

EMPLOYMENT LAW UPDATE

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Defending An Employee In A Lawsuit Does Not Amount To Ratification Of The Employee's Wrongful Conduct.

Plancarte v. Guardsmark, LLC (2004) 04 CDOS 4108

By Jason A. Geller and David P. Borovsky

Plaintiff Evelila Plancarte worked as a janitor in a building that had hired a security firm, Guardsmark, to provide security services. One of Guardsmark's guards, Toufik Kadah, assaulted Plancarte while she was cleaning a bathroom in the building. Plancarte sued Guardsmark and Kadah. Her claims against Guardsmark were based on theories of respondeat superior, negligent hiring, and negligent supervision. Kadah was also criminally charged with misdemeanor sexual battery, and was convicted of this offense after a plea of nolo contendere.

In the civil case, the trial court granted summary judgment in favor of Guardsmark, holding that the alleged assault was not related to Kadah's employment, and there was no evidence of negligent hiring or supervision. Later, Plancarte brought a motion for a new trial, contending that she discovered new evidence that demonstrated ratification by Guardsmark of Kadah's wrongful acts, which could lead to Guardsmark's

liability. The evidence was Guardsmark's payment of Kadah's defense costs in the civil suit, despite its knowledge of Kadah's conviction in the criminal case. The trial court denied Plancarte's motion for a new trial, and the California Court of Appeal, First District, affirmed.

The Court of Appeal recognized that Labor Code Section 2802 requires an employer to pay any judgment entered against an employee for conduct arising out of his employment, and defend an employee sued by a third party for such conduct. If the employer chooses not to defend, and the employee's actions are deemed to have arisen out of his employment, then the employer must indemnify the employee for the amount of judgment, costs, and attorneys' fees incurred in defending the lawsuit. At the outset of the civil case, the Court recognized that there was at least a chance that Kadah's actions could have been deemed to have arisen out of his employment. Furthermore, the Court

recognized that Guardsmark's decision to defend Kadah could have been aimed at minimizing its own potential liability. Thus, the Court held that Guardsmark's choice to defend Kadah was not a ratification of his conduct, but instead was a sound business decision aimed at minimizing Guardsmark's own potential liability, and also (arguably) satisfied its statutory duty under Labor Code Section 2802. Other factors supported the conclusion that Guardsmark did not ratify Kadah's conduct: (1) Kadah never admitted guilt; (2) Guardsmark suspended Kadah immediately after the incident; and (3) Guardsmark terminated Kadah after his criminal conviction.

Although a different result could be reached under different facts, this case supports the proposition that an employer's decision to defend an employee in a lawsuit brought by a third party for acts committed in the workplace, even if those acts fall outside the scope of employment, does not constitute ratification of the employee's wrongful conduct. In deciding whether an obligation exists to defend an employee accused of similar conduct, or whether a defense should be provided voluntarily, employers are advised to consult with counsel.

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