

SECURITY LAW NEWSLETTER

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MALICIOUS PROSECUTION

Security Guards

(SLN No. 01-161)

Investigations

Wells Fargo Security Guards Accused Of Theft

Summary: The Third U.S. Circuit Court of Appeals held a loss prevention manager had probable cause to initiate prosecution for theft against two employees based on a co-worker's statement.

Facts: Following the disappearance of a First Fidelity Bank (FFB) moneybag containing \$190,000, Carlos Rodriguez, a Wells Fargo employee, reported that he had observed the theft of the bag. Rodriguez said he saw Luis Trabal pick up a white FFB bag and throw it into a truck assigned to Jerome Ford.

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Based on this statement, William Cianci, a Wells Fargo security loss prevention manager, filed a criminal complaint against Trabal and Ford. After criminal charges were dismissed, Trabal and Ford brought separate suits against Wells Fargo alleging malicious prosecution.

Decision: **The plaintiff in a malicious prosecution action has the burden of proving the defendant lacked probable cause when he initiated charges against the plaintiff.** Here, the evidence established probable cause for the prosecution that Wells Fargo initiated against Trabal and Ford. When Cianci filed the criminal complaint, he possessed sufficient evidence to reasonably believe Trabal and Ford were parties to the theft. Rodriguez gave two sworn statements that he saw Trabal throw the moneybag into Ford’s truck. This was consistent with Ford’s admission that he made an unauthorized stop with his armored truck at his partner’s house that same day.

The fact that Rodriguez was later considered to be an unreliable witness did not negate what Cianci knew when he initiated charges. **Probable cause to arrest can be based on the statement from a witness or informant.** TRABAL v. WELLS FARGO ARMORED SERVICE CORP., U.S. Court of Appeals for the Third Circuit, No. 00-2511, October 16, 2001.

Implications. Loss prevention managers should note that Cianci’s failure to investigate Rodriguez’s credibility, Trabal and Ford’s credit records, or interview everyone who may have possessed relevant information was irrelevant. He was under no duty to do so. The law does not require a prosecutor to explore every potentially exculpatory lead before filing a criminal complaint.

Probable Cause

(SLN No. 01-162)

Returned Checks

Home Depot Must Defend Malicious Prosecution Claim

Summary: The U.S. District Court for the Eastern District of Pennsylvania ordered a case to trial in which a Home Depot customer charged the retailer with malicious prosecution involving a bad check.

Facts: Joan Hayfield made a \$35.28 purchase at Home Depot, using a check that had been erroneously printed with an incorrect account number. Hayfield was unaware of the error and sent a substitute check plus a returned check fee. After depositing the second check, Home Depot initiated criminal prosecution against Hayfield. On several occasions, Hayfield spoke with a Home Depot manager to attempt to rectify the situation to no avail. She later brought a malicious prosecution claim against Home Depot, which moved for summary judgment.

Decision: **A cause of action for malicious prosecution has three elements. The defendant must have instituted proceedings against the plaintiff: (1) without probable cause, (2) with malice, and (3) the proceedings must have terminated in favor of the plaintiff.**

The court found Home Depot had no probable cause for its prosecution. First, “NSF” was not marked on the check; rather, “Refer to Maker” was marked, which put Home Depot on notice that it was to contact the maker to discuss the situation, which they failed to do. On the contrary, Hayfield made repeated efforts to inform Home Depot of the situation, beginning immediately after she learned of the error and continuing until the time of her hearing.

Home Depot knew three months before the criminal hearing that Hayfield had paid for her purchase and it nonetheless maintained its action against her. Home Depot contended that it attempted to

contact Hayfield on numerous occasions. Their call log, however, conspicuously omitted the second page. Moreover, Home Depot claimed Hayfield called the wrong store. Although Home Depot provided a smattering of Hayfield's phone records, it again omitted key pages.

The court concluded no reasonable person would have believed that Hayfield knowingly attempted to pass a bad check. Indeed, everything pointed to the opposite conclusion — that Hayfield did everything in her power to remedy the situation. Accordingly, Home Depot had no probable cause to initiate and maintain its prosecution. HAYFIELD v. HOME DEPOT USA INC., U.S. District Court for the Eastern District of Pennsylvania, No. 00-CV-4776, October 1, 2001.

