

## Litigation Alert

### EMPLOYERS BEWARE! Questioning an Employee Concerning Potential Misconduct May Lead to Claims of False Imprisonment

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While false imprisonment in the civil context typically refers to the detention of a suspected shoplifter by a retail store manager or its in-house security personnel, actionable claims for false imprisonment may exist within the employer-employee relationship as well. And unlike the shoplifter scenario, false imprisonment in the employment context does not always pertain to suspected criminal conduct. For instance, an employee who is "detained" in a conference room and questioned regarding potential violations of company policy may have a claim for false imprisonment, depending on the circumstances of the detainment.

Whether an employee is subjected to false imprisonment is determined by several factors. For purposes of civil liability, the elements of a false imprisonment cause of action are (1) a willful detention; (2) performed without consent; and (3) without the authority of law.<sup>1</sup>

The first element of a false imprisonment claim is willful detention. To determine whether an employee was willfully detained, courts look to a myriad of factors including the words and actions of the employer; whether the employee is passive, submissive, and easily influenced, or the opposite; the relative size, age, experience, sex, and physical demeanor of the participants; the relationship between the parties; the potential consequences of the employee's refusal to remain; the bearing that employment might have upon an employee's submission to the authority of an employer; the duration of the interview; whether the employee was prevented from leaving the area; whether the employee was prevented from leaving when he or she made such a request; and whether the employee was told to remain in the interview area.

A defendant can effectuate a "willful detention" of a plaintiff by violence, threats, or other means that restrain a person from moving from one place to another. Since most employers do not resort to violence when interrogating an employee regarding potential misconduct, most false imprisonment cases in the employment context involve a willful detention by threat.

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A willful detention by threat is one that is calculated to create in the person threatened a just fear of some injury to person, reputation, or property. An employee's subjective belief that he or she was restrained is insufficient to fulfill the willful detention element of a false imprisonment cause of action.

Furthermore, the Texas Supreme Court has held that when an "employer supervises its employees, it necessarily temporarily restricts the employees' freedom to move from place to place or in the direction that they wish to go. Without more, however, such a restriction is not a 'willful detention.'"<sup>2</sup> The Supreme Court continued that an "employer has the right, subject to certain limited exceptions, to instruct its employees regarding the tasks that they are to perform during work hours."<sup>3</sup> In that case, the Texas Supreme Court held that an employee who was waiting for a district manager to arrive to question her about an incident was not willfully detained when she was told to remain at her place of employment, but not to return to her usual post.<sup>4</sup>

An employee who was allegedly sexually harassed may also have a claim for false imprisonment if the employee can establish that his or her detention was accomplished by violence, by threats, or by any other means that restrained the employee from moving from one place to another. In one federal case, an employee suing her employer for sexual harassment and false imprisonment alleged she was "cornered" in her workspace and either inappropriately touched or subjected to sexually suggestive remarks. But given that the false imprisonment allegation failed to establish a willful detention that restrained her from moving from one place to another, the court found the allegations were insufficient to state a claim for false imprisonment.<sup>5</sup>

The second element of false imprisonment is that the detention was conducted without consent. If, during an employee interrogation, the employer asks that employee to remain and the employee consents, the employee has not been falsely imprisoned. To determine the voluntariness of the employee's compliance, courts tend to look at the same factors, described above, to determine whether the employee's detention was willful.

The third element of a false imprisonment action requires a showing by the employee that his or her detention by the employer was without authority of law or adequate justification. The Texas Civil Practice & Remedies Code has codified what is popularly known as the Shopkeeper's Privilege, which shields merchants from liability for detaining and interrogating individuals suspected of shoplifting. That statute says, "[a] person who reasonably believes that another has stolen or is attempting to steal property is privileged to detain that person in a reasonable manner and for a reasonable time to investigate ownership of the property."<sup>6</sup> Although Texas courts are divided as to the applicability of the Shopkeeper's Privilege in the employment context, employers who nevertheless assert this privilege will be judged on the reasonableness of their actions. That is, the reasonableness of their belief that the employee had stolen or was attempting to steal; whether the employer detained the employee in a reasonable manner; and for a reasonable time.

Finally, employers should bear in mind that an employer is liable for false imprisonment based on the actions of its employees—even if those employees had no authority to act or abused their authority in engaging in such actions. So long as an employee is operating in the course of employment, liability for false imprisonment may attach to the employer.

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Accordingly, employers should implement and enforce clear policies for supervisors regarding employee interrogations (e.g., only the district manager can interrogate employees).

Most often, given the sensitivity of the subject matter, employee interrogations will occur in a conference room or a supervisor's office. Following are some practical tips for employers to apply when engaging in such questioning:

- § Ask the employee to come with you; do not order them. Although an employer may have a right under certain circumstances to order the employee to a nearby conference room for questioning, the safer approach is to simply ask the employee to come with you.
- § Bring a witness. A witness can help attest to the reasonableness of your actions.
- § Inform the employee he or she is free to go at any time.
- § If you decide to shut the conference room door, do not lock it.
- § Do not threaten to call the police if the employee does not remain for questioning. Although Texas courts have previously held that it is not false imprisonment for the employer to threaten an employee he or she will call the police if the employee does not remain for questioning, it is still advisable not to pursue this course of action, if at all possible.
- § Be mindful of the duration of your questioning.
- § Do not yell or otherwise try to intimidate the employee as this may influence their belief that they have been restrained.

Whether an employee is suspected of violating company policy or stealing store merchandise, employers investigating employee misconduct must tread carefully when questioning employees under suspicion. Assuming it is followed, a well written policy regarding employee interrogations can play an invaluable role in minimizing potential liability exposure for false imprisonment.

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<sup>1</sup> Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985).

<sup>2</sup> Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 645 (Tex. 1995).

<sup>3</sup> Id.

<sup>4</sup> Id, at 645, 646.

<sup>5</sup> McCann v. Texas Vocational Schools, 2005 WL 1653084 (S.D. Tex. 2005).

<sup>6</sup> TEX. CIV. PRAC. & REM. CODE ANN. §124.002 (Vernon 2005).