

June 11, 2013



**Top Employers
Know When
To Seek Counsel**



Tammy Meade Ensslin
ATTORNEY AT LAW

World Trade Center
333 West Vine St.

Suite 300 East

Lexington, Kentucky 40507

Phone: 859-368-8747

Fax: 859-317-9729

tensslin@meadeensslin.com

Your Employee is Driving Drunk in a Company Vehicle and Causes an Accident...Will the Employer be Subject to Punitive Damages?

Hopefully, it will never happen to you. But, what if the call comes in that an employee driver has been involved in an accident, in a company vehicle, and he/she is intoxicated. In Kentucky, and many other states, drunk drivers are not only subject to criminal sanctions but can be sued for injuries and assessed with punitive damages. Punitive damages are those damages meant not just to pay back the injured party but to punish the wrongdoer. If you, as the employer, are faced with such a situation, you should be asking yourself, "Am I going to get punished for the wrongdoing of my driver?"

All too often, an employer is sued for negligence for the actions of its employee on the theory of **vicarious liability**. The rationale behind such a suit is the employee was acting in the course and scope of his employment when the alleged negligent act occurred and that act is binding on the employer due to its responsibility to supervise and control the actions of its employee. Typically, the employee has little or no assets, so the Plaintiff brings suit against the employer and its deeper pockets. Thus, the responsibility of the employer becomes the paramount issue.

Vicarious liability suits are commonly seen when an employee is involved in a motor vehicle accident while in the course and scope of employment. On occasion, a Plaintiff may argue that the conduct of the employee was so egregious as to warrant additional damages, and thus a punitive damages claim is brought on the theory of vicarious liability even with no evidence of direct liability on the part of the employer.

A recent case from the U.S. District Court for the Western District of Kentucky, Louisville Division, discusses vicarious liability in the case of an automobile accident by an intoxicated employee while operating a company vehicle. On May 13, 2013, the Court entered an opinion finding in favor of the employer. In Dean v. Pike Electric, Civil Action No. 3:10-CV-652-JDM, the Plaintiff sued Pike Electric after its employee was involved in a 4-vehicle automobile accident, in 2009, while operating Pike's company vehicle. When the accident occurred, Pike's employee was on duty and significantly under the influence of alcohol. He had worked for Pike for 24 years and during those years had been arrested 3 times for driving his own vehicle while intoxicated. He had also been reprimanded and penalized once by Pike for operating a company vehicle under the influence of alcohol in 2004 (5 years prior to the accident at issue). Importantly, the Court noted, the 3 arrests made while the employee was operating his own vehicle were **unknown** to Pike and this was a key factor. Therefore, at the time of the accident at issue, the employer was only aware of one prior incident, 5 years earlier, involving this employee when he operated a Pike company vehicle while under the influence. And, upon notice, they suspended his driving privileges and required him to attend 6 weeks of rehabilitation treatment as well as random testing for 1 year thereafter (all of which were negative). Thereafter, the employee was also supposed to attend aftercare group meetings and Alcoholics Anonymous for 2 years but he failed to do so and his employer did not monitor his attendance. A claim was made for punitive damages against Pike.

In Kentucky, KRS 411.184 governs whether punitive damages may be recovered under these circumstances. The statute limits liability for an employer when certain conditions are met. It states, "In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer **authorized or ratified or should have anticipated the conduct in question**." KRS 411.184(3). Accordingly, although the statute permits an employer's vicarious liability for the actions of one of its employees, it also imposes significant limits on that potential liability. See McGonigle v. Whitehawk, 481 F. Supp. 2d 835,841-42(W.D. Ky. 2007) ("Very few cases on record have recognized vicarious liability for punitive damages.") In most instances, the employer will not have ratified or authorized the improper conduct. So, the issue then becomes, should the employer have anticipated the conduct in question? If so, then vicarious liability for punitive damages may attach to the employer.

