

# Lessons in Employer Liability

## What to Take Away from the Sexual-abuse Scandal at Penn State

By KEVIN MALTBY, Esq.

**R**ecent allegations that Jerry Sandusky, former defensive coordinator for the Penn State University football team, sexually abused children while employed by the school have brought to the forefront issues relating to employer liability for the conduct of its employees.

So, what is an employer's responsibility when confronted by alleged egregious behavior on the part of an employee?

Shortly after the criminal indictment went public, which charged Sandusky with 40 counts of sexually abusing children, Penn State fired head football coach Joe Paterno, and other school officials either resigned or were terminated in the wake of the allegations. In addition to Sandusky, the indictment charged athletic director Tim Curley and the senior vice president for finance and business, Gary Schultz, with failing to report the sexual assaults and for misleading investigators.

While reports continue to surface that Sandusky's behavior was a widely protected secret, Penn State finds itself in a precarious position as his employer because some of the alleged incidents occurred while he was employed by Penn State, and others occurred while he was a retiree using its facilities. The indictment reveals that school officials received reports of Sandusky's alleged behavior and never reported them to police. In effect, the indictment characterizes the school's official conduct as "attempting to sweep the matter under the rug."

The aftermath of these allegations leaves many employers questioning whether they are protected from the conduct of their employees, customers, and contract workers. While the circumstances surrounding the Penn State/Sandusky matter are unique, employers may encounter other circumstances that expose them to liability.

Under the theory of 'respondeat superior' (Latin for 'let the master answer'), an employer may be responsible for the conduct of an employee if the employee was acting within his scope of employment. Generally speaking, if the harm occurred while the employee was doing his or her job, then the employer will be responsible for the acts or omissions of the employee. Conversely, if the harm occurred while the employee was acting outside the scope of his or her employment, then



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employees.

These principles have been explained in the following manner: "an employer must use due care to avoid the selection or retention of an employee whom he knows or should know is a person unworthy, by habits, temperament, or nature, to deal with the persons invited to the premises by the employer. The employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is generally considered sufficient to forewarn the

the employer may escape liability under the respondeat superior theory. The following are some examples where an employer may be liable for the acts and omissions of their employee:

- A bill collector who resorts to physically assaulting someone in order to extract money owed would expose his or her employer to liability;
- A delivery driver who gets into an accident while making deliveries will expose his or her employer to liability;
- An employee who becomes intoxicated at an office function may, under the right circumstances, expose his or her employer to liability if the employee gets into an accident following the event; and
- An employee who fails to do something required of his or her job, which results in a third party's injury, may expose the employer to liability.

Assuming that all of the facts in the indictment are true, it is evident that Penn State may have exposure because Schultz and Curley failed to take the appropriate steps to respond to the allegations and adequately protect the Penn State community.

Another area where an employer may have liability is under the doctrine of 'negligent hiring/negligent retention.' Under Massachusetts law, an employer whose employees are brought in contact with members of the public in the course of the employer's business has a duty to exercise reasonable care in the selection and retention of his

employer who selects or retains such employee in his service that he may eventually commit an assault, although not every infirmity of character, such, for example, as dishonest[y] ... will lead to such result."

If the allegations set forth in the indictment are true, it is hard to imagine Penn State avoiding liability under this theory. Given the allegations that certain high-ranking officials at Penn State were aware of some of Sandusky's conduct, the victims should be able to establish a cause of action under negligent retention.

Some other examples of negligent hiring and retention follow:

- A salesperson is convicted of sexual assault while working for an employer. The employer discovers the conviction but does nothing. The sales person sexually assaults a female customer. In the example, the employer would be liable for negligently retaining the employee.
- An employer fails to perform a background check on someone who will be working with children at a day-care center. An incident occurs with one of the children at the center. If the employer had performed a background check and verified the employee's résumé, it would have discovered that the employee had several incidents involving children, and their résumé was not completely truthful. This may result in a claim for negligent hiring.

In a nutshell, in order to minimize expo-

sure, employers should always perform background checks and verify information collected on résumés and job applications. Employers should give careful consideration to job candidates who will have significant exposure with the public or work with children, the elderly, or on the financial end of the company.

It is important to note, however, that Massachusetts has strict guidelines with regard to performing background checks, so employers are encouraged to seek the guidance of an attorney or a background-check

company knowledgeable in Massachusetts law.

It is likely that the public has seen just the tip of the iceberg with regard to the Jerry Sandusky child-sexual-abuse scandal. Since employers have an obligation to keep their constituency safe from harmful employees, Penn State University may likely suffer a huge fallout in the wake of its seemingly blind-eye perspective regarding Sandusky's conduct. ■

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