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Sheriff May Be Liable For Deputy's Sexual Assault If Deputy Was 'Aided By Existence of Employment Relationship'; Skoglund, Amestoy Dissent

A deputy sheriff stopped by a general store while on patrol and forced the store clerk to perform oral sex while he and she were alone. The clerk subsequently called the police, and the deputy eventually pled nolo to charges of lewd and lascivious behavior and neglect of duty and was given a suspended sentence. The clerk brought suit against the deputy, his brother the sheriff, the department and the state. After she dismissed the claim against the deputy (because of his lack of assets), the remaining defendants were granted summary judgment, and plaintiff appealed.

Plaintiff had three theories of liability: (1) direct liability pursuant to 24 V.S.A. § 309 (which says that a sheriff shall be liable for the neglects of deputies because the deputy neglected his duty when he failed to arrest himself for his own sexual misconduct); (2) vicarious liability since the deputy's intentional criminal act was within the scope of his employment, even though that conduct was contrary to the wishes and/or instructions of defendants; and (3) vicarious liability under the Restatement (Second) of Agency § 219(2)(d) even if the deputy's acts were outside the scope of his employment.

The Supreme Court, in an opinion by Justice Dooley, concluded that the first two theories could not survive summary judgment. "Plaintiff's interpretation would effectively render sheriffs strictly liable under [13 V.S.A. § 3006] for all criminal misconduct of their on-duty deputies, except in the wholly implausible and unlikely event that the malfeasant deputy prevented his or her own criminal undertaking," Dooley explained in rejecting the first theory. "Although [the deputy's] misconduct occurred while ostensibly on duty, we cannot conclude that coercing plaintiff to perform fellatio was conduct that was actuated, even in part, by a purpose to serve the county sheriff," he added, rejecting the second theory. The deputy's criminal misconduct - an act rooted in prurient self-interest - could not properly be seen as intending to advance the employer's interests, and was therefore not within the "scope of employment" as required for traditional vicarious liability.

The Court split 3-2 on whether the defendants might be vicariously liable nonetheless for the deputy's actions outside the scope of employment which fit within an exception set forth in the Restatement (Second) of Agency § 219(2)(d). That section, not previously adopted in Vermont, applies in cases where an employee either purports to act or to speak on behalf of the principal and there is reliance upon apparent authority or is aided in accomplishing the tort by the existence of the agency relation. The first part of the § 219(2)(d) exception did not apply, since it would not have been reasonable for plaintiff to infer the deputy had been given authority by his employer to force her to perform oral sex. However, Dooley, joined by Justices Johnson and Retired Justice Gibson, concluded that the facts might support liability under the second clause of § 219(2)(d), which authorizes liability for torts committed outside the scope of employment if the employee "was aided in accomplishing the tort by the existence of the agency relation." If plaintiff were able to show that the deputy was aided in accomplishing an intentional tort involving a sexual assault on her by the existence of his employment with the law enforcement agency, vicarious liability could apply, the majority explained. "Police officers [exercise] the most awesome and dangerous power that a democratic state possesses with respect to its residents - the power to use lawful force to arrest and detain them," Dooley wrote, adding that "[i]nherent in this formidable power is the potential for abuse." It makes sense for

society to bear the cost of compensating people who are injured by abuse of that authority "because of the substantial benefits that the community derives from the lawful exercise of police power." Dooley rejected the holdings of some courts that for there to be liability there must be a showing that the employee appeared to be acting within the authority given by the principal or that the employee had engaged in misrepresentation or deceit. The majority also rejected the argument of the dissent "that any policy that allows vicarious liability for intentional torts of law enforcement officers must be made by the Legislature." Dooley noted that this was a case of first impression in which the Court was discharging its "traditional role" of defining the common law. "Exactly because we seek to follow the common law as it has developed in the jurisdictions in this country, we have used the Restatement of Agency to find the appropriate law," he added. "This is not a case like *Hillerby v. Town of Colchester*, 167 Vt. 270, 272-73 (1997), [in which the Court held that it should be up to the Legislature, not the Court, to change the rules of municipal sovereign immunity] where our action would reverse a long-standing common law principle which the Legislature has endorsed and on which it has relied. . . . If the Legislature disagrees with our balancing of the various considerations behind this decision, it can and should enact a different vicarious liability rule."

Having decided that there might be a basis for liability, Dooley looked at whether the case was appropriate for resolution on summary judgment. "We do not believe that the court could find as a matter of law that [the deputy] did not have special access to plaintiff: access created by the existence of the agency relationship that aided the commission of the tort," Dooley wrote. In addition, summary judgment is not appropriate "in any cases in which the resolution of the dispositive issue requires determination of state of mind, as the fact finder normally should be given the opportunity to make a determination of the credibility of witness, and the demeanor of the witnesses whose state of mind is at issue." The plaintiff's submission to the sexual assault went to her state of mind, and "we do not believe that her state of mind can be determined as a matter of law from the summary judgment record," Dooley concluded.

Justice Skoglund, joined by Chief Justice Amestoy, did not quarrel with the majority's adoption of § 219(2)(d) of the Restatement (Second) of Agency as an exception to our scope-of-employment rule for purposes of determining vicarious liability. However, "in its broad application of the last clause of that section to the facts of this case, specifically a sexual assault committed by a law enforcement officer while acting outside the scope of employment, the majority has created a threat of vicarious liability that knows no borders," the dissent wrote. The exception "applies to a broad range of employees whose duties grant them unique access to and authority over others, such as teachers, physicians, nurses, therapists, probation officers, and correctional officers, to name but a few." Whether to hold a law enforcement agency vicariously liable for a sexual assault perpetrated by one of its officers turns on policy considerations of a broad nature, "considerations that the majority barely acknowledges and insufficiently analyzes." As such, it is an issue more appropriate for consideration by the Legislature than the court, the dissent maintained.

• Doe v. Forrest

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