In the Pike Electric case, the Court found that punitive damages could not be assessed against the employer because (1) it was not aware of the 3 prior off duty arrests for driving under the influence; (2) there was a 10-year gap between his last off-duty arrest and the 1st on duty incident wherein he was operating a company vehicle under the influence and another 5-year gap between that incident and the accident involved in the lawsuit; and (3) between the 2 on duty incidents, he underwent intensive therapy required by his employer for his alcoholism. Therefore, the Court found that it was not reasonable to conclude that the employer could have anticipated the conduct in question. There was not enough evidence to show that this employee consumed alcohol with such regularity and frequency that his employer should have been aware of it and could have taken additional steps to prevent the accident. Accordingly, summary judgment was granted in favor of the employer on the claim for punitive damages.

Lastly, the Plaintiff argued that the employer should have been aware of the prior off duty arrests had it complied with the requirements of the Federal Motor Carrier Safety Administration ("FMCSA") regulations found at 49 CFR §391.25. However, the Court found that even if that were true, the employer's inaction would be negligence per se and not gross negligence as required by the statute.

Reminders for Employers:

1. Enact and follow strict company policies pertaining to requirements for operating company vehicles.
2. Do not allow employees to escape discipline for acts of serious misconduct or termination when repeat offenses have occurred. Also, a slap on the wrist may not be sufficient for serious conduct. Make sure employees face appropriate discipline depending on the level of misconduct.
3. Even though the Court did not rely upon the lack of compliance with the FMCSA regulations on the issue of punitive damages, it could be considered negligence per se. Therefore, employers should ensure compliance with the requirements in 49 CFR §391.25 for its employees who operate "commercial motor vehicles" as defined in the Act. It requires:
 - A. Making an inquiry to obtain the motor vehicle record of each commercial motor vehicle driver it employs once every 12 months covering at least the preceding 12 months, to the appropriate agency of every State in which the driver held a commercial motor vehicle operator's license or permit during the time period.
 - B. Reviewing the motor vehicle record of each commercial motor vehicle driver it employs once every 12 months to determine whether that driver meets minimum requirements for safe driving or is disqualified to drive a commercial motor vehicle. The motor carrier must consider any evidence that the driver has violated any applicable FMCSA regulation. The motor carrier must consider the commercial motor vehicle driver's accident record and any evidence that the said driver has violated laws governing the operation of motor vehicles, and must give great weight to violations, such as speeding, reckless driving, and operating while under the influence of alcohol or drugs, that indicate that the driver has exhibited a disregard for the safety of the public.
 - C. A copy of the motor vehicle record required by paragraph A above shall be maintained in the driver's qualification file. A note, including the name of the person who performed the review of the driving record required by paragraph B above and the date of such review, shall be maintained in the driver's qualification file.

For additional information on Employment or Labor Law issues,

please contact TAMMY MEADE ENSSLIN at 859-368-8747.

DISCLAIMER

These materials have been prepared by Tammy Meade Ensslin for informational purposes only. Information contained herein is not intended, and should not be considered, legal advice. You should not act upon this information without seeking professional advice from a lawyer licensed in your own state or country. Legal advice would require consideration by our lawyers of the particular facts of your case in the context of a lawyer-client relationship. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. A lawyer-client relationship cannot be created until we consider potential conflicts of interest and agree to that relationship in writing. While our firm welcomes the receipt of e-mail, please note that the act of sending an e-mail to any lawyer at our firm does not constitute a lawyer-client relationship and you are not entitled to have us treat the information contained in an e-mail as confidential if no attorney-client relationship exists between us at the time that we receive the e-mail. The materials presented herein may not reflect the most current legal developments and these materials may be changed, improved, or updated without notice. We are not responsible for any errors or omissions in the content contained herein or for damages arising from the use of the information herein.

Kentucky Law requires the following disclaimer: THIS IS AN ADVERTISEMENT.

Kentucky Law does not certify legal specialties.