Implications. At trial, Hayfield will be able to establish that the prosecution was malicious if she shows that it was initiated primarily for a purpose other than bringing her to justice. She will shift the burden to Home Depot if she shows, for example, that Home Depot's action was commenced and prolonged to make an example of her, i.e., that Home Depot wanted to show its toughness toward those who write bad checks, though they had no probable cause establishing that she herself wrote one.

Employee Misconduct

(SLN No. 01-163)

Private Investigators

MS Employer Prosecutes Employee For Theft

Summary: In a malicious prosecution case, the Mississippi Supreme Court affirmed summary judgment in favor of an employer who prosecuted an employee for theft.

Facts: Delta Pride, a catfish processing and shipping company, discovered significant shortfalls in its inventory and hired Pendelton Detectives to investigate. Pendelton placed Walter Sims in the plant as an undercover agent. While working one day, Sims claimed Steve McClinton, an employee, told him they were short 100 boxes on the order that they were filling. Sims brought the additional boxes to the dock, and observed McClinton transfer the extra boxes from the dock into an awaiting truck. Sims then observed the driver give McClinton \$800 cash. McClinton later approached Sims and offered to split the money with him.

Sims reported this activity to Pendelton, who in turn notified Delta Pride. After verifying that inventory was unaccounted for during that time period, Delta Pride contacted the Indiana Police Department. Chief Kenneth Winter determined that probable cause existed to make an arrest and later arrested McClinton. McClinton sued both Pendelton and Delta Pride for malicious prosecution and the circuit court granted summary judgment in favor of both defendants.

Decision: The supreme court affirmed that decision. McClinton contended that there was no probable cause to arrest him because it was unreasonable for Pendelton and Delta Pride to rely on the unsworn statement of Sims. McClinton pointed out that the only corroborating evidence was the inventory shortages, which could have conceivably resulted from other causes.

The supreme court found, however, that a reasonable jury could not have concluded that criminal proceedings were instigated without probable cause. Delta Pride relied on Pendelton's report and the court found that a reasonable employer under the same circumstances would have had an honest belief in McClinton's guilt. Additionally, at each level of the prosecution, there was agreement that the case should move forward. McCLINTON v. DELTA PRIDE INC., Mississippi Supreme Court, No. 1999-CA-00811, 2001.

Implications: To establish a case for malicious prosecution, the plaintiff must show the criminal proceedings were instigated “by, or at the insistence of the defendant.” It should be noted here that McClinton was unable to establish this element with respect to Pendelton, because Pendelton merely provided the report to Delta Pride. Delta Pride then initiated the charges after consulting with the police.

Investigators should be aware that, to avoid liability for malicious prosecution, once they have submitted their findings to their client, it is best to let the client make their own decision as to how best to proceed with the matter, and not “initiate or insist” on prosecution of an alleged culprit.

INVESTIGATIONS

Polygraphs

(SLN No. 01-164)

Employee Theft

MA Employee Terminated For Refusal To Take A Polygraph

Summary: The Massachusetts Supreme Court held an employer was entitled to demand an employee take a polygraph after the police suspected him of theft.

Facts: Ronald Bellin was a tax collector at Kelley Consultants (KCI), a tax collection service. One year after he was hired, a significant amount of cash was stolen during a break-in. Officer Wayne Minichielli was dispatched to investigate. Based on his initial investigation, Minichielli suspected it had been an “inside job.” Minichielli ran a background check on all six KCI employees. The check revealed Bellin had a prior criminal record, including multiple charges of larceny and fraud arising out of the passing of bad checks. No other employee had a criminal record.

After uncovering this information, Minichielli requested that Bellin take a polygraph. Bellin contended that Minichielli threatened to reveal Bellin’s criminal record unless he took the polygraph. Despite this alleged threat, Bellin refused. Minichielli then spoke with Frederick Kelley, KCI’s president, and advised him that Bellin was a suspect.

Kelley confronted Bellin and told him that, unless he took the polygraph, he would be fired. To avoid losing his job, Bellin agreed. Bellin signed an acknowledgement that he was taking the exam voluntarily. The examiner determined Bellin was being deceptive, whereupon he was fired. Bellin asserted Kelley wrongfully threatened to fire him if he did not take the exam.

Decision: While the Massachusetts statute on which Bellin relies prohibits employers from requiring an employee to take a polygraph examination, it nonetheless allows an employer to impose such requirements when a law enforcement agency lawfully seeks to conduct an examination of the employee as part of a criminal investigation.

