

By Ivan Puchalt

Ratification is an often-overlooked theory of liability because attorneys tend to focus on issues of notice and what could have been done ahead of time to prevent the incident which gave rise to the lawsuit. Attorneys may not realize that post-incident ratification can serve as a basis to impose vicarious liability as well as punitive damages.

Imagine you are presented with the following case: A driver for ACME Corporation (“Mr. Driver”) is running an errand in the middle of his work day, using the vehicle provided by his employer, when he decides to challenge another driver to a street race. Racing at speeds of 100 miles per hour, he injures a bystander. After the incident, ACME Corporation investigates the incident and concludes that it believes Mr. Driver’s story that he was not speeding, and no discipline whatsoever is taken. In fact, Mr. Driver is given a promotion.

Your mind swirls with the hallmark trappings of proving course and scope: the going and coming rule, minor versus substantial deviations from the employer’s business, and whether this was unauthorized conduct. However, regardless of the outcome of the course and scope analysis, you should also be evaluating whether there is a separate and independent basis for vicarious liability against ACME Corporation based on its failure to discipline Mr. Driver after it learned about how he endangered the public in a street race.

In California, a defendant is responsible for the harm caused by an agent’s conduct where it approved that conduct after it occurred. Approval can be shown through words, or it can be inferred from a person's conduct. *See* CACI 3710. This is the concept of ratification.

In the employment context, the failure to discharge an employee after knowledge of his or her wrongful conduct may be evidence of ratification. *Delfino v. Agilent Technologies, Inc.*, 145 Cal. App. 4th 790, 810 (2006). “The theory of ratification is generally applied where an employer fails to investigate or respond to charges that an employee committed an intentional tort.” *Baptist v. Robinson*, 143 Cal. App. 4th 151, 169 (2006). While ratification generally requires that the employer have actual knowledge of the wrongful conduct of its employee, “where ignorance of the facts arises from the principal’s own failure to investigate and the circumstances are such as to put a reasonable man upon inquiry, he may be held to have ratified despite lack of full knowledge.” *Volandri v. Hlobil*, 170 Cal. App. 2d 656, 659 (1959).

In the above fact pattern, ACME Corporation would no doubt argue that the street racing was an unauthorized act, and moreover, that its failure to discipline Mr. Driver does not mean it condones street racing. Yet the employer must repudiate the act, or “else he will be bound by the act as having ratified it by implication.” *Hale v. Farmers Ins. Exch.*, 42 Cal. App. 3d 681, 691-92 (1974).

Thus, even where an employee is not acting within course and scope at the time a tort is committed, where a principal learns of the conduct after it occurred and approves the conduct, the principal can be liable for ratification of an originally unauthorized tort. In the above case against ACME Corporation, a verdict form might have two separate questions regarding vicarious liability: (1) Was Mr. Driver acting within the scope of his employment for ACME Corporation when he harmed Plaintiff? (2) Did ACME Corporation know about Mr. Driver’s

conduct and approve of it after it occurred? A “yes” to either one of these questions could result in the employer being liable for the acts of its employee.

In addition, a corporate employer may be liable for punitive damages based on the malicious acts of an employee if an officer, director, or managing agent of the corporation ratified the conduct. Civ. Code Section 3294(b). Ratification for purposes of imposing punitive damages is not limited to conduct known prior to the subject incident. “[R]atification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties.” *College Hosp. Inc. v. Superior Court*, 8 Cal. 4th 704, 726 (1994). The theory is frequently applied “where an employer fails to investigate or respond to charges that an employee committed an intentional tort, such as assault or battery.” *Baptist*, 143 Cal. App. 4th at 169.

In our example, the ACME Corporation could be found to have ratified the conduct of Mr. Driver by not taking any disciplinary action against him. Mr. Driver might have been an exemplary employee prior to this incident, with no known propensities to endanger the public, but once ACME learns about the street racing conduct through a reasonable investigation and fails to discipline, it does so with the risk of a jury finding that it adopted his conduct. Also, the employer must be reasonable when it chooses to believe the story of its employee over other witness accounts. *See Herrick v. Quality Hotels, Inns and Resorts, Inc.*, 19 Cal. App. 4th 1608, 1618 (1993) (affirming punitive damages where employer testified it had “no reason to believe” the plaintiff’s charges, but where circumstantial evidence should have led employer to believe the charges). In addition, where an employee accused of assaultive conduct is given a promotion, it may be evidence of ratification. *Id.*

In sum, when looking at theories of liability, it is important not to stop the analysis at the time when the incident occurs. Post-incident ratification can be an additional basis for vicarious liability beyond the traditional tussle of finding course and scope, and could even lead to a finding of punitive damages.

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