

Presentation Objectives

Public Entity's Duty to Defend Employees

Public Entity's Duty to Indemnify Employees


Course and Scope of Employment



Duty to Defend
Govt. Code section 995

Public entity has duty to provide defense:


- Employee or former employee
- Any civil action or proceeding
- Within scope of employment



Duty to Defend
Govt. Code section 995.4

Exceptions:

- Proceeding brought by employer to remove, suspend, discipline, etc.
- Employee's appeal from administrative proceeding
- Criminal proceeding against employee



Duty to Defend

Govt. Code section 995.2(b)

Procedural mechanism for duty to defend:

If employee requests in writing that entity provide for a defense

Entity must inform employee within 20 days whether defense will be provided

If refusal to provide defense, the reason for refusal



Grounds for Refusal To Defend

Govt. Code section 995.2

Public entity may refuse to provide defense if it determines any of the following:

Act or omission not in scope of employment

Acted because of actual fraud, corruption or actual malice

Defense creates specific conflict of interest between entity and employee



Entity Refuses to Defend

Govt. Code section 996.4

If entity refuses to defend and employee retains counsel;

Determined that employee is within scope of employment

Entitled to recover reasonable fees, costs and expenses necessarily incurred in defense

UNLESS,

Entity establishes actual fraud, corruption or actual malice




Duty to Indemnify
Govt. Code section 825

If employee requests defense in writing not less than 10 days before trial date;

Within scope of employment;


AND

Reasonably cooperates in good faith



Duty to Indemnify
Govt. Code section 825


PUBLIC ENTITY PAYS\$



Duty to Indemnify
Govt. Code section 825

Entity may provide defense under reservation of rights:

Duty to indemnify employee only if established that conduct complained of was within scope of employment




Duty to Indemnify
Govt. Code section 825.2(b)

If entity refuses to defend or defends under reservation of rights and employee pays settlement or judgment;

Employee may recover settlement or judgment if:

Employee establishes scope of employment

UNLESS . . .




Duty to Indemnify
Govt. Code section 825.2(b)

The entity establishes:

Actual fraud, corruption or actual malice

or . . .

Willful failure or refusal to reasonably cooperate in good faith in defense



Duty to Indemnify


Employee may assign indemnity rights

County and employee sued for sexual harassment

County refused to defend – outside scope of employment

Plaintiff dismissed County *with prejudice*

Johnson v. County of Fresno (2003) 111 Cal.App.4th 1087



Duty to Indemnify

Plaintiff entered into stipulated judgment with employee

Employee admitted conduct within course and scope and assigned right to indemnification to plaintiff

Plaintiff filed claim against County seeking indemnification

Filed declaratory relief action to find employee in scope of employment

Johnson v. County of Fresno (2003) 111 Cal.App.4th 1087



Duty to Indemnify

If judgment entered against employee after employer refuses to defend

Employee establishes course and scope; and

Employer fails to establish fraud, corruption and malice; or

Refusal to cooperate in good faith in defense

Employee entitled to indemnification

Johnson v. County of Fresno (2003) 111 Cal.App.4th 1087



Duty to Indemnify

“We recognize that, through this assignment, Johnson has received something to which she would not otherwise be entitled to. All we can say is welcome to the world of assignments.”

Johnson v. County of Fresno (2003) 111 Cal.App.4th 1087



Fraud, Corruption or Malice

Govt. Code section 996.4

Requires showing of:

Personal animosity;

Malevolence or ill will; or

Deliberate wrongful intent

Allen v. City of Los Angeles (9th Cir. 1996) 92 F.3d 842



Fraud, Corruption or Malice

Burden of proof on employer

Judged objectively from visible conduct of employee

Not subjective intentions of employee



Specific Conflict of Interest

Govt. Code section 995.2(a)(3)

“ . . . a conflict of interest or an adverse or pecuniary interest as specified by statute or by a rule or regulation of the public entity.”



Specific Conflict of Interest

Is employee entitled to separate counsel if conflict of interest?

If *actual* conflict of interest . . .