Bellin argued this statute did not apply because the alleged crime must have been committed by a person in connection with the duties of their employment. Here, although Bellin was not literally on duty at the time of the theft, an employee’s theft of an employer’s property during off hours, using the employee’s inside knowledge to perpetrate the theft, would constitute conduct closely connected to the employee’s work.

Because there was nothing unlawful in either the alleged disclosure of Bellin’s criminal record or in his employer’s insistence that he submit to a police polygraph examination, Bellin’s claim could not

stand. Accordingly, Kelley was entitled to summary judgment. *BELLIN v. KELLEY*, Massachusetts Supreme Court, No. 8298, October 11, 2001.

Implications: Employers should be aware it was irrelevant that Bellin was not charged with a crime, but that the police were merely suspicious of him. In Massachusetts, there need not be any particular degree of support or verification of the police suspicions before an employer may insist the employee cooperate with a police polygraph examination.

Excessive Force

(SLN No. 01-165)

University Police

University Police Injure Suspected Drunk Driver

Summary: The U.S. District Court for the Southern District of Indiana ruled that university police officers did not use excessive force in detaining a diabetic student after he drove his car off the road.

Facts: Derek Smith, a diabetic, was a student at Ball State University. One afternoon, while driving home from the gym, Smith drove his car onto a sidewalk. Shortly afterward, John Rogers and John Foster, law enforcement officers of the Ball State Police Department, arrived. They assumed they were dealing with an intoxicated driver. Rogers repeatedly asked Smith to exit the vehicle but Smith did not respond. Foster and Rogers then attempted to remove Smith from the car. During this time, Smith remained looking straight ahead with his eyes open. He did not try to tear away or struggle with the officers.

Foster took hold of Smith's arm and used a straight-arm bar technique to remove him from the vehicle. Another officer, Craig Hodson, saw Foster unsuccessfully attempting to take Smith to the ground. He saw what he believed to be Foster struggling with Smith, and he could hear Foster instructing Smith to the ground. Hodson perceived that Smith's refusal to comply constituted a threat to police safety. He ran, jumped over the hood of Smith's car, and attempted to apply a knee strike to Smith's leg. Instead of applying the knee strike as intended, Hodson collided with Foster, Rogers and Smith. Both Hodson and Smith went to the ground.

Foster rolled Smith over to facilitate his breathing and recognized him as a diabetic from an earlier incident, he then radioed EMS for assistance. As a result of the encounter, Smith sustained scratches and bruises on his face, marks on his wrists from the handcuffs, and a bump on his head. Smith brought suit against the university alleging excessive force.

Decision: Smith argued the officers used excessive force in restraining and handcuffing him. The U.S. District Court, Southern District of Indiana concluded that, under the circumstances, the officers' use of force was reasonable and dismissed Smith's claim. **The right to make an investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat to enforce it.**

Here, the officers approached Smith sitting in his running vehicle, after he had driven off a main road and onto a sidewalk. They had received information from both the dispatch and a witness that the driver may have been under the influence of drugs or alcohol. They reasonably sought to remove Smith from the vehicle to assess his physical condition.

Because Smith did not respond to repeated requests to exit the vehicle, the officer attempted to remove him for further investigation. Although Smith exhibited no aggressive behavior toward the officers, his unresponsiveness necessitated the use of minimal force to accomplish this removal. *SMITH v. BALL STATE UNIVERSITY*, U.S. District Court for the Southern District of Indiana, Indianapolis Division, No. IP00-0478-C-B/S, October 29, 2001.

Implications: Security personnel should be aware that **allegations of excessive force are evaluated under an “objective reasonableness” standard, in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.**

Therefore, such a fact-specific analysis requires consideration of the totality of the circumstances surrounding the incident. These circumstances include the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting.

CONTRACT SECURITY

**Security Guards
Assault**

(SLN No. 01-166)

**Employee Misconduct
Shoplifting**

Security Guard Assaults Suspected Shoplifter

Summary. The D.C. Court of Appeals found a supermarket was not vicariously liable for a sexual assault committed by a contracted security guard on a suspected shoplifter.

