

### Employer Liability

### Beware of Your Employee's Cell Phone

The modern age of cell phone technology may certainly benefit employers, but employers should also be aware that their potential for liability increases when employees conduct business over their cell phones while driving their automobiles. Consequently, employers may wish to implement guidelines that restrict employees from using cell phones for company business while their employees are driving, including when the employees are driving to or from work.

Seventy-three percent of motorists with a cell phone admit that they talk on the phone while driving. Frank C. Morris, Jr., *The Electronic Platform Technology In The Workplace and Its Impact On Employee Liability*, SL018ALIABA 1099, 1107 (2005). Studies also reveal that talking on a cell phone while driving may be very dangerous, as the risk of an automobile accident increases 400%. *Grammatico v. Industrial Commission*, 117 P.3d 786, 792 n.6 (Ariz. 2005). Further, use of a cell phone while driving may inhibit the driver in ways similar to driving while under the influence of alcohol at the legal limit. *Id.* "Scientific research has found that a driver's reaction time is slowed by an average of [30 percent] while talking on a cell phone, similar to that of a drunk driver." Jordan Michael, *Liability for Accidents From Use of*

*Cell Phones: When Are Employers and Cell Phone Manufacturers Liable?*, 79 N.D. L. Rev. 299, 30001 (2003). A National Highway Transportation Safety Administration study reported that the use of cell phones could be a factor in 20 to 30% of car accidents. Jordan B. Michael, *Automobile Accidents Associated With Cell Phone Use: Can Cell Phone Service Providers and Manufacturers Be Held Liable Under a Theory of Negligence?*, 11 Rich. J.L. & Tech. 5, 6 (2005).

As an employee's risk of being involved in an auto accident increases by driving while using a cell phone, the employer's risk of being liable for the accident also increases. In *CLO White Co. v. Lattimore*, 590 S.E.2d 381, 382 (Ga. Ct. App. 2003), a plaintiff sued the defendant's employer for injuries as a result of a car accident that involved the defendant's employee who was driving while on his way to work. The traditional rule is that an employer is not liable for an automobile accident involving its employee when the employee is driving to and from work. *Id.* at 383. On this basis, the employer in *Lattimore* argued in a motion for summary judgment that it should not be liable. *Id.* The court, however, denied the employer's motion based on cell phone records which showed that, just prior to, and immediately after, the accident, the employee

made phone calls to his employer. *Id.* The court also found it important that on other occasions the employee, while on his way to work, called his employer for work-related reasons even though the employee was not "on the clock." *Id.* at 382. The court found that even though it was clear the employee was not on a special mission and on his way to work, the employee may have been conducting company business at the time of the accident. As such, the court ruled that a jury issue existed as to whether the employee was acting in the course of his employment, subjecting the employer to liability. *Id.* at 383.

Employers also have settled claims involving automobile accidents in which employees were on their cell phones at the time of the accident. For example, Smith Barney

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paid \$500,000 to settle a suit involving an accident where one of the firm's brokers had been talking on his cell phone at the time of the accident. SL018 ALIABA at 1108. Also, Dyke Industries paid \$16.2 million dollars to a 78-year-old woman who was severely disabled as a result of an automobile accident involving a salesman who at the time of the accident was talking on a cell phone. *Id.*

As a result, employers may want to adopt a cell phone usage policy. Such policy may state that cell phones are to be banned during working hours, to be used only at certain times or to be turned off whenever the employee is in a motorized vehicle. If an employer wishes to allow its employees to use cell phones, whether it be personal cell phones or ones provided by the employer, the employer may wish to have a written policy clearly stating that employees are not to use their cell phone while driving. Further, if an employer chooses to issue cell phones to its employees, the employer should consider having the



Use of a cell phone while driving may inhibit the driver in ways similar to driving while under the influence of alcohol. Employers should consider adopting a cell phone usage policy, or at minimum having a clearly stated written policy.

employees sign a statement company policy to use cell phones acknowledging that it is against while driving.

## More Employer Liability | 'Tis the Season to Minimize Alcohol-related Liability

As the holiday season comes to full swing, employers may be curious about their potential liability for providing alcohol at company parties and whether they may be subject to their state's dram shop act. The majority of states, but not all, have enacted "dram shop" or "social host" statutes that impose liability on those who provide alcohol and where alcohol results in injury to a third person because of the consumer's

intoxication. See Daniel R. Conrad, *Intoxicating Liquors Persons Liable: North Dakota Extends Statutory Dram Shop Liability to Social Hosts*, 71 N.D. L. Rev. 743, 748 (1995).

Traditionally, dram shop statutes were implemented to impose civil liability for injuries in connection with a commercial vendor who wrongfully served alcohol. *Id.* For example, a bar owner may be held liable for an automobile accident

caused by an individual who left the bar in a visibly inebriated condition. Most dram shop acts require the injured party to establish that a **vendor** unlawfully sold alcohol to an intoxicated person, and thus where there is no commercial sale of alcohol, there is no cause of action. 45 Am. Jur. 2d, *Intoxicating Liquors* § 517. Further, dram shop acts usually serve as a remedy for the

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innocent injured party and preclude the intoxicated individual who caused the harm from recovering for his or her injuries.