No duty to defend

City of Huntington Beach v. Petersen Law Firm (2002) 95 Cal.App.4th 562



Specific Conflict of Interest

If *potential* conflict of interest only, entity has duty to provide defense, but not separate

Professional duties owed by attorney if he believes there is conflict of interest

Not owed by entity

City of Huntington Beach v. Petersen Law Firm (2002) 95 Cal.App.4th 562



Specific Conflict of Interest

Defense under reservation of rights does not create conflict of interest

Employee not entitled to separate counsel

DeGrassi v. City of Glendora (9th Cir. 1999) 207 f.3d 636



Punitive Damages

Govt. Code section 825

A public entity is not required to pay punitive or exemplary damages

Allegation of punitive damages does not create a conflict of interest

No separate counsel required

Laws v. County of San Diego (1990) 219 Cal.App.3d 189



Good Faith Cooperation

Public entity defends officer in civil rights action

Officer resigns and makes secret deal with plaintiff

Officer's cooperation with plaintiff created conflict

City entitled to withdraw defense

Stewart v. City of Pismo Beach (1995) 219 Cal.App.4th 1600



Scope of Employment

CACI 3720

Employee within scope of employment if acts complained of:

(1) Reasonably related to kinds of tasks employed to perform;

or

(2) Reasonably foreseeable in light of employer's business or employee's responsibilities



Scope of Employment

CACI 3722

Unauthorized conduct may be within scope of employment if:

Committed in the course of a series of acts authorized by the employer;

or

Arose from a risk inherent in or created by the enterprise.



Scope of Employment

Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202

Los Angeles police sergeant pulls plaintiff over for suspected drunk driving

Fails field sobriety tests

Sergeant takes her home where he forcefully rapes her



Scope of Employment

Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202

Jury returned verdict for plaintiff finding sergeant's conduct within scope of employment

City vicariously liable for sergeant's conduct



Scope of Employment

Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202

Vicarious liability:

Departure from general principal that liability must be based on finding of fault (strict liability)

A rule of policy


A deliberate allocation of risk



Scope of Employment

Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202

Policy objectives of respondeat superior:

- (1) Holding employer liable may prevent occurrence of tortious conduct;
 - (2) Greater assurance of compensation for victim; and
 - (3) Equal distribution of loss by those benefiting from enterprise
- 

Scope of Employment Sexual Assault


Not within scope of employment:

Teacher molests junior high student

John R. v. Oakland Unified (1989) 48 Cal.3d 438

Janitor's rape of student

Alma W. v. Oakland Unified (1981) 123 Cal.App.3d 133



Scope of Employment Sexual Assault

Not within scope of employment:

Sunday school teacher's sexual assault of minor

Jeffrey E. v. Central Baptist Church (1988) 197 Cal.App.3d 718

Priest's seduction of parishioner

Rita M. v. Roman Catholic Archbishop (1986) 187 Cal.App.3d 1453



Distinguishing Mary M.

Authority of police over public :

Uniform

Badge

Gun

Marked patrol vehicle

Wrongful acts flowed from authority given to him by the City of Los Angeles

Policy objectives of respondeat superior all supported by imposition of liability



Distinguishing Mary M.

Community should bear cost resulting from abuse of power by police

Substantial benefits derived from lawful exercise of police power

Use of authority is enterprise engaged in



Scope of Employment Sexual Assault

County of Los Angeles v. Superior Court, 2002 WL 31525339

LASD deputy from Child Abuse unit alleged to have molested minor daughter of woman he had relationship with (mother worked for Dept. of Family Services)

Molested victim over period of nine years

Often molested while in uniform and in patrol car

Scope of Employment Sexual Assault

County of LASD v. Superior Court, 2002 WL 31525339

Fact that employment brought deputy together with minor's mother not enough to establish causal link

Relationship – not employment – gave deputy opportunity for contact with minor

Minor acquiesced not because of peace officer authority but because of relationship with mother

Scope of Employment Sexual Assault

Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995)
12 Cal.4th 291

Pregnant plaintiff after slip & fall goes to hospital ER for examination

During ultrasound examination, technician sexually assaults her

No vicarious liability for hospital

Scope of Employment Sexual Assault

Fact that employment provided opportunity for technician to assault plaintiff is insufficient to create vicarious liability

Motivating emotions of technician were not attributable to work related events.