Facts. Argenbright Security provided unarmed personnel to work as security guards in a Safeway supermarket. A Safeway employee notified Joseph Hunter, an Argenbright security guard, that he had observed Octavia Brown steal some candy. Hunter asked her to come back inside the store and allegedly pulled her into the security booth. He then emptied her pockets and began to search her, first touching the upper part of her arm and then the upper portions of her chest.

Despite her request that a female security guard conduct the search, Octavia claimed that no other employee was present. Hunter, on the other hand, claimed that a female employee was present. He said that he took one photograph of Octavia, but placed it in the store’s files, and did not post it on the wall of the store as Octavia had claimed.

Octavia’s mother filed a complaint against both Safeway and Argenbright alleging negligence, negligent infliction of emotional distress, and intentional infliction of emotional distress. The trial court granted summary judgment to both Safeway and Argenbright.

Decision: The D.C. Court of Appeals affirmed summary judgment in favor of Safeway but held the claim against Argenbright should proceed to trial. **Under the doctrine of respondeat superior, an employer may be held liable for the acts of his employees committed within the scope of their employment.** Here, the court found a reasonable jury could have concluded that Hunter’s actions were, at least in part, within the scope of his employment.

While it is probable that the vast majority of sexual assaults arise from purely personal motives, **it is nevertheless possible that an employee’s conduct may amount to a sexual assault and still be actuated, at least in part, by a desire to serve the employee’s interest.** A search of a suspected shoplifter is particularly susceptible to this interpretation, especially when the search was initiated by Hunter only after he had reason to believe his employer’s interests had been affected.

As to the respondeat superior claim against Safeway, because Hunter was not Safeway’s employee but was a contracted security guard, Safeway could not be held vicariously liable for Hunter’s conduct unless a master-servant relationship existed between the parties. Here, no such relationship existed because Safeway had no right to control or direct Hunter in the performance of

his work. *BROWN v. ARGENBRIGHT SECURITY INC.*, District of Columbia Court of Appeals, No. 99-CV-1603, October 4, 2001.

Implications: For a company to be held liable for the actions of contracted security, a plaintiff must show more than mere peripheral control of the security guard. Here, Argenbright's manager testified that a security guard's performance and conduct was monitored by Safeway management. Such a statement, however, does not demonstrate the kind of control sufficient to establish a master-servant relationship upon which liability may be founded.

WORKPLACE HORSEPLAY

Employee Misconduct

(SLN No. 01-167)

Respondeat Superior

Bartender Accidentally Shoots Customer With Pellet Gun

Summary: An Indiana appeals court held that a nightclub was not responsible for the actions of its employee in shooting a pellet gun at a customer.

Facts: Chris Maxwell worked as a bartender at Mars Nightclub. One day, Maxwell brought an air-powered pellet gun to work in order to chase away pigeons that were in the club's exhaust vents. Maxwell brought the gun despite the club's policy prohibiting firearms on business premises. The general manager and two other employees were present when Maxwell brought in the gun and put it behind the D.J. booth.

After setting up, Maxwell retrieved the gun and claimed he was going to scare his friend, John Hurlow, with it. Maxwell shouted Hurlow's name and pointed the gun at him. At that point, the gun fired a pellet, striking Hurlow in the head. Hurlow brought suit against the club under a theory of respondeat superior and negligent supervision of an employee. The trial court entered summary judgment in favor of the club on the respondeat superior claim, and Hurlow appealed.

Decision: Hurlow contended Maxwell's shooting of the pellet gun was within the scope of his employment. He maintained that even if the act was in Maxwell's own self interest, the act partially served the club's interest as well. He argued that joking around with customers was part of Maxwell's job expectations as it increased business.

The only people present at the time of the shooting were employees and Hurlow. Even assuming that there may be patrons who would enjoy the spectacle of intimidation by pellet gun, none were present that night. Furthermore, Maxwell's set-up duties included stocking the bar, getting ice, cutting fruit, and making popcorn; none of these acts had a close association with "joking around with a pellet gun."

In short, there was no evidence that Maxwell's joking around with the gun either furthered the club's business or was so closely associated with his duties that it fell within the scope of his employment. Therefore, the court of appeals affirmed. *HURLOW v. MANAGING PARTNERS INC.*, Court of Appeals of Indiana, No. 53A04-0011-CV-479, October 2, 2001.

