properly borne by the employer.

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