Took advantage of solitude with naïve patient for personal purposes

Abused position of trust NOT job created authority



Scope of Employment Sexual Assault

K. G. v. County of Riverside (2003) 106 Cal.App.4th 1374

Deputy molested his step-daughter over 2½ year period

On occasion abuse took place in deputy's patrol car

Other deputies in uniform present on occasion

Plaintiff alleges she did not refuse demands or inform her mother because of stepfather's authority as deputy



Scope of Employment Sexual Assault

Not within course and scope of deputy's employment

Stepfather molesting stepdaughter – not officer who is enforcing law raping woman unknown to him

Association did not arise out of employment

Threats of authority was not sufficient to hold employer responsible



Scope of Employment Sexual Assault

Doe 1 v. City of Murrieta (2002) 102 Cal.App.4th 899

Murrieta police officer who acted as advisor to Explorer program (Boys Scouts of America)

Engaged in consensual sexual relationship with 2 female explorers while riding with officer

City not vicariously liable



Scope of Employment Sexual Assault

Sexual activity did not arise from officer exercising job created authority over victims

No assertion of authority or force – officer was supervising explorers who consented to sexual advances

Victims not general members of public
Co-worker or supervisor relationship

Personal gratification



Scope of Employment Sexual Harassment

Farmers Insurance v. County of Santa Clara (1995) 11 Cal.4th 992

Jail deputy sexually harasses female co-workers (one of whom he supervised during his harassment)

Outside scope of employment



Scope of Employment Sexual Harassment

Though harassment occurred at workplace, it was purely personal in nature

Not related to any workplace issues

In direct violation of County policy

No parallel to authority of peace officer over citizen



Scope of Employment Sexual Harassment

Doe v. Nevada County Consolidated Courts, 2007 WL 1540954

County law librarian began sending obscene letters to woman using law library

Woman was in pro per seeking assistance in family law matter



Scope of Employment Sexual Harassment

Not within scope of librarian's employment

Librarian simply learned woman's address through employment and began sending letters

Motivation behind letters was not attributable to "work-related events or conditions"

Purely for personal gratification

No coercive authority over library patron



Scope of Employment

Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790

Employee of internet provider uses work computer to send threatening e-mails

"I seriously hope you have health insurance because you're going to get your #\$\$@ stomped."

"You can look forward to all your fingers getting broken."

Scope of Employment

Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790

Scope of employment generally given broad construction

Fact that employee is not engaged in ultimate object of employment does not preclude liability

Scope of Employment

Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790

Employer's liability may extend to willful and malicious torts as well as negligence

Act may be within scope of employment even if it breaks an express company rule and confers no benefit on employer

Scope of Employment

Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790

No vicarious liability if employee *substantially* deviates from employment duties for personal purposes

If tort is purely person in nature, mere presence at work will not create vicarious liability



Scope of Employment

Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790

Sending personal e-mails, even though using company computer, was outside scope

Employer "may have set the stage for [its employee's] misconduct, but the script was entirely of the employee's own, independent invention."



Scope of Employment

Stone v. Regents of University of California (2000) 77 Cal.App.4th 736

Former employee sued for stealing human eggs and embryo

Outside scope of employment



Scope of Employment

Munoz v. City of Palmdale (1999) 75 Cal.App.4th 367

Unpaid volunteer at senior center spills coffee on plaintiff

No respondeat superior liability based on volunteer exclusion under Labor Code

Exception for reserves, community service, etc.



Scope of Employment

Hild v. Southern Cal Edison Company 2007 WL 1806850

SCE employee on work site at Big Creek

Kids playing paintball nearby

Coaxes neighbor boy to approach her

Accidentally shoots boy in eye



Scope of Employment

Hild v. Southern Cal Edison Company 2007 WL 1806850

Jury found within scope of employment

\$704,633 award

SCE moves to set aside judgment on grounds outside scope of employment



Scope of Employment

Hild v. Southern Cal Edison Company 2007 WL 1806850

Requires "nexus" between the conduct and the employee's work

The tort must, in a general way, be foreseeable from the employee's duties

Liability applies only to types of injuries that as a practical matter are sure to occur in conduct of employer's enterprise