Implications: Business owners and managers should be aware that, while management may have allowed Maxwell to keep the pellet gun on the premises, the keeping of the pellet gun was no part of the employment

relationship. Management's allowing of the pellet gun on the premises was an issue more properly addressed under a claim for negligent supervision of an employee, a claim the trial court sent to the jury.

SECURITY GUARDS

Disability

(SLN No. 01-168)

Discrimination

Wal-Mart Terminates Disabled NM Security Guard

Summary: The U.S. District Court for the District of New Mexico ordered a case to trial in which a loss prevention officer alleged that Wal-Mart fired him because of his disability.

Facts: Thomas Ward was employed by Wal-Mart as a loss prevention officer. He was diagnosed with a permanent upper body disability that prevented him from lifting any object above waist level. Ward contended that he informed his interviewer of his condition during his hiring process.

Six months after being hired, Ward was terminated for failure to perform an essential job function, namely, his inability to roll up trailer doors to inspect trucks as they arrived at the warehouse. Ward alleged that he was fired in violation of the Americans with Disabilities Act (ADA); Wal-Mart moved for summary judgment.

Decision: Wal-Mart claimed that Ward was neither "disabled" nor "qualified" under the ADA. Ward's impairment permanently restricted him from reaching overhead on a repetitive basis and from lifting objects greater than two pounds over his head. The district court found this impairment was substantially limiting on its face. Ward's restrictions, therefore, were for all intents and purposes absolute.

The court further found that lifting the trailer doors was a nonessential function of Ward's job as a loss prevention officer. While loss prevention officers must have the ability to verify the contents of incoming trucks, the ability to open the doors on those trucks was peripheral.

Moreover, **the ADA instructs an employer's written description of a position is evidence of the job's essential functions.** Here, however, on a checklist of essential functions for the loss prevention officer position, upper body mobility, while listed as a potential category for the position, was not checked off as an essential function. The court found it would have been disingenuous for Wal-Mart to now claim, in contravention of the company's own written statement, that lifting the trailer doors was an essential function.

Because lifting the trailer doors was the only job function at issue, Ward demonstrated he was qualified to perform his essential job functions in spite of his disability, and summary judgment on this ground was denied. *WARD v. WAL-MART STORES INC.*, U.S. District Court for the District of New Mexico, No. CIV. 99-1070, 2001.

Implications: **To establish a claim under the ADA, an employee must prove he was (1) disabled, (2) qualified, and (3) terminated because of his disability.** To be qualified, an employee must show that he was able to perform the essential functions of his job with or without reasonable accommodations. Therefore, even if the employee cannot perform the essential functions of his job, an employer must first try to accommodate the employee so he can perform those functions.

Therefore, if lifting the trailer doors had been deemed an essential and not a peripheral job function, Wal-Mart must first have tried to make a reasonable accommodation before terminating Ward.

For instance, Wal-Mart must have shown that it allowed Ward to call another employee for assistance in lifting the doors whenever a truck came in for inspection. Only then, after providing a reasonable accommodation, and providing evidence that Ward still could not perform his essential functions, would termination be appropriate under the ADA.

INADEQUATE SECURITY

Third-Party Assault

(SLN No. 01-169)

Negligence

Amtrak Passenger Allegedly Thrown Off Train

Summary: The U.S. District Court for the Western District of New York ordered a case to trial in which an Amtrak passenger claimed that he was thrown off a train by a group of other passengers.

Facts: Amtrak passenger Marc Roses alleged he was followed by men, whom he suspected may have had weapons, and were intending to harm him. Roses told Cedric Lewis, the assistant conductor, that he feared for his safety and requested to sit in the conductor's area. Lewis told Roses this was not possible and Roses continued wandering the train looking for a safe place. According to Roses, the next thing he remembered was waking up next to the train tracks.

In a bizarre series of occurrences, Roses alleged he had been thrown off the train by several black men due to a conspiracy involving the CIA, Interpol, and the Germans, which arose because he had made a snare drum for Van Halen and he did not pay for it. Roses brought suit against Amtrak alleging the carrier was negligent by failing to provide adequate security to passengers, failing to prevent non-ticketed persons access to the train, failing to improve security after similar past incidents, and failing to respond to a direct request for assistance following threats upon his physical well-being. Amtrak moved to dismiss.