Regulation of such activity, however, varies from state to state. Whether a state's dram shop act applies to a social host (e.g., employer) depends on the language of the state's specific statute and case law. For example, in North Dakota, the state's supreme court has found its dram shop statute applies to all persons, including employers. *See Born v. Mayers*, 514 N.W.2d 687 (N.D. 1994). The North Dakota statute states, in part, that "[e]very person, spouse, child, parent, guardian, employer, or other person who is injured by an obviously intoxicated person has a claim for relief for fault . . . against any person who knowingly disposes, sells, barter, or gives away alcoholic beverages to a person under 21 years of age, an incompetent, or an obviously intoxicated person . . ." N.D. Cent. Code § 50106.1.

Colorado has a dram shop statute that generally shields social hosts from civil liability but allows civil recovery under certain circumstances. *See Colo. Rev. Stat. § 1247801*. In *Rojas v. Engineered Plastics Designs, Inc.*, 68 P.3d 591 (Colo. Ct. App. 2003), the Colorado Court of Appeals determined that its state's dram shop statute extends to an employer who acts as a social host. The Colorado statute, however, imposes liability upon social hosts only in certain circumstances, which include the serving of alcoholic beverages to persons under the age of 21 years or providing a place where persons under the age of 21 can consume alcohol. In *Rojas*, an

employer provided a room with alcoholic beverages for its employees that was used for social gatherings after work. On one occasion, after an employee consumed alcohol on his employer's premises, the employee's automobile collided with another motorist, killing the innocent driver. Subsequently, the parents of the deceased motorist brought suit against the employer claiming wrongful death, negligence and negligent supervision. The court dismissed the plaintiffs' claims under Colorado's dram shop statute, finding that, although Colorado's dram shop statute imposed liability on social hosts, because the employer did not knowingly provide alcohol to a minor, the dram shop statute shielded the employer from liability.

Some states, like Kansas and Missouri, have no dram shop statute and will not impose *civil* liability upon a social host for providing alcohol to its guests – even if the guest is a minor.

Regardless of whether a state imposes civil liability on social hosts who serve alcohol, employers sponsoring holiday parties may wish to exercise some caution. Employers who choose to serve alcohol at their holiday functions should consider the following:

1. Advise employees that engaging in inappropriate conduct at the party may be deemed grounds for termination either through a meeting or a distributed policy;

2. Advise managers/supervisors that they should take it upon themselves to identify individuals who look too young to drink and/or have participants under the age of 21 wear wristbands;

3. Limit the maximum number of drinks allowed for all employees and pass out drink tickets for those amounts or stamp individuals' hands for each drink;

4. Make sure everyone knows that the party is not mandatory and is purely a voluntary event;

5. Make sure everyone knows that cabs and/or designated drivers are available;

6. Ensure there are plenty of nonalcoholic drinks and food available to counter the drinks;

7. Consider having the party somewhere other than the workplace; and

8. To eliminate any suggestion that employees are working during the event, do not invite clients or customers.



**Know your state's dram shop laws and take every necessary step to minimize your company's risks related to holiday parties.**

# Job References

## When Neutral Information Is Not Neutral

Much has been written about the problems associated when a potential employer seeks a referral from an applicant's former employer. Under these circumstances, the former employer is placed in a precarious position. On the one hand, if the former employer provides a reference in which the content is false or keeps the applicant from getting the job sought, the former employer faces a potential defamation suit. John W. Belknap, *Defamation, Negligent Referral, and The World of Employment References*, 5 J. Small & Emerging Bus. L. 113 (2001). Even if the information is accurate, a former employer will find that it may be forced to spend time and money for legal advice. *Id.* On the other hand, if the former employer gives a positive reference about the employee, but does not disclose known harmful incidents done by the employee, the former employer may face a negligent misrepresentation suit from the new employer. *Id.*

Consequently, former employers

often follow a no comment policy and/or only release neutral information to a former employee's new employer. Such neutral information may be as innocent as giving the former employee's dates of employment and job description. However, even information as neutral as a job description may be a basis for a former employee to sue if the information contained in the job description is inaccurate.

A recent case in New Jersey found that an employee may have a negligent misrepresentation claim against his or her former employer even when the former employer disseminates only neutral information. In *Singer v. Beach Trading Co., Inc.*, 876 A.2d 885 (N.J. Super. Ct. App. Div. 2005), the plaintiff left her former place of work and accepted a position with a new employer as a customer service manager. Upon interviewing for the new position, the plaintiff stated that, while she was with her previous employer, she had the title of

The former employer stated that at all times the plaintiff was a customer service representative and never held a supervisory role at the company. Eventually, the plaintiff was terminated, and one of the articulated reasons was that the plaintiff misrepresented her work history on her résumé.

