

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LEXINGTON INSURANCE COMPANY	:	CIVIL ACTION
As subrogee of SUNBURST HOSPITALITY	:	
CORPORATION,	:	
Plaintiff,	:	
	:	
v.	:	NO. 02-0764
	:	
HENKELS & McCOY, INC., and	:	
HAROLD UNDERWOOD,	:	
Defendants.	:	

ORDER

AND NOW, this day of May, 2003, upon consideration of the Motion for Summary Judgment filed by Defendant Henkels & McCoy, Inc. (“Defendant”) on September 13, 2002 (Docket Entry No. 7), the Supplemental Memorandum of Law in Support of Defendant’s Motion for Summary Judgment, filed on December 19, 2002 (Docket Entry No. 12), the Response to the Motion for Summary Judgment, filed by Plaintiff Lexington Insurance Company (“Plaintiff”) on January 7, 2003 (Docket Entry No. 13), and Defendant’s Reply filed on January 21, 2003 (Docket Entry No. 14), it is hereby ORDERED that the Motion for Summary Judgment is DENIED for the reasons that follow.

By this action, Plaintiff seeks to recover, as subrogee of Sunburst Hospitality Corporation (“Sunburst”), compensation for damages to a hotel owned by Sunburst. The damages to the hotel resulted from a fire allegedly caused by the negligence of Harold Underwood (“Underwood”), an employee of Defendant who was staying at the hotel at the time of the fire. Plaintiff’s Complaint

sets forth a single claim against Defendant for negligence, alleging that Defendant is liable for damages caused by Underwood's negligence because Underwood was acting within the scope of his employment at the time in question.¹ Defendant has moved for summary judgment, arguing that the undisputed facts establish as a matter of law that Underwood was not acting within the scope of his employment at the time of the fire, and that this action should therefore be dismissed.

The standard of review upon a motion for summary judgment is well-established. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The court is not required to resolve all disputed factual issues, but rather should determine whether "the evidence is such that a reasonable [finder of fact] could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). In making this determination, the evidence of the nonmoving party is to be believed, and the district court must draw all reasonable inferences in the nonmovant's favor. Id. at 255.

¹ Plaintiff filed an Amended Complaint on September 26, 2003, adding Harold Underwood as a Defendant and adding a negligence claim against Underwood. On April 29, 2003, Plaintiff filed with this Court proof of service of the summons and Amended Complaint upon Defendant Underwood. Plaintiff's pending negligence claim against Underwood is not at issue here.

In addition, in reviewing this particular motion for summary judgment, it is significant to note that, pursuant to Pennsylvania law, the question of whether an employee's conduct was within the scope of his employment is typically one for the jury.²

It is a well settled principle of law in this Commonwealth that: "Where the facts are in dispute *or more than one inference can be drawn therefrom*, the issue whether or not the servant was acting for the defendant and within the scope of his employment is for the jury and the surrounding facts and circumstances are to be considered by the jury in this inquiry."

Iandiorio v. Kriss & Senko Enterprises, Inc., 517 A.2d 530, 533 (Pa. 1986) (emphasis added) (citation omitted).

Here, although the factual circumstances surrounding the fire at the hotel are evidently not in dispute at this juncture, the Court concludes that more than one inference can be drawn from the facts as to whether Underwood was acting within the scope of his employment at the time of the fire. The facts as presented by the parties are as follows.³ The hotel, "Mainstay Suites," is an "extended stay" hotel located in Malvern, Pennsylvania. The rooms of the hotel contain kitchens with multiple appliances including stoves, microwave ovens, refrigerators, toasters, and dishwashers. Underwood, who resides in Oregon and who was employed by Defendant at the time, was staying at the hotel along with a number of other employees of Defendant. Underwood and the other employees had traveled to the Malvern, Pennsylvania area as part of their employment with Defendant to work on a project installing fiber cable for a

² Neither party disputes that Pennsylvania law applies to this diversity action.

³ All of the facts set forth herein are taken from the following sources: Pl.'s First Amended Complaint at ¶¶ 1-18; Def.'s Answer to Pl.'s First Amended Complaint at ¶¶ 1-18; Def.'s Motion for Summary Judgment at 1-3; Pl.'s Response at 2-6.

customer of Defendant. At approximately 6:00 p.m. on Sunday, March 25, 2001, Underwood was preparing to cook a meal on the kitchen stove in his room at the hotel, Room 314. It is alleged by Plaintiff that Underwood negligently left an oil-filled pan on the stove unattended, resulting in a fire causing significant damage to the hotel property.

Underwood had initially traveled to Pennsylvania from Oregon in a truck owned by Defendant. Prior to the day of the fire, Underwood had been staying at the hotel for approximately two and a half months. During the week preceding the Sunday in question, Underwood had worked Monday through Saturday, but he was not working that Sunday, and, in fact, never worked on Sundays for Defendant. Furthermore, Underwood never conducted business while in his hotel room. Defendant paid Underwood approximately \$13 per hour, and provided a \$40 per diem allowance for living expenses, including hotel and food, while on this work trip to Pennsylvania. Underwood therefore was therefore responsible on his own for paying any expenses over \$40 per day.

Defendant placed no restrictions on where Defendant stayed while working in Pennsylvania, and Defendant did not assist Underwood in finding or choosing the hotel. However, Underwood testified in his deposition that the reason the employees of Defendant chose an efficiency hotel with cooking facilities was because it was less expensive than going out to eat every night. Although Defendant's employees were technically allowed to travel home on weekends when not working, traveling home would have entailed a trip from Pennsylvania to Oregon and back, and Defendant's policy was not to reimburse them for such travel. Furthermore, a representative for Defendant acknowledged that it is generally more cost-effective to send employees like Underwood to project locations such as Pennsylvania when such

employees are already familiar with the type of work to be done, rather than hiring local employees and having to train them. In fact, during Underwood's three years of employment with Defendant, he traveled an average of four days per week.