Decision: The district court denied Amtrak's motion to dismiss. Negligence cannot be presumed by the mere happening of an occurrence; rather, a plaintiff must prove the injury was caused by the defendant's breach of duty. **As a common carrier, Amtrak had a duty to take reasonable steps to protect its passengers from assaults by fellow passengers after it had sufficient notice to anticipate the likelihood of injury.** The nature and extent of this duty necessarily depends on the danger reasonably to be anticipated.

The district court found Roses established a prima facie case of negligence. Amtrak owed Roses, as a passenger, a duty to take reasonable steps to protect him from assaults of fellow passengers after it had sufficient notice to anticipate the likelihood of injury absent additional security measures.

Amtrak breached this duty because it had notice of the danger to Roses and reasonable cause to anticipate that harm would befall him absent action on its part, because Roses told an Amtrak employee that some men, who may have weapons, had been following him around with the intent to hurt him. Amtrak then failed to take reasonable steps to protect Roses such as allowing him to sit by the conductor. As a result of Amtrak's breach of duty, Roses was forcibly thrown from the train and sustained injuries. **ROSES v. NATIONAL RAILROAD PASSENGER GROUP CORP.**, U.S. District Court for the Western District of New York, No. 99-CV-0355E(F), 2001.

Implications: It is quite possible, and perhaps rightly so, that Lewis thought Roses was mentally unstable. That is probably why he ignored Roses' pleas for help. For this very reason, however, Lewis should have

probably kept an even closer eye on Roses. Although Roses may very well lose at trial, the fact remains that he established his prima facie case.

Historically, common carriers had been held to an absolute duty to protect their passengers from criminal assault by third parties; however, this extraordinary duty has been abolished and common carriers are now held to the same duty of care as any other potential tortfeasor.

Essentially, a carrier is generally not liable to its passengers for the misconduct of fellow passengers unless it anticipated or should have anticipated the likelihood of injury. The rule to take from this case is simple — regardless of how strange the passenger may seem, the prudent course of action for employees should always be to take their claims seriously.

**Inadequate Security
Contract Security**

(SLN No. 01-170)

Negligence

Airport Security Check Theft

Summary: The Ninth U.S. Circuit Court of Appeals ruled that the Warsaw Convention limited an airline passenger's claims for stolen luggage to \$400.

Facts: Ester Dazo placed her carry-on bag on the x-ray machine conveyor belt at San Jose International Airport. By the time she passed through the metal detector, an unknown person had taken her bag. The bag allegedly contained jewelry worth over \$100,000. Globe Airport Security Services operated the security checkpoints at the airport.

Dazo filed a complaint against Globe, as well as Trans World and Continental Airlines, asserting claims for negligence and the breach of the implied contract of bailment. The airlines argued Dazo's state law claims were preempted by the Warsaw Convention. The district court dismissed the case. Dazo appealed.

Decision: The Ninth Circuit affirmed. **The Warsaw Convention is an international treaty governing the liability of air carriers engaged in the international transportation of passengers and cargo. The Convention creates a presumption of air carrier liability, but substantially limits that liability.** The Convention preempts state and federal claims falling within its scope.

The Ninth Circuit first held the Warsaw Convention applied to Globe as the airlines' agent, and capped Globe's liability to \$400. Globe was considered a carrier because the theft occurred while Globe was conducting a security check that every airline or its agent must perform.

The Convention limits the damages resulting from the loss of carry-on baggage, unless the passenger can establish that the loss was caused by the carrier's wilful misconduct. Dazo's allegation of wilful misconduct was that Globe and the airlines knew that similar thefts had occurred, yet failed to make reasonable efforts to prevent such thefts, thereby subjecting her to an unreasonable risk.

The district court found, and the court of appeals agreed, this allegation was insufficient because Dazo's grievance was essentially that Globe failed to completely prevent thefts at the security checkpoint. Absent concrete allegations of intentional performance of acts committed with the knowledge that the theft of the baggage would occur, a stolen bag is simply not tantamount to willful misconduct. **DAZO v. GLOBE AIRPORT SECURITY SERVICES**, U.S. Court of Appeals for the Ninth Circuit, No. 00-15058, October 11, 2001.

Implications: The Ninth Circuit fell in line with most other courts in extending the Warsaw Convention's coverage to an airline's agents and employees (in this case, Globe). It should be noted, however, that under California law, wilful misconduct is separate and distinct from negligence.