Scope of Employment

Hild v. Southern Cal Edison Company 2007 WL 1806850

Employee's conduct was purely personal in nature

Playing practical joke

Not foreseeable that employee would be distracted by kids playing paintball

Nothing of what she did was inherent in work environment

Scope of Employment

Sunderland v. Lockheed Martin (2005) 130 Cal.App.4th 1

Lockheed employee re-assigned from Edwards AFB to Georgia

Packs belongings to travel to Georgia

Stops at In-N-Out drive through on way out of town and rear ends plaintiff

Scope of Employment

Sunderland v. Lockheed Martin (2005) 130 Cal.App.4th 1

Employee's personal vehicle

Paid mileage

Paid per diem

Trial court – personal activities & not in scope of employment

Scope of Employment

Sunderland v. Lockheed Martin (2005) 130 Cal.App.4th 1

Plaintiff argues worker's comp concept of "commercial traveler's rule"

Within course of employment during entire period of travel while engaged in employer's business

Appellate court held it does not apply

Scope of Employment

Sunderland v. Lockheed Martin (2005) 130 Cal.App.4th 1

If main purpose of injury-producing activity was pursuit of employee's personal ends, employer is not liable

Going through drive-through to eat was purely personal in nature and not related to employment

Not engaged in any work duties

Nothing for benefit of employer

Scope of Employment Off-Duty Peace Officer

Inouye v. County of Los Angeles (1994) 30 Cal.App.4th 278

Off-duty Dept. of Health "safety police officer" involved in shooting on way home from work (attempted robbery)

Driving personal vehicle

Personal weapon

Peace officer 24/7 if performing duties imposed/authorized by law

Scope of Employment Off-Duty Peace Officer

Inouye v. County of Los Angeles (1994) 30 Cal.App.4th 278

County policy that safety officers are not engaged in the performance of their duties in off-duty hours

Penal Code Section 830.31 – Safety officers empowered to make arrests while off-duty

Penal Code trumps policy – within scope of employment

Scope of Employment Off-Duty Peace Officer

Thorn v. City of Glendale (1994) 28 Cal.App.4th 1379

Glendale fire marshal sets incendiary devices while conducting a fire inspection

Business burns down

Not in course and scope of employment

Scope of Employment Off-Duty Peace Officer

Fire marshal setting incendiary device is "startling and unusual" to extent it is outside those risks that should be imposed on employer

Ability to access private areas of building arose from employment but is not unique



Scope of Employment Off-Duty Peace Officer

Van Ort v. Estate of Stanewich (1996) 92 F.3d 831

Narcotics officers serve search warrant on residence and find cash, jewelry and coins in safe

Stanewich returns next day and commits home invasion robbery

Stanewich, who was wearing mask, is shot and killed by responding deputy



Scope of Employment Off-Duty Peace Officer

Federal District Court analyzes whether Stanewich was acting under color of state law for purposes of civil rights violation

NOT under color of state law

Was not acting pursuant to any official police business

Solely a personal pursuit

Disguised his identity



Scope of Employment Off-Duty Peace Officer

Mendoza v. City of Los Angeles (1998) 66 Cal.App.4th 1333

Off-duty police officer shoots fiancée with personal firearm

Not within course and scope

Officers permitted but not required to carry concealed
firearm while off duty



Scope of Employment Off-Duty Peace Officer

Huffman v. County of Los Angeles (1998) 147 F.3d 1054

Intoxicated off-duty deputy sheriff armed with personal
concealed handgun loaded with department issued
ammunition

Engages in verbal confrontation with intoxicated patron
of restaurant

Attacked by patron outside of bar – during encounter
deputy shoots and kills attacker



Scope of Employment Off-Duty Peace Officer

Federal case analyzed to determine if deputy was acting
"under color of law" at time of shooting

Not under color of law

Not on duty; not wearing uniform; did not identify himself as
peace officer; using his personal weapon

Actions purely personal and not related in any way to
performance of official duties



Scope of Employment Off-Duty Peace Officer

Hoblitzell v. City of Lone (2003) 110 Cal.App.4th 675

Off-duty police officer and building inspector go to job site and tell property owner the plaintiff contractor had been working without permits

Also made disparaging remarks about quality of plaintiff's work

As a result, work was delayed for three days

Scope of Employment Off-Duty Peace Officer

Not in course and scope of employment

Acting outside of City jurisdiction (in county)

Wearing civilian clothing

Acting for personal reasons

Scope of Employment

Mary M. specific to peace officers who abuse authority while on duty

Courts have narrowed scope of employment

Personal purposes

Unrelated to any work activity

Worth risk of refusing to defend?

**Central Valley Chapter
PARMA**

**Defending The Public Employee
2008**

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