The lower court dismissed the plaintiff's claims of defamation, tortious interference and negligent misrepresentation against her former employer during the summary judgment phase of the lawsuit. However, the New Jersey appellate court found that the plaintiff had a potential negligent misrepresentation claim. Specifically, the court found that questions remained as to whether the former employer voluntarily responded to a clearly identified inquiry by plaintiff's new employer and, in turn, whether the former employer defendant breached its duty of care by not exercising reasonable care, i.e., not providing correct information or competence in its response to the inquiry. If the facts demonstrated that plaintiff's former employer undertook and breached such a duty and if it was shown that plaintiff suffered economic harm as a result, the former employer could be liable under a theory of negligent misrepresentation.

Customer Service Representative and was asked to supervise the customer service department during one particular holiday season. Eventually, the plaintiff's new employer became weary of the plaintiff's inability to perform her job and contacted her former employer.

Consequently, before employers disseminate any information regarding a former employee's work history, even if such information appears neutral on its face, the employer should verify the accuracy of such information.

COMPANY OR EMPLOYER NAME: _____		POSITION APPLIED FOR: _____	
<b>Employment Application</b>		APPLICANT TELEPHONE: _____	
YOUR NAME: _____		SOCIAL SECURITY NUMBER: _____	
_____ Last	_____ First	_____ Middle	
ADDRESS: _____			
ARE YOU LEGALLY ELIGIBLE FOR EMPLOYMENT IN THE U.S.A.? <input type="checkbox"/> Yes <input type="checkbox"/> No (If yes, verification will be required.)			
I AM SEEKING A PERMANENT POSITION <input type="checkbox"/> Yes <input type="checkbox"/> No			
IF NECESSARY FOR THE JOB I AM ABLE TO:			
Work (which shifts)? _____		Select: _____	
Work overtime? _____		Select: _____	
Provide a valid Alaska Drivers License? _____		Select: _____	
Are you able to perform the essential functions of the position with or without accommodations? <input type="checkbox"/> Yes <input type="checkbox"/> No			
IF NECESSARY FOR THE JOB, ARE YOU OVER (Please mark one) 14__ 15__ 16__ 18__ 19__ 21__			
I WILL BE ABLE TO REPORT TO WORK ___ DAYS AFTER BEING NOTIFIED THAT I AM HIRED.			
EDUCATION:			
High School	Yes Completed	Field of Study	Graduate or Degree
College/University			
Business/Technical			
Other (May include grammar school)			

A recent case in New Jersey found that an employee may have a negligent misrepresentation claim against his or her former employer even when the former employer disseminates only neutral information.

# Retaliation

## Supreme Court to Consider Job Transfers in Retaliation Cases

More employment retaliation cases are being filed each year. As a percentage of employment discrimination cases, retaliation filings have increased nearly 300% since 1990. Employee's attorneys call them "two-fer's." A complaint of discrimination is filed. The employee continues to work. The employee's job circumstances change. The employee claims an "adverse job action," and files a complaint that the employer retaliated because of the initial filing.

Frequently when a sexual harassment complaint is filed, the employer transfers the alleged harasser and the complainant in order to separate them from each other in the workplace. When an allegation of some type of hostile environment occurs, transfer is a tool used by employers to move a complainant out

of the area and investigate the matter.

Shawna White, a worker for the Burlington Northern Santa Fe Railway in Memphis, Tennessee, ran a fork lift. She was the only woman working at the railroad yard. She complained about harassment. The alleged harasser was suspended and she was transferred to work in another environment. Her new job involved repairing track and was physically more demanding.

She sued over the transfer, and, after she received a favorable jury verdict, Burlington Northern Santa Fe Railway appealed. The matter ultimately ended up in the United States Supreme Court, where oral argument and ultimately a decision will occur. The various federal appeals courts are split on the issue of whether a transfer, often at the

same rate of pay, can constitute a materially adverse employment action.

The United States Supreme Court will probably resolve the question of whether a transfer constitutes a materially adverse employment action with the simple phrase, "It depends." The court will probably determine that the circumstances involving a transfer – if sufficiently material and adverse – can qualify as adverse job action. Minimal circumstantial changes probably will not qualify. More retaliation cases probably will result because the determination of whether a job action was materially adverse or not will be one that only a judge or jury can determine. Two-fer filings will continue to thrive.



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City, State Zip \_\_\_\_\_

E-mail \_\_\_\_\_

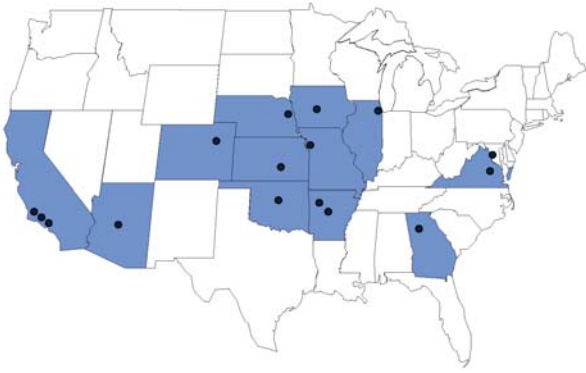
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