"It is well settled that an employer is held vicariously liable for the negligent acts of his employee which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment." Costa v. Roxborough Memorial Hospital, 708 A.2d 490, 493 (Pa. Super. 1998), *appeal denied*, 727 A.2d 1120 (Pa. 1998). "To be considered within the scope of employment, conduct must meet the following criteria: (1) it must be of the kind the actor was employed to perform; (2) it must occur substantially within the authorized time and space limits; and (3) it must be actuated, at least in part, by a purpose to serve the master." Shuman Estate v. Weber, 419 A.2d 169, 173 (Pa. Super. 1980) (citing Restatement (Second) Agency § 228 (1957)). "It is not necessary, however, that the acts be specifically authorized by the master to fall within the scope of employment; it is sufficient if they are clearly incidental to the master's business." Id.

In 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, the following matters of fact are to be considered:

- (a) whether or not 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 the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not 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 or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

Restatement (Second) of Agency § 229 (1958) (cited in Iandiorio, 517 A.2d at 533).

Taking all of the above factors into consideration, the Court concludes that a reasonable juror could infer from the facts as set forth herein that Underwood was acting within the scope of his employment at the time of the fire. The relevant Pennsylvania case law, although sparse, supports this conclusion.

In Herr v. Simplex Paper Box Corp., 198 A. 309 (Pa. 1938), the plaintiff, employed by an oil company, was in the process of delivering gasoline to the defendant-company's underground gas tank when an employee of the defendant approached the plaintiff to sign the delivery receipt and struck a match to light a cigarette. Id. at 309-10. The match caused the gas fumes in the air, and the spilled gas on the plaintiff's clothing, to ignite, thereby injuring the plaintiff. Id. at 310. The issue before the Court was whether the defendant could be held liable for the negligence of its employee. Id. The Court held that the employer should not be held liable because, in striking the match in order to smoke a cigarette, the defendant's employee "was doing nothing in furtherance of or in connection with his employer's business," but was merely doing "something . . . for his own enjoyment and satisfaction." Id.

Significantly, the Court in Herr also noted that liability of an employer for injuries caused by the smoking of an employee might be established where, even though the act is not within the scope of employment, there is evidence showing that "the employer had knowledge of the

propensity of his servants to smoke, which habit they were likely to indulge in while at work,” such that “the doing of the act was to be reasonably apprehended” by the employer. Id. at 312; see also Iandiorio, 517 A.2d at 533-34 (where the Pennsylvania Supreme Court, relying upon this portion of the Herr opinion, held that the defendant-employer could be held liable for injuries caused by the smoking of its employee because the employer knew that its employees smoked at work and dictated where its employees should take breaks and smoke, and therefore exerted sufficient control over the employees’ conduct to bring these activities within the scope of employment). However, the Court in Herr did not apply this possible basis for liability because there was no such evidence presented. Herr, 198 A. at 312.⁴

Here, Defendant’s own agent acknowledged that it benefitted financially from sending employees such as Underwood to remote locations for extended business trips. Moreover, lodging and eating will necessarily be elements of such extended business trips, whether they are directly provided by the employer or not, and Defendant’s understanding of this fact is evident in its provision of \$40 per day to its employees for living expenses. Thus, a reasonable juror might conclude that in preparing his meal at the efficiency hotel on a Sunday during a business visit lasting over two and a half months, Underwood’s actions were incidental to and in furtherance of Defendant’s business interests, and therefore within the scope of his employment such that

⁴ Defendant relies primarily upon the case of Minamayer Corp. v. Paper Mill Suppliers, Inc., 297 F.Supp. 524 (D.C. Pa. 1969). However, Minamayer is readily distinguishable from the instant case because, as in Herr, the injury in Minamayer occurred as a result of the personal act of smoking by a servant of the defendant. As the Court stated in Herr, “[t]he courts, both in this country and in England, have generally refused recovery in an action against an employer, where injury was done to the person or property of a third person by a servant smoking; such an act being purely for the servant’s own enjoyment and in no way in furtherance of the master’s business.” Herr, 198 A. at 311.

Defendant should therefore bear the costs associated with such conduct. See Restatement (Second) of Agency § 229, cmt. a (the “ultimate question” in determining the scope of employment is “whether or not it is just that the loss resulting from the servant’s acts should be considered as one of the normal risks to be borne by the business in which the servant is employed”). In addition, depending upon the evidence presented at trial, a reasonable juror might find that Defendant had knowledge of the propensity of its employees to stay at “extended stay” hotels (or efficiency hotels) and to prepare their own meals on extended business trips (in order to be able to afford to sleep and eat on the \$40 per diem allowance provided by Defendant), and that Defendant could therefore have reasonably expected such conduct under the circumstances.⁵

In summary, because more than one inference may be drawn from the facts presented, and because a reasonable juror could conclude that Underwood’s conduct, which allegedly caused the fire in question, was within the scope of his employment, Defendant’s Motion for Summary Judgment is denied.

BY THE COURT:

Legrome D. Davis

⁵ Because Defendant’s Motion for Summary Judgment is denied based upon traditional principles of agency law, the Court does not reach Plaintiff’s alternative argument that Defendant “may also be liable under an emerging theory of liability known as the ‘enterprise theory’ of respondeat superior,” which, according to Plaintiff, has not yet been addressed by Pennsylvania courts. Pl.’s Response at 15-16.