Unlike negligence, which implies a failure to use ordinary care, wilful misconduct is not marked by a mere absence of care. Rather, it involves a more positive, active disregard of its consequences. Thus, carriers should be aware that a similar case may have a different result in another jurisdiction depending on that state's definition of wilful misconduct.

DRUG TESTING

Employee Misconduct

(SLN No. 01-171)

Investigations

Drug Use Considered Employee Misconduct

Summary: A Missouri court of appeals ruled an employee who failed a drug test was not entitled to collect unemployment compensation.

Facts: Henry Ottendorf, an employee at George's Processing Inc., reported to the plant nurse and told her that he had injured his back at work. The nurse then sent Ottendorf to see a chiropractor. George's substance abuse policy required an injured worker needing medical treatment to submit to alcohol and drug testing. Ottendorf's urine sample tested positive for marijuana and he was summarily fired for violation of the company's substance abuse policy.

Ottendorf then filed a claim for unemployment benefits. George's protested the claim on the basis that the termination was for job-related misconduct. The Labor and Industrial Relations Commission held that Ottendorf's violation of George's substance abuse policy did not constitute misconduct in connection with his work so that he would be disqualified from receiving unemployment compensation benefits.

Decision: The court of appeals reversed, holding Ottendorf's **reporting for work in an impaired condition as a result of marijuana use was a wanton and wilful disregard of his employer's rules. It was a disregard of standards of behavior that his employer had the right to require of him.**

Ottendorf's drug-impaired condition threatened the efficient operation of George's production. Moreover, it threatened Ottendorf's safety and the safety of other employees. The court of appeals held the commission's conclusion that Ottendorf was not guilty of misconduct connected with his work was an erroneous application of law to the facts of the case. *GEORGE'S PROCESSING INC., v. OTTENDORF*, Missouri Court of Appeals for the Southern District, No. 24162, October 30, 2001.

Implications: Employers should note that when attempting to defend an unemployment benefits claim on the basis that a claimant was discharged for misconduct, the burden of proving the claim was connected with work falls on the employer. Some statutes impose restrictions on a claimant's recovery if the claimant was discharged for misconduct connected with their work. Many of those statutes, however, do not define what constitutes misconduct.

Misconduct has been defined by Missouri courts to mean "an act of wanton or wilful disregard of the employer's interest, a deliberate violation of the employer's rules, a disregard of standards of behavior which the employer has the right to expect of his employee, or negligence in such degree or recurrence as

to manifest culpability, wrongful intent, or evil design or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.”

SECURITY IN THE NEWS

Inadequate Security (SLN No. 01-172)

Hotel Faces Suit For Teen's Death

A surprise birthday party at the Columbia Courtyard by Marriott led to the fatal shooting of a teenager attending the party and wounded another. According to the *Baltimore Sun*, the teen's mother has filed a wrongful death suit against the hotel, alleging the hotel failed to protect the teen by permitting underage drinking and guests carrying guns. During the party, hotel security went to the rooms following complaints by other hotel guests. The mother is seeking \$1 million in damages. *Baltimore Sun*.

Invasion Of Privacy (SLN No. 01-173)

NJ Tenant Sues Landlord For Peepholes

The *Record* reports a New Jersey woman filed a lawsuit against her landlord for invasion of privacy and sexual harassment, alleging he drilled peepholes in her apartment to watch her. She is seeking compensatory and punitive damages. The tenant claimed the landlord cut a hole in the wall and then scraped the back of the mirror in order to watch her in her bedroom. She also found other holes in her apartment. The landlord was charged with fourth-degree peeping Tom offense, which is pending. *The Record*; www.bergen.com.

Malicious Prosecution (SLN No. 01-174)

Jury Finds Wal-Mart Liable For Arresting Wrong Woman

After almost a month in jail and three months of probation, a Wal-Mart customer sued the retailer for malicious prosecution. A Wal-Mart loss prevention investigator picked the customer out of a lineup and identified her as a participant in a shoplifting ring, reports the *National Law Journal*. A jury found Wal-Mart liable for malicious prosecution, intentional infliction of emotional distress, and negligent hiring and awarded the customer \$13 million. Wal-Mart claimed the investigator's participation in the lineup was at police request. The investigator also asserted the customer appeared on surveillance video, despite testimony from the customer's postman that he spoke with her 200 miles from where the incident occurred. *National Law Journal*.