



THE BASSETT FIRM
WWW.THEBASSETTFIRM.COM

Passion. Preparation. Persistence.

Volume 5, Issue 12

THE BASSETT BULLETIN™

AN EMPLOYEE'S CRIMINAL CONDUCT AND THE EMPLOYER'S LIABILITY

Under what circumstances will an employer be held responsible for an employee's criminal conduct? A current Houston Court of Appeals' opinion indicates that an employer will be liable if the criminal conduct is a foreseeable act.

In *Barton v. Whataburger, Inc.*, 2008 Tex. App. LEXIS 5782 (Tex. App.—Houston [1st Dist.] 2008), the court found that an employer was not liable for the criminal acts of a restaurant manager which resulted in the death of an employee.

FACTS OF THE CASE

In May of 2003, Christopher Dean, a mentally impaired Whataburger employee, was murdered during a robbery attempt at a northwest Houston restaurant. On the night of the murder, Gregory Love was the night manager on duty. Shortly after the beginning of Love's shift, he called another manager and indicated that he needed to leave work. Love left the restaurant and put Dean in charge of the restaurant. Love never returned to the restaurant again that night.

Around 4:00 p.m., three men attempted to rob the Whataburger. One man entered the restaurant through the drive-through window. The man chased Dean through the restaurant and cornered him in the back. He demanded that Dean give him the key to the safe or he would shoot him. Dean repeatedly told the man that he did not have a key to the safe and could not comply with the robber's demands.

When Dean could not produce the key, the robber shot Dean in the face and fled the Whataburger. The robbers left with nothing, but were apprehended later when they robbed a donut store equipped with video surveillance. The police connected Love to the robbery. Love was convicted of capital felony murder and was sentenced to life in prison.

Dean's mother, Rose Barton, sued Whataburger under the Texas wrongful death statute, asserting that Whataburger's negligence proximately caused Dean's death. Whataburger moved for a no-evidence summary judgment on the negligence claim, asserting that Barton had produced no evidence of duty, breach of duty, or proximate cause. The trial court granted a final summary judgment in favor of Whataburger. The case was appealed to the First Court of Appeals in Houston.

Evidence presented to the Court of Appeals indicated that Love had a past criminal history. In September of 1993, Love was convicted of a felony offense of "dealing cocaine" in Indiana, where he served one year in jail. And in November 2002, Love was convicted of felony nonpayment of child support in Texas.

A background check performed by Whataburger before hiring Love did not reveal either felony conviction. However, the background check consisted of a search in Harris County only and for the time frame of November 1995 to November 2002.

NONSUBSCRIBERS AND NEGLIGENCE

Whataburger is a nonsubscriber to the Texas Workers' Compensation Act. Except for public employees and as otherwise provided by law, employers are not required to obtain workers' compensation insurance coverage. The Texas courts have consistently held that in an action against an employer who does not have workers' compensation insurance coverage, the statutory defenses such as contributory negligence are not available.

In the context of the employer-employee relationship, a company has a duty (1) to provide rules for the safety of employees, and to warn them of reasonably foreseeable hazards; (2) to furnish reasonably safe machinery and equipment; (3) to furnish a reasonably safe place to work; and (4) to exercise ordinary care to select careful and competent fellow employees.

THE COURT'S DECISION

It is undisputed that Whataburger owed a duty to Dean, as its employee. However, this duty is to protect its employees from foreseeable harms. Generally, a person has no legal duty to protect another from the criminal acts of a third person. This is because the criminal conduct is a superseding event which prevents placing any liability on the first party.

In order for an employer to be liable for the criminal acts of a third party, the evidence must prove more than just the opportunity to commit such a crime. The facts must show both (1) that the Defendant committed negligent acts and (2) that a crime would be committed because of such negligent acts.

Barton first contends that Whataburger was negligent in several different ways: (1) negligent hiring, (2) failure to provide a safe workplace, and (3) failing to follow its own company policies and procedures to minimize the risk of theft or robbery.

Negligent hiring. The court found that although Love's convictions, if discovered, should have raised Whataburger's suspicions about his fitness to manage a restaurant, under Texas law, they did not make his eventual participation in an aggravated robbery leading to murder reasonably foreseeable. Even the convictions presented did not show that Love was a violent person in the past. Therefore, even a careful background search would not have revealed that a violent act was foreseeable.

Failure to provide a safe workplace. Barton provided evidence that alleged the restaurant was situated in an area of high crime based on statistical data of the past crimes and the dangerous area which the Whataburger was located. In order to show an unsafe workplace based on criminal acts of third parties, the court considers, “(1) whether any criminal conduct previously occurred on or near the property, (2) how recently it occurred, (3) how often it occurred, (4) how similar the conduct was to the conduct under review, and (5) the publicity of the occurrences, as to indicate that the landowner knew or should have known about them.”

While there is some evidence of criminal activity at and near the Whataburger in question, the type of criminal acts are not the same type of violence which was exhibited at Dean’s murder. The court found that the criminal activity was not enough evidence to show rampant, violent criminal activity in the area which would raise a fact issue about the foreseeability of the aggravated robbery that resulted in Dean’s murder. The court indicated that “general evidence of crime rates and of robberies in other locales cannot create ‘an industry standard of foreseeability’ sufficient to impose a duty to prevent crime.”

Failing to follow its own company policies and procedures to minimize the risk of theft or robbery. Although there were several policies that were not followed on the night of the robbery, the superseding criminal acts were unforeseeable even with the policy violations.

CONCLUSION

The First Court of Appeals ruled that the aggravated robbery and murder of Dean was an extraordinary event. The diabolic conduct of others—men who committed the aggravated robbery and murder—was a superseding cause of Dean’s death that was not reasonably foreseeable to Whataburger. Although tragic, the responsible parties are the criminals and not Whataburger.

WHAT DOES THIS MEAN?

Although in the instant case the First Court of Appeals found no liability on Whataburger, and employer could be found liable with the right facts. Employers should take steps to protect themselves from this type of occurrence. A couple of things an employer should do are:

- Employers must be careful in the screening and hiring of employees. Depending on the type of employment that the employee is hired to perform, different background checks must be performed to ensure that the employee is not a threat to other employees and the public.
- Employers must ensure that the workplace is a safe working environment for both employees and customers. The employer must provide adequate security measures and lighting to protect the employees and customers.
- Employers must follow the established work protocol every time. If the employer has policies and protocol for the running of the business, these policies must be followed. Deviation from the established procedures may open the employers up to liability.

The Bassett Firm

**Two Turtle Creek Village
3838 Oak Lawn Avenue
Suite 1300
Dallas, Texas 75219
(214) 219-9900 Telephone
(214) 219-9456 Facsimile
Toll Free: 1-800-310-9769
www.thebassettfirm.com**

ATTORNEYS

- **MIKE H. BASSETT**
- **JENNIFER R. ELDRIDGE**
- **CHRISTINE S. JOHNSON**
- **ROBERT L. MCGEE, JR.**
- **JAMIE J. MCKEY**
- **DEAN MIYAZONO**
- **MICHAEL J. NOORDSY**
- **MATHEW SAMUEL**



Information regarding *The Bassett Bulletin*TM is available from **Angie Stevenson** (astevenson@thebassettfirm.com) at (214) 219-9900. ©2004 The Bassett Firm. All rights reserved.

*The Bassett Bulletin*TM is published twenty-six times a year, and is a complimentary publication of The Bassett Firm.
